

# **Diplomatic Protection of Human Rights as practised by South Africa and Nigeria**

**Emmanuel Okon**

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**Under the supervision of Professors M. Olivier (Supervisor)  
C. Nicholson & M. Hansungule (Co-supervisors)**

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## DEDICATION

To God, my family and friends

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I declare that this thesis, **Diplomatic Protection of Human Rights as practised by South Africa and Nigeria** is my original work both in conception and execution and that all the sources I have used or quoted have been acknowledged by means of complete reference. I also declare that this thesis has not been previously submitted by me for a degree at any other tertiary institution

***Emmanuel Okon***

## SUMMARY

The main purpose of this research is to examine and assess the extent to which Nigeria and South Africa are prepared to invoke diplomatic protection in order to safeguard the human rights of their nationals living abroad and to determine whether there are constitutional provisions empowering them to do so. Diplomatic Protection is an institution in international law whereby a state may take diplomatic action to protect its national who has suffered some harm or injury in a foreign land, but, has not been compensated by the government of the responsible state. The practice of diplomatic protection is believed to have originated in 16<sup>th</sup> century Continental Europe, and that Vattel, a Swiss jurist and diplomat was the father of the concept. In a broad sense however, Diplomatic Protection also includes the functions performed by diplomatic missions and consular officials. It is an important institution in international law in terms of the redress it affords to individuals who suffer from injuries sustained in foreign countries.

Diplomatic protection is examined from the legal and human rights perspectives in this thesis. The method adopted for the research is to identify and critically analyze certain rights which foreigners enjoy outside their countries in order to determine whether these rights can be diplomatically protected in Nigeria and South Africa and the circumstances under which such rights can be denied, derogated or limited by the two states.

The choice of the human rights adopted in this research is determined by their importance to the individual generally, and their utility to any individual living in a foreign land. The categories of rights adopted for the examination include, fundamental rights, which are rights so basic to the individual that they cannot be derogated from even in times of national emergencies. Such rights include the right to life, the right to be free from discrimination and the right to be free from torture and other inhuman treatment or punishment.

The second category of rights examined is the right to own private property in a foreign land, while the third category is procedural rights. These are rights which assist the individual to obtain substantive justice in a court of law – that is to say, due process rights. They include the right to a fair hearing, the right to be presumed innocent until proven guilty and the right to be tried within a reasonable time.

The conclusion is that although diplomatic protection is not constitutionally entrenched in the two states, their provisions are constitutionally contemplated. However, the human rights of both nationals and aliens in Nigeria and South Africa are constitutionally protected. Nevertheless, it is envisaged that the situation will greatly improve through the implementation of the suggestions and recommendations proffered in the thesis. These include the amendment of the Constitutions of the respective states to reflect the desired change, the reorganization of diplomatic and consular missions of the two states and above all, by making human rights the corner-stone of democracy in the respective states.

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## ABBREVIATIONS

AAR	Annual Activity Report
AC	Appeal Cases
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ADRDM	American Declaration on the Rights and Duties of Man
AHRLR	African Human Rights Report
<i>AJIL</i>	American Journal of International Law
AI	Amnesty International
All ER	All England Reports
Am Society of Int Law	American Society of International Law
<i>AM U INT'L L REV</i>	<i>American University International Law Review</i>
ANC	African National Congress
AU	African Union
B. C. INT'L & COMP.L.REV	Boston College International and Comparative Law Review
BCLR	Butterworth Constitutional Law Reports
BHRC	Butterworth Human Rights Cases
<i>Brit. J. Pol. S</i>	British Journal of Political Science
<i>Brit. Y.B. Int'l L.</i>	<i>British Yearbook of International Law</i>
<i>BYb IL Comm'n</i>	<i>British Yearbook of International Law Commission</i>
C & F	Clark and Finelly's House of Lords Cases
CA	Court of Appeal
CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	Constitutional Court
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CHR	Centre for Human Rights
<i>CILSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>
CILJ	Comparative International Law Journal
<i>CILSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>

CJTL	Columbia Journal of Transnational Law
Cranch Reports	Cranch Reports, United States Supreme Court
CRC	Convention on the Rights of the Child
DOC	Document
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights Report
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West Africa
EJIL	European Journal of Human Rights
ER	English Reports
FLR	Federal Law Report
F Supp	Federal Supplement
F 2nd	Federal Reporter, Second Series
GA	General Assembly
GAOR	General Assembly Official Records
GG	Government Gazette
Hague Receil	Recueil des Cours de l' Academie de Droit International
HCHR	High Commissioner for Human Rights
HIJL	Harvard Institute Journal of Law
Hum.Rts. Brief	Human Rights Brief
HUM. RTS. L. J	Human Rights Law Journal
HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCMA	International Cooperation in Criminal Matters Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Reports	International Court of Justice Reports
ICLR	International and Comparative Law Review
ICLQ	International and Comparative Law Quarterly
IHRR	International Human Rights Reports

ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Iran-USCTR	Iran-US Claims Tribunal Reports
IQR	International Quarterly Review
JAL	Journal of African Law
JCPC	Judicial Committee of the Privy Council
KB	Kings Bench Division
LNTS	League of Nations Treaty Series
LRC	Law Reports of the Commonwealth
MCD	Movement for Democratic Change
Mod LJ	Modern Law Journal
NGO	Non-Governmental Organisations
NLR	Nigerian Law Reports
NO	Number
NWLR	Nigerian Weekly Law Reports
OAS	Organization of America States
P	Probate, Divorce & Admiralty Division
PAJA	Promotion of Administrative Justice Act
PAR	Paragraph
PC	Privy Council
PCIJ Reports	Permanent Court of International Justice Reports
QB	Queens Bench Division
Recueil des Cours	Recueil des cours de l'Academie de droit international
Rev.Afr.Comm'n.Hum Peo Rts.	Review of the African Commission of Human and Peoples' Rights
RIAA	Reports of International Arbitral Awards
SA	South African Law Reports
SACR	South African Criminal Law Reports
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAYIL	South Africa Yearbook of International Law
SC	Supreme Court of Nigeria
SCOR	Security Council Official Reports



SCR	Supreme Court Reports
St Louis U L J	Saint Louis University Law Journal
THRHR	Tydskrif vir Hedendaagse Romein-Hollandse Reg
TLR	Times Law Report
TRC	Truth and Reconciliation Commission
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee
UNIAA	United Nations International Arbitral Awards
UNRIAA	United Nations Report of International Arbitral Awards
UNTS	United Nations Treaty Series
UNYB	United Nations Yearbook
US	Reports of the United States Supreme Court
US	United States
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VOL	Volume
WACA	Selected Judgments of the West African Court of Appeal
WNLR	Western Nigeria Law Report
WLR	Weekly Law Reports
WRN	Weekly Report of Nigeria
Yale L J	Yale Law Journal
YB	Yearbook
YBILC	Yearbook of International Law Commission
ZLR	Zimbabwe Law Reports

## CHAPTER ONE

### Introduction

#### 1 Definition of terms

This thesis deals with the diplomatic protection of human rights as practised by the Republic of South Africa and Nigeria. According to the International Law Commission's (ILC) Draft Articles on diplomatic protection

Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.<sup>1</sup>

The word 'diplomatic', which qualifies the noun 'protection', is derived from the word diplomacy, which in turn is derived from the Greek word *diploma* meaning 'folded in two.' In ancient Greece, a diploma was a certificate confirming the completion of a course of studies typically folded into two. In the days of the Roman Empire, however, the word was used to describe travelling documents such as a passport.<sup>2</sup> Later, the meaning of *diploma* was extended to cover treaties and other official documents.<sup>3</sup> In the 1700s, the French called that body of officials attached to a

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<sup>1</sup> See the International Law Commission's (ILC) Draft Articles on Diplomatic Protection, art 1 as adopted in 2006. The ILC is presently engaged in the compilation of a set of Draft Articles on Diplomatic Protection. Six reports have been produced on the subject. In 2000, the ILC agreed on a first reading of a set of nineteen articles which were provisionally adopted in 2004. The Draft Articles were then sent to States for review and were adopted in 2006 after a second and final reading. The Draft Articles are now with the United Nations General Assembly (UNGA) pending their adoption as a treaty. See the *Official Records of the General Assembly, Sixty-first Session, Supplement No 10(A/61/10)* 15. See generally, Dugard *International Law: South African Perspective* (2005) 282. Diplomatic protection has also been defined as "an elementary principle of international law under which an individual who was wronged in a strange land and who had been unable to obtain that justice which had been refused him, can obtain justice." See Freeman *The International Responsibility of States for Denial of Justice* (1983) 5. See also Lillich (ed) "The Current Status of the Law of State Responsibility for Injuries to Aliens" *International Law of State Responsibility for Injuries to Aliens* (1983). Borchard *Diplomatic Protection of Citizens Abroad* (1916) 6 defines diplomatic protection as "a limitation upon the territorial jurisdiction of the country in which the alien is settled."

<sup>2</sup> See 'Diplomacy': [http://en.wikipedia.org/wiki/Diplomatic\\_relations](http://en.wikipedia.org/wiki/Diplomatic_relations) (accessed 2007/09/06).

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

foreign legation the corps *diplomatique*.<sup>4</sup> Today however, the term ‘diplomatic’ has acquired a narrow and technical meaning as well as a broad and popular one. Technically, the term ‘diplomatic’ means ‘relating to, or involving diplomacy or diplomats.’<sup>5</sup> In a broad popular sense, the term means tactful, adroit, or ‘using tact and sensitivity in dealing with others.’<sup>6</sup>

The word ‘protection’ means defence or shelter.<sup>7</sup> It is derived from the verb to ‘protect’ which means to shield from danger.<sup>8</sup> In ordinary parlance therefore, diplomatic protection is the action taken by a state against another state in respect of an injury to the person or property of a national of the former state caused by an internationally wrongful act or omission attributable to the latter state.<sup>9</sup>

Since the term ‘diplomatic’ has to do with diplomacy and diplomats, diplomatic protection is not just an action taken by a state to protect its nationals abroad, but also an institution<sup>10</sup> and a function.<sup>11</sup> This function is performed by diplomatic envoys and missions<sup>12</sup> in respect of their nationals who are in need, or are in distress abroad.<sup>13</sup> The term is therefore used in this thesis in a dual sense – as an institution, and as a function. It is used firstly to refer to the institution under customary international law whereby a state may invoke diplomatic action to protect its nationals who have suffered a wrongful act abroad, but have not been compensated

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<sup>4</sup> *Ibid.*

<sup>5</sup> See the *American Heritage Dictionary of the English Language* 482 (2007).

<sup>6</sup> *Ibid.*

<sup>7</sup> See the *Large Print English Dictionary* 271 (1991).

<sup>8</sup> *Ibid.*

<sup>9</sup> See the Report of the ILC on the work of its Fifty-second session, 1 May to 9 June and 10 July to 18 August (2000). General Assembly document A/CN.4/506 (Special Rapporteur’s report) 1.

<sup>10</sup> Traditionally, diplomatic protection is regarded an institution in international law. See Silva *Diplomacy in International Law* (1972) 33; Geck “Diplomatic Protection” in the *Encyclopaedia of Public International Law* vol 1 (1992) 1045 and Crawford “The ILC Articles on Diplomatic Protection.”(2006) 31 *SAYIL* 19 22.

<sup>11</sup> The *Large Print English Dictionary supra* n 7 139 defines “function” as office, duty, work.

<sup>12</sup> A diplomatic envoy or a diplomat is someone involved in diplomacy. A diplomatic envoy has been variously described as one sent on a mission, a messenger, a representative, a functionary commissioned to represent his country at the capital of another state, or to negotiate and treat with that other state on national affairs. See Garner (ed) *Black’s Law Dictionary* 8<sup>th</sup> ed (2008) 576. The collective term for a group of diplomats from a single country who are resident in another country is a diplomatic mission, See Silva *supra* n 10 33. A mission within this context refers to a permanent diplomatic mission as distinguished from a “special mission.” A “special mission” is a temporary mission, representing the State, sent by one State to another with the consent of the latter for the purpose of dealing with it on specific questions, or performing in relations to it a specific task. See the 1969 Convention on Special Missions art 1(a) and Dembinski *The Modern Law of Diplomacy: External Missions of States and International Organizations* (1988) 57.

or redressed under international law.<sup>14</sup> Secondly, it is used to refer to the general assistance rendered by states through their diplomatic missions and agents to those of their nationals who are in need or are stranded in foreign countries.<sup>15</sup>

Human rights are those fundamental and inalienable rights which are essential for life as a human being.<sup>16</sup> These rights can not be sold, mortgaged, donated, forfeited or transferred, and should therefore not be taken away by any other person or state.<sup>17</sup> As a result, steps must be taken within each and every society to protect them. This is because, human rights affirm that all individuals, solely by virtue of being human, have moral rights which no society or state should deny.<sup>18</sup> This idea has its classic source in seventeenth and eighteenth century theories of natural rights.<sup>19</sup>

The protection of human rights by nations occupies a centre stage in present day political, legal, social and economic realities the world over. A nation's human rights record has become the yardstick by which its democratic status in the world is

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<sup>13</sup> See Silva *supra* n 10 63.

<sup>14</sup> This is the traditional institution of diplomatic protection.

<sup>15</sup> Although Dembinski *supra* n 12 41 and Geck *supra* n 10 1051 argue that diplomatic missions do not perform the function of diplomatic protection strictly so-called, they both concede that the functions of diplomatic missions are generally referred to as "diplomatic protection."

<sup>16</sup> The UN has described human rights as those rights which are inherent in human nature and without which man cannot live as a human being. See United Nations *Human Rights: Questions and Answers* 4 (1987) See also Wallace *International Law* (2005) 224 and Howard & Donnelly *International Handbook of Human Rights* (1987)1.

<sup>17</sup> This is simply because they are natural and inalienable rights. See *supra* n 16

<sup>18</sup> See the Preamble to the American Declaration of Independence: "We hold these truths to be self evident, that all men were created equal, that they are endowed by their creator with certain inalienable Rights, that among these are Life, Liberty and Pursuit of Happiness."

<sup>19</sup> The chief exponent of the natural rights theory was John Locke. But it was Thomas Hobbes before him who initiated the idea. Hobbes imagined the existence of human beings in a state of nature. In that state of nature, men and women were in a state of freedom, able to determine their actions and also in a state of equality in the sense that no one was subjected to the will or authority of another. To end the certain hazards and inconveniences of the state of nature, men and women entered into a contract by which they mutually agreed to form a community and set up a body politic. However, in setting up that political authority, they retained the natural rights of life, liberty, and property, which were their own. Government was therefore obliged to protect the natural rights of its subjects. See eg Weston "Human Rights" 20 *New Encyclopedia Britannica* (1992) also in Steiner, Alston & Goodman *International Human Rights in Context – Law, Politics, Morals* (2008) 478-9; Shestack "The Jurisprudence of Human Rights" in Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 70-71. See also Sidorsky "Contemporary Reinterpretations of the concept of Human Rights" in Sidorsky (ed), *Essays on Human Rights* (1979) 89.

measured.<sup>20</sup> Foreign nationals are particularly vulnerable to human rights abuses. With regard to foreign nationals, diplomatic envoys are accredited to various states and are empowered to safeguard their “interests” generally, which include their human rights.<sup>21</sup>

Consuls are also required to help nationals of their home states in the states of their accreditation.<sup>22</sup> They are required to safeguard the interests of minors, and to represent or arrange representation for nationals of their states before the tribunals of the receiving states.<sup>23</sup> Moreover, a General Assembly Resolution was adopted in 1985 regarding the human rights of individuals who are not nationals of the country in which they live.<sup>24</sup> This resolution is one of the international legal instruments spelling out the rights of individuals living outside the country of their nationality.<sup>25</sup> The question however is, to what extent can the human rights of foreigners be diplomatically protected in the receiving state? This is the focus of this thesis.

## 2 Purpose of the research

The main purpose of this thesis is to examine and assess the extent to which Nigeria and South Africa are prepared to exercise diplomatic protection to safeguard the human rights of their nationals living abroad.<sup>26</sup>

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<sup>20</sup> See Simma & Alston, “Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles” Alston (ed) *Human Rights Law* (2000) 3. See also *Australian Yearbook of International Law* (1992) 84.

<sup>21</sup> See the provisions of the Vienna Convention on Diplomatic Relations (VCDR) 1961 art 3(b) and ch 3 *infra* for further discussion on this point.

<sup>22</sup> See the Vienna Convention on Consular Relations (VCCR) 1963 art 5(a) Thus, diplomatic protection in a broad sense, also includes consular action. See the ILC Special Rapporteur’s report *supra* n 9. See also ch 3 *infra*.

<sup>23</sup> The VCCR does not define the term “receiving state.” The term refers to the state to which the envoy is sent or accredited.

<sup>24</sup> GA Res 144 (XL) GOAR 49 Session Supp 53 253 (hereinafter referred to as UN Res 40/144).

<sup>25</sup> See Dugard “Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission.” *Australian Yearbook of International Law* vol. 24 76 (2003).

<sup>26</sup> Foreign nationals are often referred to as foreigners or aliens. The dictionary defines an alien as a “foreigner.” See eg *Large Print English Dictionary supra* n 7 13. Although the ILC’s Draft Articles on Diplomatic Protection 2006 does not define who an alien is, the Draft Convention on International Responsibility of States for Injuries to Aliens art 21, defines an “alien” as regards a particular state, as “a person who is not a national of that state.” See Garcia-Amador, Sohn & Baxter *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974) 277. See also U.N. Resolution 40/144 *supra* n 24 art 1. Tiburcio defines an alien as “an individual who according to the laws of a given state, is not considered a national.” See Tiburcio *The Human Rights of Aliens under International and Comparative Law* (2003) 1. In this thesis however, the terms “alien”, “foreigner” and “foreign national” shall be used interchangeably. Interestingly,

Mobility is a fact of life. People travel to other countries for various reasons.<sup>27</sup> One of the most common problems a person may face in a foreign land is that of discrimination.<sup>28</sup> Such a person may be discriminated against in his or her daily life simply because he or she is a foreigner.<sup>29</sup> This discriminatory attitude may emanate not only from laymen in their private lives, but may also extend to official circles – from national authorities like the police and immigration officials, to legislators and even judges.<sup>30</sup>

Regardless of the duration of time that foreigners must have lived in a foreign land, and notwithstanding the establishment of families where they have lived,<sup>31</sup> they may never be sure of their personal safety nor the safety of their families or property. They may be expelled without due process of the law. They may be arrested and detained without good cause and may be unable to obtain justice because they may be deprived of their right to fair hearing by being denied the opportunity of going to

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diplomatic protection is not an obligation under International Law. See *Barcelona Traction Light & Power Co. Ltd. (New Application) Belg. V Spain* (1970), ICJ. Rep. 3 (Judgement of Feb 5 ) 32.

<sup>27</sup> This may be in pursuit of tourism, adventure, commerce, scholarship etc. Poverty or threat of violence in the home country may compel migration. Lingering war or persecution at home may make it difficult for the immigrant to contemplate return, etc. See generally Tiburcio *supra* n 26 (xi).

<sup>28</sup> Although there is no universally accepted definition of discrimination, different types of discrimination have been identified by the U N Committees on Discrimination. These include *de facto* and *de jure* discrimination, direct and indirect discrimination, intentional and non-intentional discrimination, multiple discrimination, systemic inequality and private discrimination. See Vandenhoe *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005) 3 33-36. However, discrimination against aliens or foreigners is often engendered by the feeling of xenophobia. Xenophobia is the fear or dislike of foreigners. See Tiburcio *supra* n 26 (xxii). See also Rehman *International Human Rights Law – A Practical Approach* (2003) 278. *Large Print English Dictionary supra* n 7 383.

<sup>29</sup> Tiburcio *supra* n 26 (xxi) maintains that “in many cases, aliens are treated differently not because of objective criteria, but for subjective reasons - simply because they are aliens. Consequently, they are different and as such are not trust worthy.” She refers to Rudyard Kipling’s poem “The Stranger” where Kipling tells his countrymen that he feels comfortable with them because he knows the lies they tell, but cannot predict what a stranger can do.

The stranger within my gate  
He may be true or kind  
But he does not talk my talk  
I can not feel his mind  
I see the face and the eyes and the mouth –

But not the soul behind - Rudyard Kipling “The Stranger.” See Tiburcio (xii).

<sup>30</sup> *Idem* (xi).

<sup>31</sup> See *Boffolo’s Case* (1903) 10 RIAA 528 & *Dr Breger’s Case* in Whiteman Digest vol. VIII 861; See also Plender *International Migration Law*.(1988) & Goodwin-Gill *International Law and the Movement of Persons Between States*,(1978).

an appropriate court or tribunal to air their grievances.<sup>32</sup> Their property may be seized, confiscated or expropriated without compensation<sup>33</sup> and under extreme circumstances; they may be tortured and deprived of their lives without the due process of law.<sup>34</sup> This gives rise to the following questions, which must be considered when the rights of foreigners are at hand. What rights do these persons possess? Are there international or municipal laws to protect them? If so, what are those laws and to what extent are they being enforced?

Under international law, it is only the State of the nationality of the injured alien that can invoke diplomatic means or measures to protect its national for injuries suffered in the territory of another state.<sup>35</sup> Traditional international law therefore recognises the right of a state to bring a claim against another state in respect of the injury caused to the person or property of its nationals abroad. This is called diplomatic protection. The state that caused the injury is required to pay reparation for the injury caused. As the PCIJ said in the *Mavrommatis Palestine Concessions* case.<sup>36</sup>

It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state from whom they have been unable to obtain satisfaction through ordinary channels.

### 3 Who is a national?

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<sup>32</sup> See *Chattin's Claim (United States of America (B.E. Chattin) v United Mexico States)* United States – Mexican Claims Commission (1927) 422; 4 UNIAA. 282.

<sup>33</sup> See *Libyan American Oil Company (LIAMCO) v Libyan Arab Republic* (1977) 62 ILR 140; *Amaco International Finance v Iran* (1987-1) Iran-USCTR 189 (Iran – U.S. Claims Tribunal) & the *Chorzow Factory Indemnity Case (Merits) (Germany v Poland)* PCIJ Ser A (1928) No 17.

<sup>34</sup> See *Neer Claim (U.S v Mexico)* (1926) 4 R I A A 60 and *Claire Claim (France v Mexico)* 5 RIAA (1929) 516. A recent example is the xenophobic attacks on foreign nationals in South Africa in May 2008. See Ogen vos “Mass xeno suicide threat” *The Citizen* (2008) 06 09) 1; Ogen vos “Xenophobia still lurks in SA” *The Citizen* (2008) 06 18) 5; In practice however, a foreigner whose human rights have been violated by the receiving state may take the matter up with the embassy of his or her own country or nationality. Since diplomatic missions are empowered to protect the interests of their nationals in the receiving state, the embassy may try to assist the person by taking up the matter through diplomatic channels with the foreign office of the defaulting state. If no settlement is reached at this stage, the mission may refer the matter to the sending state. That State may in turn institute an international claim in an international court or tribunal or resort to any other means of diplomatic protection. See Silva *supra* n 10 63.

<sup>35</sup> See Garcia-Amador, Sohn & Baxter *supra* n 26 277.

<sup>36</sup> PCIJ *Collection of Judgments* series A No 2 (1924).

Since diplomatic protection is protection given by a state to its nationals abroad, it is necessary to know who a national of a State is for the purposes of diplomatic protection. A national of a state is an individual who by the law of that state, is a citizen of that state, owing permanent allegiance to and under the protection of that state.<sup>37</sup> A national of any state becomes an alien when he or she is outside his or her country of nationality.<sup>38</sup> The first necessary inference to be drawn is that the definition of an alien is tied to the concept of nationality, and the second is that any one who lives outside the country of his nationality is, *ipso facto*, an alien.<sup>39</sup>

A discussion of the concept of nationality in relation to diplomatic protection is therefore imperative for the development of this thesis. This is so because it is the bond of nationality between the individual and the state of his or her nationality which confers upon a state the right to exercise diplomatic protection.<sup>40</sup>

#### 4 The concept of nationality

Nationality is the relationship existing between the individual and the state, normally involving allegiance on the part of the individual to the state, and protection of the individual by the state.<sup>41</sup> The concept of nationality has a multi-dimensional content – political, sociological, legal, and psychological.<sup>42</sup> On the political level, nationality is the status of a natural person who is attached to the state by the tie of allegiance.<sup>43</sup> From the sociological point of view, nationality is a sense of belonging to a group.<sup>44</sup> From the legal perspective however, nationality is the recognition given by a state to an individual as its citizen,<sup>45</sup> whereas, psychologically, “nationality is a state of mind corresponding or striving to correspond to the political facts.”<sup>46</sup>

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<sup>37</sup> Garner *supra* n 12 1050.

<sup>38</sup> See Tiburcio *supra* n 26 1.

<sup>39</sup> *Idem*.

<sup>40</sup> See *Nottebohm's Case (Liechtenstein v Guatemala)* (1955) ICJ 4.

<sup>41</sup> Harvard Research in International Law: Draft on Nationality (1929) Art 1 (a).

<sup>42</sup> Tiburcio *supra* n 26 4.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Idem*.

<sup>45</sup> See the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws(1930) (179 LNTS 89 101 04 12 arts.1 & 2.

<sup>46</sup> Tiburcio *supra* n 26 4. It should be noted that the concept of nationality can also be perceived from the vertical and horizontal dimensions. See Lagarde *La Nationalite Francaise* (1975) 210.



Diplomatic protection is based upon the nationality of the person who is injured. In other words, a state is permitted to exercise diplomatic protection only on behalf of an individual who is its national. Thus, the ILC draft Articles on diplomatic protection provide that

the state entitled to exercise diplomatic protection is the state of nationality.<sup>47</sup>

For the purposes of diplomatic protection of a natural person however, a state of nationality means the State whose nationality the individual seeking protection has acquired by birth, descent, succession of state, naturalisation or in any other manner, consistent with international law.<sup>48</sup>

Since nationality is so important for purposes of diplomatic protection, the concept is given priority from the outset in this thesis. The thesis attempts to define the concept of nationality *vis-à-vis* diplomatic protection. It also attempts to distinguish between nationality and citizenship - terms often used interchangeably.<sup>49</sup> It is trite that states are free to legislate on issues of citizenship since it is within their domestic jurisdiction,<sup>50</sup> whereas, only international law can determine the question of nationality for purposes of diplomatic protection.<sup>51</sup> States also have the right to grant or withdraw nationality granted to anybody on any ground.<sup>52</sup>

The thesis assesses the importance of nationality to an individual in relation to diplomatic protection and tries to determine whether this protection can be extended to other categories of people, for instance, people with dual nationality or to stateless people.<sup>53</sup> The thesis therefore investigates the importance of nationality to the

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<sup>47</sup> ILC Draft Articles on Diplomatic Protection art 3(1). See n 1 *supra*. For the purposes of diplomatic protection of a natural person, a state of nationality means a state whose nationality the individual sought to be protected has acquired.

<sup>48</sup> ILC Draft Articles on Diplomatic Protection art 4.

<sup>49</sup> See Dugard *supra* n 1 282.

<sup>50</sup> See the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws(1930), *supra* n 46 art 1.

<sup>51</sup> See *Nottebohm's case supra* n 40.

<sup>52</sup> *le citizenship*. See Weis, *Nationality and Statelessness in International Law* (1956) 123-124 133. See also Sen A *Diplomat's Handbook of International Law and Practice*. (1988) 326.

<sup>53</sup> Dual nationality may occasionally result from an overlap of two countries' legislation on the subject. A stateless person is one who has been denationalised either by his or her country, or by operation of law, eg by state succession. The plight of the people from the Bakasi Peninsula now

individual generally, ascertains how nationality is acquired or lost, and explains the legal consequences thereof.

Accordingly, the thesis determines who is a Nigerian or a South African national according to Nigerian and South African law respectively. It examines the circumstances under which nationality can be granted or revoked under the laws of these two countries, and goes further to ascertain the capacity or extent to which Nigeria and South Africa are prepared or willing to act diplomatically extraterritorially in order to protect their nationals abroad in cases of violation of their human rights.

As a rule, the treatment of foreigners has always been the concern of international law.<sup>54</sup> In the past, the exercise of diplomatic protection or the invocation of the law of state responsibility for injuries to aliens was dominated by doctrines or concepts such as “denial of justice,” “minimum international standards of justice,”<sup>55</sup> “national or equitable standards,”<sup>56</sup> and so forth. Presently, however, the controversy surrounding those theories and concepts,<sup>57</sup> have been laid to rest as a consequence of the advent of human rights law.<sup>58</sup> This is because; these issues have been overtaken by events in recent times, mainly by the appearance of a third standard-

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ceded to the Cameroon by Nigeria is a good example. See the ILC’s Draft Articles on Diplomatic Protection 2006 arts 3(2) & 8.

<sup>54</sup> Traditional international law recognized very early in its development that states had an obligation to treat foreign nationals in a manner that conforms to certain minimum standards of civilisation or justice. See Buergethal *International Human Rights in a Nutshell* (1995) 13.

<sup>55</sup> Which supports the idea that no matter how a state may treat its nationals, there are certain minimum standards of human treatment in relation to foreigners that can not be violated. See Sen *supra* n 52 334-5. See also *Roberts’s Claim* (1927) 4 RIAA 77.

<sup>56</sup> Which provides that aliens should receive only equal treatment with nationals, *etc.* See Tiburcio *supra* n 26 45. See also *Neer Claim (US v Mexico)* *supra* n 34 60 and *Claire Claim* *supra* n 34 516.

<sup>57</sup> I.e “national treatment,” eg or “minimum international” standards.

<sup>58</sup> After the Second World War, modern international law came to recognize that individuals irrespective of their nationality should enjoy certain basic human rights. The substantive principles of the law of State Responsibility therefore provided a reservoir of norms that could be drawn upon in codifying international human rights law. Today however, because of the dramatic evolution and extensive codification of human rights law, human rights law nourishes the law of State Responsibility. It is important however to remember, as the *Restatement of the Foreign Relations Law of the United States (Third)* (1987) aptly notes that, “the difference in history and in jurisprudential origins between the older law for responsibility for injuries to aliens, and the newer law of human rights, should not conceal their convergence.” The *Restatement* goes on to point out that “as the law of human rights developed, the law of responsibility for injury to aliens, as applied to natural persons, began to refer to violations of their “fundamental human rights” and states began to invoke contemporary norms of human rights as the basis for claims for injuries to their nationals.” See Buergethal *supra* n 54 15. See generally Garcia-Amador, Sohn & Baxter *supra* n 26 4.

the “human rights standard.”<sup>59</sup> The question of which standard to adopt in assessing the level of protection for foreigners is no longer relevant, because there is only one standard to adopt in the assessment of all human rights violations today – the human rights standard.<sup>60</sup> The only relevant question to be considered, however, is whether human rights law has *pro tanto* overtaken the relevance of diplomatic protection in international law.

Dugard is of the view that although the growth of international human rights law had led some to argue that diplomatic protection had lost its *raison d’etre* and that it should cease to exist, that argument is misconceived.<sup>61</sup> This is because it seriously exaggerates the extent of the protection of human rights by international conventions. Besides, it is based on a wrong premise.<sup>62</sup> According to him, <sup>63</sup> until the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection. As an important instrument in the protection of human rights, it should be strengthened and encouraged.

The above notwithstanding, attempts made by the international community to determine a set of “rights” to be granted to foreigners, efforts made to protect those rights and the difficulties surrounding such attempts,<sup>64</sup> are questions and issues addressed in this thesis. Hence, the various rights and obligations - like the obligation imposed on the international community prohibiting discrimination against aliens,<sup>65</sup> the recognition and guarantees of the rights of the individual regardless of

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<sup>59</sup> For the rationale see n 58 *supra*.

<sup>60</sup> *Ibid.*

<sup>61</sup> Dugard *supra* n 25 76.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Idem* 78.

<sup>64</sup> Several attempts have been made to codify the law of State Responsibility for Injuries to Aliens. Such attempts include the American Institute of International Law’s Draft in 1925, Garcia-Amador’s draft in 1956, Robert Ago’s draft in 1963, and Willem Riphagen’s draft, made between 1980 and 1986. See Tiburcio *supra* n 26 53-55. The current draft was compiled by Dugard. None of these draft conventions has so far been adopted as a treaty. See Tiburcio *supra* n. 26 53-4. See also Dugard *supra* n 1 272.

<sup>65</sup> Equality and non discrimination are prominent features in both the International Covenant on Civil and Political Rights (ICCPR) (1966), the International Covenant on Economic Social and Cultural Rights (ICESCR) (1966), Convention on the Protection of the Human Rights of Migrant Workers & Members of their Families (1990) etc.

nationality,<sup>66</sup> are all underscored, analyzed and discussed in this thesis. The international instruments adopted for the protection of the rights of foreigners are also discussed.<sup>67</sup>

Certainly, in a world of diverse cultural and heterogeneous people in which every human being is a potential foreigner whenever he or she intends or contemplates travelling outside his or her country, it is necessary for him or her to know his or her rights and what obligations or disabilities he or she is likely to face in a foreign land. Another interesting issue which arises for consideration in relation to diplomatic protection is that it is convenient to know that such a national can always turn to his or her state of nationality for help in case of any injury sustained abroad.<sup>68</sup>

## **5 Diplomatic protection and the Law of State Responsibility for Injuries to Aliens**

Diplomatic protection belongs to the subject of 'Treatment of Aliens' which in turn is based upon the law of State Responsibility for injuries to Aliens.<sup>69</sup> The law of State Responsibility for Injuries to Aliens states that a state is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that state, and causes an injury to an alien.<sup>70</sup> A state which is responsible for such an act or omission, has a duty to make reparation to the injured alien, or an alien claiming through him, or to the State entitled to present a claim on behalf of the individual claimant.<sup>71</sup>

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<sup>66</sup> Eg the GA Declaration on the Human Rights of Individuals who are not nationals of the countries in which they live. GA res. 144 (XL)1985 *supra* n 24.

<sup>67</sup> See ch 4 *infra*.

<sup>68</sup> Based on the bond of his or her nationality.

<sup>69</sup> The Law of State Responsibility for Injuries to Aliens deals with the responsibility of states for injuries caused to the person or property rights of aliens on state territory. Garcia Amador was the first Rapporteur appointed by the ILC to codify the Law of State Responsibility for Injuries to Aliens. See Garcia Amador, Sohn & Baxter, *supra* n 26 277. This law was meant to promote the maintenance of freedom of communication and of movement between nations. It is the law of State Responsibility which extends its protection to those who travel or live abroad and facilitates social and economic ties between states. See the explanatory note to art 1 of Garcia-Amador's Draft Articles on the Law of State Responsibility for Injuries to Aliens *supra* n 26 143.

<sup>70</sup> See the Draft Articles on the International Responsibility of States for Injuries to Aliens art.1 compiled under the auspices of the ILC, with Gracia-Amador as Special Rapporteur.

<sup>71</sup> *Ibid* art 1.

The law of State Responsibility for Injuries to Aliens must however be distinguished from the law of State Responsibility strictly so-called.<sup>72</sup> The law of State Responsibility, in international law, involves the attribution of internationally wrongful acts to the state generally. Article 1 of the ILC's Draft Articles on State Responsibility for instance, states that 'every internationally wrongful act of a state entails the international responsibility of that state,'<sup>73</sup> whereas the Law of State Responsibility for Injuries to Aliens addresses only a specific aspect of state responsibility, that of responsibility for injuries to aliens.<sup>74</sup>

The law of State Responsibility for Internationally Wrongful Acts,<sup>75</sup> provides that a state may incur responsibility where for instance it is in breach of its obligation under an international agreement with another state.<sup>76</sup> Responsibility may also arise where the agents or organs of a state inflict injury on another state or group of states.<sup>77</sup> Within this context, such responsibility is said to be direct.<sup>78</sup> Where however, the person or property rights of a foreigner is injured, the responsibility is said to be indirect.<sup>79</sup> The Law of State Responsibility for injuries to aliens or diplomatic protection is the technical name for this indirect responsibility in international law. The general belief is that by injuring the person or property rights of a foreigner, the responsible state is deemed to have injured the state of nationality of the foreigner itself.<sup>80</sup>

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<sup>72</sup> I.e the Law of State Responsibility for Internationally Wrongful Acts. See the Report of the ILC (2001) GOAR 56<sup>th</sup> Session Supp No. 10 (A/56/10) 29.

<sup>73</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts art 1. Report of the ILC (2001) GOAR. 56<sup>th</sup> Session, Supp. No. 10 (A/56/10)29 *supra*.

<sup>74</sup> See the Draft Articles on State Responsibility for Injuries to Aliens art 1 *supra* n 26 or the Draft Articles on Diplomatic Protection *supra* n 1.

<sup>75</sup> See *supra* n 69.

<sup>76</sup> The *Dictionnaire de la Terminologie du Droit International* (1960) 541 defines State Responsibility as "the obligation which is imposed on a state by international law following a violation of international obligations by acts or omissions of that State as regards another State for injuries suffered by the State itself or its nationals".

<sup>77</sup> See Dugard *supra* n 1 270.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Idem.*

<sup>80</sup> See the case of *Mavrommantis Palestane Concessions* (Jurisdiction) case *supra* n 36. This is a legal fiction. The fiction that the injury suffered by the alien abroad is an injury to the state of the alien's nationality preserved the notion that only states were subjects of international law. See Buergethal *supra* n 54 14.

The basic principle was elaborated in the oft-quoted *Mavrommatis Palestine Concessions Case*<sup>81</sup> where the Permanent Court of International Justice (PCIJ) pointed out that:

By taking up the case of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights, its right to ensure, in the person of its subjects respect for the rules of international law.<sup>82</sup>

Hence, once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter, the state is the sole claimant.<sup>83</sup>

It is clear therefore that the definition of diplomatic protection or the law of state responsibility for injuries to aliens is narrower in scope than the definition of State Responsibility properly so-called.<sup>84</sup> For many years, the ILC had focussed its attention on and undertaken an indepth study of the subject of diplomatic protection in order to understand the subject in all its ramifications - its nature, scope and rationale.<sup>85</sup> However, because this subject is so nebulous, complicated and intricate, it has not been easy to comprehend or to codify it.<sup>86</sup>

From the outset, the ILC saw diplomatic protection as being part and parcel of an elaborate study of State Responsibility.<sup>87</sup> This approach inevitably restricted the study to determining responsibility only for injuries to the persons and damages to the property of aliens - what is generally referred to as the substantive rules of the international law of diplomatic protection.<sup>88</sup> In 1956, for instance, the ILC started work on the codification of the law of State Responsibility for Injuries to Aliens under

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<sup>81</sup> *Supra* n 36. See also the *Panevezys-Sadutiskiis Railways case*, PCIJ, Series A/B, No.76; 9. AD 308.

<sup>82</sup> Particularly 12. This concept is said to be Vattelian in origin. See Vattel *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* vol. III (1758 English translation by Fenwick 1916) chap VI 136. See the *Official Record of the General Assembly supra* n.1 25. See p 45 *infra*. Vattel noted that "whoever ill-treats a citizen, indirectly injures the state, which must protect that citizen." (Quiconque maltraite un citoyen offense indirectement l'Etat, qui doit proteger ce citoyen). See *Le Droit des gens* (1758 reprinted 1916) vol 1 Bk 11 par 71.

<sup>83</sup> See also e.g. the case of *Lonrho Exports Ltd v EGGD* (1996) 4 All E.R 673 687; 108 ILR 596.

<sup>84</sup> See Tiburcio *supra* n 26 37.

<sup>85</sup> For more than 50 years. See Casese *International Law* (2001) 78.

<sup>86</sup> *Idem* 53.

<sup>87</sup> See Crawford *supra* n 10 19.

the special rapporteurship of Garcia Amador of Cuba.<sup>89</sup> Garcia Amador focused mainly on State Responsibility for Injuries to Aliens and their property, and drew no distinction between primary and secondary rules.<sup>90</sup> Little progress was made on the topic between 1957 and 1961.<sup>91</sup> In 1963, he was replaced by Roberto Ago of Italy who took the decision to limit the enterprise to the special rules governing State Responsibility, that is to say, secondary rules.<sup>92</sup>

Not much was achieved during the tenure of Robert Ago and his successors as Special Rapporteurs. There were obvious delays in the drafting and presentation of the articles. The first set of complete draft articles was only made possible for first reading during the 1996 session.<sup>93</sup> In 1997 Mohamed Bennouna was appointed Special Rapporteur on Diplomatic Protection.<sup>94</sup> His Preliminary Report highlighted

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<sup>88</sup> *Ibid.*

<sup>89</sup> Dugard *supra* n 1 271; Tiburcio *supra* n 26 53 however mentions that earlier attempts were made to codify the Law of State Responsibility for Injuries to Aliens. In 1925 for instance, the American Institute of International Law prepared a draft with the title “Diplomatic Protection” dealing with the topic of responsibility for harm caused to the person or property rights of aliens on state territory. In 1927, the Institute of International Law also addressed the topic, proposing a Resolution on “International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners.” The American Institute of International Law and the International Commission of Jurists also presented projects on the topic in 1927 & 1928 respectively. The Codification Committee of the League of Nations examined the question of “The Responsibility of States for Damage done in Their Territories to the Person or Property of Foreigners” for Harvard Research of International Law with Borcard as *Rapporteur*. This Conference could not approve of any definitive draft due to the complexity of the subject. See Tiburcio *supra* n 26 53.

<sup>90</sup> Dugard *supra* n 1 271. Primary rules are those rules governing the treatment of the person and property of aliens, breach of which gives rise to responsibility to the States of nationality of the injured person, whereas, secondary rules relate to the conditions that must be met for the bringing of a claim for diplomatic protection. See the *Report of the ILC Fifty-eighth Session* in the *General Assembly Official Records, Sixty-first session, supra* n 1 22-3. However, from 1956 to 1961, Garcia Amador presented six reports on State Responsibility for Injuries to Aliens, but the Commission did not approve of any of them. See Tiburcio *supra* n 26 54.

<sup>91</sup> See Crawford *supra* n 10 20.

<sup>92</sup> See Dugard *supra* n 1 271-2. Ago’s reports were equally unsuccessful because of his generic treatment of the topic. His draft deals with State Responsibility for Internationally Wrongful acts in general and was highly criticized. It does not focus specifically on the problems of aliens. See Tiburcio *supra* n.26 55.

<sup>93</sup> Dugard *supra* n 1 272. It was in 1996 that the ILC identified “Diplomatic Protection” as a separate topic appropriate for codification and progressive development. GA res 51/160 of (1996) 12 16 invited the Commission to further examine the topic in light of comments made in the Sixth Committee and any written comments made by governments. In 1997 the ILC established a working group on the topic which proposed an outline for consideration of the topic. See the *Official Records of the General Assembly, Fifty-first Session, Supplement No 1 (A/51/10) Fifty-second Session, Supplement No 10 (A/52/10) ch VIII*. See also Crawford *supra* n 10 21.

<sup>94</sup> See Crawford *supra* n 10 21. Tiburcio *supra* n 26 55 mentions that Crawford himself was appointed a Special Rapporteur on Diplomatic Protection in 1997, but Crawford does not mention it in his article *supra* n 10.

two questions the Commission needed to consider.<sup>95</sup> In 1999, following Bennuona's election to the International Tribunal for the former Yugoslavia, the ILC appointed Dugard as Special Rapporteur.<sup>96</sup>

In 2004, the Commission adopted a set of 19 draft articles on diplomatic protection under the leadership of Dugard. These draft articles were transmitted to various state governments for their comments and observations.<sup>97</sup> Currently, the ILC has adopted a set of draft articles on diplomatic protection which deals only with secondary rules – that is to say, nationality and the exhaustion of local remedies. The final text was adopted by the ILC in 2006.<sup>98</sup> The text as adopted is now with the UN General Assembly pending adoption as a treaty.<sup>99</sup>

## 6 Conditions for the exercise of diplomatic protection

The basic requirement for the exercise of diplomatic protection is the bond of nationality.<sup>100</sup> That is to say, to be protected, the individual must be a national of the state which seeks to protect him or her.<sup>101</sup> Other conditions for the exercise of diplomatic protection include, that the injured national must exhaust all local remedies available in the defendant state before the claim may be espoused at the international level;<sup>102</sup> that there must exist a wrong in international law imputable to the defendant state which must have caused the injury to the foreign national in the

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<sup>95</sup> The questions were, first, whether the underlying right is held by the state or the individual, ie the legal character of diplomatic protection; Secondly whether to limit the topic to the codification of secondary rules, which could exclude some questions eg the “clean hands” rule. See Preliminary Report on Diplomatic Protection, Mohamed Bennouna Special Rapporteur (1988) 02 4 A/CN.4/484 par 2-3.

<sup>96</sup> Crawford *supra* n 10 21.

<sup>97</sup> *Ibid.*

<sup>98</sup> See the *Official Records of the General Assembly, Sixty-first Session, supra* n 1 15 and Crawford *supra* n 10 19.

<sup>99</sup> *Ibid.*

<sup>100</sup> See *Nottebohm's case supra* n 40 4.

<sup>101</sup> See also ILC's Draft Article on Diplomatic Protection 2006 art 1. However, under art 3 (2) of the Draft Articles, Diplomatic Protection may be exercised in respect of a non-national in accordance with art 8.

<sup>102</sup> See *idem* art 14 and the Draft Convention on the Law of State Responsibility to Aliens prepared by Garcia-Amador art. 2(a). See also. *Panezys- Sadutiskis Railway Case supra* n 81; Borchard *supra* n 1 817-18; Trindade *The Application of the Rules of Exhaustion of Local Remedies in International Law* (1983); Amerasinghe *Local Remedies in International Law* (1990) and Kokott “Interim Report on the Exhaustion of Local Remedies” *International Law Association Report on the Sixty-Ninth Conference* London (2000) 606. See the case of *Ex parte Ferhut Butt* 116 ILR 607



first place;<sup>103</sup> and that a state is entitled to exercise diplomatic protection in respect only of a person who was a national of that state continuously from the date of injury to the date of the official presentation of the claim.<sup>104</sup> Continuity is presumed if that nationality existed at both these dates.<sup>105</sup>

These conditions, as well as some vital questions arising therefrom are critically and comprehensively discussed in this thesis. The questions include, *inter alia*: Is diplomatic protection a right, a duty or a discretion? If it is a right, is it vested in the individual who is injured, or in the state of his or her nationality who espouses the claim? Another interesting question is whether the individual can repudiate the claim while his or her state of nationality is handling the matter.

A related question is whether the inter-state petition system provided for under the ICCPR and the ACHPR can be invoked to promote the diplomatic protection of human rights of aliens internationally, regionally and nationally, particularly in Nigeria and South Africa? These questions and more are objectively tackled in the research with reference to current general principles of international law, judicial decisions, and state practice.

## **7 Diplomatic protection and human rights law**

Is there a common nexus between diplomatic protection and human rights law? Do they have anything in common? Do the provisions of the Vienna Convention on Diplomatic Relations (VCDR) 1961, and the Vienna Convention on Consular Relations (VCCR) 1963, cover the protection of human rights? If so, to what extent? Do these instruments cover this field? This study attempts dispassionately to address these questions.

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614 – 15. The requirement for the exhaustion of local remedies also arises in a number of treaties: See e.g. Optional Protocol 1 of the ICCPR.

<sup>103</sup> Eg the ILC's Draft Articles on Diplomatic Protection (2006) art. 1 provides for "an injury caused by an internationally wrongful act." Legal commentators have considered this condition to be vague and very difficult to be fulfilled because there is still no clear definition in traditional international law of acts that can give rise to "internationally wrongful wrongs". See Tiburcio *supra* n 26 42.

<sup>104</sup> Generally referred to as the condition of "continuous nationality." See ILC's Draft Art 5 on Diplomatic Protection.

<sup>105</sup> Draft Art 5(1).

Diplomatic protection and human rights have similar characteristics as well as manifesting some differences. First and foremost, both have a common objective – to protect the lives and property of individuals.<sup>106</sup> Is it possible to imagine a situation in an international system in which the treatment of aliens is left entirely to the discretion of the foreign countries in which foreigners live or visit? Although Garcia Amador maintains that in primitive communities, the stranger or outsider was frequently outside the protection of those rules which governed the life of the indigenous group, it would be inconceivable to imagine a contemporary world in which an alien's livelihood is left entirely to the whims and caprices of the receiving state.<sup>107</sup>

Diplomatic protection and human rights are also built upon the concept of 'wrong' or injury. Thus, both diplomatic protection and human rights law require the existence of a wrong for their jurisdiction to be invoked.<sup>108</sup> The general principle of law is *Ubi jus ibi remedium*, which means "where there is a wrong or injury, there is also a remedy."<sup>109</sup> Thus, both are aimed at righting wrongs. Both require the exhaustion of local remedies as a condition for their operation. The rationale behind this rule is threefold; (a) to allow the State where the violation occurred an opportunity to redress it by its own means and within the framework of its own domestic system,<sup>110</sup> (b) to reduce the number of possible international claims, and (c) to restore respect for the sovereign state involved.<sup>111</sup>

Diplomatic protection and human rights also manifest some differences. The most obvious difference is in their scope of operation or width of protection.<sup>112</sup> While diplomatic protection is restricted to the protection of the lives and property of individuals of a given nationality only, human rights protect the rights of all

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<sup>106</sup> See Garcia-Amador, Sohn & Baxter *supra* n 26 144.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Idem* 6.

<sup>109</sup> See Garner *supra* n 12.

<sup>110</sup> See *Interhandel Case* (1959) ICJ Rep 6 27.

<sup>111</sup> *Ibid.* It should be noted that the term "domestic or local remedies" is not restricted to the courts and tribunals only, but also includes references to the use of procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law. See the ILC's Draft Articles on Diplomatic Protection art 14 (2) and the case of *Ambatielos Arbitration (Greece v UK)* 12 RIAA. 83 (1956) 23; I L R 306 (1956).

<sup>112</sup> See Garcia-Amador, Sohn & Baxter *supra* n 26 5.

mankind.<sup>113</sup> These similarities and differences notwithstanding however, diplomatic protection and human rights complement each other and should be seen as different methods of achieving a common goal.<sup>114</sup>

With regard to the application of the VCDR to the protection of human rights, article 3(b) of the Convention enjoins diplomatic envoys or missions to:

protect in the receiving state the interests of the sending state and of its nationals within the limits permitted by international law.

It is submitted that the term ‘interest’ within the context of the article, is wide enough to embrace or include human rights.<sup>115</sup>

As for the requirement that consular officers should also protect their nationals abroad,<sup>116</sup> there is no doubt that laws and usages governing the functions, privileges, immunities, *et cetera* of consular officers were codified subject to certain adoptions, alterations and extensions in the VCCR.<sup>117</sup> The Convention covers a wider field than the VCDR, but does not preclude states from concluding treaties to confirm, supplement, extend or amplify its provisions.<sup>118</sup> Again, matters not expressly regulated by the Convention continue to be governed by customary international law.<sup>119</sup> This situation clearly reveals that the two conventions<sup>120</sup> are not exhaustive or sacrosanct and that there is room for expansion. What then are those areas that can be amplified, extended, supplemented or confirmed?

It is submitted that the protection of human rights is one of the areas that requires confirmation, extension, amplification, or supplementation of the provisions of the Vienna Conventions. Although human rights are difficult to define,<sup>121</sup> there is no doubt that the focus of international law has shifted from being state-centred, and is

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<sup>113</sup> *Ibid.*

<sup>114</sup> Dugard *supra* n 25 91.

<sup>115</sup> See ch 3 *infra*.

<sup>116</sup> VCCR art 5(a).

<sup>117</sup> See Shearer *Stake's International Law* (2005) 390.

<sup>118</sup> *Ibid.*

<sup>119</sup> See the preamble. This provision reemphasizes the cardinal role of Customary International Law in international relations.

<sup>120</sup> Ie the VCDR 1961 & VCCR 1963.

<sup>121</sup> See Shearer *supra* n 117 224.

presently focused on the human rights of the individual.<sup>122</sup> The advent and rapid expansion of the human rights regime in the world has had a tremendous impact on mankind as a whole, and particularly upon the institution of diplomatic protection.<sup>123</sup> Garcia-Amador is of the view that human rights should be diplomatically protected because the two concepts have synthesized, fused and merged into the doctrine of “the international recognition of human rights and fundamental freedoms of man.”<sup>124</sup>

It is submitted, however, that if there has been any fusion between diplomatic protection and human rights, that fusion is not watertight. The fusion is not that of substance but of form, and can be likened to the fusion between common law and equity in English law after the Judicature Acts.<sup>125</sup> As Lord Diplock said about the effect of the fusion between equity and common law in England,<sup>126</sup> “though the two streams have met and are now running together in the same channel, their waters do not mix”.<sup>127</sup>

For this reason, therefore, human rights law is examined in the thesis to ascertain the relationship between it and diplomatic protection so as to determine whether the practice of diplomatic protection is still relevant today or whether it has been overshadowed by the new concept of human rights.<sup>128</sup>

The establishment of the modern international human rights regime is discussed in this context. The instruments created to safeguard the human rights of all individuals, such as the Charter of the United Nations Organisation (UN), the international Bill of Rights<sup>129</sup> and other UN human rights instruments are identified, highlighted and

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<sup>122</sup> See generally Sohn “The New International Law :Protection of the Rights of Individuals Rather than States.” 32 *Am U L Rev* 1 61-62 1982).

<sup>123</sup> See Tiburcio *supra* n.26 64.

<sup>124</sup> See Garcia-Amador *et al supra* n 26 4.

<sup>125</sup> Judicature Acts 1873 – 1875. See Baker *Snell's Principles of Equity* (1982) 17

<sup>126</sup> See Ashbury's *Principles of Equity* (1933) 18. and Baker *supra* n 125 *ibid*.

<sup>127</sup> This remark is an allusion to the loose relationship between law and equity in English law after the Judicature Acts of 1873-1875.

<sup>128</sup> According to Tiburcio *supra* n 26 66 “Notwithstanding that much has been studied and written on both the subjects of diplomatic protection and human rights, there have been great controversies as regards the exact limits of each with regards to the other. Doctrine has been mostly unclear and controversial referring to this aspect, for it has been said that the modern doctrine of human rights has taken the place of diplomatic protection, and thus diplomatic protection does not exist any more. Conversely, it has been said that diplomatic protection will always exist, because of its specific nature.”

<sup>129</sup> I.e. the UDHR, ICCPR & ICESCR.

analysed within the context of diplomacy, in order to determine their applicability to foreigners internationally, regionally and nationally, particularly in Nigeria and South Africa.

## **8 International instruments for the protection of the human rights of foreigners**

The study also identifies and critically analyses certain rights which foreigners enjoy outside their country of origin with a view to determining whether or not these rights can be diplomatically protected in Nigeria and South Africa.<sup>130</sup> The scope and extent of such protection, and the circumstances under which such rights may be denied, derogated from or limited by the receiving state, are also examined and critically analysed.

The choice of the human rights considered is determined by their hierarchical and normative value,<sup>131</sup> their practical importance, the scope of their application, the existence of national and international legislation and decisions pertaining to their vitality, utility and necessity to an individual living in a foreign land. The categories of rights identified and adopted for examination are as follows: (a) Fundamental rights; (b) Property rights; and (c) Procedural rights.<sup>132</sup>

## **9 Categorisation of rights**

### **9.1 Fundamental rights**

Fundamental rights are a special category of human rights, comprising the most basic human rights which are granted to everyone, irrespective of their circumstances.<sup>133</sup> These rights are so essential, important, and basic to the liberty of

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<sup>130</sup> Apart from the various international and regional instruments considered, the choice is also based on GA Resolution 40/144 of (1985). GA Res 144 (XL) GOAR 49 Session Supp. 53, 253 *supra* n 24.

<sup>131</sup> See generally Meron, "On the Hierachy of International Human Rights Norms" 80 *Am. J. Inter'l Law* (1986) 1-23 where he distinguishes between "fundamental" rights and other "rights".

<sup>132</sup> Tiburcio *supra* n 26 xiii however classifies the rights of aliens into seven categories along the lines discussed here. Ie (a) Fundamental Rights (b) Private Rights (c) Social and Cultural rights (d) Economic rights (e) Political rights (f) Public rights and (g) Procedural rights.

<sup>133</sup> *Idem* 75.

man in the society that they are more or less inalienable.<sup>134</sup> They include the right to life,<sup>135</sup> freedom from torture, cruel and inhuman treatment or punishment,<sup>136</sup> and non-discrimination.<sup>137</sup> These rights are classified as “fundamental,” because of the requirement of non-derogability by all international conventions.<sup>138</sup> Thus, as most international conventions consider these rights to be non derogable under any circumstances even circumstances such as public danger or public need,<sup>139</sup> they are referred to as fundamental rights.

(a) *Right to life*

All human rights instruments guarantee the right to life. The UDHR, for instance provides in article 3 that ‘Everyone has the right to life, liberty and security of person.’ Likewise, the American Declaration,<sup>140</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>141</sup> the European Charter on Human Rights and Fundamental Freedoms (ECHR)<sup>142</sup> and the Convention on the Rights of the Child (CRC) also reproduce the same provision.<sup>143</sup> The African Charter on Human and People’s Rights (ACHPR) guarantees the right to life in the following terms:

<sup>134</sup> *Idem.*

<sup>135</sup> All human rights instruments guarantee the right to life. The UDHR eg in art. 3; the ICCPR art 6(1) ; The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) art 2(1); The Inter-American Convention on Human Rights (ACHR) art 4(1); the African Charter on Human and Peoples’ Rights (ACHPR) art 4. See also the Second Protocol to the ICCPR (2 OP) art 1(1) and art 5(1)(a) of Resolution 40/144. See also chapter 3 *infra* for a discussion of the legal effect of resolutions in International Human Rights Law.

<sup>136</sup> UDHR art 5; ICCPR art 7; ECHR art 3; ACHR art 5(2); ACHPR art 5; Resolution 40/144 art 6;.The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art 1. Art 4 of CAT e.g requires State Parties to make all acts of torture criminal offences, including attempts and complicity. Thus State Parties must assert jurisdiction over torture offences when they are committed in their territory, or when the alleged offender is within their territory. See the case of *Filartiga v Pena-Irala* 630 F. 2<sup>nd</sup> 876 (1980) United States Court of Appeals (Second Circuit).Therefore, freedom from torture is a fundamental right.

<sup>137</sup> The right not to be discriminated against is also contained in many International Human Rights Instruments. See eg the Charter of the UN art 1; the UDHR arts 1, 2(1) & 7; the ICCPR art 26; CERD arts 1(3) & 5; CEDAW art 1; ECHR art 14; ACHR art 1; ACHPR art 2; Resolution 40/144 - art.5(c).This right is generally regarded as non-derogable. See Tiburcio *supra* n. 26 90; Rehman *supra* n 28 269 Steiner, Alston & Goodman, *supra* n 19 192; Harris & Joseph: *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 563; Hepple & Szyszczak (eds)*Discrimination: The Limits of Law* (1992) 50 & Malone *A Practical Guide To Discrimination* (1980) 3.

<sup>138</sup> See the UDHR; the ICCPR; CAT; ECHR, ACHR; and the ACHPR etc.

<sup>139</sup> Eg during times of emergency, such as war or natural disasters. Besides, these are the first generation rights.

<sup>140</sup> Art 1.

<sup>141</sup> Art 6(1).

<sup>142</sup> Art 2(1).

<sup>143</sup> Art 6(1).

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.<sup>144</sup>

(b) *Freedom from torture, cruel and inhuman treatment or punishment*

Again, this right is universally acclaimed as a fundamental right. The UDHR, for instance, provides that 'No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.'<sup>145</sup>

The ICCPR, likewise provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation<sup>146</sup>

At the regional level, the ACHPR provides that:<sup>147</sup>

All forms of exploitation and degradation of man particularly...torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited.

The ECHR also provides that<sup>148</sup> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment', and the ACHR provides that<sup>149</sup> "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."

(c) *Right not to be discriminated against*

As already indicated, people living in foreign countries are usually discriminated against and international conventions prohibit it.<sup>150</sup> Thus, the right not to be

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<sup>144</sup> Art 4.

<sup>145</sup> Art 5.

<sup>146</sup> Art 7.

<sup>147</sup> Art 5.

<sup>148</sup> Art 3.

<sup>149</sup> Art 5(2). See generally Jayawickrama *Judicial Application of Human Rights Law – National, Regional and International Jurisprudence* (2002) 296.

<sup>150</sup> See e.g the Convention on the Protection of the Rights of Migrant Workers and Members of their Families.(1990) *supra* n 65 art 7, and the Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they live (1985) *supra* n 24 art 5.

discriminated against is a veritable shield for people living in foreign lands. The UDHR, for instance, ordains that:<sup>151</sup>

All human beings are born free and equal in dignity and rights; they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

And that,<sup>152</sup>

Every one is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion national or social origin, property, birth or other status.

It provides further that:<sup>153</sup>

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Needless to say, the ICCPR, the CERD, the ACHPR, as well as the ECHR and ACHR all prohibit discrimination.<sup>154</sup>

## 9.2 *Property rights*

Property rights are not limited to the rights of foreigners<sup>155</sup> but include the property rights of foreigners to inherit and to dispose of movable or immovable property.<sup>156</sup> Property rights are private rights.<sup>157</sup> According to traditional understanding, the term

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<sup>151</sup> Art 1.

<sup>152</sup> Art 2(1).

<sup>153</sup> Art 7.

<sup>154</sup> See the ICCPR art 26; CERD art 1(3) & 5; the ACHPR art 2; the ECHR art 14 and the ACHR art 24.

<sup>155</sup> See the UDHR art 17(1) & (2); ECHR (Protocol 1); and the ACHR arts. 21(1) (2) & (3).

<sup>156</sup> See Tiburcio *supra* n 26 135.

<sup>157</sup> Tiburcio *ibid* maintains that “the expression private rights should be understood as comprising ‘civil rights’ according to its meaning in civil law traditions.” It must be conceded that according to classical Western philosophy, property rights are classified under civil and political rights. See eg the works of John Locke. Property is discussed here as a separate right to emphasize the importance of this right to a foreigner.



“private right” comprises “civil rights”<sup>158</sup> Civil rights are constitutional rights which are “universal political rights within a given society.”<sup>159</sup> It is noteworthy, however, that for some time aliens have been denied the right to own property in countries where they lived.<sup>160</sup>

Restrictions on the transmission of property after death was imposed and strictly enforced among the ancient Hebrews.<sup>161</sup> Under Roman law, aliens were forbidden from inheriting from citizens, neither could citizens inherit from foreigners.<sup>162</sup> There was hardly any change in the situation throughout Europe during the Middle Ages.<sup>163</sup> Although Grotius defended the right of an alien to family life, he refrained from commenting on issues bordering on property rights of aliens.<sup>164</sup>

It was not until 1870 that aliens were allowed to acquire a fee simple title in land in England.<sup>165</sup> In France however, foreigners of certain nationalities were allowed to transmit their property after death, on payment of the required taxes, before the French Revolution.<sup>166</sup> Aliens were however prevented from accepting or to transferring property in France after the Revolution.<sup>167</sup>

In Africa, the peculiar nature of land tenure did not permit the ownership of real property by aliens.<sup>168</sup> The basic characteristic of African land tenure was communal.<sup>169</sup> It was characterised by the dominant role of groups and communities on land. In other words, land belonged to the community, the village or the family,

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<sup>158</sup> *Ibid.*

<sup>159</sup> See Church, Schulze & Strydom, *Human Rights from a Comparative and International Law Perspective* (2007) 133.

<sup>160</sup> For a historical look at the treatment of aliens *vis-a-vis* their rights to own property, see Tiburcio *supra* n 26 103-143.

<sup>161</sup> See Weis *Traite Theorique Et Pratique Du Droit International Prive* 7 (1908) and, generally Tiburcio *supra* n 26 103.

<sup>162</sup> Tiburcio *ibid* 104.

<sup>163</sup> *Ibid.*

<sup>164</sup> Grotius *The Law of War and Peace* (1884). Vattel however defended it. See Vattel *The Law of Nations supra* n. 81 bk. 2 ch 8. See Tiburcio *supra* n 26 104.

<sup>165</sup> Borchard *supra* n 1 85. See Tiburcio *supra* n 26 104.

<sup>166</sup> This was due to the existence of treaties with those foreign states. See Tiburcio *ibid* 105.

<sup>167</sup> See Batiffol & Lagarde *Droit International Prive* 205 (1970) Tiburcio *supra* n 26 105.

<sup>168</sup> See Elias *The Nature of African Customary Law* (1956) 162.

<sup>169</sup> *Ibid.*

never to the individual and therefore could not be alienated.<sup>170</sup> This was a pure native custom throughout the whole of Africa.<sup>171</sup>

With the advent of the human rights movement, however, the trend is gradually changing. Today, all States are obliged to recognize nationals of other states as human beings with legal personality, who can acquire rights, privileges and obligations with all the consequences of their status as human beings.<sup>172</sup> Thus, aliens can now own private properties in some countries.<sup>173</sup> Conditions are however almost always attached to such acquisitions. Sometimes, such conditions are based on reciprocity, and at other times on courtesy.<sup>174</sup> This thesis investigates whether property rights can be acquired by foreigners in Nigeria and South Africa, and how such rights can be diplomatically protected, particularly in cases of expropriation without compensation.

### 9.2.1 Definition of property

Higgins has pointed to 'the almost total absence of any analysis of conceptual aspects of property.'<sup>175</sup> Property should therefore include physical objects and

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<sup>170</sup> See the case of *Amodu Tijani v Secretary Southern Nigeria* (1921) 2 AC 399. It must however be pointed out that even in those olden days, there was individualization of land. Individualisation came about by the partitioning of family or communal land. The coming of the Europeans to Africa and the adoption of English concepts of land holding further made individualization of land possible.

<sup>171</sup> See Elias *supra* n 168 162 where the author expresses his pleasant surprise when in 1952, the then Prime Minister of Toro in Uganda, after reading a few pages of his book *Nigerian Land Law and Custom* at random, exclaimed "These are the same as our own principles of land rules in Uganda." See also Okon "Land Law as an Instrument of Social Change" *Journal of the Indian Law Institute* (1989) 203.

<sup>172</sup> See Anzilotti *Hague 26 Recueil Des Course* (1929) 45.

<sup>173</sup> Eg in Brazil, Argentina and Greece. See Tiburcio *supra* n 26 140-41. In Nigeria however, the Land Use Act 1976 is silent on the question of whether a foreigner can own real property or not. There is however, a Lagos State Law called "The Acquisition of Lands by Aliens Law" of 1971. S 1 of that law states that no alien shall acquire an interest or right in or over land from a native of Nigeria unless the transaction has been previously approved by the State Governor. This is however a state law and does not apply to the entire country. See Jemide "Can a Foreigner Own Land in Nigeria?" *Thisday* (2008) 05 6. In Ghana, foreigners can own real property: See *Global Property Guide* <http://www.globalpropertyguide.com/Africa/Ghana/Buying-Guide> (accessed 2008/11/11). Similarly, in South Africa, foreigners can own real property. But there is a law in the offing, aimed at prohibiting foreigners from owning land. See Roos "SA land not for foreign buyers" (2008) 09 04 (Fin24.com) and "Will South Africa impose a Property Ownership Ban on Foreigners?" [http://www.shelteroffshore.com/index.php/property/more/south\\_africa\\_property/](http://www.shelteroffshore.com/index.php/property/more/south_africa_property/) (accessed 2008/11/11).

<sup>174</sup> See Tiburcio *supra* n 26 103.

<sup>175</sup> Higgins, "Taking of Property" 268. See generally Shaw *International Law* (2003) 740.\*\*

certain abstract entities.<sup>176</sup> The 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens,<sup>177</sup> for instance, discusses the concept of property as including:<sup>178</sup>

all movable and immovable property whether tangible or intangible, including industrial, literary and artistic property as well as rights and interests in property.

In the *Liamco* case,<sup>179</sup> for example, the arbitration specifically mentioned concession rights as forming part of incorporeal property.<sup>180</sup> This is a crucial matter, because many expropriation cases in fact involve a wide variety of contractual rights.<sup>181</sup> Hence, breach of contracts between the states concerned<sup>182</sup> and foreigners will be discussed in this thesis under matters arising from property rights.

### 9.3 Procedural rights

Rights which assist in the realisation, manifestation or preservation of substantive rights are procedural rights. All rights linked to the due process of law are procedural rights.<sup>183</sup> They include, *inter alia*, the right to a fair hearing,<sup>184</sup> the right of access to the courts,<sup>185</sup> the right to be informed of the reasons for arrest,<sup>186</sup> and the right to be tried within a reasonable time.<sup>187</sup>

The due process right discussed in this research is the right to fair trial or fair hearing. The two aspects of the rule discussed are: (a) The presumption of innocence,<sup>188</sup> and (b) the right to be tried within a reasonable time.<sup>189</sup> These rights

<sup>176</sup> Eg shares in companies, debts and intellectual property.

<sup>177</sup> 55 *AJIL* 1961 548 art 10(7).

<sup>178</sup> *Ibid.*

<sup>179</sup> 20 *ILM* 1981 1; 62 *IHR* 141.

<sup>180</sup> 20 *ILM* 1 53; 62 *ILR* 141 189. See also the *Shufeldt* case (1930) 2 *R I A A* 1083 1097 ; 5 *AD* 179.

<sup>181</sup> See generally Shaw *supra* n 175 740.

<sup>182</sup> I.e Nigeria and South Africa.

<sup>183</sup> See Tiburcio *supra* n 26 245.

<sup>184</sup> UDHR art 10, ICCPR art 14 (1), ECHR art 6(1), ACHR art 8(1), ACHPR arts 7(1) & 26.

<sup>185</sup> See the case of *Golder v United Kingdom* (1975) 1 *EHRR* 524 where it was said that the right to a fair trial embodies the right of access to a court.

<sup>186</sup> ICCPR art 14(3)(a), ECHR art 6(3) (a).

<sup>187</sup> See generally the provisions of ICCPR art 14(3)(c), ACHPR art 7(1) (d).

<sup>188</sup> UDHR art 11(1); ICCPR art 14(2); American Declaration of the Rights and Duties of Man (ADRD) art 26(1); ECHR art 6(2); ACHR art 8(2); and ACHPR art 7(1) (b).

<sup>189</sup> See n 187 *supra*.

are important not only to citizens in general but to foreigners in particular, because they are based on the rules of natural justice.<sup>190</sup>

The fair trial or fair hearing doctrine is a general rule not only of international law,<sup>191</sup> but also of municipal law.<sup>192</sup> As was indicated above, this rule is based on the rules of natural justice which must be observed in the settlement of any dispute.<sup>193</sup> Natural justice demands that in the determination of any civil or criminal obligation of any person, the person should be treated fairly.<sup>194</sup>

In any judicial decision, it is a cardinal rule of natural justice that both sides to the dispute must be heard, as no one should be condemned unheard.<sup>195</sup> This is called the doctrine of *audi alteram partem* which means “hear the other side.” The rationale for this doctrine is aptly summed up by the maxim *qui aliquid statuerit parte inaudita altera aequum licet dixerit hand aequum facerit*, which means that he who determines any matter without hearing both sides, though he or she may have decided rightly, has not done justice.<sup>196</sup>

Fair hearing and fair trial are said to be synonymous and the test for its observance is not based on mere technicality, but on the substance of the proceedings.<sup>197</sup> Generally, the twin pillars of fair hearing as stated above, are embodied in the Latin maxim *audi alteram partem* and *nemo iudex in sua causa* which means “you must not be a judge in your own cause.”<sup>198</sup>

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<sup>190</sup> Natural justice demands that fairness should be the yardstick in the settlement of disputes among people. That notwithstanding, these are the rights most often violated by the receiving states in immigration cases, ie cases involving migration, expulsion or deportation of aliens.

<sup>191</sup> It is classified under Art 38 (c) of the statute of the ICJ as “general principles of law recognized by civilised nations.”

<sup>192</sup> See the Constitution of the Federal Republic of Nigeria 1999 s 36 eg and the Constitution of the Republic of South Africa 1996 s 36.

<sup>193</sup> See the case of *Nigerian-Arab Bank Ltd v Comex* (1999) 6 NWLR 648.

<sup>194</sup> The fairness of a trial is demonstrated by the attitudinal behaviour of the presiding judge in the course of trial towards a party. It is characterised by lack of prejudice or bias and being open-ended in such a way that any common man present in court, will easily attest to the fairness of the proceedings. See the case of *Nigerian-Arab Bank Ltd v Comex supra* n 193 648.

<sup>195</sup> See the case of *United Bank for Africa v Okonkwo* (2004) 5 NWLR 445.

<sup>196</sup> *Ibid.*

<sup>197</sup> See the case of *Ika Local Govt Area v Mba* (2007) 12 NWLR 677.

<sup>198</sup> See Garner *supra* n 12.

This right has a venerable history. Its modern application arose in the English case of *R v Cambridge University*<sup>199</sup> where one Dr. Bentley had been deprived of his academic degrees at the University of Cambridge without being heard. In ordering *mandamus* for his reinstatement, the learned trial judge held that even God in his judgement against Adam and Eve, did not condemn them without first calling upon them to defend themselves. The effect of non compliance with or breach of the rule against fair hearing is to render the trial null and void.<sup>200</sup>

One of the principal requirements of a fair hearing is the presumption of innocence.<sup>201</sup> Thus, a person charged with a criminal offence has the right to be presumed innocent until he or she is proven guilty according to law.<sup>202</sup> Widely proclaimed as a very important right,<sup>203</sup> this right is proclaimed in article 11(1) of the UDHR, and in other international human rights instruments.<sup>204</sup> The right is however often breached where foreigners are involved, probably because foreigners appear to be different from nationals.<sup>205</sup> This apparent difference also engenders bias, prejudice and discrimination against the foreigner in that he or she may not be afforded the benefit of the doubt before being condemned.<sup>206</sup> This thesis critically examines the scope of this right and underscores its importance. Since a breach of this right is tantamount to a denial of justice, it may constitute a ground for diplomatic protection if breached with impunity by the receiving State.<sup>207</sup>

The other procedural right examined in this thesis is the right to be tried within a reasonable time. Article 9(3) of the ICCPR provides that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial powers and shall be entitled to trial within a

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<sup>199</sup> (1972) 1 S T R 557.

<sup>200</sup> *Ika Local Govt Area v Mba supra* n 197 681.

<sup>201</sup> See n 188 *supra*.

<sup>202</sup> See the UDHR, art 11(b); S 36(5) of the Nigerian Constitution & s 35(3) (h) of the Constitution of South Africa.

<sup>203</sup> As distinguished from “fundamental” right.

<sup>204</sup> See also art 6(2) of the ECHR, and art 7(1)(b) of ACHPR. It is beyond doubt that this right is recognized by the Constitutions of many nations, eg Nigeria, s 36(5) and South Africa s 36 ( 5).

<sup>205</sup> See Tiburcio *supra* n 26 xxii. See also n 29 *supra*.

<sup>206</sup> *Dr. Bentley’s Case supra* n 199.

<sup>207</sup> See *Chattin’s Case supra* n 32. See also the resolution of the African Union on ending impunity in Africa and the domestication of the Rome Statute of Criminal Court (2005) Hyns & Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (2010) 4<sup>th</sup> ed 405.

reasonable time or to be released.<sup>208</sup> How often is this provision breached with regard to foreigners? Can this right be diplomatically protected? If so, what are the legal and diplomatic consequences of its breach for the relations between the affected states?

Furthermore, the question may arise whether a breach of legal procedure leading to a denial of justice to an individual arises equally in respect of all classes of aliens, or if the wealthier alien is better placed. It is submitted that even jet-setters can find themselves accused of crime and may have need of ensuring procedural protection of the law.

## 10 The controversy surrounding the hierarchy of human rights norms

The classification of human rights into the above categories creates the impression that all rights are not equal, and that some rights are more important than others. Some rights, such as the right to life are classified as “fundamental,” while procedural rights for instance, are not. Why is that so?

There is a controversy surrounding the classification of human rights norms generally in international law.<sup>209</sup> While some human rights norms are said to be more important than others by proponents of the hierarchal doctrine of legal norms,<sup>210</sup> this claim has been strongly denied by some jurists and commentators.<sup>211</sup> The claim for the superiority of some human rights norms over others springs from the premise that some rights are so basic and essential to human existence that they are more or less inalienable – that is to say fundamental, while others are not.

Generally, the so-called “first generation” rights<sup>212</sup> are said to be more important than the “second”<sup>213</sup> or “third” generation<sup>214</sup> rights. Moreover, individual rights are also regarded as superior to collective rights.<sup>215</sup>

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<sup>208</sup> See also n 187 *supra*.

<sup>209</sup> See Meron *supra* n 131 1.

<sup>210</sup> Eg Meron *id*.

<sup>211</sup> Eg Van Boven. “Distinguishing Criteria for Human Rights” in Vasak & Alston (ed.) *The International Dimension of Human Rights*, vol 1 (1982) 43.

<sup>212</sup> ie civil and political rights. This was the notion particularly during the cold war. While Western nations alleged that civil and political rights were more important than economic, social and

The vital question however, is why some human rights norms should be regarded as more important than others whereas every right is necessary for the sustenance and enjoyment of life in the society?<sup>216</sup>

The alleged superiority of some human rights norms over others, it is further contended, is underscored by the fact that they are universally accepted, are recognized as customary international law, affirmed in numerous international conventions, declarations and resolutions, and are enacted in the constitutions of almost every nation whereas others are not.<sup>217</sup> Such “special rights”, it is contended,<sup>218</sup> include *inter alia*, the right to life, freedom from torture, as well as freedom from discrimination.

This controversy has provoked philosophical debates concerning the nature, categorisation and prioritisation of human rights in general.<sup>219</sup> While some jurists and commentators believe that there are obvious differences between human rights norms, and that all human rights are not equal,<sup>220</sup> others say that all human rights

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cultural rights and accused the Eastern Block of violating them, the East disagreed and maintained the exact opposite. This debate however died with the demise of the Soviet Union. See Steiner *et al supra* n 19 518-519.

<sup>213</sup> le economic, social and cultural rights. While Eastern European countries alleged that economic, social and cultural rights are more important than civil and political rights, the West disagreed. This debate also died with the demise of the Soviet Union. See Steiner *et al ibid*.

<sup>214</sup> Solidarity rights e.g. the right to peace, development and a protected environment. See generally Meron *supra* n 131 78. See also Sohn, *supra* n 122, 161- 62 Regarding the interdependence and equal status of human rights, see par. 5 of the Vienna Declaration and Programme of Action adopted at the Vienna Conference on Human Rights of 1993 UN, GAOR, World Conference on Human Rights, 48<sup>th</sup> Session, 22<sup>nd</sup> plen, mtg. part 15 UN Doc. A/CONF. 157/24(1993). See also Alston “Conjuring up New Human Rights: A proposal for Quality Control” (1984) 78 *AJIL* 607 612.

<sup>215</sup> This is the concept of the liberal Western mind. See Steiner *et al supra* n 19 515 which states *inter alia*: “With respect to the core values of liberalism, individual rights remain lexically superior to the demands of a culture or group, to the claims of any collective identity or group solidarity.” Among the communal minded Africans, Indonesians, Indians, or Chinese however, the reverse is the case. See the criticism of the individualistic concept of human rights by the American Anthropological Association in their Statement on Human Rights 49 *Amer. Anthropologist* (1947) No 4 539, and in Steiner *et al supra* n 19 529. See UN Press Release (Geneva) No. H/1735 (1985) 08 2.

<sup>216</sup> See Weil n 231 *infra*. See also the Vienna Declaration and Programme of Action 1993 *supra* n. 214. art 3.

<sup>217</sup> See Schachter *International Law in Theory and Practice* (1991) 50. He however maintains at 51 that recent developments in various parts of the world indicate that certain human rights have penetrated deeply into the consciousness of peoples in many countries.

<sup>218</sup> By exponents of superior rights doctrine eg Meron.

<sup>219</sup> See Rehman *supra* n 28 5.

<sup>220</sup> Eg Meron, *supra* n 131 80.

are equal.<sup>221</sup> They believe that all human rights have the same value and that since they form a single package, no human right should rank above the other on a hierarchical scale.<sup>222</sup> This approach presupposes the indivisibility of all human rights.<sup>223</sup>

Merón submits that “some human rights are obviously more important than other human rights,” but cautions that:<sup>224</sup>

except in a few cases, to choose which rights are more important than other rights is exceedingly difficult [ because] it is fraught with personal, cultural, and political bias, and to make matters worse, has not been addressed by the international community as a whole perhaps because of the improbability of reaching a meaningful consensus...

He admonishes, however, that “resort to hierarchical terms has not been matched by careful consideration of their legal significance” and that “hierarchical terms tend to contribute to the unnecessary mystification of human rights rather than to their greater clarity.”<sup>225</sup> Merón concludes that “caution should be exercised in resorting to a hierarchical terminology.”<sup>226</sup>

Opposing this view, Van Boven, maintains that:<sup>227</sup>

there is another argument against making a distinction between fundamental human rights and other human rights<sup>228</sup>

And that:

such a distinction might imply that there is a hierarchy between various human rights according to their fundamental character

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<sup>221</sup> Eg Van Boven *supra* n 211 43.

<sup>222</sup> *Ibid.*

<sup>223</sup> See also the Vienna Declaration and Programme of Action 1993 par 5 *supra* n 214.

<sup>224</sup> Merón *supra* n 131 80.

<sup>225</sup> *Idem* 99.

<sup>226</sup> *Idem.* According to him, “too liberal an invocation of superior rights such as ‘fundamental rights’ or ‘basic rights’ may adversely affect the credibility of human rights as a legal discipline.” At 98.

<sup>227</sup> Van Boven *supra* n 211 43.

<sup>228</sup> *Ibid.*



He goes on to assert that “in modern human rights thinking, the indivisibility of human rights and fundamental freedoms is prevalent.”<sup>229</sup>

Alluding to the term “fundamental human rights” in the UN Charter, Van Boven plays down the “supra-positive” character of such rights.<sup>230</sup>

Another writer who has raised an impressive challenge to the notion of “relative normativity” of international legal norms is Weil.<sup>231</sup> In his article, “*Towards the Relative Normativity in International Law?*,”<sup>232</sup> Weil alerts the international community to a trend or threat “towards the replacement of the monolithically conceived normativity of the past, by graduated normativity” of the present.<sup>233</sup> He then reminds the international community that the international normative system has traditionally been characterized by its unity, and that all norms have always been placed on the same plane or pedestal, and that their interrelations have never been governed by any hierarchy.<sup>234</sup> Weil warns that this unity of normative regime is being shattered by the distinction made between “peremptory” and “merely binding” norms, norms “creating obligations essential for the preservation of fundamental interests”, and norms “creating obligations of less essential kind.”<sup>235</sup>

According to Weil, “normativity is becoming a question of more or less that...”<sup>236</sup>

some norms are ... of greater specific gravity than others, or are more binding than others.

Weil, therefore, queries the criterion or mechanism by which a rule is used to elevate from the status of an ordinary norm “to a norm of higher grade”, and concludes that, whatever their rank,.<sup>237</sup>

all norms produce legal effects, all norms are binding, and the breach of any one, no matter which, constitutes an internationally wrongful act.

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<sup>229</sup> *Idem.*

<sup>230</sup> *Idem* 44.

<sup>231</sup> Weil *Towards Relative Normativity in International Law?* 77 *AJIL* 413 (1983).

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid* 421.

<sup>234</sup> *Idem.*

<sup>235</sup> *Idem.*

<sup>236</sup> *Idem.*

<sup>237</sup> *Idem* 29.

Other commentators and jurists who have descended into the arena, and joined this interesting debate include Sohn,<sup>238</sup> Brownlie,<sup>239</sup> and Alston.<sup>240</sup>

In spite of this controversy however, it is generally agreed that some norms or rights are more fundamental and intrinsic to human dignity than others.<sup>241</sup> Thus, the use of hierarchical terms or labels in describing certain human rights cannot be escaped. In the *Barcelona Traction Case*,<sup>242</sup> for instance, the ICJ gave currency to the idea of a hierarchy of norms by suggesting in a famous *dictum* that “basic rights of the human person create obligations *erga omnes*.”<sup>243</sup> This *dictum* has become the *locus classicus* in any discussion of the status of human rights norms in international law.<sup>244</sup>

The *dictum* was interpreted by the ILC to mean that there are:

a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a

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<sup>238</sup> Sohn *supra* n 122 61-62.

<sup>239</sup> Brownlie “Causes of Action in the Law of Nations.” 50 *Brit. Y.B. Int’l L.* 13 40 (1979).

<sup>240</sup> Alston *supra* n 214.(1984) 78 *AJIL* 607.

<sup>241</sup> See the case of *Palko v Connecticut* 302 US 319 (1957) where Justice Cardozo of the US acknowledged the fact that not all rights are equal, and that there are, and indeed must be, some rights (in the Bill of Rights) that are fundamental enough to require incorporation. The judge’s opinion thus established the “Honour Roll of Superior Rights.” See Church, Schulze & Strydom *supra* n 159 139 -140.

<sup>242</sup> *Barcelona Traction Light & Power Co. Ltd. (New Application) Belg. V Spain supra* n 26 32. With regards to the fundamentality of certain norms, in the *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (1980) ICJ Reports 3, the court referred to the “fundamental principles enunciated in the Universal Declaration of Human Rights” 1980 ICJ Rep 3 42 (Judgement of May 24. Again, in the *Advisory Opinion on Legal Consequences for the continued Presence of South Africa in Namibia (South West Africa) Not Withstanding Security Council Resolution 276* (1970) the court stated that “the denial [by South Africa] of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.” 1971 ICJ Rep 16 57 (Advisory Opinion of June 21). See generally Alston (ed) *Human Rights Law* (1999) 77.

<sup>243</sup> Par 33.

<sup>244</sup> Meron *supra* n 131 84. He however maintains at 89 that “international practice and scholarly opinion seem to have moved well beyond the *erga omnes* dictum of *Barcelona Traction*.” He further argues that “... the distinction between basic human rights and human rights, as regards their *erga omnes* character, can no longer be supported.” *ibid*. Besides, according to Oppenheim “one can also distinguish between those rules of International Law which even though they may be of universal application, do not in any particular situation give rise to rights and obligations *erga omnes*. Thus, although all states are under certain obligations as regards the treatment of aliens, those obligations (generally speaking) can only be invoked by the state whose nationality the alien possesses.” See Oppenheim’s *International Law* (1992) 856.

whole, are,- unlike the others - obligations, in whose fulfilment all states have a legal interest.<sup>245</sup>

This interpretation is supported by the fact that, the ICCPR has enumerated some rights from which no derogation is allowed under any situation, even in times of public emergency.<sup>246</sup> The right to life,<sup>247</sup> the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment,<sup>248</sup> and the right not to be discriminated against,<sup>249</sup> are some of such rights. As aptly put by Meron,<sup>250</sup>

most observers would ... agree that protection of the right to life from arbitrary taking, and protection of the human person from torture or egregious racial discrimination are fundamental rights.

Thus, the general acceptance of the fundamental nature of the rights mentioned above by Meron coupled with the overall effect of their breach on human life in general; inform their adoption in this study in connection with the diplomatic protection of the rights of foreigners. Furthermore, the fact that such rights are specifically safeguarded and are intended to retain their full strength and validity in a number of comprehensive human rights instruments at the universal and regional levels, is a strong argument in favour of the contention that there is at least a minimum catalogue of fundamental or elementary human rights that must be jealously guarded.<sup>251</sup>

## 11 Political rights

Although human rights as proclaimed by the UDHR, the ICCPR and other international and regional instruments are meant to be enjoyed by “everyone,”<sup>252</sup> international law concedes certain special rights to nationals of states to be enjoyed

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<sup>245</sup> [1976] 2 *BYb IL Comm'n* pt 2 99; UN Doc A/CN4/ Ser A 1976/ Add 1 (pt 2).

<sup>246</sup> Art 4 par 2.

<sup>247</sup> Art 6.

<sup>248</sup> Art 7.

<sup>249</sup> Art 26.

<sup>250</sup> Meron *supra* n 131 87.

<sup>251</sup> Van Boven *supra* n 211 130.

<sup>252</sup> I.e both nationals and aliens alike.

by them exclusively. An example of such a special right is the right of citizenship.<sup>253</sup> Therefore, in most national constitutions foreigners are not entitled to certain rights, such as political rights.<sup>254</sup> Hence political rights are not discussed in this thesis.

Political rights are rights which only citizens of a state are entitled to enjoy. Political rights include, but are not limited to the right to vote or be voted for, the right to be given public jobs, the right to be involved in certain decision-making processes, the right to serve in the armed forces, *etcetera*.<sup>255</sup> Nevertheless, the research treats the diplomatic protection of human rights of foreigners internationally and regionally. On the regional level, the study is restricted to Africa. Within the African system, the work is further restricted to Nigeria and South Africa.

## 12 Why Nigeria and South Africa are chosen for the study

Nigeria and South Africa have been chosen for this study because they are prominent in terms of size, population, economic, social and political status on the African continent of Africa.<sup>256</sup> Besides, Nigeria and South Africa share a common heritage in terms of the English language and English common law.<sup>257</sup> Their legal systems are similar, being a legacy of their common colonial past. The difference however is that the South African legal system has a Roman Dutch law background.<sup>258</sup> Above all, the two States have had their fair share of human rights problems which have occurred particularly during the military regimes in Nigeria and the *apartheid* regime in South Africa.<sup>259</sup>

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<sup>253</sup> See the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws art 1 *supra* n 43. The right of citizenship must be distinguished from the right to citizenship which is not a human right as such. The right of citizenship is the right to enjoy all the privileges attached to citizenship. See e.g art. 13 of the African Charter which stipulates that 13(1) Every citizen shall have the right to participate freely in the government of his country. Article 13(2) goes further to stipulate that "Every citizen shall have the right of access to public property and services..." whereas art. 13(3) merely says that "Every individual shall have the right of access to public property and public services..."

<sup>254</sup> Tiburcio *supra* n 26 xiv.

<sup>255</sup> *Ibid.*

<sup>256</sup> See Heyns *The Protection of Human Rights in Africa* vol 1 (2004) 1387 & 1506. The author is a Nigerian while the research is undertaken in SA.

<sup>257</sup> *Ibid.*

<sup>258</sup> See Dugard *supra* n 1 49. See also <http://www.rx.com/features/southafrica.html> (accessed 2009-04-11).

<sup>259</sup> In relation to the protection of human rights, both countries have at one time or the other, set up Truth and Reconciliation Commissions to resolve human rights issues.

The Nigerian legal system consists of indigenous laws of the people, usually referred to as customary law,<sup>260</sup> English law, brought into the country by the British colonialists,<sup>261</sup> and Nigerian legislations enacted by the Nigerian legislature.<sup>262</sup> The South African legal system is a mixed or hybrid system<sup>263</sup> which also consists of indigenous law,<sup>264</sup> common law,<sup>265</sup> statutory law<sup>266</sup> and case law.<sup>267</sup> While legislation is a primary source of law in South Africa, common law<sup>268</sup> also plays a very important role. Both Nigeria and South Africa have written Constitutions. The South African Constitution is the supreme law of the land.<sup>269</sup>

Although Nigeria is a Federal Republic<sup>270</sup> while South Africa is a Republic,<sup>271</sup> they have a lot in common.<sup>272</sup> Both profess democracy. The legal systems of the two countries, however, differ on the grounds that while Nigeria operates a pure common law tradition,<sup>273</sup> South Africa operates a mixed or hybrid legal system.<sup>274</sup> A mixed or

<sup>260</sup> Which includes Islamic law. See Ananaba *Essential Principles of Nigerian Law* (2002) 3.

<sup>261</sup> This comprised the common law of England, the doctrines of Equity, and English statutes. See s 45 of the Interpretation Act (Cap. 89 of 1958 Laws of Nigeria) which provided *inter alia* that “the common law of England and the doctrines of equity, together with the statutes of general application *that were in force in England on the 1<sup>st</sup> of January 1900*, shall ... be in force in the Federation.” See Okonkwo *Introduction to Nigerian Law* (1980) 4.

<sup>262</sup> Other sources consist of case law, law reports, professional textbooks, etc.

<sup>263</sup> A mixed system may be defined as one that is made up of at least two diverse components having substantive attributes derived from two or more systems generally recognized to be independent of the other. See Church, *et al supra* n 159 49.

<sup>264</sup> Indigenous law is part of South African law although the system is generally described as “Roman-Dutch.” During colonial and apartheid years, although indigenous law was recognised, it was so recognised only as a special and personal law that operated outside of, but only as determined by the general law. However indigenous law has been recently recognised. See ss 87, 211 & 233 of the 1996 Constitution. See also Church, *et al, supra* n 159 52-53.

<sup>265</sup> I.e. the previous decisions of superior courts and rules set down by the “old Roman-Dutch” authorities. See Dugard *supra* n 1 49 and <http://www.rx.com/features/southafrica.htm>. (accessed 2009/05/02).

<sup>266</sup> Acts of the National and Provincial legislatures and government regulations.

<sup>267</sup> This law is not codified and like English law, must be sought in court decisions and individual statutes. See n 266 *supra*.

<sup>268</sup> I.e. Roman-Dutch law as developed by the courts.

<sup>269</sup> See *Features Researching South African Law* <http://www.rx.com/features/southafrica.htm> (accessed 2009/06/08).

<sup>270</sup> The federal principle is “the method of dividing powers so that general regional governments are each within a sphere coordinate and independent.” See Wheare *Federal Government* (1963) 101.

<sup>271</sup> A Republic is a state governed by elected leaders. The term is often used in contradistinction to a monarchy. See *Large Print English Dictionary supra* n 7 287.

<sup>272</sup> One of the areas of similarities in the legal systems of the two countries is in the operation of the common law tradition. The key feature of the common law tradition is the case law system based on the doctrine of hierarchical judicial precedent. Under this doctrine, the courts are bound by judicial precedent or *stare decisis*, depending on their position within the hierarchy of courts.

<sup>273</sup> See Okonkwo *supra* n 261 4.

<sup>274</sup> See Church *et al supra* n 159 49.

hybrid system reflects a mixture of the common law and civil law traditions.<sup>275</sup> The peculiarities of the civil law tradition are its scholarly tradition; romanistic style; the division it makes between public and private law, its conceptual and systematic nature, its theory of the formal sources of law, and its legal techniques.<sup>276</sup>

Under the civil law system, the courts are not strictly bound by the doctrine of judicial precedent, but make decisions on a case by case basis.<sup>277</sup> South Africa, however, has a strict system of *stare decisis*. Furthermore, like other civil law systems, the courts in South Africa take into consideration the opinion of text writers and professors of law in reaching a decision. Hence the role of the law professor in the development of the law in South Africa is very crucial and can not be overestimated.<sup>278</sup>

Apart from the legal system, another area of similarity between Nigeria and South Africa is their multi-culturalism. South Africa has been described as a “rainbow” society, because of the different traditions and cultures that contribute to it. This cultural diversity has given birth to the oft-used expression ‘unity in diversity’ in expressing the need to breach the cultural gap between the different cultures and ethnic groups. Nigeria, too, is a plural society with diverse geographical, historical, cultural and linguistic components. “Unity in diversity” is also the catch-phrase used in Nigeria to neutralise these differences.<sup>279</sup>

Some political similarities between the two countries also exist. Although a close discussion of this factor is beyond the scope of this thesis, suffice it to say that historically, both Nigeria and South Africa have shared similar political experiences. While Nigeria was colonised by the British in 1860, amalgamated in 1914 and became independent in 1960,<sup>280</sup> South Africa was colonised by the British in 1901,

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<sup>275</sup> One system is derived from the Romano-Germanic culture, while the other is derived from the Anglo- American family of laws.

<sup>276</sup> See Church *et al supra* n 159 62.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

<sup>279</sup> The lyrics of the first National Anthem of Nigeria succinctly captured this “unity in diversity” theme by declaring that “Though tribe and tongue may differ, in brotherhood we stand.”

<sup>280</sup> After its independence, the first major crises in Nigeria occurred in 1962 during the Western Region crises. This led to the declaration of a state of emergency in the then Western Region. As a result of the lingering crises in the country, the first military *coup* took place in 1966. In 1967

was amalgamated in 1910 and became independent in 1961.<sup>281</sup> In essence, both countries have had four constitutions to date,<sup>282</sup> are still developing, and both have middle power status in the world.<sup>283</sup>

The Nigerian and South African judicial systems are also similar. While Nigeria has a hierarchy of courts with the Supreme Court at the apex and the customary courts at the base of the ladder, South Africa also has the Constitutional Court at the apex of their judicial system with indigenous courts at the lowest level. Their socio-economic systems are both capitalistic. But while the Nigerian economy is based mainly on oil revenue, the South African economy is a diversified economy based on mining, agriculture and the manufacturing industry. South Africa is the biggest economy in Africa. Consequently, South Africa is a member of the G-20 group of nations. The inclusion of South Africa in the G -20 group of nations is a recognition of its international economic status. Nigeria also is afforded prestige and respect by virtue of its membership of OPEC. That notwithstanding, however, financially, South Africa

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following the mass killings of Southerners in the Northern parts of the country, the Eastern Region seceded from the rest of the country and proclaimed the Republic of Biafra. Civil war ensued. After thirty months of civil war, peace was finally restored in the country in 1970. Successive military regimes governed the country until 1998 when the death of General Abacha ushered in Abdulsalami Abubakar's Administration. Abubakar inaugurated a transition programme aimed at returning the country to civilian rule. Elections were consequently conducted at the end of 1998 and Obasanjo was elected President and sworn into office on 1999-05-29. See Heyns *supra* n 256 1388.

<sup>281</sup> Democratic rule was achieved in 1994. The country entered into a new era following the unbanning of several liberation movements and the release from prison of African National Congress (ANC) leader Nelson Mandela in February 1990. Through formal negotiations lasting from December 1991 till the end of 1993 involving the government and most political groups, the system of *apartheid* was replaced by democratic dispensation. Elections were conducted in 1994, and on May 10 1994, Nelson Mandela was inaugurated President. A "final" Constitution was passed by the new democratic parliament in 1996 and entered into force in 1997. See Heynes *supra* n 256 1506.

<sup>282</sup> Nigeria has so far had the 1960 Independent Constitution, the 1963 Republican Constitution, the 1979 Constitution and the 1999 Constitution, while South Africa has had the 1910 Constitution, the 1961 Constitution, the 1983 Constitution and the 1996 Constitution. See Mubangizi *The Protection of Human Rights in South Africa*. (2005) 35.

<sup>283</sup> By this is meant the military or defence capability of the two countries. Nigeria has 80,000 military personnel (Army 62,000, navy 8,000, airforce 10,000), with a defence budget of US \$988 m (2007 figures.) while South Africa has 62,334 military personnel (army 41,350, navy 5,80 & airforce 9,183). SA's military expenditure is US \$ 3,520 million per annum. See *Whitaker's Almanak* (2009) 953 1006-7. These figures should be compared with those of less military - capable states like Mali with 7,350 military personnel, Burkina Faso with 10, 000 military personnel, and Barbados eg, with less than a thousand military personnel. See *Whitakers Almanak* (2009) 650 978 -779 and contrasted with those of super power nations like the US or Russia who have more than a million military personell each, many nuclear warheads, and military or defence budgets of US \$ 571,000m for the USA, (2007 figures) and US \$70,000 m for Russia (2006 figures). See *Whitakers Almanak* (2009) 978 1051 respectively.

is possessed of such resources and infrastructure which Nigeria simply does not have at its disposal.<sup>284</sup>

Finally, from the diplomatic perspective, there are also important diplomatic experiences shared by the two countries. This is a consequence of the damage done to Nigeria's diplomatic and international image as a result of its alleged human rights abuses during its period of military rule.<sup>285</sup> It will be recalled that the country was ostracized and banned from all international fora.<sup>286</sup> With the restoration of democratic rule in 1999, however, the country is attempting to restore its international image. Thus, Nigeria is relatively a sophomore in diplomatic circles.

The same is true of South Africa. After many years of isolation from the international community because of its *apartheid* policies,<sup>287</sup> its attainment of democratic rule in 1996 and its restoration to the international scene makes it one of the newcomers to diplomatic circles. It is hoped that the two countries will enhance respect for human rights by using diplomacy not only to protect the human rights of their nationals within and outside their territories, but also the human rights of all non-nationals living in their countries.

### 13 Objectives of the study

This thesis will:

- Take a fresh and critical look at the institution of diplomatic protection, define its scope and establish its relationship *vis-a-vis* modern human rights law;

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<sup>284</sup> It is generally said that corruption is endemic in Nigeria. Had Nigeria's oil wealth been effectively utilised to develop the country, perhaps it would have equalled or even surpassed South Africa in terms of infrastructural development. According to *Whitaker's Almanak supra* n 283 953 "Nigeria is the leading sub-Saharan oil producer enjoying oil boom in the 1970's and currently benefiting from high oil prices. The profits from the 1970 boom were dissipated by mismanagement and corruption. The majority of the population received little benefit and 70% live below poverty line." The *World Almanac and book of Facts* (2003) 824 puts it this way, "Nigeria emerged as one of the world's leading oil exporters in the 1970's but much of the revenue has been squandered through corruption and mismanagement."

<sup>285</sup> See Heyns *supra* n 256 1388.

<sup>286</sup> This was during the reign of General Abacha. See Heyns *ibid*.

<sup>287</sup> Heyns *idem* 1506.



- Appraise the institution of diplomatic protection in international law and determine the extent to which diplomatic missions perform the function of diplomatic protection;
- Determine whether the governments of Nigeria and South Africa are constitutionally obliged to protect the human rights of their nationals abroad, and the extent to which these governments are prepared to act in order to protect their nationals abroad;
- Explore the scope and effectiveness of diplomatic protection of human rights available in both countries.
- Identify the international and regional human rights instruments designed for the protection of human rights generally and those of foreigners particularly, and determine whether Nigeria and South Africa have incorporated the rights into domestic laws and if so, the *modus* employed for such incorporation;
- Engage in a comparative analysis of the practice of diplomatic protection of human rights in Nigeria and South Africa, draw conclusions, offer suggestions and make recommendations on the way forward, based on the data and relevant information released by the investigation, and finally,
- Determine whether human rights law has overshadowed or made irrelevant the institution of diplomatic protection as a remedy in international law.<sup>288</sup>

## 14 Methodology

Diplomatic protection is examined from an international legal and human rights perspective in this thesis. However, the political and moral perspectives are not completely ignored. As the ICJ said in the *Barcelona Traction* case,<sup>289</sup> diplomatic protection is often motivated by political considerations rather than legal. The nagging moral question on the other hand, is whether or not a state is morally bound to protect its nationals when such a national is injured abroad.

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<sup>288</sup> It has been said that the institution of diplomatic protection is no longer in existence because the modern doctrine of human rights has taken its place. Some authorities maintain the contrary. See Tiburcio *supra* n 26 67.

<sup>289</sup> *Supra* n 26.

A comparative methodology has been adopted in this thesis to analyze the practice adopted by each country although the main approach is descriptive and analytical, deductive and critical, prescriptive and didactic at the same time.<sup>290</sup> For a proper assessment and evaluation of the subject matter generally, a comparative law method is employed. First, the institution of diplomatic protection in international law is examined and analyzed and critically compared and contrasted with human rights law to determine its scope and relevance today. Then, the role of diplomatic missions in the protection of human rights is appraised and evaluated. The Nigerian and South African practices are not only examined and analyzed, but are also compared and contrasted.

The comparative method is used throughout this thesis because it encourages a more analytical and critical approach to the subject of diplomatic protection of human rights in the two countries. It also provides an enabling environment for the exchange of ideas, particularly with reference to judicial decisions on the protection of human rights of aliens in Europe, America, Africa and other jurisdictions. The comparative law method also helped to inform any efforts aimed at improving the law relating to diplomatic protection of human rights in Nigeria and South Africa.

Literature review is also employed to establish the scope of diplomatic protection as a legal discipline and to highlight the contributions made by different authorities to the subject-matter. In order to succeed, a descriptive and analytical approach becomes inevitable. Domestic legislation of Nigeria and South Africa are critically analysed, not only for descriptive purposes, but also to determine the extent to which they provide for and encourage diplomatic protection in the two countries. This approach also reveals the extent to which the two countries are “human rights friendly” or “democratic” in status.

It is pertinent that the materials used for the thesis were obtained from primary and secondary sources. The primary sources consisted of authoritative records of the law made by law-making authorities internationally, regionally and nationally. These

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<sup>290</sup> Since the research involves literature review, a descriptive and analytical approach is adopted. The deductive and critical approach is employed to draw inferences from materials used in the

comprised international and regional instruments on diplomatic protection and human rights and included resolutions and declarations of the UN General Assembly (GA), judicial decisions of the ICJ, and the African Commission, and the Constitutions of Nigeria and South Africa. Judicial decisions of both countries as contained in law reports were also consulted. These sources were perused and analysed. The secondary sources consisted of textbooks, journal and newspaper articles, audio and video devices, and internet sources. Most of the materials used in chapter 5 of this thesis were obtained from newspaper cuttings at the Nigerian Institute of International Affairs (NIIA).

The deductive and critical approach earlier referred to is employed in this thesis to draw inferences from materials used in the study. The method consisted of the classification of certain basic human rights into three categories. The objective of adopting this tripology of rights was to find out whether there are certain basic or fundamental rights that are denied to aliens and the extent to which such denials can trigger the exercise of diplomatic protection by the affected States. The inferences drawn therefrom revealed whether the country concerned is democratic or not. This is because, a nation's human rights record has become the yardstick by which its democratic status in the world is measured.<sup>291</sup>

The prescriptive and didactic approach, on the other hand, was employed not only to make suggestions, proposals and recommendations at the end of the research, but also to facilitate the comprehension and implementation of the lessons learnt, and conclusions drawn from the study.

Although international law confers the right upon States to provide diplomatic protection in respect of citizens, at the present, states are not obliged to provide diplomatic protection to their citizens under international law.<sup>292</sup> However, as Dugard

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study, while the prescriptive and didactic approach is employed to make suggestions, proposals and recommendations.

<sup>291</sup> See Simma & Alston *supra* n 20 3.

<sup>292</sup> *Ibid.*

Special Rapporteur to the ILC on diplomatic protection, noted in his first report in 2000:<sup>293</sup>

Much has changed in recent years. Standards of justice for individuals at home and foreigners abroad undergo major changes. Some 150 states are today parties to the ICCPR and/or its regional counterparts in Europe, the Americas and Africa which prescribe standards of justice in criminal trials and in the treatment of prisoners. Moreover, in some instances the individual is empowered to bring complaints about violations of his human rights to the attention of international bodies such as the UN, the ECHR, the American court of Human Rights and the ACHPR.

The Special Rapporteur said further that:

Today, there is general agreement that the norms of *jus cogens* reflect the most fundamental values of international community and are therefore deserving of international protection. It is not unreasonable therefore to require a state to react by way of diplomatic protection to measures taken by a state against its nationals which constitute the grave breach of a norm of *jus cogens*. If a state party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the right contained in the convention and to provide adequate means of redress, there is no reason why a state of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.

It is submitted that, in spite of the changing legal, socio- economic and political world order and the deficiency of the *status quo* whereby states are not obliged to provide *diplomatic* protection irrespective of the type of norm violated, the right to diplomatic protection will always remain at the discretion of the state concerned. The reasons for this were clearly stated by the ICJ in the *Barcelona Traction* case.<sup>294</sup> The vital question is whether there are any constitutional or legal imperatives that can compel

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<sup>293</sup> See the First Report on Diplomatic Protection ILC 52<sup>nd</sup> Session 2000: A/CN 4/506 and Addendum *supra* n 9.

<sup>294</sup> *Supra* n 26. See ch 2 *supra* for a further analysis of that case.

Nigeria and South Africa to exercise this right as an obligation? <sup>295</sup> This is one of the questions that the study tries to answer.

## 15 Issues for determination

The issues for determination in this thesis include, *inter alia*,

- (1) Whether or not the Nigerian and the South African Constitutions specifically provide for the diplomatic protection of their nationals abroad and, if so, the extent to which these countries are prepared to act extraterritorially in order to diplomatically protect the human rights of their nationals abroad;
- (2) Whether or not the requirement of 'clean hands' is taken into consideration by the governments of Nigeria and South Africa when deciding whether to exercise diplomatic protection on behalf of their nationals;<sup>296</sup>
- (3) Whether, apart from the Institution of diplomatic protection engaged by sovereign states to protect their nationals abroad, diplomatic missions also play any significant role in the protection of the human rights of their nationals abroad. This will depend on the interpretation of article 3(b) of the VCDR, and article 5(a) of the VCCR;
- (4) Whether or not diplomatic protection is a right, a privilege, a duty or a discretion;
- (5) Whether or not there is any machinery in place for the diplomatic protection of human rights of foreigners on the international, regional and national levels and if so, what procedures have been adopted to enforce these rights?
- (6) Whether or not diplomatic protection has ceased to exist, and whether human rights law has taken its place in international law.

## 16 Literature Review

Much has been written on the subject of Diplomatic Protection as well as Human Rights as separate disciplines. <sup>297</sup> There are however a few books written on the subject of Diplomatic Protection of Human Rights.<sup>298</sup> The name of Vattel readily

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<sup>295</sup> Some scholars are of the view that diplomatic protection should be made an obligation for states. See Dugard (2005) *supra* n 25 80 & Dugard (2005) *supra* n 1 290. See also Erasmus & Davidson "Do South Africans have a right to Diplomatic Protection?" (2000) 25 *SAYIL* 123.

<sup>296</sup> See Shapovalov, "Should a Requirement of 'Clean Hands' be a prerequisite to the exercise of diplomatic protection?" *AM U INT'L L REV* 830.

comes to mind whenever the subject of diplomatic protection is discussed because he is considered to be the father of the concept.<sup>299</sup> The concept was enunciated by Vattel in his book, published in 1783, where he asserted that:<sup>300</sup>

Whoever ill-treats a citizen indirectly injures the State which must protect that citizen. The sovereign of the citizen must avenge the dead, and if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society which is protection.<sup>301</sup>

Diplomatic protection was originally seen as belonging to the study of State Responsibility.<sup>302</sup> The subject matter of State Responsibility towards aliens was firmly established as a separate branch of international law with the publication in 1916 of Borchard's treaties on *The Diplomatic Protection of Citizens Abroad*.<sup>303</sup> With that publication, the technical name for the subject was firmly established.<sup>304</sup> Borchard defined Diplomatic Protection as:

a limitation upon the territorial jurisdiction of the country in which the alien is settled.<sup>305</sup>

Borchard emphasized that in practical terms, a definite practice granting protection to citizens abroad began after the French Revolution and that there was no need to look for the origin of the concept before that date.<sup>306</sup> This view is shared and supported by Tiburcio.<sup>307</sup> Nevertheless, although diplomatic protection was

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<sup>297</sup> See e.g Vattel *supra* n 81; Borchard *supra* n 1; Geck *supra* n 10; Lillich *supra* n 1; Garcia - Amador, Sohn & Baxter *supra* n 26; Dolzer "Diplomatic Protection for Foreign Nationals" *Encyclopedia of Public International Law* vol 1 1068; and Crawford *supra* n 10 to name but a few.

<sup>298</sup> Tiburcio *supra* n 26; Dugard *supra* n 25.

<sup>299</sup> See Tiburcio *supra* n 26 35.

<sup>300</sup> Vattel *supra* n 82 136. Vattel was a Swiss jurist and diplomat See Tiburcio *supra* n 26 & *The Official Records of the GA supra* n 1 25.

<sup>301</sup> At 136. Heffter *Le Droit International De L'Europe* (1883) is also considered by some as being one of the first writers to give a scientific treatment to the subject of diplomatic protection. See eg Parry "Some considerations upon the protection of individuals in international law." (1956) 90 *Recueil Des Cours* 657. Heffter however focused on the topic of State Responsibility in general instead of dealing with the subject of injuries to aliens specifically. See Tiburcio *supra* n 26 35.

<sup>302</sup> See p 12 *supra* n 69.

<sup>303</sup> *Supra* n 1.

<sup>304</sup> Tiburcio *supra* n 26 36.

<sup>305</sup> At 5.

<sup>306</sup> At 6.

<sup>307</sup> *Supra* n 26 36 where she asserts that "the concept of diplomatic protection as we know it today technically only became possible after the creation of nation states and the consequent formation

technically identified as a subject in international law by the year 1916, it took almost a century for the subject to be specifically identified as a separate subject for codification in international law.<sup>308</sup>

One of the factors that helped in the eventual metamorphosis of diplomatic protection from the Law of State Responsibility in international law to a separate discipline, was the publication in 1974 by Garcia Amador of his book *Recent Codification of the Law of State Responsibility of Injuries to Aliens*.<sup>309</sup> This book was a compilation of the reports that Amador presented to the International Law Commission from 1956 to 1961 as a Special Rapporteur on Diplomatic Protection with Commentaries.<sup>310</sup> The book tries to justify Amador's attempt to merge the doctrine of "national treatment" and "minimum international standard" of treatment of aliens in his Draft Articles on State Responsibility for Injuries to Aliens.<sup>311</sup> His view was that the fundamental human rights adopted by international conventions should be regarded as the minimum standard to be granted to both nationals and aliens.<sup>312</sup> Thus in his Draft Articles to the ILC, he included draft article 5(1) which provided that:

The State is under a duty to ensure to aliens the enjoyment of the same civil rights and make available to them the same individual guarantees as enjoyed by its own nationals. These rights and guarantees shall not however in any case be less than the 'fundamental human rights' recognized and defined in contemporary international instruments.<sup>313</sup>

His draft, however, encountered harsh opposition and was rejected by the ILC.<sup>314</sup> Many countries opposed the draft because of his reference to human rights, without

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of nationalities." Others, such as Visscher *Cours General de Droit International Public* (1973) 136 *Recueil De Cours* 9 155 had traced the origin of diplomatic protection to the Middle Ages.

<sup>308</sup> It was at its 48th session in 1996 that the ILC identified the subject "Diplomatic Protection" as one of the subjects appropriate for codification and progressive development. See the *Official Records of the GA supra* n 1 13. See also the *Yearbook* (1996) vol II (Pt II) par 248 annex II & addendum 1.

<sup>309</sup> *Supra* n 26.

<sup>310</sup> Garcia Amador was the first Special Rapporteur to be appointed by the ILC on Diplomatic Protection. See the *Official Records of the GA supra* n 1 22 & Tiburcio *supra* n 26 53-54.

<sup>311</sup> At 4.

<sup>312</sup> Tiburcio *supra* n 26 54.

<sup>313</sup> See 2 *Yearbook of International Law* (1957) 112-113.

<sup>314</sup> Tiburcio *supra* n 26 54. Many commentators believe that his work was rejected because it was too specific. It does not cover all aspects of State Responsibility. It only deals with injuries caused to the person or property rights of aliens. Tiburcio *ibid*.

listing the rights to be considered “fundamental.”<sup>315</sup> In his defence, Amador explained in his book that:

Both the ‘international standard’ of treatment and the ‘national standard’ of treatment of aliens have been reformulated and integrated into a new legal rule which incorporates the essential elements and serves the purposes of both.<sup>316</sup>

The basis of this synthesis is:

the universal respect for and observance of human rights and fundamental freedoms.<sup>317</sup>

It is therefore obvious that Amador was not only a disciple of diplomatic protection, but also a keen advocate of the use of diplomatic protection for the safeguard of human rights of aliens.<sup>318</sup>

Another important contribution to the subject of Diplomatic Protection is the scholarly work of Geck.<sup>319</sup> Although Geck argues that “the term ‘diplomatic protection’ is not altogether precise,”<sup>320</sup> he discusses every aspect of diplomatic protection as an institution in international law – its principles, prerequisites, conditions for its exercise, the means of exercising diplomatic protection *et cetera*.<sup>321</sup> He identifies treaties entered into by states in respect of the diplomatic protection of their citizens abroad *per se*, and the new types of human rights treaties entered into by them for the protection of human rights specifically.<sup>322</sup>

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<sup>315</sup> *Ibid.*

<sup>316</sup> At 4.

<sup>317</sup> *Ibid.* See p 106 -107 *supra* for further discussion on this point.

<sup>318</sup> Tiburcio *supra* n 26 46 maintains that the criticism leveled against Garcia Amador was unfounded.

<sup>319</sup> *Encyclopedia of Public International Law supra* n 10.

<sup>320</sup> Because according to Geck, “first, not only diplomatic agents and missions and their foreign offices may and do exercise diplomatic protection, but also at a different level consuls and although very rarely military forces. Secondly the term diplomatic protection does not clearly denote the boundary line to other diplomatic activities for the benefit of individuals, such as the mere promotion of interests of one’s own nationals in a foreign State, or friendly intercessions with foreign authorities. Thus diplomatic or consular action to obtain concessions or other government contracts for nationals from the receiving State, or the arrangement for legal defense for justly imprisoned national are not diplomatic protection in our sense,[because] they are usually neither directed against the other State nor based on a real or alleged violation of International Law.”

<sup>321</sup> See Geck *supra* n 10 1026 – 1064.

<sup>322</sup> *Idem* 1059-1061.



Since World War II, new types of treaties have come into existence which fit neither into the triangle of interests typical of diplomatic protection nor into legal framework of this Institution...Human Rights treaties form the first category of such treaties.

Geck then compares and contrasts the differences and similarities between these two types of treaties,<sup>323</sup> and identifies their strengths and weaknesses.<sup>324</sup> In his balanced evaluation, Geck maintains that although diplomatic protection has helped in fostering economic and social ties among nations,<sup>325</sup> it has serious flaws.<sup>326</sup> One of the greatest inherent weaknesses in the institution is the difficulty of ascertaining precisely appropriate situations where diplomatic protection is justified, and the quantum of adequate compensation that should be paid under such circumstances.<sup>327</sup> He regrets however that:

The hope that diplomatic protection would become largely superfluous through human rights conventions has so far not materialized.<sup>328</sup>

Nevertheless, in spite of all its shortcomings Geck is confident that:

diplomatic protection remains an indispensable means for improving the legal position of most individuals against foreign State power.<sup>329</sup>

The work of Tiburcio is another piece of literature that deserves special mention as far as diplomatic protection and human rights are concerned.<sup>330</sup> In her seminal book, Tiburcio, like Geck, makes a comprehensive examination of the institution of diplomatic protection in international law.<sup>331</sup> Since the protection of the basic rights of aliens is dealt with either by the institution of diplomatic protection or by human rights instruments, she seeks to discover whether there are patterns established by international law for the treatment of aliens, and if so, to compare these patterns with

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<sup>323</sup> *Ibid.*

<sup>324</sup> *Ibid.*

<sup>325</sup> *Idem* 1063.

<sup>326</sup> *Ibid.*

<sup>327</sup> *Idem* 1063-4.

<sup>328</sup> *Idem* 1064.

<sup>329</sup> *Ibid.*

<sup>330</sup> *Supra* n 26.

<sup>331</sup> See Ch 3 *supra*.

domestic legislation of different countries in order to verify the extent to which those countries complied with international law.<sup>332</sup> Her objectives are twofold: (1) to define the status of aliens in international law; and (2) to determine whether the set of rules established by international law has been incorporated into the domestic legislation of various states.

In order to achieve these objectives, Tiburcio establishes a set of seven categories of rights<sup>333</sup> and painstakingly compares and contrasts the provisions of those rights under review with international and comparative legal instruments and the domestic legislation of the countries concerned. Her conclusion is that although some rights granted to aliens are often strenuously guarded and protected under the domestic legislation of most states,<sup>334</sup> some other rights<sup>335</sup> do not receive the same level of protection. According to her, the most effective typology is to classify the rights of aliens into three categories – rights which cannot be denied to aliens,<sup>336</sup> rights which should be restricted or limited to aliens<sup>337</sup> and rights which may not be granted to aliens under any circumstance.<sup>338</sup> This is what is done in this thesis.

One of the questions posed for determination in this thesis is whether diplomatic protection is a right or an obligation in international law and the extent to which Nigeria and South Africa are prepared to go in order to protect their nationals abroad. Another question is whether diplomatic protection is still relevant today or whether it has been overshadowed by human rights. Although the issue of discretion or obligation was settled in the *Barcelona Traction* case,<sup>339</sup> Dugard in his work has carried the subject further.<sup>340</sup> He dismisses the claim that diplomatic protection is a false legal fiction,<sup>341</sup> and like Garcia Amador before him, Dugard introduced a draft article which sought to impose a limited duty of protection on states of nationality,

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<sup>332</sup> At 1.

<sup>333</sup> At xiii.

<sup>334</sup> Eg the right to life.

<sup>335</sup> Eg property rights.

<sup>336</sup> Eg fundamental rights.

<sup>337</sup> Eg procedural rights.

<sup>338</sup> Since states may deny such rights to aliens without the need to justify their denial. Eg the right to enter.

<sup>339</sup> *Supra* n 26 where the ICJ held that diplomatic protection is a mere discretionary power of a State.

<sup>340</sup> See Dugard *supra* n 1 & *supra* n 25 respectively.

<sup>341</sup> See Dugard *supra* n 25 78.

particularly where the norms of *jus cogens* are violated as Special Rapporteur on Diplomatic Protection.<sup>342</sup> This was, however, rejected by the ILC. According to Dugard:<sup>343</sup>

A proposal by the Special Rapporteur to the ILC that a limited duty of protection be imposed on the State of nationality was rejected by the ILC as going beyond the permissible limit of progressive development.

In spite of the rejection of his proposal however, Dugard is convinced that:

there is growing support for the proposition that there is some duty on States to afford diplomatic protection to nationals subjected to serious human rights violations in foreign States.<sup>344</sup>

Be that as it may, Dugard devotes an entire chapter of his book to the discussion of Diplomatic Protection.<sup>345</sup>

Dugard's article on Diplomatic Protection and Human Rights is also very relevant. It is an evaluation of his draft articles on Diplomatic Protection and an exploration of the extent to which the draft articles have enhanced human rights.<sup>346</sup> Dugard reveals that he adopted a pragmatic approach to his work as the Special Rapporteur on Diplomatic Protection, and "a maximalist fashion" to the number of draft articles he submitted.<sup>347</sup>

I provided the Commission with more rather than fewer draft articles, allowing it to choose to discard articles that it considered unnecessary or unacceptable. In the result I proposed 27 articles of which only 19 were approved.

Dugard revealed further that:

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<sup>342</sup> This would occur where the injury is systematic and directed at a substantial number of nationals, thereby providing evidence of discrimination against a particular state's nationality. See Dugard *supra* n 25 77.

<sup>343</sup> *Supra* n 1 290.

<sup>344</sup> *Idem* 291.

<sup>345</sup> Ch 13. State Responsibility, Diplomatic Protection & the Treatment of Aliens.

<sup>346</sup> *Supra* n 25. At its fifty-first session in 1999 the ILC appointed Dugard as Special Rapporteur on Diplomatic Protection.

<sup>347</sup> *Supra* n 25 79.

While the Commission as a body has on occasion rejected proposals designed to promote a strong human rights approach to diplomatic protection, and individual members of the Commission have on many occasions expressed the view that diplomatic protection should not be seen as a human rights institution, the Commission has been mindful of the rights of the individual in its formulation of the draft articles...<sup>348</sup>

On the relevance of diplomatic protection today, Dugard makes a strong argument in defence of diplomatic protection. According to him:

To suggest that universal human rights conventions particularly the ICCPR provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy...<sup>349</sup>

He therefore admonishes that:

Until the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection.<sup>350</sup>

Dugard believes that his articles on diplomatic protection and human rights<sup>351</sup> are a modest contribution to the human rights of aliens<sup>352</sup> and hopes that it will provide insights into the work of the ILC.<sup>353</sup> It is submitted that mention should also be made of the work of Crawford on diplomatic protection.<sup>354</sup> Crawford, reviewed Dugard's ILC Articles on Diplomatic Protection<sup>355</sup> and tackles the main issues raised by them, as a tribute to Dugard – “the pre-eminent South African public lawyer of his generation.”<sup>356</sup> In conclusion, it is noteworthy that many current textbooks contain chapters on Diplomatic Protection - State Responsibility and the treatment of

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<sup>348</sup> *Ibid.*

<sup>349</sup> *Idem* 77.

<sup>350</sup> *Idem* 78.

<sup>351</sup> *Supra* n 25.

<sup>352</sup> *Ibid.*

<sup>353</sup> *Idem* 75.

<sup>354</sup> Crawford *supra* n 10.

<sup>355</sup> *Supra* n 25.

<sup>356</sup> At 19.

aliens.<sup>357</sup> This portrays the increased importance of this subject matter not only in international relations, but in our every day life.<sup>358</sup>

## 17 Context of the research

The specific objectives of this study have been spelt out above and need not be repeated here. However, every effort will be made to explore novel ways of looking at the subject. To this end, the work will examine whether or not diplomatic protection of human rights can also be carried out by special missions of international organisations, and if so, to what extent. It will investigate whether and to what degree the state-state complaints or enforcement mechanism<sup>359</sup> laid down under article 40 of the ICCPR and article 47 of the ACHPR can be utilised to advance diplomatic protection of human rights generally and between Nigeria and South Africa in particular. To achieve its objectives, the study is structured as follows:

Chapter two deals with the Institution of diplomatic protection generally. It first investigates the relationship between the individual and his or her country of nationality which gives rise to diplomatic protection. In this connection, the status of the individual is discussed under international law. A comparison is then made between the status of the individual in international law and in municipal law for purposes of diplomatic protection. Since diplomatic protection is based on the nationality of the individual concerned, the concept of nationality,<sup>360</sup> and the bond of nationality<sup>361</sup> are critically analysed and examined with reference to judicial decisions, the provisions of the ILC's Draft Articles on Diplomatic Protection and comments thereon. The nature of diplomatic protection, the rationale for diplomatic protection, the legal basis of diplomatic protection, and other conditions for diplomatic protection are discussed and comprehensively analysed.

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<sup>357</sup> See Wallace *supra* n 16 197- 213; Shearer *supra* n 117 265 – 306; Harris *Cases and Materials on International Law infra* n 385 504 –653; Shaw *supra* n 175 & Lee *infra* n 760 124 – 188.

<sup>358</sup> For the literature on the South African perspective see Erasmus & Davidson *supra* n 293; Olivier "Diplomatic Protection: Right or Discretion?" (2005) 30 *SAYIL* 238; & Pete & du Plessis "South Africans abroad and their right to Diplomatic Protection." (2006) 22 *SAYIL* 439.

<sup>359</sup> This is the procedure whereby states are allowed to submit petitions against other states to the African Commission under the ACHPR and the ICCPR.

<sup>360</sup> Which belies the relationship between the individual and his country.

<sup>361</sup> Which is one of the conditions for diplomatic protection.

Is diplomatic protection a right or a privilege, a duty or an obligation? With the aid of decided cases, these questions are answered. Useful references are also made to works of jurists, scholars and other leading authorities on this subject. Since diplomatic protection is based on the treatment of aliens, the Law of State Responsibility for Injuries to Aliens is also discussed. A distinction is then drawn between diplomatic protection itself and the Law of State Responsibility for Injuries to Aliens. Further distinction is drawn between these two concepts and the law of State Responsibility for the Wrongful Acts of States generally. This is followed by an examination of the relationship between diplomatic protection and human rights, to determine whether human rights have overshadowed the institution of diplomatic protection today.

The role of diplomatic missions in the task of protecting the human rights of nationals abroad, and the international instruments put in place for that purpose is discussed in chapter three of the thesis. This chapter examines the functions of diplomatic missions as they relate to diplomatic protection. It identifies the privileges and immunities granted to diplomatic missions to ensure that they do their work without any fear of hindrance, intimidation, or molestation. The chapter also assesses whether those guarantees are adequate or not. The role of consular posts in protecting the human rights of nationals is also examined. Both the Vienna Convention on Diplomatic Relations 1961<sup>362</sup> and the Vienna Convention on Consular Relations 1963<sup>363</sup> provide that diplomatic protection is to be exercised “within the limits permitted by International Law.” The thesis reviews these *provisos* and attempts an explanation of their parameters as far as the diplomatic protection of nationals is concerned.

Chapter four examines international and regional instruments for the diplomatic protection of human rights of foreigners. This is because, diplomatic protection deals with the rights of foreigners specifically. The method employed in this examination is to identify and select those international instruments designed for the protection of human rights of foreigners specifically, analyse, compare and contrast them with the

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<sup>362</sup> Art 3 (b).

general international human rights instruments meant for the protection of nationals. The objective is to determine whether the general international human rights instruments adopted for the protection of nationals could also be applied for the protection of foreigners.<sup>364</sup>

The chapter is divided into two sections. The first section is principally devoted to a discussion of the international instruments, while the second section deals with regional instruments. In the first section, emphasis is placed on those international instruments meant specifically for the protection of the rights of foreigners, although for comparative purposes, the rights adopted for the protection of nationals are also discussed. The obvious question is whether the instruments adopted for the protection of nationals also protect foreigners, and to what extent?

This discussion is followed by an examination of those instruments designed to protect the rights designated for special study in this thesis. Since this section deals with international and comparative law, the jurisprudence and case law from other jurisdictions namely, the ICJ, as well as case law from European, American, and Canadian Courts of Human Rights are cited when and where necessary to illustrate judicial attitudes to these human rights issues.

The second section examines regional instruments meant for the diplomatic protection of human rights of foreigners in Africa. For purposes of comparative jurisprudence, the general human rights instruments adopted under the ACHPR are also examined to determine whether they also protect the rights of foreigners. The three fundamental rights,<sup>365</sup> designated for special examination in this thesis along with property and procedural rights<sup>366</sup> are also discussed. Although the search light

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<sup>363</sup> Art 5 (a).

<sup>364</sup> This doubt stems from comments made by some scholars concerning international human rights instruments. While some proponents are of the view that international human rights instruments apply to both nationals and foreigners alike because their provisions mention “everyone” as beneficiaries, opponents believe that they don’t. They argue eg that International Bill of Rights ie (the UDHR, ICCPR & ICESCR) do not protect aliens because nationality is not listed as one of the prohibited grounds for differentiation. See McKean *Equality and Discrimination under International Law* (1983) 199.

<sup>365</sup> I.e the right to life, the right to be free from discrimination, and right to be free from torture etc.

<sup>366</sup> I.e right to a fair hearing, with emphasis on the right to be presumed innocent and the right to be tried within a reasonable time.

is on the ACHPR, the jurisprudence and case law from other jurisdictions are also cited when and where necessary.

Chapter five goes to the very core of the thesis. It discusses the diplomatic protection of human rights in Nigeria.<sup>367</sup> It investigates the present state of human rights in Nigeria, examines those factors that have posed challenges to the protection of human rights in Nigeria and demonstrates how Nigeria has exercised diplomatic protection of its nationals in recent years. The relationship between international law and municipal law in Nigeria is examined, the incorporation of diplomatic and international Human Rights law instruments into Nigeria, and the method of such incorporation are also discussed and critically appraised in this chapter.

The various diplomatic and human rights instruments incorporated into Nigeria, such as, international treaties or conventions, UN resolutions and declarations, and other relevant human rights instruments,<sup>368</sup> are analysed against the backdrop of the provisions of the 1999 Constitution of the Federal Republic of Nigeria. This is to determine whether or not the Nigerian Constitution has incorporated them, and whether or not they are justiciable in Nigeria. Case authority and interpretations of these constitutional provisions are also analysed to ascertain whether Nigeria has complied with the international and regional standard or not.

The chapter also identifies certain rights, particularly those rights selected for special attention in this thesis, such as the right to life, freedom from torture and discrimination,<sup>369</sup> property rights and procedural rights to determine whether they are granted or denied to foreigners in Nigeria and with what results. The procedural right discussed is that of a fair hearing. Presumption of innocence and trial within a reasonable time are the two aspects of the right to a fair hearing discussed.

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<sup>367</sup> Nigeria is discussed first because the author is a Nigerian

<sup>368</sup> E.g the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa ( "the OAU Refugee Convention" );The Bamako Convention on the Ban of Import into Africa and Control of Trans-boundary Movement and Management of Harzadous Waste within Africa ( the "Bamako Convention" ); African Charter on the Rights and Welfare of the Child ( The "African Children's Charter" ) and the Protocol on the Rights of Women.

<sup>369</sup> I.e Fundamental rights.



Chapter six explores the diplomatic arena for the protection of human rights in South Africa. All the parameters used in the assessment of the diplomatic protection of human rights in Nigeria are employed here also. This analysis will reveal the constitutional provisions concerning the protection of human rights generally and those of foreigners particularly in place in South Africa.

Chapter seven is the conclusion. It includes a critical and comparative analysis of the constitutional provisions governing diplomatic protection of human rights in both Nigeria and South Africa. This analysis is performed against the back drop of international and regional human rights instruments. The analysis also includes the similarities and differences inherent in the legal, constitutional, political, cultural and the socio-economic systems of the two countries.

The treatment of foreigners in the two countries is scrutinized with particular reference to the xenophobic violence in South Africa, and the perennial taking of foreigners as hostages in the Niger Delta region of Nigeria.<sup>370</sup> This is to determine whether responsibility for these atrocities can be imputed to the governments of the countries concerned and whether any steps could have been taken to prevent them. After a comprehensive and comparative analysis and review of the practice of diplomatic protection in Nigeria and South Africa, this chapter will draw conclusions and make useful suggestions, recommendations and proposals aimed at improving the current situation.

Factors hindering diplomatic protection of human rights as a legal remedy in the two countries are examined and critically analyzed. A recurring theme throughout this thesis is whether diplomatic protection as a legal remedy in international law has ceased to exist and been replaced by human rights? The thesis critically tackles this final issue in view of changing trends in international law and the current international world order. The subject-matter is given a fresh, new, critical and analytical treatment.



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<sup>370</sup> The Niger Delta problem in Nigeria has been defused by the declaration of amnesty to the militants by the Federal Government of Nigeria. See 435 n 2809 *infra*.

## CHAPTER TWO

### The Institution of Diplomatic Protection

#### 1 Introduction

In this chapter, the institution of diplomatic protection in international law will be examined.<sup>371</sup> Diplomatic protection has already been defined.<sup>372</sup> It consists of action taken by a state against another state in respect of an injury to the person or property of its national caused by an internationally wrongful act or omission attributable to the latter State.<sup>373</sup> Before the advent of international human rights law, diplomatic protection was the most effective means employed by states to obtain reparation for the treatment of aliens in contravention of international law.<sup>374</sup> The issues for discussion therefore are, first; how this institution operates, its nature, origin and characteristics, second; its legal basis, conditions for its exercise, current relevance and whether or not it is synonymous with human rights, third; it is intended to determine whether diplomatic protection can be used as an instrument for the protection of human rights.

The institution of diplomatic protection is a substantive as well as a procedural device in international law.<sup>375</sup> As substantive law, diplomatic protection is concerned with claims arising from any act or omission of a state in its own territory against an alien.<sup>376</sup> As a procedural device, diplomatic protection is the procedure employed by the state of nationality of the injured person to seek redress and obtain reparation for the internationally wrongful act.<sup>377</sup> It is therefore a hybrid device available to states for the breach of the legal responsibility owed to them by other states as subjects of

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<sup>371</sup> See Geck *supra* n 10 1046 where he discusses diplomatic protection as an institution of international law. See also Crawford *supra* n 10 22.

<sup>372</sup> *Supra* n 1. See also the ILC's Draft Articles on Diplomatic Protection (2006). *Official Records of the G A supra* n 1 24. See also Sen *supra* n 52 319.

<sup>373</sup> See the *Report of the I LC on the work of its Fifty-second session*, 1 May to 9 June & 10 July to 18 August (2000). G A document, A/CN.4/506 (Special Rapporteur's report) 11.

<sup>374</sup> Geck *supra* n 10 1046.

<sup>375</sup> Tiburcio *supra* n 26 36. Crawford *supra* n 10 41.

<sup>376</sup> Geck *supra* n 10 1046.

<sup>377</sup> See the *Official Records of the G A supra* n 1 24.

international law.<sup>378</sup> Over the years however, this institution has been influenced by some important changes in the international legal order.<sup>379</sup>

Since diplomatic protection deals with the treatment of individuals in international law, it is necessary to understand the position of the individual in terms of the capacity in which he or she can bring an action or claim before an international court or tribunal.

## 2 The status of the individual at international law

Although the individual occupies a unique position within the framework of municipal legal system,<sup>380</sup> international law traditionally took little notice of individuals.<sup>381</sup> It focussed primarily on states. Hence, international law was originally a system of rules governing the relationship between sovereign states only. The role of individuals was not contemplated under traditional international theory.<sup>382</sup> The individual was not regarded as a subject<sup>383</sup> of international law, and as a result, could not bring an international action or claim.<sup>384</sup>

The failure to recognise the individual as a subject of international law led some writers to express the view that the individual is an object of International Law.<sup>385</sup> Other writers have, however, opposed this contention by arguing that the individual

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<sup>378</sup> Geck *supra* n 10 1046..

<sup>379</sup> *Ibid.* These important influences include: (i) The ever growing interdependence between states; (ii) the development of human rights; and (iii) the attempts made at international law to raise the position of individuals more and more to the status of holders of international rights and duties.

<sup>380</sup> I.e. the internal law of a state.

<sup>381</sup> Except however in cases involving piracy eg. In *re Piracy Jure Gentium* [ 1934 ] A C 586 (Privy Council ) following the arrest of Chinese nationals on the high seas, the Judicial Committee of the Privy Council (JCPC) was asked to consider whether actual robbery was an element of the offence of piracy *jure gentium*. It was held that with regard to crimes as defined by international law, the law has no means of trying or punishing them. The recognition of piracy as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country.

<sup>382</sup> See Cassese *supra* n 85 78.

<sup>383</sup> The term "legal subject" means any being that can have rights, duties and status in law. A legal subject is any entity recognized by law as possessing such status. See Conje & Heaton *The South African Law of Persons* (1999) 1

<sup>384</sup> *Ibid.*

<sup>385</sup> A legal object is anything which has economic value, but upon which the law has not conferred the competence to have rights and duties, and therefore cannot participate in legal or commercial transactions. See Conje & Heaton *supra* n 382 Some of those writers who assert that the individual is an object of International Law are Triepel, Volkerrecht, Lauderrecht and Heilbron.

should rather be seen as a “beneficiary” of international law rather than as an object,<sup>386</sup> while others would rather prefer the individual to be referred to as a “participant” or “a non - state actor” in international law.<sup>387</sup>

Be that as it may, the fact is that over a long period of time,<sup>388</sup> human beings were under the exclusive control of states.<sup>389</sup> Therefore, individuals had no place or rights in the international legal order.<sup>390</sup> Traditional international law did not include general rules conferring rights on individuals, regardless of their nationality. An individual could therefore not sue or be sued in international law. On occasion, individuals acquired some relevance in international affairs, mostly as “beneficiaries” of treaties of commerce and navigation or of conventions on the treatment to be accorded to foreigners, not as subjects of international law.<sup>391</sup> Alternatively, individuals constituted a “reference point” to state powers.<sup>392</sup>

The general position of international law with regard to individuals was aptly set out by the Permanent Court of International Justice (PCIJ) in its advisory opinion in the *Dazing Railway Officials* case.<sup>393</sup> In that case, Poland contended that the agreement between her and Dazing regulating the conditions of employment of Dazing officials whom she had taken into her railway service was an international treaty that created rights and obligations between Poland and Dazing only; that, as the agreement had not been incorporated into Polish municipal law, it did not create rights and obligations for individuals; that Poland’s responsibilities were limited to those owed to

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<sup>386</sup> See O’Connell *International Law* (1970) 106/107 who has pointed out that by such assertion, the individual is being relegated to the position of a mere “thing” in international law. See also Lauterpacht *Survey of International Law in relation to the work of Codification of International Law*. Com: Memorandum prepared for the UN Secretariat, UN Doc A/CN.4/1/Rev.1 February 1949, 19-20 in Lauterpacht, *International Law: being the collected papers of Hersch Lauterpacht* (1970) Vol 1 469-471. According to him, “...Practice has abandoned the doctrine that states are the exclusive subjects of international rights and duties” See also Harris, *Cases and Materials on International Law* (2004)140. See also Wallace *supra* n 16 where she asserts that “it is misleading to characterize individuals as objects of international law simpliciter because the term ‘object’ implies passive as opposed to an active capacity.”

<sup>387</sup> See Dugard *supra* n 25 77. See also Gal-Or “Desirability of Enhanced Legal Position of Non-State Actors.” *International Law Association – Research Seminar on Non-state Actors* Leiden Belgium 27 – 28 March (2009) 9.

<sup>388</sup> As long ago as when nation states came into existence. See Cassese *supra* n 85 78.

<sup>389</sup> *Ibid.*

<sup>390</sup> See the *Official Records of the G A supra* n 1 25.

<sup>391</sup> Cassese *supra* n 85 78.

<sup>392</sup> *Ibid.* Customary international law rule granting states the right to exercise diplomatic protection of their nationals abroad is a good example of this.

Dazing and therefore, that Dazing courts had no jurisdiction. The court said, *inter alia*,

It may be readily admitted that according to a well established principle of international law, the agreement being an international agreement, cannot as such create direct rights and obligations for private individuals. But it cannot be disputed that, the very object of an international agreement according to the intention of contracting parties, may be the adoption by the parties, of some definite rules creating individual rights and obligations, enforceable by the national courts. That there is such an intention in the present case may be established by reference to the terms of the agreement.<sup>394</sup>

### 3 The changing status of the individual in international law

As a result of the historical events,<sup>395</sup> and the spread of new ideologies, the status of the individual in international law is changing.<sup>396</sup> Although states have lost their exclusive monopoly over individuals and have gradually yielded their power to other entities such as international organisations,<sup>397</sup> the individual is yet to emerge as a generally recognised subject of international law.<sup>398</sup> The position of the individual in international criminal law has, however, recently developed into a separate discipline under international law.<sup>399</sup>

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<sup>393</sup> *Jurisdiction of the Courts of Dazing (Advisory Opinion) (1928) P.C.T. Ser B, No 15 17-18.*

<sup>394</sup> At 304. For other examples of treaties conferring benefits on individuals, see the VCDR (1961) and the VCCR (1963).

<sup>395</sup> Particularly the Nazi atrocities of the Second World War. The enormity of these atrocities dramatically changed the nature of international law. This experience compelled statesmen to accept the need for a new world order in which the state was no longer free to treat its own nationals as it pleased. This new world order was proclaimed by the Charter of the UN, which recognized the promotion of human rights as a principal goal of the new world organization. As a result, the UDHR was proclaimed in 1948.

<sup>396</sup> Other factors responsible for this changing framework include globalization of the world economy, the privatization of public sectors and the fragmentation of states. These phenomena undeniably have had some impact on a State's grip on the individual. See the *Official Records of the General Assembly supra* n 1 25.

<sup>397</sup> See the *Reparation Case. Reparations for Injuries suffered in the Service of the United Nations*, Advisory Opinion ICJ Reports (1949) 174 185-186.

<sup>398</sup> This is based on the current perception of the status of the individual at international law. See eg the conclusions reached at the ILA NSAC seminar *supra* n 324.

<sup>399</sup> Individuals have gradually come to be regarded not only as holders of internationally material interests, but also capable of infringing fundamental values of the world community. This was recognized by the ICJ in the case of *La Grand (Germany v USA)* ICJ Report 2001 466 and in the *Avena* cases. *Case Concerning Avena and other Mexican Nationals (Mexico v USA)* ICJ Rep par 40. In the sphere of duties imposed by international law, the principle that the obligations of international law bind individuals directly, regardless of the law of their state and of any contrary

Whether the individual is a “subject”, a “beneficiary”, a “participant” or “a non-state actor,” on the international plane is, however, immaterial.<sup>400</sup> One thing is clear. While an individual may tend to have more rights today than ever before under international law, the remedies provided to the individual under international law are limited in scope.<sup>401</sup> The status of the individual in international law was the subject of investigation by a Committee of the International Law Association in Leuven, Belgium.<sup>402</sup> The aim was to study the rights and obligations of individuals and establish an integrated and comprehensive assessment of the status of non-state actors in international law.<sup>403</sup> At the conference, it was pointed out that since there is considerable disagreement as to the correct position or status of non-state actors (NSA)<sup>404</sup> under international law, there was a need to determine their status.<sup>405</sup>

It was iterated at the conference that a subject of international law is an entity capable of possessing international rights and duties and the capacity to bring international claims.<sup>406</sup> It was also accepted that the principal formal contexts in which questions of capacity or personality of individuals arose in international law

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order received from their superiors was affirmed in the judgement of the Nuremberg Tribunal, when the Tribunal said, *inter alia*, “crimes against international law are committed by men not abstract entities and only by punishing individuals who commit such crimes, can the provisions of international law be enforced.” See the Judgment of Nuremberg Tribunal, International Military Tribunal, Nuremberg (1946) 41 *Am. J. Int. L.*(1947) 172. This was reaffirmed in the Resolution of the GA of 11<sup>th</sup> Dec 1946 expressing adherence to the principles of the Nuremberg Charter and Judgement. Again in *Attorney – General of the Government of Israel v Eichmann* (1961) 36 ILR 5, Eichmann, former head of the Jewish Office in Germany during the Second World War, was abducted from Argentina in 1960 and brought to Israel to face charges of war crimes, crimes against humanity and crimes against the Jewish people. He was prosecuted in Israel under the Nazi and Nazi Collaborators (Punishment) Law 1951. Defence counsel submitted, *inter alia*, that since Eichmann was a German national, he could not be subject to Israeli criminal jurisdiction. It was held that the abhorrent crimes defined in the Law are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the Law of Nations itself (*delicta juris gentium*) See Cassese, *supra* n 85 79.

<sup>400</sup> Higgins *Problems and Process: International Law and How we Use It* (1994) 96 has argued that the notions of “subject”, and “objects” has no “credible reality” and no “functional purpose.” More recently, authors have advocated that participation in the international legal system should be the relevant criterion instead of relying solely on the existing categories of subjects and objects. See for instance McCorquodale “An Inclusive International Legal System.” 17 *Leiden Journal of International Law* (2004) 477.

<sup>401</sup> Dugard *supra* n 25 77.

<sup>402</sup> The research seminar was held by the Committee of International Law Association on the topic of “Non State Actors “ at Leuven Belgium on 2009-03- 27 - 28.

<sup>403</sup> See eg Gal-Gore “Desirability of Enhanced Legal Position of Non-State Actor.” (1999) 1

<sup>404</sup> Including individuals.

<sup>405</sup> Including individuals.

were in circumstances such as (a) Capacity to make claims in respect of breaches of International Law, (b) capacity to enter into treaties and agreements valid in international law; and (c) the capacity to enjoy certain privileges and immunities from its sovereign jurisdiction.<sup>407</sup> The conclusion reached at the conference was that since NSA<sup>408</sup> did not possess these capacities, the NSA could not be considered a subject of international law.<sup>409</sup>

#### 4 The position of the individual in municipal law

In contrast to the approach of international law to the individual, most municipal legal systems regard the individual as a legal subject rather than their object.<sup>410</sup> This means that, unlike in international law, the individual is vested with legal personality and capacity under municipal law.<sup>411</sup> Municipal law also distinguishes between two classes of legal subjects - natural persons and juristic or artificial persons.<sup>412</sup> All human beings are natural persons irrespective of their age, mental condition or intellectual ability, but juristic or artificial personality may be bestowed on certain entities or associations of natural persons, making them legal persons, according to the demands of the legal system concerned.<sup>413</sup> Diplomatic protection can be exercised on behalf of either a natural or legal person.<sup>414</sup>

In relation to diplomatic protection, it is appropriate to assess the role played by municipal legal concepts in international law. What, if any, is the place of municipal

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<sup>406</sup> I.e. the legal personality of NSA in international law.

<sup>407</sup> See eg Gal-Gore *supra* n 402 4.

<sup>408</sup> Including the individual.

<sup>409</sup> See Gal-Gore *supra* n 402 10.

<sup>410</sup> This is the position in Nigerian and South African legal systems. See Conje & Heaton *supra* n 382 1; and Okogwu *The Legal Status of Aliens in Nigeria* (1960) 15.

<sup>411</sup> He or she can sue and be sued. See Conje & Heaton *supra* n 382 3. Legal personality is bestowed only upon such entities as the law deems fit. Since the legal systems of different countries naturally differ from each other, entities recognized as legal subjects in one country may not necessarily be recognized as such in another country See Conje & Heaton *ibid*. This personality is conferred on an entity only in terms of the legal norms of a particular community or country. It is governed by the Law of Persons, which forms part of Private Law. See Conje & Heaton *ibid*. The law of persons is that part of private law which determines which beings or entities are legal subjects or persons, the way in which legal personality begins and ends or terminated, the different classes of legal subjects that are distinguished, and the legal status of each of these classes of persons etc. Conje & Heaton *ibid*.

<sup>412</sup> *Ibid*.

<sup>413</sup> *Ibid*, Such an association is known as a "juristic person".

<sup>414</sup> See the ILC Draft Articles on Diplomatic Protection 2006 art 1.



legal concepts in International Law? Are they relevant or recognized in international law? As already indicated, diplomatic protection is regulated by international law norms. The individual, however, has little or no status in International Law. His or her status is paradoxically governed by municipal law.<sup>415</sup> The vital question therefore is whether municipal law concepts, such as the law of persons, for instance, are recognized in international law for purposes of diplomatic protection, and if so, to what extent?

A similar question fell for determination by the ICJ in the famous *Barcelona Traction* case.<sup>416</sup> In that case, Belgium brought an action for the diplomatic protection of a Canadian company the majority of whose shareholders were Belgians, based upon the injury inflicted on the company by Spain. The subject of the action, the Barcelona Traction and Power Company, was an entity recognized under municipal law, but not recognised at international law. The question for determination was whether the ICJ could invoke a municipal law concept to resolve an international law issue. In resolving the matter, the court said, *inter alia*,<sup>417</sup>

turning now to the international legal aspects of the case, the court must ... start from the fact that the present case essentially involves factors derived from municipal law – the distinction and the community between the company and the shareholders ... If the court were to decide the case in disregard of the relevant institutions of municipal law, it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions in international law to which the court could resort. Thus the court has, as indicated, not only taken cognizance of municipal law, but also to refer to it.

It is submitted that based upon the principles laid down in *Barcelona Traction* case,<sup>418</sup> it can be argued that the municipal law concept of legal personality is applicable and is recognizable in international law for purposes of diplomatic

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<sup>415</sup> See Conje & Heaton *supra* n 382 1.

<sup>416</sup> *Supra* n 26.

<sup>417</sup> Par 33.

<sup>418</sup> *Supra* n 26. Art 38(1)(C) of the statute of the ICJ specifically authorizes the court to apply “general principles of law recognized by civilized nations.” This provision was inserted in the statute of the court in order to provide an additional basis for a decision in cases where other materials give no assistance to the court i.e cases of *non liquet* See Shearer *supra* n 117 29.

protection. This submission is supported by the fact that the *Barcelona Traction* case<sup>419</sup> in which the municipal legal concept of corporate personality was recognized and adopted, was itself a classic test case of diplomatic protection.

## 5 The law of diplomatic protection

The general rule is that when the person or property of a foreign national is injured by a state, the state of the injured foreigner can invoke diplomatic action or other means of peaceful settlement to protect its national with a view to obtaining reparation.<sup>420</sup> The defaulting state is said to incur responsibility, because of its failure to treat the foreign national according to the minimum standard of justice required for the treatment of aliens.<sup>421</sup> The basis for responsibility is that, by injuring its national, the defendant State has injured the plaintiff State itself.<sup>422</sup> Under customary international law, the plaintiff State was required to prove the following facts in order to succeed in its action:<sup>423</sup>

- (a) That the injured person is its national;<sup>424</sup>
- (b) That all local remedies have been exhausted in the respondent state;<sup>425</sup>
- (c) That the conduct of the defendant state violates the rules of international law relating to the treatment of aliens;<sup>426</sup> and
- (d) That the injured national has continuously been a national of that State from the date of injury to the date of the official presentation of the claim.

### 5.1 *The origin of diplomatic protection*

The origin of diplomatic protection in international law is uncertain. Sen however asserts that “the right to afford protection to its citizens in the country of their sojourn has been regarded throughout the ages as one of the important attributes of

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<sup>419</sup> *Supra* n 26.

<sup>420</sup> ILC’s Draft Articles on Diplomatic Protection 2006 art 1.

<sup>421</sup> The minimum international standard of justice was the standard of treatment recognized by the international community to be acceptable for the treatment of foreigners. See *supra* p 10 and 111 *infra*.

<sup>422</sup> This is the nationality of claims rule and is said to be a legal fiction. See the *Official Records of the G A supra* n 1 25. See also *Mavrommatis Palestine Concession* case *supra* n 36.

<sup>423</sup> These conditions are now embodied in the ILC’s Draft Articles on Diplomatic Protection 2006.

<sup>424</sup> ILC’s Draft Articles on Diplomatic Protection 2006 art 3.

<sup>425</sup> *Ibid*, art 14.

<sup>426</sup> *Ibid* art 1 See generally Dugard *supra* n 1 282.

sovereignty.”<sup>427</sup> Other writers trace the origin of the practice specifically to the Middle Ages.<sup>428</sup> Borchard asserts that the practice was only firmly established after the French Revolution.<sup>429</sup> Tiburcio has urged, however, that the origin of the practice should be sought after the creation of nation-states in continental Europe, because

“it makes no sense to look for its origins earlier than that. Only after that period, did definite practice arise and, as a consequence to that practice, did international law commentators start to develop its theoretical basis.”<sup>430</sup>

## 5.2 *Legal or theoretical basis of diplomatic protection*

Just as the origin of diplomatic protection is uncertain, the legal or theoretical basis of diplomatic protection is likewise uncertain.<sup>431</sup> According to Tiburcio

“One of the early widely accepted theories developed the idea that since a national is part of the State, and the national is the personal element of the state,<sup>432</sup> whoever ill-treats an individual harms the state.”<sup>433</sup>

She submits further that

“Another theory which justifies the existence of diplomatic protection is the objective theory. This theory subscribes to the view that every state has the duty to abide by the rules of the international community. Therefore, whoever breaks the law, has to be punished”.<sup>434</sup>

Shaw however affirms that

“The basic concept remains that in a state-oriented world system, it is only through the medium of his or her state of nationality, that the individual may

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<sup>427</sup> See *supra* n 52 319.

<sup>428</sup> De Visscher *cours General de Droit International Public*, 136 *Receuil De Cours*, 9, 155 (1973). See Tiburcio *supra* n 26 36.

<sup>429</sup> See Borchard *supra* n 1 988. See also *supra* p 45

<sup>430</sup> Tiburcio *supra* n 26 36. To corroborate, Crawford *supra* n 10 22 maintains that the modern approach to diplomatic protection took shape in the 18<sup>th</sup> century and is reflected in the writings of Vattel, who expressed it as an obligation of the sending state to protect its citizens when they are injured abroad.

<sup>431</sup> Tiburcio *idem* 63.

<sup>432</sup> Some scholars such as Kelson (1926) 14 *Hague Recueil* 231 239 believe that the State and the individuals in it are one and the same entity.

<sup>433</sup> This theory was based on the Vattelian principles. (Quiconque maltraite un citoyen offense indirectement l'Etat, qui doit proteger ce citoyen) See Vattel *supra* n 81 136.

<sup>434</sup> See *Mavrommatis Palestine Concession Case supra* n 36. See also Tiburcio *supra* n 26 63.

obtain the full range of benefits available under international law, and nationality is the key.”<sup>435</sup>

## 6 Nationality as a precondition for diplomatic protection

The basic condition for the exercise of diplomatic protection is nationality. In other words, the requirement is that a state can only assert a right of diplomatic protection in respect of its own nationals.<sup>436</sup> As already indicated, nationality is the relationship existing between the individual and the State, normally involving allegiance on the part of the individual to the State, and protection of the individual by the State.<sup>437</sup> It is usually the only link between an individual and the State, ensuring that effect is given to the individual’s rights and obligations at international law.<sup>438</sup>

Nationality may also be defined as the legal status or membership of a collectivity of individuals whose acts, decisions and policies are safeguarded through the legal concept of the State representing them.<sup>439</sup> One of the cardinal requirements for the exercise of diplomatic protection is that the person seeking protection must be a national of the protecting state.<sup>440</sup>

Nationality must be distinguished from citizenship. Although the two terms are often used interchangeably,<sup>441</sup> they differ in conception as already pointed out.<sup>442</sup> Nationality is an international law term which denotes a legal connection between the individual and the State, whereas citizenship is a term of Constitutional Law, best used to describe the status of individuals nationally.<sup>443</sup> A national of a state is, therefore, an individual who, according to international law, is recognized by the law

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<sup>435</sup> See Shaw *supra* n 175 722. Crawford *supra* n 10 22 maintains that diplomatic protection reconciled the need for protection of aliens abroad with the then-accepted proposition that only states could be actors and have rights and duties under international law. See also the ILC’s Draft Arts on Diplomatic Protection 2006 art 3(1). This is, however, qualified by art 8, dealing with stateless persons & refugees.

<sup>436</sup> See Crawford *supra* n 10 26.

<sup>437</sup> Harvard Research in International Law Draft on Nationality, Harvard 1929 art 1(a).

<sup>438</sup> Shearer *supra* n 117 307.

<sup>439</sup> *Ibid.*

<sup>440</sup> See the ILC Draft Arts on Diplomatic Protection art 3 and *Panevezys-Saldutiskis Railways case supra* n 81. See also Wallace *supra* n 16 187; Tiburcio *supra* n 26 4 ; and Sen *supra* n 52 323.

<sup>441</sup> See Dugard *supra* n 1 282.

<sup>442</sup> See p 9 *supra* n 49.

of that state as its national,<sup>444</sup> whereas a citizen is a person who, according to the Constitution of that state, is, either by birth or naturalization, a member of that state, owing allegiance to that state, and entitled to all the rights, privileges and obligations attached thereto.<sup>445</sup>

## 6.1 *The concept of nationality*

The relationship existing between an individual and the state is governed by his or her nationality. This relationship was succinctly expressed in the judgment of British-Mexican Claims Commission in the leading case of *Re Lynch*:<sup>446</sup>

A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community. This legal relationship involves rights and corresponding duties upon both – on the part of the citizen no less than on the part of the State.

Tiburcio maintains that the concept of nationality has a multi-dimensional content – political, sociological, legal and psychological.<sup>447</sup> The concept of nationality can also be viewed both from a vertical and horizontal perspectives.<sup>448</sup> The vertical perspective is lineal. It emphasizes the link between the individual and the State in which the individual belongs, and in which the individual has rights and duties,<sup>449</sup>

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<sup>443</sup> Dugard *supra* n 1 283 particularly the aggregate of civil and political rights to which individuals are entitled.

<sup>444</sup> Geck *supra* n 10 1050. See the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws (1930) *supra* n 45 art 1.

<sup>445</sup> Dugard *supra* n 1 283. "On the question who is a national, there is an uneasy tension between the role of national and international law." Crawford *supra* n 10 27.

<sup>446</sup> *Annual Digest of Public International Law Cases* (1929 – 1930) 221 223. See also the definition of the term by the ICJ in *Nottebohm's case* *supra* n 40 23.

<sup>447</sup> Tiburcio *supra* n 26 4. See p 8 *supra*.

<sup>448</sup> See Largarde *supra* n 46 210.

<sup>449</sup> The duties include loyalty, military obligation, etc while the rights include diplomatic protection. *Ibid*.

whereas the horizontal perspective is more holistic. It regards the individual as a member of a community of the population which forms the state.<sup>450</sup>

## 6.2 Nationality of natural persons

Every state has the right to prescribe by law persons who are its nationals. Thus, the nationality of a natural person depends on the laws made by his or her state of nationality on that issue.<sup>451</sup> However, although every state is entitled to determine by law who its nationals are, the capacity of a state to protect its nationals diplomatically is governed by international law.<sup>452</sup> Under customary international law, states are entitled to protect only their nationals.<sup>453</sup> For the purposes of diplomatic protection of a natural person, a state of nationality means a state whose nationality that person has acquired in accordance with the law of that state by birth, descent, naturalisation, succession of states, or in any other manner consistent with international law.<sup>454</sup>

The right to exercise diplomatic protection on behalf of its nationals is determined by the bond existing between the individual and the state of his or nationality, often referred to as the “bond of nationality”.<sup>455</sup> This bond of nationality constitutes the genuine link between an individual and his or her country. A state is therefore entitled to exercise diplomatic protection on behalf of any individual against a defaulting state if it is proved that the bond of nationality exists and that the link is genuine.<sup>456</sup>

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<sup>450</sup> *Ibid* See also Tiburcio *supra* n 26 4.

<sup>451</sup> See the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) *supra* n 45, arts 1 & 2. Crawford *supra* n 10 27 however maintains that this right is not absolute and that this position was modified by the statement of the PCIJ in the *Nationality Decree in Tunis and Morocco* case. (1923) PCIJ Ser B No 4 24.

<sup>452</sup> Dugard *supra* n 1 284. See also ILC’s Draft Arts on Diplomatic Protection art 4.

<sup>453</sup> Dugard *idem* 283. See also *Panevesys-Saldutiskiis Railway case supra* n 81.

<sup>454</sup> See ILC’s Draft Articles on Diplomatic Protection art 4.

<sup>455</sup> *Panevesys Saldutiskiis Railway case supra* n 81. See also *Nottebohm’s case supra* n 40 23 and *Sen supra* n 52 323.

<sup>456</sup> *Sen ibid*.

### 6.3 Acquisition of nationality

Most states have laid down certain recognized grounds for the conferment of nationality on an individual. These grounds include; (a) Birth in the territory<sup>457</sup> (b) descent;<sup>458</sup> and (c) naturalization or marriage. On rare occasions, however, an individual may acquire nationality as a consequence of conquest, cession or other changes of circumstance in the nature of a state.<sup>459</sup> According to the principle of *jus soli*, the nationality of an individual is determined by the fact of his or her birth in the territory of a state.

As a result of this principle, some states provide in their laws that every individual born within their territory shall be its citizen.<sup>460</sup> Based on blood relationship, the principle of *jus sanguinis* is based on the fact of descent. Under this principle, any individual born in any territory is deemed to have acquired the nationality of the father,<sup>461</sup> whereas an illegitimate child acquires the nationality of the mother.<sup>462</sup>

Naturalisation is citizenship acquired subsequently by a person who was not a citizen of the state by birth. This includes persons who were nationals of some other states, as well as stateless persons.<sup>463</sup> According to the laws of some countries, foreign women married to their nationals automatically acquire the nationality of that state by reason of such marriage.<sup>464</sup> In most countries, however, marriage to a foreign national is regarded merely as a qualification for the subsequent acquisition of the nationality of that state by registration or naturalization.<sup>465</sup> People in a

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<sup>457</sup> *Jus soli*. See *Sen idem* 324.

<sup>458</sup> *Jus sanguinis*. See *ibid*.

<sup>459</sup> Bishop *Cases and Materials in International Law* (1961) 420.

<sup>460</sup> See *Sen supra* n 52 324. See e.g the Nigerian Constitution 1999 Ch 3 s 25. In South Africa nationality is governed by the South African Citizenship Act 88 of 1995. The 1996 Constitution s 3 provides that national legislation must provide for the acquisition, loss and restoration of Citizenship. See generally the *Encyclopaedia of Public International Law* vol 1 (1992) 106.

<sup>461</sup> *Sen supra* n 52 324.

<sup>462</sup> *Ibid*.

<sup>463</sup> *Ibid*. Some countries establish a fundamental difference between these categories of nationals. Nationality by birth is regarded as complete nationality, whereas the naturalized national is often discriminated against.

<sup>464</sup> Eg in France and Iraq See *Sen supra* n 52 326.

<sup>465</sup> *Ibid*.

conquered or ceded territory may acquire the nationality of the victorious, posterior, or predecessor state.<sup>466</sup>

Under Nigerian law, citizenship is governed by the 1999 Constitution.<sup>467</sup> Chapter three provides that a person may become a Nigerian citizen either by birth,<sup>468</sup> registration,<sup>469</sup> or by naturalisation.<sup>470</sup> Thus, every person born in Nigeria before the date of independence, either of parents or grandparents who belong or belonged to a community indigenous to Nigeria, is a Nigerian citizen by birth.<sup>471</sup> A person may become a Nigerian citizen by registration if the President is satisfied that: (i) he or she is a person of good character, (b) he or she has shown a clear intention of his or her desire to be domiciled in Nigeria; and (c) he or she has taken the oath of Allegiance.<sup>472</sup>

A person becomes a citizen of Nigeria by naturalisation if he or she is granted a Certificate of Naturalisation.<sup>473</sup> In South Africa however, citizenship is governed by the South African Citizenship Act of 1995.<sup>474</sup> Subject to certain exceptions, the Act provides that a person becomes a South African citizen by birth,<sup>475</sup> descent,<sup>476</sup> or by naturalisation.<sup>477</sup>

#### **6.4 Loss of nationality**

It is possible that a person who was a citizen of a state at birth may subsequently lose that status by reason of some voluntary act on his or her part, or by reason of operation of law.<sup>478</sup> According to the practice of states, nationality is often lost or forfeited on the acquisition of a different nationality.<sup>479</sup> It may also be lost by

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<sup>466</sup> *Idem* 328. See also Tiburcio *supra* n 26 16.

<sup>467</sup> See the Constitution of the Federal Republic of Nigeria 1999 *supra* n 459.

<sup>468</sup> S 25.

<sup>469</sup> S 26.

<sup>470</sup> S 27.

<sup>471</sup> S 25 (1).

<sup>472</sup> S 26(1)(c).

<sup>473</sup> S 27(1).

<sup>474</sup> *Supra* n 459.

<sup>475</sup> S 2.

<sup>476</sup> S 3.

<sup>477</sup> Ss 4 & 5.

<sup>478</sup> *Sen supra* n 52 326.

<sup>479</sup> See the Nigerian Constitution 1999 s 28 & the SA Citizen Act s 6.



renunciation,<sup>480</sup> specific state regulation,<sup>481</sup> marriage to an alien,<sup>482</sup> or by prolonged absence from the state.<sup>483</sup>

In this connection, it must be noted that a state has the right to denationalize an individual.<sup>484</sup> Denationalisation is normally caused by entry into foreign civil or military service, or by the acceptance of foreign honours or distinctions. Foreign naturalization, departure or sojourns abroad, conviction for certain crimes, are other grounds for the denationalization of an individual. Political attitudes or activities, as well as racial and national security grounds may also count in denationalization.<sup>485</sup> A person becomes stateless when he or she is deprived of his or her nationality, but so far as both international and municipal law are concerned, there is a presumption against the loss of nationality that has been held for some time.<sup>486</sup> A heavy burden of proof must be discharged before the loss is recognised.<sup>487</sup>

Nigerian law, for instance, permits the President to deprive a person other than a person who is a citizen of Nigeria by birth or registration, of his or her citizenship, if he is satisfied that such a person has, within a period of seven years after becoming naturalised, been sentenced to imprisonment for a term of not less than three years.<sup>488</sup> Under South African law, a South African citizen shall cease to be a South African citizen if:-

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<sup>480</sup> I.e by Deed signed and registered at a consulate, or by declaration made upon coming of age: See eg Lisboa "50 Nigerians renounce citizenship" *The Punch* 1977- 08 -19 1.

<sup>481</sup> See eg the Nigerian Constitution 1999 s 30.

<sup>482</sup> The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) *supra* n 45 arts 8 – 11 and CEDAW art 9 deal with this problem.

<sup>483</sup> See Weis *supra* n 52 123-124 & 133.

<sup>484</sup> I.e deprivation of nationality by special denationalisation laws, passed by the State of which the individual is a national. See Shearer *supra* n 117 311.

<sup>485</sup> Weis *supra* n 52 124.

<sup>486</sup> Shearer *supra* n 117 311.

<sup>487</sup> *Ibid.* For instance, under the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) art 7, the mere grant of an expatriation permit is not enough to entail the loss of the nationality of the state issuing it. Under English Law, an individual seeking to establish loss of nationality of a particular state, must not merely satisfy the court by positive evidence as to the facts of the municipal law under which such loss was alleged, but also prove that nationality has been lost for all purposes. See Shearer *supra* n 117 311.

<sup>488</sup> The Nigerian Constitution s 30(1). Section 30(2) stipulates *inter alia* that "The President shall deprive a person other than a person who is a citizen of Nigeria by birth of his citizenship if he is satisfied from the records of proceedings of a court of law or other tribunal, or after due inquiry in accordance with regulations made by him that (a) the person has shown himself by act or speech to be disloyal towards the Federal Republic of Nigeria; or (b) the person has during any war in which Nigeria was engaged unlawfully traded with the enemy ...".

- (a) he or she, whilst not being a minor, by some voluntary and formal act, other than marriage, acquires the citizenship or nationality of a country other than that of the Republic,<sup>489</sup> or,
- (b) he or she, in terms of the laws of any other country, also has the citizenship or nationality of that country, and serves in the armed forces of such country while that country is at war with the Republic.<sup>490</sup>

## 6.5 Importance of nationality

The importance of nationality to both the individual and the state for purposes of diplomatic protection cannot be overemphasized.<sup>491</sup> The possession of nationality grants privileges and imposes corresponding duties on both the individual and the state.<sup>492</sup> In the first place, the motivation for the individual to ask for protection hinges on his or her nationality, and the *raison d'etre* for the state taking up the case of the injured individual is also based on the nationality of the individual concerned.<sup>493</sup> It is therefore of great importance to ensure that an individual who approaches any state for protection has the nationality of that state.<sup>494</sup> Nationality imports allegiance, and one of the principal incidents of loyalty is the duty to perform military service for the state to which such obedience is owed.<sup>495</sup> A person who has no nationality becomes a stateless person in international law.<sup>496</sup>

Nationality also determines the status of an individual in the international community.<sup>497</sup> It determines his or her right to enter, reside and work in his or her country or any other country. It also plays a vital role in his or her departure or exit because only aliens are subject to deportation, expulsion or extradition.<sup>498</sup> Generally

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<sup>489</sup> S 6(a).

<sup>490</sup> S 6(b).

<sup>491</sup> See the *dicta* of the PCIJ in *Panevezys Saldutiskiis Railways case supra* n 81 16-17. See also *Nottebohm's case supra* n 40 23.

<sup>492</sup> *Sen supra* n 52 323.

<sup>493</sup> *Idem* 326.

<sup>494</sup> *Ibid.*

<sup>495</sup> *Shearer supra* n 117 312.

<sup>496</sup> See *Stateless persons & refugees* p 88 *infra*.

<sup>497</sup> *Shearer supra* n 117 308-309.

<sup>498</sup> See the case of *Shugaba Darman v Minister of Internal Affairs* (1982) 3 NCLR 915. See also *Tiburcio supra* n 26 6.

however, a state does not refuse to receive its own nationals back into its territory<sup>499</sup> By the same token, a state has a general right, in the absence of a specific treaty obligation to the contrary, to refuse to extradite its own nationals to a requesting state.<sup>500</sup> Enemy status in time of war may be determined by the nationality of the person concerned, and, moreover, states may frequently exercise criminal or other jurisdiction on the basis of nationality.<sup>501</sup> Above all, since a person who has no nationality becomes a stateless person in international law he or she loses all the privileges associated with diplomatic protection because no state may be willing to protect him or her.<sup>502</sup>

## 7 Nationality and diplomatic protection

### 7.1 Nationality of claims rule

A state may only espouse a claim against another state on behalf of its national. In most cases, no conflict may arise between the right of a state to exercise diplomatic protection on behalf of its national and the legitimacy of the nationality concerned. In extraordinary cases, however the legitimacy of the nationality of an individual may be questioned and international law may refuse to recognize the nationality for the purposes of diplomatic protection.<sup>503</sup> Thus, a state's right to accord diplomatic protection may be challenged on the grounds that the link between it and its alleged national is only tenuous and not genuine.<sup>504</sup>

The extent to which a state may be restrained from protecting an individual on the bases of its municipal law was spelt out by the ICJ in *Nottebohm's case*.<sup>505</sup> In that case, Nottebohm was born in Germany in 1887 and was a German national by birth. In 1905, he immigrated to Guatemala where he lived and carried on business for several years. In 1939, at the start of the Second World War, Nottebohm acquired

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<sup>499</sup> See the ICCPR art 12 par 4 which provides that "No one shall arbitrarily be deprived of the right to enter his own country."

<sup>500</sup> Shearer *supra* n 117 312.

<sup>501</sup> This depends upon some quality attaching to the person involved, justifying a state to exercise jurisdiction over that person.

<sup>502</sup> See *Nottebohm's case supra* n 40.

<sup>503</sup> Dugard *supra* n 1 284.

<sup>504</sup> See *Nottebohm's case supra* n 40 25.

<sup>505</sup> *Ibid.* This case is the *locus classicus* on that point of law.

the nationality of Liechtenstein while still domiciled in Guatemala. In 1943, he was arrested in Guatemala and sent to the United States of America where he was incarcerated for two years without trial as a dangerous enemy alien.

After the war, Nottebohm returned to Liechtenstein, because all his assets in Guatemala had been seized. Liechtenstein brought an action against Guatemala before the ICJ in 1951 asking the Court to declare that the government of Guatemala had acted in breach of international law by arresting, detaining, expelling and refusing to readmit Nottebohm, and seizing and retaining his property without compensation.

The Court held that Liechtenstein had no title to act on behalf of Nottebohm as Nottebohm's purported acquisition of Liechtenstein nationality in 1939 was invalid at international law. The Court held that the purported nationalisation of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction but could not be considered at international law. In determining the nationality question, different factors have to be taken into consideration, and their importance will vary from case to case. The habitual residence of the person concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachments shown by him for a given country, and inculcated in his children who must be taken into consideration.

The court further held that a person should be deemed to be a national of the state with which he or she is most closely and genuinely connected as could be gathered from the circumstances. The court analysed the bond of nationality thus:

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a result of an act of the authorities,

is in fact more closely connected with the population of the state conferring nationality than with that of any other State.<sup>506</sup>

The court thus affirmed its preference for the test of real and effective nationality and denied international recognition to the nationality which was not based on stronger factuality between the person concerned and one of the states whose nationality was involved.

The decision in *Nottebohm's* case has attracted a lot of criticism.<sup>507</sup> The basic criticism is that the Court applied the rule of effective nationality, valid when there has to be a choice between two or more nationalities, in a situation where there was no dual nationality.<sup>508</sup> By applying this rule, the court rendered Nottebohm a stateless person on the international level. A further criticism of *Nottebohm* is that as a matter of law, the court erroneously applied article 5 of the 1930 Hague Convention on Nationality which provides that in cases of dual Nationality, the most effective one should be applied. In this case, *Nottebohm* did not have the nationality of Guatemala; he only had the nationality of Liechtenstein. Therefore, it was not a case of dual nationality.<sup>509</sup> Nevertheless, the decision in *Nottebohm's* case<sup>510</sup> is a clear message to states that for purposes of diplomatic protection, the decision whether nationality has been bestowed in the manner required by international law is

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<sup>506</sup> At 23.

<sup>507</sup> See Tiburcio *supra* n 26 70 - 72 for her criticism of the judgment. See also Geck *supra* n 10 1050. Dugard *supra* n 1 285 says that the court "left unanswered the question whether Liechtenstein would have been able to protect Nottebohm against a state with which he had no close connection." He however comes to the conclusion that the question should be answered in the affirmative because the court was determined to propound a relative test only. He goes on to explain that based on the judgment in *Nottebohm's* case, the ILC's Draft Articles on Diplomatic Protection art 4 does not require a state to prove an effective or genuine link between itself and its nationals along the lines suggested in that case. According to him the ILC took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Nottebohm and Liechtenstein were 'extremely tenuous' compared with the close ties between Nottebohm and Guatemala for over 34 years. Accordingly, the ILC concluded that the court did not intend to expound a general rule applicable to all states, but only a relative rule according to which a state in Liechtenstein's position was required to show a genuine link between itself and Nottebohm in order to permit it to claim on his behalf against Guatemala, with whom it had extremely close ties. Moreover, the ILC was mindful of the fact that if the genuine link requirement proposed by the *Nottebohm* Case was strictly applied, it would exclude millions of persons from the benefit of diplomatic protection in today's world of globalization.

<sup>508</sup> Tiburcio *supra* n 26 71.

<sup>509</sup> See also Sen *supra* n 52 330.

<sup>510</sup> *Supra* n 40.

entirely that of international law to make.<sup>511</sup>

## 7.2 Dual nationality

A person may sometimes qualify to be a national of two or more states and he or she may be claimed as a national of any of those states by virtue of the applicable municipal laws on citizenship.<sup>512</sup> Cases of dual nationality may also arise in relation to persons acquiring the nationality of a state by naturalisation.<sup>513</sup> It may result from an overlap of two countries' legislation on the subject, or from exceptional circumstances.<sup>514</sup> Although the laws of some states do not permit their nationals to be nationals of other states,<sup>515</sup> international law does not prohibit dual or multiple nationality. Indeed such nationality was approved by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides that:<sup>516</sup>

a person having two or more nationalities may be regarded as it's national by each of the States whose nationality he possesses.

It is in the area of dual or plural nationality that the dilemma of not having a definite nationality for purposes of diplomatic protection is most felt.<sup>517</sup> As a result, attempts have been made to eliminate dual and multiple nationality, but those attempts have

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<sup>511</sup> See Dugard *supra* n 1 286

<sup>512</sup> *Sen supra* n 52 328. A person may be a citizen of one State by birth for instance, while he or she may be regarded as a citizen of another state by reason of his or her descent.

<sup>513</sup> *Ibid.* Cases of dual or multiple nationality may also arise where legitimation of illegitimate children is involved. It may also arise where, in the case a married woman, she is allowed to retain the nationality of her ex- husband even if her marriage to a foreign national is dissolved. See Shearer *supra* n 117 311. See also *Sen supra* n 52 329.

<sup>514</sup> *Ibid.* A change or acquisition of nationality may occur under exceptional circumstances, because of state succession, for instance. Thus, nationals of a predecessor state may acquire the nationality of the successor State, while people in conquered or ceded territories ultimately acquire the nationality of the victorious state.

<sup>515</sup> See the Nigerian Constitution s 28, for instance, which provides that subject to certain exceptions, a person shall forfeit his or her Nigerian citizenship if, not being a citizen of Nigeria by birth, he or she acquires or retains the citizenship or nationality of a country other than Nigeria, The South African situation is the same as that of Nigeria. See the South African Citizen Act 88 of 1995 s 6.

<sup>516</sup> *Supra* n 45.

<sup>517</sup> See *Sen supra* n 52 It is gratifying that the ILC's Draft Articles on Diplomatic Protection has taken care of cases of people with dual nationality. See the ILC's Draft art 6 which provides (1) that "Any State of which a dual national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national," and (2) that "Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national."

failed.<sup>518</sup> This makes it all the more necessary to address diplomatic protection in cases of dual and multiple nationality.<sup>519</sup>

In the case of persons possessing dual or multiple nationality, two issues always arise for determination; namely: (a) which of the states can espouse his or her claim against a third state and (b) whether one of the states of which he or she is a national can represent him or her against the other state which also claims his or her nationality.

With reference to the first issue, the general rule is that where an individual possesses a dual or multiple nationality, any state of which he or she is a national may adopt his or her claim against a third state. In this regard, one view is that the state whose passport the person is carrying is the only state that can protect him or her. The other view is that the state of which he or she is an “active national” is the only state competent to afford diplomatic protection to him or her.<sup>520</sup>

As already stated, international law has moved beyond the active nationality theory laid down in *Nottebohm’s case*.<sup>521</sup> Consequently, the ILC’s Draft Article on Diplomatic Protection provides that:<sup>522</sup>

For the purposes of the diplomatic protection of a natural person, a State of nationality means a state whose nationality that person has acquired in accordance with the law of that state, by birth, descent, naturalisation, succession of states, or in any other manner, not inconsistent with International Law.

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<sup>518</sup> See Crawford *supra* n 10 31. E.g the Hague Conference on the Codification of International Law set out to abolish or reduce dual and multiple nationality, but in the event recognised its existence in art 3 of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws *supra* n 42. European States sought to abolish it in the European Convention on Reduction of Cases of Multiple Nationality and Military Obligation in Cases of Multiple Nationality of (1963) 05 6, UKTS No 88 (1971) ETS No 43) although this goal remained unachieved. See now the 1977 European Convention on Nationality which recognizes dual and multiple nationality (1977) 11 6, ETS No 166.

<sup>519</sup> See Crawford *ibid.*. Dugard had noted this problem in his First Report *supra* n 9 par 121.

<sup>520</sup> In the *Merge case* (1955) 22 ILR 443. It was emphasised that the principle based on the sovereign equality of states, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective or active nationality, whenever such nationality is that of the claimant state.

<sup>521</sup> *Supra* n 40.

Draft article 4 does not require a state to prove an effective or genuine link between itself and its national along the lines suggested in *Nottebohm's* case as an additional factor for the exercise of diplomatic protection even where the individual possesses only one nationality.<sup>523</sup> Besides, article 6(1) of the Draft Articles provides that:

Any state of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a state of which that person is not a national.

While article 6(2) goes further to provide that

Two or more states of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Draft article 6 is limited to the exercise of diplomatic protection by one or all of the states in which the injured person is a national against a state of which that person is not a national. Similar to draft article 4, this does not require a genuine or effective link between the national and the claimant State. The weight of authority does not require such a link in cases of diplomatic protection against third states.<sup>524</sup> Crawford, however, asserts that this can only be true if *Nottebohm* is disregarded.<sup>525</sup> Article 6(2) recognises that diplomatic protection may be exercised jointly by two or more states of nationality. However, there may be circumstances where the responsible state may object on the basis of *locus standi*.<sup>526</sup>

The exercise of diplomatic protection by one state of nationality against another state of nationality is covered in draft article 7. In respect of claims brought against another state of nationality, draft article 7 provides that:

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the

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<sup>522</sup> Art 4.

<sup>523</sup> See the *Official Records of the G A supra* n 1 32-3.

<sup>524</sup> See the Commentary to draft art 6 par 3 in the *Official Records of the G A supra* n 1 42 citing, *inter alia Salem* (1932) 21 UNR I A A 1165 1188; *Merge supra* n 516 456; and *Daillal v Iran* (1983) 3 IUSCIR.

<sup>525</sup> Crawford *supra* n 10 30. According to him, in *Nottebohm*, Guatemala was a third state and the court accepted that Nottebohm's new nationality had been granted in accordance with the law of Liechtenstein.

<sup>526</sup> See commentary to draft art 6 par 4 *Official Records of the GA supra* n 1 43. See also *Barcelona Traction* case *supra* n 26 on the issue of objection.



nationality of the former State is predominant, both at the time of the injury and at the time of the official presentation of the claim.

The commentary on draft article 7 reveals that, historically, there was a strong support for the proposition that a state of nationality could not espouse a diplomatic protection claim in respect of a dual national against another state of nationality.<sup>527</sup> In 1949 the ICJ described the practice of states not to claim against another state of nationality as “the ordinary practice.”<sup>528</sup>

There was however support for permitting a State of nationality to espouse a diplomatic protection claim in respect of a dual national against another state of nationality where the claiming State was the State of dominant or effective nationality.<sup>529</sup> This was endorsed by the ICJ in *Nottebohm’s case*<sup>530</sup> and in *Merge* claim by the Italian-US Conciliation Commission.<sup>531</sup> The ILC therefore took the view that the principle of dominant or effective nationality reflects customary international law and incorporated it in Draft Article 7.<sup>532</sup>

The main objective of this formulation is to permit a state of nationality with which an individual has established a predominant nationality subsequent to the injury to bring a claim against the other state.<sup>533</sup>

## 8 Stateless persons and refugees

Can a stateless person or a refugee be diplomatically protected? A person becomes stateless when he or she is deprived of his or her nationality, while a refugee is a

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<sup>527</sup> This was stipulated in the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) *supra* n 45 art 4 and was supported by other draft codification proposals eg the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens art 23(5) (1961) 55 *AJIL* 545, and arbitral awards, e.g the *Alexander case* (1898) 3 Moore *International Arbitrations* 2529.

<sup>528</sup> See Commentary to draft art 7 par 3 *Official Records of the GA supra* n 1 44 and references contained therein.

<sup>529</sup> The *Reparation case supra* n 397.

<sup>530</sup> *Supra* n 40.

<sup>531</sup> *Italian-United States Conciliation Commission: Yanguas, Messia, Sorentino.* (1955) 22 *ILR* 443 455 (par 5).

<sup>532</sup> See commentary on art 7 par 5 *Official Record of the GA supra* n 1 46.

<sup>533</sup> See Crawford *supra* n 10 34.

displaced person.<sup>534</sup> Statelessness is a condition recognized both by municipal and international law.<sup>535</sup> It has indeed become a major problem in international law in recent years.<sup>536</sup> Statelessness may arise through conflict of municipal nationality laws, changes of sovereignty over a territory, and denationalisation by the state of nationality.<sup>537</sup>

Traditionally, individuals who are stateless may be left completely unprotected internationally because they may not have any state entitled to present a claim on their behalf. The ILC's Draft Articles on Diplomatic Protection, however, provides that a state may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.<sup>538</sup> Article 8(2) goes further and provides that a state may exercise diplomatic protection in respect of a person who is recognized as a refugee by that state.<sup>539</sup>

Thus, although nationality is a *sine qua non* for the exercise of diplomatic protection, the draft articles on diplomatic protection have tremendously enhanced the progressive development of international law, by making provision for the protection of stateless persons and refugees. Credit must be given to the ILC for this progressive innovation. It is a glowing testimony to the fact that its mandate to codify and progressively develop international law is bearing fruits.<sup>540</sup> Being *lex de lege*

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<sup>534</sup> For a detailed definition of a refugee, see the 1951 Refugee Convention and its Protocol which defines a refugee as a person who, alleging persecution by his or her government, seeks asylum in another country.

<sup>535</sup> Shearer *supra* n 117 312.

<sup>536</sup> The urgency and acuteness of the problem of statelessness prompted the insertion in the UDHR art 15 that "every one has right to nationality," and that "no one shall arbitrarily be deprived of his nationality". See also the Constitution of South Africa *supra* n 459 s 20.

<sup>537</sup> Shearer *supra* n 117 312.

<sup>538</sup> Art 8(1). The traditional position was that a state could only exercise diplomatic protection in respect of its nationals and that no state could intervene on behalf of stateless persons. See the decision of the US Mexican Claims Commission in *Dickson Car Wheel Co. v United Mexican States* 4 UNRIAA 669 678.

<sup>539</sup> Art 8 is regarded as a progressive development of the law. The commentary notes the concern for refugees and stateless persons which is evidenced by the Convention on the Status of Refugees of 1951, and the Convention on the Reduction of Statelessness of 1961, although neither of them deals with diplomatic protection *per se*.

<sup>540</sup> The ILC was established by the GA in 1947 to promote the codification and progressive development of International Law. See Dugard's comment on this issue in Dugard *supra* n 25 89.

*ferenda*, Crawford has drawn attention to several points that may be made out concerning Draft Article 8.<sup>541</sup>

## 9 Nationality of corporations and other legal persons

International law recognizes that diplomatic protection can be extended to corporations and other legal entities.<sup>542</sup> The Court in the *Barcelona Traction case*<sup>543</sup> remarked that customary rule gave the right of diplomatic protection of a corporation to the state under whose law the company is incorporated.<sup>544</sup>

It will be recalled that in that case, Belgium brought a claim on behalf of its nationals, who comprised the vast majority of shareholders in the Barcelona Traction, Light and Power Company Limited. The company was incorporated in Canada in 1911 in connection with the development of electricity supplies in Spain. In 1948, the company was declared bankrupt by a Spanish court, and about the same time, other steps were taken by Spanish authorities injuring it. Canada intervened on its behalf to begin with but later withdrew. At all relevant times, 88 per cent of the shares in the company were, as Belgium claimed, owned by Belgium nationals. Spain, however, objected that since the injury was to the company and not to shareholders, Belgium lacked the *locus standi* to bring the claim. The Court ruled by fifteen to one that since the right of diplomatic protection in respect of injury to a corporation belongs to the state under whose laws the corporation is incorporated and in whose territory it has

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<sup>541</sup> See Crawford *supra* n 10 35. "First, the requirement of both lawful residence and habitual residence for the stateless person sets a high threshold because the provision is an exceptional measure introduced *de lege ferenda*. Secondly, the requirements as to continuous nationality are repeated in paragraphs 1 and 2, reflecting the principle in draft article 3. Thirdly, paragraph 1 does not define stateless persons. The commentary notes that a definition can be found in the Convention Relating to Stateless Persons of 1954. Fourthly, paragraph 2 does not limit the term "refugee" to those who meet the definition in the 1951 Refugee Convention and its Protocol. Finally paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee where the claim is against the refugee's State of nationality. According to the commentary, to allow such claims would contradict the basic approach of the Draft Articles that nationality is the basis for the exercise of diplomatic protection.. Moreover, to do so "would open the floodgates for international litigation." The fear of demands for such action might deter states from accepting refugees."

<sup>542</sup> *Barcelona Traction case supra* n 26.

<sup>543</sup> *Ibid.*

<sup>544</sup> At 42. For purposes of diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. This is a general principle of international law. See *Barcelona Traction case supra* n 26 45.

its registered office, Belgium could not exercise diplomatic protection in its favour against Spain.<sup>545</sup>

Chapter III of the ILC's Draft Articles on Diplomatic Protection deals with the nationality of corporations and other legal persons. Two substantial issues arise. The first is whether a state is entitled to exercise diplomatic protection in respect of corporations, and the second is whether a state is entitled to exercise diplomatic protection in respect of its nationals who are shareholders in a corporation incorporated in another state.<sup>546</sup>

As to the first issue, it will be recalled that the claim in *Barcelona Traction case*<sup>547</sup> was denied, because Belgium had no *locus standi* to institute the action.<sup>548</sup> The company, Barcelona Traction, did not possess a Belgian nationality and the Court ruled that Belgium could not exercise diplomatic protection in its favour against Spain.<sup>549</sup> That was however an exception to the rule. The general rule is that a state may bring an action under international law to protect its corporation which is injured by the act of another state.

In *ELSI case*,<sup>550</sup> for instance, the Chamber of the ICJ allowed the US to bring a claim against Italy in respect of damage suffered by an Italian company whose shares were wholly owned by two American companies. Although Italy formally objected that the company the rights of which were affected was Italian, the Chamber avoided pronouncing on the compatibility of its decision with *Barcelona Traction case*.<sup>551</sup>

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<sup>545</sup> Par 88. This rule has been subjected to criticism. In Dugard's fourth report to the UNILC for instance, he pointed out that the rule is derived from general principles of corporation law rather than from customary international law and that had the court had regard to State practice in bilateral and multilateral investment treaties and lump sum settlement agreements, it might have found evidence in favour of a right of the shareholders state of nationality. Dugard also argued that the *Barcelona Traction* rule established an "unworkable standard," since in practice States will not exercise diplomatic protection in the absence of some genuine connection arising from a substantial national shareholding: See Dugard's Fourth Report on Diplomatic Protection ILC 55<sup>th</sup> Session 2003 A/CN.4/530 & Addendum 1.

<sup>546</sup> See Crawford *supra* n 10 36.

<sup>547</sup> *Supra* n 26.

<sup>548</sup> At par 92.

<sup>549</sup> As already said, this rule has been subjected to criticism. See *supra* n 543.

<sup>550</sup> *US v Italy* (1989) ICJ Rep 15.

<sup>551</sup> The case no doubt was concerned with the interpretation of a specific treaty rather than general International Law; the case might also have been considered to involve the infringement of the rights of shareholders themselves. Additionally, it might have been argued that the company had ceased to exist because it had gone into liquidation, or that the State of nationality of

Following the decision in the *Barcelona Traction* case,<sup>552</sup> however, the ILC Draft Articles on Diplomatic Protection has provided that there is an exception to the nationality of claims rule.<sup>553</sup> Thus, where there is no significant link or connection between the state of incorporation and the corporation itself, and where certain significant connections exist with another state, then, that other state is to be regarded as the state of nationality for the purposes of diplomatic protection.<sup>554</sup> Hence, Draft Article 9 provides *inter alia* that:

when the corporation is controlled by nationals of another State or States, and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

As explained by the commentary, Draft Article 9:<sup>555</sup>

accepts the basic premise of *Barcelona Traction* while making an exception for the case where certain significant connection exists with another state.

In addressing the issue of protection of shareholders, it is not clear whether a diplomatic claim may be brought in respect of injury to the shareholders' own right.<sup>556</sup>

In *Barcelona Traction*, the ICJ said, *inter alia*:

an act directed against and infringing only the company's rights, does not involve responsibility towards the shareholders, even if their interests are affected....The situation is different if the act complained of is aimed at the direct rights of the shareholders as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company including, the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on

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shareholders was entitled to exercise diplomatic protection, because the company was injured by the State of incorporation. See Crawford *supra* n 10 37.

<sup>552</sup> *Supra* n 26.

<sup>553</sup> Art 9.

<sup>554</sup> See the *Official Records of the G A supra* n 1 52.

<sup>555</sup> Commentary to draft art 9 par 4 *ibid*.

<sup>556</sup> See Crawford *supra* n 10 38.

liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action<sup>557</sup>

It must be stressed, however, that the Court in *Barcelona Traction* did not have to consider the matter further, because Belgium did not base its claim on an infringement of the rights of shareholders but on the economic harm they incurred as a result of Spain's treatment of the corporation. However, in the South African case of *Van Zyl v Government of RSA*,<sup>558</sup> the question was whether the government of South Africa could exercise diplomatic protection on behalf of a South African national who held majority shares in a company registered in Lesotho. The property of the company was confiscated without compensation. In a suit brought by the South African national for compensation, it was held that the *Barcelona Traction*<sup>559</sup> decision precluded diplomatic protection to be extended to a South African national by the government of South Africa against the government of Lesotho in respect of a company incorporated in Lesotho.<sup>560</sup>

Again, in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*,<sup>561</sup> as a result of an alleged conspiracy between the South African government and the government of Lesotho to dispose of the applicant of its rights in the diamond lease, an application was brought by the applicant, a company registered in Lesotho but controlled by South African shareholders, to obtain recovery of documents relating to the alleged conspiracy. It was however held that the matter was non justiciable, based on the "true agreement" between South Africa and Lesotho.<sup>562</sup>

Although not strictly a diplomatic protection case, in the oft-cited case of *Trendtex Trading Corp. v Central Bank of Nigeria*,<sup>563</sup> it was held that the Nigerian government could not protect the Central Bank of Nigeria, a Nigerian corporation sued in the UK

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<sup>557</sup> At par 46 - 47.

<sup>558</sup> 2005 (4) SA 96 (T).

<sup>559</sup> *Supra* n 26.

<sup>560</sup> For further discussion of this case, see ch 6 *infra*.

<sup>561</sup> 1999 (2) SA 279 (T).

<sup>562</sup> See Dugard *supra* n 1 78.

<sup>563</sup> (1977) QB 529; [1977] 1 All ER 881.

for damages for breach of contract.<sup>564</sup> In that case, the Central Bank of Nigeria through a correspondent London Bank, issued a letter of credit in favour of the plaintiff, a Swiss company, to pay for cement which was to be used for the building of army barracks in Nigeria. The Central Bank refused to pay for the cement or for demurrage incurred by delay at the port of delivery. In a suit brought against the Central Bank of Nigeria for damages, the Central Bank claimed state immunity.

At the Court of Appeal in England, a distinction was drawn between *jure imperii*<sup>565</sup> and *jure gestionis*.<sup>566</sup> Lord Denning considered whether the Bank was an organ of the State of Nigeria and so entitled to immunity, and concluded that it was not.<sup>567</sup>

The question which arises for determination is therefore, in what circumstances may a claim be brought by the State of the shareholders' nationality for injury to the company? The matter is addressed by draft article 11, which provides that:

The state of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of injury to the corporation unless:

- (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
- (b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury and incorporation under the law of the latter State was required by it, as a precondition for doing business there.

Articles 11(a) and (b) are exceptions to the general rule that a State of nationality of shareholders cannot exercise diplomatic protection on their behalf in the case of injury to the corporation. In the light of these exceptions enumerated by draft article 11, it is submitted that both *Van Zyl*<sup>568</sup> and *Swissborough*<sup>569</sup> were wrongly decided because in both cases, not only were the injury to the companies caused by the State of incorporation, but the Lesotho Government had made it a precondition that

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<sup>564</sup> Nigeria unsuccessfully pleaded as a defence, sovereign immunity, which was equivalent to diplomatic protection.

<sup>565</sup> Public acts of government. At 554 G-H.

<sup>566</sup> Commercial acts of government. At 556 B-C.

<sup>567</sup> *Idem* at 890.

<sup>568</sup> *Supra* n 556.

<sup>569</sup> *Supra* n 559.

the companies must first be incorporated under the laws of Lesotho before they were granted mining licence.<sup>570</sup>

ILC's draft article 12 on Diplomatic Protection however provides that:

To the extent that an internationally wrongful act of a state causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the state of nationality is entitled to exercise diplomatic protection in respect of its nationals.

Crawford has submitted that the ILC's formulation of exceptions in draft article 11(b) has gained little support.<sup>571</sup>

"Why should there be a general exception for cases where local incorporation is required by law?" he queries.

According to him,

"This question is appropriate, because in certain strategic sectors,<sup>572</sup> it is common to require a local subsidiary as a guarantee.<sup>573</sup> Furthermore, in the majority of cases, although there is no legal requirement for local incorporation, there are good business reasons to use local investment vehicles.<sup>574</sup> In such cases, the effect of draft article 11 is to prevent any shareholders' actions for wrongs done to the company so long as the company itself continues to exist under local law – a matter over which the shareholders themselves have no control.<sup>575</sup> Finally, it is odd to limit the exception contained in draft article 11(a) to cases where the company has "ceased to exist for a reason unrelated to the injury."<sup>576</sup>

In conclusion, Crawford summarises the rationale behind the exceptions contained in Draft article 11. According to him

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<sup>570</sup> See Schmulow "Diplomatic intervention in event of expropriation of a company without compensation." (1996) 21 *SAYIL* 73 74.

<sup>571</sup> See Crawford *supra* n 10 40.

<sup>572</sup> Eg banking, media, telecommunications, public service concessions etc.

<sup>573</sup> Crawford *supra* n 10 40.

<sup>574</sup> *Ibid.*

<sup>575</sup> *Ibid.*

<sup>576</sup> *Idem* 41.



“It may be said that the exceptions contained in Draft Article 11 do not implement the *dicta* in the *Barcelona Traction* case and are both under –and–over exclusive.<sup>577</sup> Thus, in cases where the wrongful act is implicated in the dissolution of the company, shareholders will have recourse under article 12, but there may be no direct injury. In cases where the company continues to exist and the law of the respondent state does not require local incorporation, diplomatic protection is excluded altogether.<sup>578</sup> By contrast however, where local incorporation is required by law, any foreign shareholder may be protected, irrespective of the amount of its holding or other measures being taken to vindicate the rights of the corporation.”<sup>579</sup>

## 10 Other conditions for the exercise of diplomatic protection

### 10 1 Exhaustion of local remedies

Apart from the issue of nationality of claims as a *sine qua non* requirement for the exercise of diplomatic protection, another requirement is that all local remedies must first be exhausted in the State where the injury took place before the claim can be espoused at the international level.<sup>580</sup>

The need to exhaust local remedies has its origin in State practice concerning the protection of a State’s subjects injured abroad.<sup>581</sup> By the 14<sup>th</sup> century, European sovereigns had accepted that their subjects should first seek redress for any grievance from the foreign State where they resided. Only in circumstances where this was not forthcoming should they turn to their governments for aid.<sup>582</sup>

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<sup>577</sup> *Ibid.*

<sup>578</sup> *Ibid.*

<sup>579</sup> *Ibid.* Neither *Van Zyl supra* n 556 nor *Swissborough supra* n 559 was protected under this exception. Draft art 13 however provides that the rules applicable to corporations apply to the diplomatic protection of other legal persons as appropriate.

<sup>580</sup> See the *Tinoco Concession case* (1924) 1 UNRAA 18 A.J.I.L.(1924). P.147. *The North American Dredging Company Claim (United States v Mexico)* (1926) 4 UNRAA 26-30; *The Mexican Railway Union Claim (Great Britain v Mexico)* (1930) 5 UNRAA. 155. See also *Sen supra* n 52 390 and the ILC Draft Articles on Diplomatic Protection 2006 art 14. The expression “exhaustion of domestic remedies” comprises not only resort to the judicial and administrative authorities, but also to other types of redress eg executive pardon etc.

<sup>581</sup> See Crawford *supra* n 10 41.

<sup>582</sup> Aid in early times meant reprisals and exhaustion of local remedies in its infancy meant determining when such unlawful acts were permitted. A sovereign adopting the claim of his or her

This rule has been justified on several grounds, but the main purpose for the rule is to afford the state concerned an opportunity to redress the wrong that has occurred within its own legal order, and to reduce the number of international claims that might be brought.<sup>583</sup> Article 44 of the ILC's Articles on State Responsibility provides that the responsibility of a state may not be invoked if local remedies have not been exhausted.<sup>584</sup> This rule was applied by the ICJ in the *Interhandel Case*<sup>585</sup> as a "well established rule of international law."<sup>586</sup>

The rule is set out in the ILC's Draft Article 14 on Diplomatic Protection as follows:

- 1 A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.
- 2 "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies whether ordinary or special, in the State alleged to be responsible for causing the injury
- 3 Local remedies shall be exhausted where an international claim or request for a declaratory judgment related to the claim is brought preponderantly on the basis of an injury to a national or other persons referred to in draft article 8.

There is no doubt that the rule in respect of the exhaustion of local remedies is firmly established in international law based on the premise that diplomatic protection is an exceptional remedy available in respect of internationally wrongful conduct on the part of a state, for breach of its international obligations.<sup>587</sup> If, however, the state itself provides the appropriate remedies under its laws for the harm or injury suffered by the alien, no liability arises, because the state cannot be said to have failed in its duty.<sup>588</sup>

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subject obtained satisfaction by taking reprisals against the subjects of the offending sovereign who were in his territory or those who fell into his hands. See Crawford *supra* n 10 42.

<sup>583</sup> *Ibid.*

<sup>584</sup> This rule was well illustrated in the case of *Ambatielos Arbitration* 12 RIAA 83 (1956); 23 ILR, 306 where the matter was dismissed because of failure to exhaust local remedies.

<sup>585</sup> 1959 ICJ Reports 6 27 *supra* n 110.

<sup>586</sup> See also the case of *Elettronica Sicula (ELSI) Case* *supra* n 548 15 where a Chamber of the ICJ described the practise as "an important principle of customary international law."

<sup>587</sup> *Sen supra* n 52 390.

<sup>588</sup> *Ibid.*

There is however, a dispute as to whether this principle of exhaustion of local remedies is a substantive or procedural rule or some sort of hybrid rule.<sup>589</sup> What ever the case, it is trite that until local remedies are exhausted, the injury can still be considered a domestic problem which can be solved by the competent internal or local authorities.<sup>590</sup>

(a) *When are local remedies exhausted?*

It may be necessary to evaluate municipal law and procedure in order to determine whether a claimant has exhausted all available local remedies.<sup>591</sup> In *Interhandel*,<sup>592</sup> for example, the rule was applied to bar an international claim by a party which, after a decade of litigation, finally obtained *certiorari* from the US Supreme Court and was ready to start again. In *Ambatielos*,<sup>593</sup> the importance that arbitral tribunals attach to this rule generally was reflected in the attitude of that tribunal to an individual's failure to call a key witness at the trial. It was held that it amounted to failure to exhaust local remedies.<sup>594</sup>

In order to satisfy the requirement of exhausting local remedies, a state must allow foreigners access to courts of law within its territory for the purpose of redressing their grievances in order to fulfil this legal obligation. Failure to do so itself is an international wrong.<sup>595</sup> It is only after all such remedies are exhausted, including any appeal, that the question of diplomatic protection may arise.<sup>596</sup>

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<sup>589</sup> See e. g. the discussion in the *Yearbook of the International Law Commission* 1977 vol 11 pt 2 30 ff and Report of the ILC on its 54<sup>th</sup> Session 2002 131. See also Shaw *supra* n 175 730.

<sup>590</sup> *Sen supra* n 52 391.

<sup>591</sup> Eg the determination may involve an international tribunal in applying national law to judge whether a claimant has tested or exhausted all available judicial mechanisms. See Crawford *supra* n 10 42.

<sup>592</sup> *Supra* n 110.

<sup>593</sup> *Supra* n 111.

<sup>594</sup> At 336.

<sup>595</sup> *Ibid.*

<sup>596</sup> This is because, if the case has not been decided, or may still lead to redress and punishment by the determination of local authorities, then there is no defined situation in international law as yet, and there is no decision to be challenged. Only after a decision is reached, and only after there is *res judicata* on the merits of the case, or if the claim is said to be inadmissible, is the decision definite and final. Then and only then, does the issue of an international claim arise. See Tiburcio *supra* n 26 40.

As draft article 14(2) clearly states, the rule is limited to legal remedies. The European Commission on Human Rights said in *Neilson v Denmark*<sup>597</sup> that the rule requires “that recourse be had to all legal remedies available under the local law.”<sup>598</sup> Be that as it may, while these formulations plainly include all judicial remedies, they leave open the extent to which a claimant must use administrative and executive remedies. The better view, however, is that those remedies of a judicial character, whether discharged by courts or not, are included in this rule, whereas remedies based on discretionary action of public organs are not.<sup>599</sup> Thus, remedies contemplated in the rule of exhaustion of local remedies do not include “remedies as of grace,” such as “executive clemency or a request for pardon,” as Mexico noted in its comments on the ILC draft articles on diplomatic protection.<sup>600</sup>

(b) *Exceptions to the local remedies rule*

Draft Article 15 on Diplomatic Protection has enumerated a number of well established exceptions to the exhaustion of local remedies rule. They are applicable where

- (a) there are no reasonable available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
- (b) there is undue delay in the remedies in the remedial process which is attributable to the State alleged to be responsible;
- (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
- (d) the injured person is manifestly precluded from pursuing local remedies, or
- (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

These exceptions will now be discussed *seratim*.

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<sup>597</sup> Application No 343/57 (1961) 37; 28 ILR 210 230.

<sup>598</sup> At 230. See also *Ambatielos* case *supra* n 111 where the court referred to the “whole system of legal protection.” At 336.

<sup>599</sup> Crawford *supra* n 10 44.

<sup>600</sup> See Dugard Second Report to the ILC on Diplomatic Protection ILC 53rd Session 2001; A/CN 4/514.

(i) *Where local remedies are not available or clearly futile*

The requirement to exhaust local remedies does not apply where there are no local remedies to exhaust or where they are futile to pursue.<sup>601</sup> In the *Norwegian Loans Case*,<sup>602</sup> for example, France brought a claim on behalf of its nationals who were holders of Norwegian bonds. Norway objected to the action, *inter alia*, on the ground that France had not exhausted the local remedies available in Norway.

In a separate opinion, Lautpacht J warned that, the requirement of exhaustion of local remedies is not a purely technical or rigid rule, but a rule which international tribunals have applied with considerable elasticity.<sup>603</sup> They have refused to act upon it in cases where there are in fact no effective remedies available owing to the law of the state concerned, or the conditions prevailing in it.<sup>604</sup> Where the plaintiff state has suffered direct injury, the requirement to exhaust local remedies does not apply.<sup>605</sup> In cases of mixed claims,<sup>606</sup> however, exhaustion of local remedies is required, and the standard of proof is that of preponderance of evidence.<sup>607</sup>

If any local remedy is to be efficient, it must not be a sham but real.<sup>608</sup> A remedy which is practically or legally unavailable to the injured alien is not a real remedy within this context.<sup>609</sup> Draft article 15(b) expresses the requirement as follows:

[Where] there are no reasonable local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.

A better provision, however, is the provision of the *Restatement (Second)* which stipulates that:<sup>610</sup>

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<sup>601</sup> Where an appeal eg would not have affected the basic outcome of the case. See the *Finnish Ships Arbitration Case 2* RIAA, 1479 (1934) 7 AD 231. See also *Interhandel Case supra* n 110 6 where the court declared that “the rule that local remedies must be exhausted is a well established principle of international law.”

<sup>602</sup> (*France v Norway*) ICJ Rep 1957 9.

<sup>603</sup> At 39.

<sup>604</sup> See the *Panevezys Saldutiskis Railway case supra* n 81 26-17.

<sup>605</sup> See the *Iran Hostages Case supra* n 242 3 where the ICJ found that the claim was predominantly direct, and therefore there was no need to exhaust local remedies.

<sup>606</sup> That is where the claim involves both the direct interests of the state and that of its national. See for instance the *Interhandel Case supra* n 110.

<sup>607</sup> Dugard *supra* n 1 293.

<sup>608</sup> Crawford *supra* n 10 44.

<sup>609</sup> *Ibid.*

<sup>610</sup> See the Restatement of the Foreign Relations Law of the United States(Third) *supra* n 58.

[e]xhaustion of a remedy does not require the taking of every step that might conceivably result in a favourable determination, but the alien must take all steps that offer a reasonable possibility, even if not a likelihood of success.

As provided by Article 15(b), exhaustion of local remedies will not be required when “there is undue delay in the remedial process which is attributable to the state alleged to be responsible” for the injury. To determine whether a delay has been of such a length as to merit an exception to the rule, it is necessary to consider all the surrounding circumstances of the case.<sup>611</sup>

Another exception to the exhaustion of local remedies rule is where

“the injured person is manifestly precluded from pursuing local remedies.”<sup>612</sup>

The type of preclusion envisaged by draft article 15(d) may be either physical, mental, or psychological preclusion. It may include false imprisonment, refusal of legal representation, intimidation of lawyers and judges, *et cetera*.<sup>613</sup>

(ii) *Connection between the injured party and respondent State*

The exhaustion of local remedies rule will apply only where the claimant is subjected to or properly rooted in the jurisdiction where the injury occurred.<sup>614</sup> In other words, there must be a link between the injured individual and the state whose actions are impugned.<sup>615</sup> If there is no relevant connection between the injured person and the state alleged to be responsible for the injury, then, local remedies need not be exhausted.

However, the state alleged to be responsible for the injury to the alien may waive the requirement to exhaust local remedies.<sup>616</sup> That state may also be estopped from

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<sup>611</sup> See *Interhandel* case *supra* n 110. In that case, although litigation had gone on for ten years, this did not justify an exception to the rule.

<sup>612</sup> Art 15(d).

<sup>613</sup> See Crawford *supra* n 10 46.

<sup>614</sup> The Draft Arts on Diplomatic Protection art 15(c).

<sup>615</sup> *Ibid.* See *Bankovic v Belgium (Preliminary Objections)* (2001) 123 ILR 94; 116-7 par 83.

<sup>616</sup> The Draft Arts on Diplomatic Protection art 15(e)

raising the issue of failure to exhaust local remedies as a defence to any action for diplomatic protection, if it is not raised timeously.<sup>617</sup>

(iii) *Waiver*

Waiver may be express or implied.<sup>618</sup> The most obvious examples are cases of waiver between the forum state and the state of nationality. It is normal to waive local remedies in claims settlement agreements which aim at a swift and comprehensive settlement of a class of claims by a single commission or tribunal.<sup>619</sup>

In relation to the exhaustion of local remedies and waiver, a state and an alien may enter into an agreement stipulating how contractual disputes are to be resolved.<sup>620</sup> Although the effect of such agreements may pose a complex problem of capacity to contract, the better view is that both the host state and the private party enjoy contractual autonomy, and their stipulation as to the method of dispute settlement must be respected.<sup>621</sup>

Where there is a written agreement requesting for an international arbitration, that agreement is deemed to operate as a waiver of other remedies.<sup>622</sup> Finally, since the basic tenet of international law is that the provisions of municipal law can not justify the violation of international law and *vice versa*, then a waiver under a private law/contract cannot operate as a bar to oust the right of the state of nationality from taking advantage of such stipulation by invoking it.<sup>623</sup>

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<sup>617</sup> *Ibid.*

<sup>618</sup> The presumption against implied waiver is strong but not irrebutable. See *Steiner and Gross v Polish State* (1927-8) 4 ILR 472.

<sup>619</sup> The Claims Settlement Declaration attached to the Algiers Accord of 1981- 01 -19 eg submitted all pending disputes between Iranian or US nationals and these two States to the Iran-US Claims Tribunal; Exhaustion of local remedies were not merely waived, but barred in some of the claims. See *American International Group Inc v Islamic Republic of Iran* (1983) 4 Iran-US CTR 96. See also Crawford *supra* n 10 47.

<sup>620</sup> Eg by local courts, by international arbitration etc. See Crawford *supra* n 10 48.

<sup>621</sup> See e.g *CAA and Vivendi v Argentina* (Decision on Annulment) (2002) 07 03 and *SGS v Philippines* (objection to Jurisdiction) 2004- 01- 29.

<sup>622</sup> See Dugard Third Report on Diplomatic Protection ILC 54<sup>th</sup> Session 2002 A/CN/523 & Addendum par 59.

<sup>623</sup> Crawford *supra* n 10 48.

Since diplomatic protection is an international remedy, a waiver cannot, operate *in future*.<sup>624</sup> It is also not clear whether it can be contractually waived by the host state in favour of a private party.<sup>625</sup> If the principles enunciated in the *Mavrommantis* case<sup>626</sup> are still good law, then the answer should be in the negative since the private party concerned, is merely a beneficiary and not the holder of the right at stake.<sup>627</sup>

(iv) *Estoppel*

Notwithstanding any express or implied waiver of the requirement to exhaust local remedies, the defendant state may be estopped from raising an objection to the effect that the claimant state has not exhausted the local remedies available in its territory.<sup>628</sup> In *ELSI's* case,<sup>629</sup> for instance, it was stated that:

It cannot be excluded that an estoppel could in certain circumstances arise from silence when something ought to have been said

The importance attached to the time frame within which an objection based on the exhaustion of local remedy rule should be raised has been stressed in judicial decisions.<sup>630</sup> Hence an objection made out of time, is likely to be rejected on grounds of estoppel. The European Commission on Human Rights (ECHR), addressing an objection on exhaustion of local remedy made out of time, said *inter alia*, that

The Court will take cognizance of preliminary objections of this kind in so far as the respondent State may have first raised them before the Commission, in principle at the stage of the initial examination of admissibility, to the extent that their character and the circumstances permitted; if this condition is not fulfilled, the Government is estopped from raising the objection before the Court.<sup>631</sup>

Again in *Castillo Petruzzi v Peru*,<sup>632</sup> the Inter-American Court of Human Rights put it thus.<sup>633</sup>

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<sup>624</sup> *Ibid.*

<sup>625</sup> *Ibid.*

<sup>626</sup> *Supra* n 36.

<sup>627</sup> Crawford *supra* n 10 48.

<sup>628</sup> *Ibid.*

<sup>629</sup> *Supra* n 546 .

<sup>630</sup> See *Catillo Petruzzi v Peru* Preliminary objection (1988) 09 4 Inter Am Ct HR Ser C No 41.

<sup>631</sup> At 340.

<sup>632</sup> *Supra* n 626.



the State did not allege the failure to exhaust domestic remedies before the Commission. By not doing so, it waived its means of defence that the Convention established in its favour and made a tacit admission of the non-existence of such remedies or their timely exhaustion.

It can therefore be safely said that if the exhaustion of local remedy rule is waived by the beneficiary, then it will not apply irrespective of the importance of the rule in diplomatic protection actions. In this connection, as already indicated, failure to raise an objection timeously by the respondent state can constitute a waiver.<sup>634</sup>

(v) *Distinction between direct injury and diplomatic protection*

Where there is a direct injury to the plaintiff state, it is not necessary to exhaust local remedies.<sup>635</sup> This rule enabled Mexico to argue in the *Avena* case,<sup>636</sup> that in breaching article 36(1) of the VCCR, the US had:<sup>637</sup>

violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals.

In response, the court observed by pointing out first and foremost that the individual rights of Mexican nationals under the Convention

are rights which to be asserted, at any rate, in the first place, within the domestic legal system of the United States, and that the exhaustion rule applied.

It was further argued by Mexico that “it had suffered directly, and through its nationals, as a result of the violation.” Accepting this position, the court described the relation between state and individual claims as closely connected:<sup>638</sup>

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<sup>633</sup> Par 56.

<sup>634</sup> See *ELSI's case supra* n 548. See also *Castillo's case supra* n 628.

<sup>635</sup> See *Crawford supra* n 10 50.

<sup>636</sup> *Case Concerning Avena and other Mexican Nationals (Mexico v US) supra* n 398.

<sup>637</sup> Par 30.

<sup>638</sup> At 35-6 (par 40). It must be noted that the *Avena* case was a mixed claim. The problem of categorization presented by mixed claims also arose in the *Hostages case (Case Concerning US diplomatic and Consular staff in Iran supra* n 242 although it was more obvious that the claims, affecting diplomatic and consular personnel as such, were predominantly for direct injury to the sending state. However in *ELSI supra* n 548 & *Interhandel supra* n 110 cases the ICJ held that the State claims could not be separated from claims of the individuals injured. This made the rule of exhaustion of local remedies applicable.

[V]iolations of the rights of the individual under [the Convention] may entail a violation of the rights of the sending state, and...violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under [the Convention]...The duty to exhaust local remedies does not apply to such a request.

An interesting question, however, is whether there is any easy formula to assist in distinguishing between mixed claims *per se* and claims that affect the State directly in terms of exhaustion of local remedies. This distinction is necessary since the boundaries between the two concepts may sometimes be very difficult to draw.

Draft article 14(3) on Diplomatic Protection articulates the test of preponderance as follows:

Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought predominantly on the basis of an injury to a national or other person referred to in draft article 8.

By implication therefore, a claim brought predominantly on the basis of a direct injury to the state is not subject to the requirement of exhaustion of local remedies.<sup>639</sup>

## 11 Existence of an international wrong

Apart from the exhaustion of local remedy rule, another condition for the exercise of diplomatic protection is the existence of an international wrong. Hence, it must be proved that the harm complained of is an international wrong, committed by the state itself or its agents by action or omission, and that the injury occurred within the jurisdiction of the state.<sup>640</sup> Thus, the injury must have been caused by the state itself – either by the executive, legislative or the judicial arm of government but not by a

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<sup>639</sup> See the *Iran Hostages case supra* n 242.

private individual.<sup>641</sup> This condition involves the existence of an injury or wrong as defined by international law.<sup>642</sup> The term “international wrong” in this context refers to the breach of some duty which rests on a State in terms of international law and which is not a breach of a purely contractual obligation. The term “international delinquency” is often used to describe such wrongs.<sup>643</sup>

A state is only allowed to intervene if the wrongful act is contrary to international law. If the act or omission complained of is not contrary to international law, then the other state has no basis to interfere diplomatically, otherwise it will be regarded as an invalid interference in the domestic affairs of another state.<sup>644</sup> Despite the difficulty in establishing this rule however, it has been adopted by codification drafts,<sup>645</sup> court decisions,<sup>646</sup> and writers.<sup>647</sup>

The concept of wrong within this context covers situations in both public and private law.<sup>648</sup> Thus in the *Mavrommatis* case,<sup>649</sup> the PCIJ stated that the question whether the dispute originated in an injury to a private interest or not was irrelevant.<sup>650</sup> The law is that even an *ultra vires* act of a state, must be imputable to the state concerned.<sup>651</sup>

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<sup>640</sup> Tiburcio *supra* n 26 37 & 42; Dugard *supra* n 1 282; Shaw *supra* n 175 696/7.

<sup>641</sup> Tiburcio *Idem* 41.

<sup>642</sup> This principle was reaffirmed in the *International Fisheries Co. Case (US v Mexico) 1931 4 UNRIAA, 71*. Possible defences include force majeure, consent, countermeasures in respect of an internationally wrongful act, fortuitous event, distress, state of necessity, and self defence. See the ILC draft on State Responsibility.

<sup>643</sup> Shearer *supra* n 117 275.

<sup>644</sup> Tiburcio *supra* n 26 44.

<sup>645</sup> See the ILC Draft Art on Diplomatic Protection 2006 art 14.

<sup>646</sup> See the case of *South Pacific Properties (Middle East) v Arab Republic of Egypt (1993) 32 ILM 933*.

<sup>647</sup> Eg Wallace *supra* n 16 188; Tiburcio *supra* n 26 42; Dixon & McCorquodale, *Cases and Materials on International Law*, (2000) 429.

<sup>648</sup> See Tiburcio *supra* n 26 42.

<sup>649</sup> *Supra* n 79.

<sup>650</sup> At 12.

<sup>651</sup> See the case of *South Pacific Properties (Middle East) v Arab Republic of Egypt, supra* n 644 where the tribunal said *inter alia*:- ‘the principle of international law which the tribunal is bound to apply is that which establishes the international responsibility of states. When unauthorized or *ultra vires* acts of officials have been performed by state agents under cover of their official character and if such an unauthorized or *ultra vires* acts could not be ascribed to the State, all State Responsibility would be rendered illusory.’ See also *Youman’s claim (1926) 4 RIAA 110*.

## 12 Continuous nationality

A further condition for the exercise of diplomatic protection is the rule of continuous nationality of the claimant. Traditionally, the rule's first requirement was that the individual must have the nationality of the protecting State at the time of the internationally wrongful act. The second requirement was continuity of that nationality either until the claim was presented by the protecting State, or settled on the international level.

Although some treaties for the protection of aliens make exceptions,<sup>652</sup> this rule has recurred in innumerable treaties,<sup>653</sup> and has come to be regarded as a rule of customary international law.<sup>654</sup> Hence, article 5(1) of the ILC Draft Articles on Diplomatic Protection provides that:

A State is entitled to exercise diplomatic protection in respect of any person who was a national of that State continuously from the date of injury, to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

This rule has been subjected to considerable criticism.<sup>655</sup> It has been said that, the rule of continuous nationality can leave an individual's claim unprotected if the claim has passed onto a holder of a different nationality between the time of the injury and the time of presentation of the claim.<sup>656</sup> This can occur *inter alia* through succession on death, an assignment of the claim to a non-national, or even as a consequence of change in the nationality of the injured individual.<sup>657</sup>

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<sup>652</sup> Such as treaties of friendship, commerce and navigation.

<sup>653</sup> This is the case for instance, in nearly all of the 200 lump sum agreements concluded after World War 11. See eg the September 10, 1952 Agreement between the Federal Republic of Germany and Israel (UNTS Vol 162 206).

<sup>654</sup> Geck *supra* n 10 1055 See e.g the decision of the US International Claims Commission 1951-1954 in the *Kren* claim ILR vol 20 233 234.

<sup>655</sup> See the comment of Judge Fitzmaurice in the *Barcelona Traction* case *supra* n 26 101-102; Wyler *La Regle Dite de la Continuïte de la Nationalite dans le Contentieux International* (1990) and the *Official Records of the G A supra* n 1 36.

<sup>656</sup> *Ibid.*

<sup>657</sup> See however the ILC Draft Articles on Diplomatic Protection 2006 art 5 (3) which provides that "Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality".

Suggestions that this condition be abandoned have been resisted for fear of abuse that may lead to “nationality shopping” for the purposes of diplomatic protection.<sup>658</sup> Hence, draft article 5 retains the continuous nationality rule, but allows exceptions to accommodate cases in which unfairness might otherwise result.<sup>659</sup> State practice and judicial opinion, however, seem to favour the date of presentation of the claim over the date of settlement of the claim.<sup>660</sup> Thus article 5(2) of the ILC Draft Articles on Diplomatic Protection provides that:

Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.<sup>661</sup>

Paragraph 2, therefore, makes an exception to the general rule in paragraph 1 provided three conditions are met. These are, first, the injured person has lost his or her former nationality; secondly, the new nationality was acquired for reasons unrelated to the bringing of the claim; and third, the new nationality was acquired in a manner not inconsistent with international law.

Paragraph 3 provides a further safeguard: A claim cannot be brought by the new state of nationality against a former state of nationality if the injury was incurred when the person was a national of the former state of nationality. Finally, in accordance with paragraph 4, a diplomatic protection claim lapses if the injured

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<sup>658</sup> *Official Report of the General Assembly supra* n 1 36.

<sup>659</sup> *Ibid.*

<sup>660</sup> See Geck *supra* n 10 1055. This is in accordance with the 1965 Warsaw Resolution of the Institut de Droit International. Art 1(b) of that Resolution admits only one general exception to the continuous nationality rule; namely that for diplomatic protection given by states which have recently become independent to those of its nationals who before independence, had the nationality of the former colonial power. Geck *ibid.*

<sup>661</sup> As noted by Dugard in his first report *supra* n 9, the traditional position had the potential to cause injustice where an individual had a *bona fide* change of nationality subsequent to the injury but unrelated to the bringing of the claim. Besides, the rule was difficult to reconcile with the Vattelian idea that an injury to the national is an injury to the State itself – if so, the claim would vest in the State of nationality at the time of the injury and could not be affected by the subsequent conduct or change of status of the individual concerned. See Crawford *supra* n 10 30.

person acquires the nationality of the respondent state after the date of the presentation of the claim.<sup>662</sup>

### 13 The nature of diplomatic protection

What is the nature of diplomatic protection and in what circumstances will it be exercised? State practice has shown that some states abuse rules relating to diplomatic protection with the adverse consequence that, diplomatic protection is often exercised in unsuitable situations.<sup>663</sup> It has, for instance, been exercised as a pretext for political gains or vendetta.<sup>664</sup> This has attracted criticism calling for its complete abolition.<sup>665</sup> While it is correct that on several occasions, states abuse the rules relating to diplomatic protection by wrongfully invading territories belonging to other nations or otherwise under the pretext of exercising diplomatic protection, the invasion does not invalidate the doctrine.<sup>666</sup>

The ideal situation where diplomatic protection should be exercised is when it is absolutely necessary. It should be exercised only as a last resort and as a legal duty imposed on a state to salvage the fortunes of its nationals abroad. It should be embarked upon only where local remedies are not available or where they are available, are not effective or are contrary to international law.<sup>667</sup> The idea is to protect. Hence the name - diplomatic protection. Diplomatic protection should therefore not be regarded as a possible remedy which is resorted to every time an individual is harmed in a foreign country.<sup>668</sup> If the event does not “shock the conscience of mankind”<sup>669</sup> and is settled fairly and squarely, then the other state

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<sup>662</sup> See *Loewen Group Inc. v USA* 7 ICSID Rep 442 485 par 225.

<sup>663</sup> Tiburcio *supra* n. 26 45.

<sup>664</sup> *Ibid.*

<sup>665</sup> *Ibid.* See also Garcia-Amador, Sohn & Baxter, *supra* n. 26 3. The Argentine Jurist Carlos Calvo was one of the strongest critics of this doctrine. This gave birth to the “Calvo Doctrine.” See Tiburcio *supra* n 26 45-46. Reference should also be made to the Declaration adopted by the Inter-American Conference on Problems of War and Peace (Mexico City 1945) decrying the misuse of diplomatic protection. See Tiburcio *supra* n 26 43.

<sup>666</sup> Tiburcio *idem* 44.

<sup>667</sup> According to the principles laid down in the *Mavrommatis Palestine Concession* case *supra* n 36 the State intervenes in order to uphold respect for international law.

<sup>668</sup> Tiburcio *supra* n 26 44.

<sup>669</sup> *Robert's Claim supra* n 55.

should not interfere. Otherwise the interference may be seen as invalid intrusion in the domestic affairs of another sovereign state.<sup>670</sup>

### 13.1 *Is diplomatic protection a right or an obligation?*

A right is a claim, an entitlement, a demand or a protected interest.<sup>671</sup> When a person claims that he or she has a right to something, it means that he or she is entitled to it.<sup>672</sup> Several judicial *dicta* from the PCIJ and the ICJ create the impression that diplomatic protection is a right.<sup>673</sup> Many writers also refer to diplomatic protection as a right. In *Mavrommatis Palestine Concession Case*,<sup>674</sup> for example, the PCIJ pointed out that:

By taking up the case of one of its subjects, and by resorting to diplomatic action or international judicial proceedings, on his behalf, *a state is in reality asserting its own right, its right to ensure in the person of its subject, respect for the rules of international law.*<sup>675</sup>

In the *Barcelona Traction case*,<sup>676</sup> the ICJ, *inter alia*, said:

Within the limits prescribed by international law, a state may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, *for it is its own right that the state is asserting* [emphasis supplied].<sup>677</sup>

In the *Pannevezys-Saldutiskiis Railways Case*,<sup>678</sup> the same court decided in the following terms:

This right is necessarily limited to intervention [by a state] on behalf of its own nationals because in the absence of a special agreement, it is the bond of

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<sup>670</sup> See Tiburcio *supra* n 26 44.

<sup>671</sup> See Dias *Jurisprudence* (1991) 305.

<sup>672</sup> *Ibid.*

<sup>673</sup> See cases cited *infra*. *Mavrommatis Concessions case supra* n 36 6; *Pannevezys-Saldutiskiis Railway case supra* n 81 18; *Barcelona Traction case supra* n 26 45.

<sup>674</sup> *Supra* n 36.

<sup>675</sup> At 12. See also *Pannevezys-Saldutiskiis Railways case (Greece v UK) supra* n 81 308.

<sup>676</sup> *Supra* n 26.

<sup>677</sup> At 44.

<sup>678</sup> *Supra* n 81.

nationality between the State and the individual which alone confers upon *the state the right* of diplomatic protection<sup>679</sup>

Garcia-Amador states *inter alia* that:

Traditional international law had recognised a *State's right* to bring a claim against another State in respect of the injury caused to the person or property of its nationals. The right of 'diplomatic protection,' which is the name usually given to this prerogative, therefore, proceeds from a State's right to protect its nationals abroad.<sup>680</sup>

If diplomatic protection is a right, why do contemporary thinking and draft codifications on the subject not reflect this idea? Neither the current nor the past Draft Articles on Diplomatic Protection refer to it as a right. Article 1 of the ILC Draft Articles on diplomatic protection 2006 simply defines diplomatic protection as

the invocation by a State through diplomatic action or other means of peaceful settlement of the responsibility of another State for an injury caused by an internationally wrongful act

Draft Article 1 does not refer to it as a right.<sup>681</sup> If it is accepted that diplomatic protection is a right according to those judicial *dicta* and writers, it may be asked in whom is this right vested? Does the right belong to the State that espouses the claim of the individual, or in the national who is injured?

It appears to be of necessity to distinguish the right of the state from that of the individual.<sup>682</sup> On this point, two schools of thought have emerged among scholars

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<sup>679</sup> At 16.

<sup>680</sup> See Garcia-Amador *supra* n 26.

<sup>681</sup> The Draft Articles on Diplomatic Protection 2006 art 1 makes no attempt to provide a complete and comprehensive definition of diplomatic protection. Instead it merely describes the salient features of diplomatic protection. See the commentary to art1 in the *Official Records of the G A supra* n 1 24. See also the Draft Articles on the International Responsibility of States for Injuries to Aliens art 1.

<sup>682</sup> Dugard: First Report to the ILC on Diplomatic Protection ILC 52<sup>nd</sup> Session 2000 A/CN 4/506 and Addendum notes that the identity of the holder of the right of diplomatic protection has important consequences. According to him, "If the holder of the right is the state, it may enforce its rights irrespective of whether the individual himself has a remedy before an international forum. If on the other hand, the individual is the holder of the right, it becomes possible to argue that the State's right is purely residual and procedural, that is, a right that may only be exercised in the absence of a remedy pertaining to the individual."



and legal commentators.<sup>683</sup> The first school of thought maintains that since an individual has no standing in international law, and has no access to international courts or tribunals, the state, when exercising diplomatic protection, is merely representing the individual at the international level.<sup>684</sup> The second school is of the view that by protecting its nationals abroad, the State is merely defending its own right.<sup>685</sup> It would appear that the second view is more popular and is more widely accepted. As a result, the institution of diplomatic protection has been almost unanimously understood to be a right of the State of the injured national and not that of the national who has been injured.<sup>686</sup>

Thus the individual has no right to diplomatic protection in international law. This gives rise to an interesting question; namely, if diplomatic protection is a right, where is the correlative duty? The general rule of law and jurisprudence is that where there is a right there must be a corresponding duty. In whom is the corresponding duty vested?

### **13.2 Is there a duty or obligation to protect?**

The correlative of a right is a duty. In terms of diplomatic protection, however, the general principle of customary international law is that a state has the right but not the duty to grant diplomatic protection to its nationals.<sup>687</sup> International law however leaves the decision whether to exercise diplomatic protection or not to the domestic

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<sup>683</sup> See Geck *supra* n 10 1056-7.

<sup>684</sup> This understanding is espoused by Lauterpacht and apparently by Garcia Amador. See Tiburcio *supra* n 26 63.

<sup>685</sup> Anziliotti *Corso Di Diritto Internazinale* (1955) 423 expresses the same view point in a very objective manner when he said "International responsibility does not derive from the fact that an alien has suffered injury, ... The alien as such has no rights against the State, save in so far as the law confers them upon him. The reparation sought by the State in cases of this kind (denial of justice) is not therefore, reparation for the wrong suffered by individuals, but reparation of the wrong suffered by the State itself." It would appear that Brierly *The Law of Nations: An Introduction to The Law of Peace* (1955) 218 changed his view from the traditional concept as regards this subject when he argued that "A State has in general an interest in seeing that its nationals are fairly treated in a foreign state, but it is an exaggeration to say that whenever a national is injured in a foreign State his State as a whole is necessarily injured too."

<sup>686</sup> See the cases cited above. Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself. This legal fiction reemphasizes the fact that an individual is not a subject of International Law. See the *Official Report of the G A* *supra* n 1 25.

<sup>687</sup> *Barcelona Traction Case* *supra* n 26. See also Geck *supra* n 10 1051.

law of each state.<sup>688</sup> There are thus considerable differences in state practice.<sup>689</sup> In Nigeria for example, although there is no constitutional provision for diplomatic protection under the 1999 Constitution of the Federal Republic, nevertheless, when situations demanding diplomatic protection arise, the State responds to them. Similarly in South Africa, in the absence of any constitutional provision for diplomatic protection, some judicial pronouncements have held that it is not a constitutional duty. Nevertheless, some dissenting opinions have also been expressed to the contrary.<sup>690</sup>

In *Kaunda v President of the Republic*,<sup>691</sup> for instance, an order was sought to compel the South African government to intervene diplomatically on behalf of a group of South African nationals who were arrested in Zimbabwe *en route* to Equatorial Guinea allegedly to overthrow the government of that state, in a *coup d'état*. Chaskalson CJ, reading the majority judgment, held that the government could not be compelled because there was no constitutional duty on the part of the state to exercise diplomatic protection on behalf of the applicants.<sup>692</sup> In a dissenting judgment however, O'Regan J. proposed that the government be ordered "to take appropriate steps" to provide diplomatic protection to those affected,<sup>693</sup> because the government was bound to do so.<sup>694</sup>

Vattel was of the view that there is a general duty on the part of the state to exercise diplomatic protection on behalf of its nationals. According to him,

Whoever ill treats a citizen indirectly injures the state which must protect the citizen. The sovereign of the injured citizen must avenge the dead and if possible, force the aggressor to give full satisfaction or punish them, since otherwise the citizen will not obtain the chief end of civil society which is protection.<sup>695</sup>

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<sup>688</sup> Geck *ibid.*

<sup>689</sup> *Ibid.*

<sup>690</sup> See the case of *Kaunda v The President of Republic of South Africa* 2005 (4) SA 235 (CC), ILM vol 44 (2005) 173. and *Van Zyl v Government of the RSA supra* n 556 See also chapter 6 *infra* for detailed discussion of these and other cases.

<sup>691</sup> *Supra* n 688.

<sup>692</sup> Par 50.

<sup>693</sup> *Idem* 271.

<sup>694</sup> *Idem* 238.

<sup>695</sup> Vattel *supra* n 82 136.

This duty-oriented concept of diplomatic protection is re-enforced by the social contract theory propounded by such political philosophers as Hobbes, Locke and Rousseau.<sup>696</sup>

Garcia-Amador is convinced that diplomatic protection should be a duty,<sup>697</sup> but regrets that “history and international practice show that it has never been treated as such.” According to him,

Except for a very few writers, the bulk of legal opinion has never considered diplomatic protection as a duty of the State of nationality. Borchard himself describes it rather as moral duty ‘which is unenforceable by legal methods’...neither national nor international practice has recognized it as a duty’.<sup>698</sup>

Shaw, like Vattel, maintains that

“A state is under a duty to protect its nationals, and it may take up their claims against other states”.<sup>699</sup>

However, according to him,

“There is under international law no obligation for states to provide diplomatic protection for their nationals abroad”.<sup>700</sup>

This contradiction in terms compels us to distinguish between duty and obligation. The dictionary defines duty as “what one is bound to do” while obligation is defined as “the binding power of a promise.”<sup>701</sup> The two words are often used interchangeably. However, duty within this context can only mean legal obligation, while “no obligation” can only mean that the State has no legal duty, or has a discretion or liberty to exercise or not to exercise diplomatic protection.

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<sup>696</sup> See p 4 *supra* n 19.

<sup>697</sup> Garcia-Amador *supra* n 26 4.

<sup>698</sup> *Ibid.*

<sup>699</sup> Shaw *supra* n 175 722.

<sup>700</sup> *Ibid.* See also *HMHK v Netherlands* 94 ILR 342, & *Commercial F SA v Council of Ministers* 88 ILR 691.

<sup>701</sup> See the *Large Print English Dictionary supra* n 7 104 & 236 respectively.

## 14 Discretionary factors influencing diplomatic protection

In the *Barcelona Traction* case,<sup>702</sup> the ICJ held that diplomatic protection is a mere discretion. According to the court,

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It remains in this respect a discretionary power<sup>703</sup>

The court stated that such discretionary power may be determined by considerations of a political or other nature unrelated to the particular case.<sup>704</sup>

The question of discretion came up in that case because Canada, the country of nationality of Barcelona Traction Company had exercised diplomatic protection on behalf of the company to begin with, but had withdrawn from the case. According to the Court:<sup>705</sup>

At a certain point the Canadian government ceased to act on behalf of Barcelona Traction for reasons not fully revealed

The Court noted further that Canada's refusal to continue the exercise of diplomatic protection was a deliberate choice.<sup>706</sup>

Canada's withdrawal notwithstanding, Belgium lacked the capacity to bring the action since the general rule on the subject did not entitle the Belgian government to

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<sup>702</sup> *Supra* n 26.

<sup>703</sup> At 44. Discretion is the freedom, liberty or privilege to act or not to act in a given situation. See Dias *supra* n 669 305. In contrast to the ICJ *dictum* in *Barcelona Traction* case, Dugard: First Report on Diplomatic Protection *supra* n 9 par 60, proposed a draft art 3 that reads as follows "The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right." Draft art 4 then qualified this by imposing a limited duty to the exercise of diplomatic protection where the injury resulted from a grave breach of a norm of *jus cogens*. See First Report (par 74). Draft art 4 was, however, rejected as going beyond the permissible limits of progressive development. For the debates see *Official Records of the G A Supplement No 10 (A/55/10)* pars 447-56. Consequently, references to a duty or discretion to exercise diplomatic protection were omitted from the Draft Articles. See Crawford *supra* n 10 26.

<sup>704</sup> *Ibid* 44.

<sup>705</sup> Par 77.

<sup>706</sup> *Ibid*.

put forward a claim.<sup>707</sup> The ICJ then pronounced the well-known and oft-quoted rule governing the extent to which diplomatic protection may be exercised:<sup>708</sup>

Within the limits prescribed by international law, a state may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, *for it is its own right* that the state is asserting.

As was said by the Court, a State's discretionary power may be determined by "considerations of a political or other nature unrelated to the particular case."<sup>709</sup> Other factors that may influence the exercise of diplomatic protection include economic, social, ideological, or even military factors.<sup>710</sup> These may have either positive or negative effects.

The economic system, economic activities and the attitude of the State towards individual rights in general may influence its basic attitudes towards diplomatic protection.<sup>711</sup> A state which exports few goods, or services and little capital, will probably be more reserved towards the institution of diplomatic protection than a state which exports on a large scale because this may affect its trade relations.<sup>712</sup> A state which reserves economic activities abroad mainly or even exclusively for itself<sup>713</sup> may hardly exercise diplomatic protection for obvious reasons, in contrast to a state which leaves these activities to private individuals.<sup>714</sup>

Furthermore, it may be difficult to establish whether the defendant State has violated an international obligation against the plaintiff State.<sup>715</sup> The way to a peaceful and binding clarification may be long and stony. Even if a rule of international law has

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<sup>707</sup> Par 92.

<sup>708</sup> Par 78.

<sup>709</sup> *Ibid* 44.

<sup>710</sup> See Geck *supra* n 10 1047.

<sup>711</sup> A state which restricts the individual rights of its nationals on the domestic front, including the right to travel abroad freely, may find it undesirable to have such rights granted to foreigners through international treaties and have these rights secured through diplomatic protection. *Geck ibid* 1048.

<sup>712</sup> *Ibid*.

<sup>713</sup> Such as socialist States for instance. See Geck *ibid*.

<sup>714</sup> I.e capitalist States. Diplomatic protection of nationals abroad developed and expanded in scope as a result of the increase in the number of nationals abroad as a consequence of increase in commercial activities. See Geck *supra* n 10 1047.

<sup>715</sup> *Ibid*.

been violated, and all other prerequisites for diplomatic protection have been met,<sup>716</sup> it may still be very hard or even impossible to obtain reparation because the defendant state may refuse any settlement, and the protecting state may be too weak militarily, politically, or economically to use force in order to obtain reparation under the circumstances.<sup>717</sup>

Even if the prospect of success in the exercise of diplomatic protection appears likely in the individual case, the price required may be too high.<sup>718</sup> For instance, the defendant state may pay the demanded damages, but walk out of an alliance, prohibit business transactions, or refuse a loan, all detrimental to the vital interests of the protecting state. The defendant state may muster a majority in an international Organization against the protecting state in a decision of paramount importance to the latter.<sup>719</sup>

Discretionary factors influencing the exercise of diplomatic protection may have a positive or negative impact. On the positive side, the fear of adverse publicity at home may compel a state to exercise diplomatic protection at all costs. In the Iran Hostage case,<sup>720</sup> for instance, the detention of 52 US diplomatic and consular staff in Tehran in 1979 was a great embarrassment to the government and people of the US. The US government had to take action. The US did not only take the matter to the ICJ, but also embarked upon a failed attempt to rescue the diplomats.<sup>721</sup>

Another good example was the Israeli raid on Entebbe Airport in Uganda in 1976.<sup>722</sup> In that incident, the Israeli government undertook a rescue mission to save the lives

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<sup>716</sup> Such as nationality, the exhaustion of local remedies, or the continuity of nationality conditions for instance.

<sup>717</sup> Geck *supra* n 10 1047.

<sup>718</sup> *Ibid.*

<sup>719</sup> *Ibid.* Other factors in this connection are that the defendant state may accept diplomatic protection in principle, but believes that some prerequisite is missing in the specific case at hand. Worse still, the defendant state may view the exercise of diplomatic protection as an expression of political antagonism or of wholesale distrust of its legal system. Besides, a number of states view diplomatic protection as a possible pretext by stronger states for economic coercion, intervention, and intrusion into their domestic affairs. See Geck *ibid.*

<sup>720</sup> *Supra* n 242.

<sup>721</sup> On April 24<sup>th</sup> 1980, a commando raid to rescue the hostages was aborted. See Ferencz *Enforcing International Law- A way to World Peace* vol 2 (1983) 475. See also par 93 of the 1980 ICJ Judgment *supra* n 242.

<sup>722</sup> "Operation Thunderbolt" See [en.wikipedia.org/wiki/Operation\\_Thunderbolt](http://en.wikipedia.org/wiki/Operation_Thunderbolt) (accessed 2010-03-30).

of 103 Israeli nationals who were hijacked by Palestinian and German militants. The adverse publicity generated by the incident at home compelled the Israeli government to act. Consequently, Israeli commandos stormed Entebbe Airport and released the hostages.<sup>723</sup>

On the negative side, the state exercising diplomatic protection can hardly overlook the possibility of reciprocity or *quid pro quo*. The protecting or claimant state of today may become the defendant state of tomorrow.<sup>724</sup> That notwithstanding, however, if its cause is just, the protecting state need not be intimidated by any fear of retaliation by the responsible State. The conclusion is, therefore, that diplomatic protection is a right which a state has a discretion *sui generis*<sup>725</sup> to exercise because an injury to a national is deemed to be an injury to the state itself.<sup>726</sup> There is, however, no duty on the part of the state to exercise it.<sup>727</sup> Rather, the state reserves the discretion to exercise diplomatic protection on behalf of its nationals.<sup>728</sup>

In the *Barcelona Traction* case,<sup>729</sup> it was said that precisely what action to take, what form of diplomatic protection to extend, lay within the discretion of the claimant state. If it decides to intervene and thereby make the claim its own, it may espouse the claim through informal discussions with the respondent state, make a formal diplomatic protest, or exert various economic and political pressures to encourage a settlement.

It must, however, be borne in mind as Tiburcio has pointed out, that  
the exercise of diplomatic protection may involve resort to all forms of diplomatic intervention, both amicable and non-amicable, for the settlement of

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<sup>723</sup> *Ibid.*

<sup>724</sup> See Geck *supra* n 10 1047.

<sup>725</sup> *Panevezys-Saldutiskiis Railways Case supra* n 81; *Mavrommatis Palestine Concession Case supra* n 36. See also Tiburcio *supra* n 26 58/9; Dugard *supra* n 1 284, *Official Records of the General Assembly supra* n 1 25.

<sup>726</sup> *Mavrommatis Palestine Concession case supra* n 36. See however Dugard *supra* n 1 290 who submits that there is growing support for the proposition that there is some duty on States to afford diplomatic protection to nationals who are subjected to serious human rights violations in foreign states under domestic administrative and constitutional rules rather than International Law.

<sup>727</sup> *Barcelona Traction case supra* n 26.

<sup>728</sup> *Ibid.*

<sup>729</sup> *Supra* n 26.

disputes.<sup>730</sup> These may range from diplomatic negotiation, good offices, resort to an international tribunal or even to threats or actual use of force.<sup>731.</sup>

## 15 Treatment of aliens<sup>732</sup>

Although there is no obligation on the part of any state to admit aliens into its territory, international law demands that once they are admitted, they should be treated fairly in accordance with civilized standard of behaviour.<sup>733</sup> The standard of treatment to be accorded to aliens is however controversial among states.<sup>734</sup> While some states argue that the standard is a national one, requiring states to treat aliens as they treat their own nationals,<sup>735</sup> others maintain that aliens should be treated in accordance with the “international minimum standard.”<sup>736</sup>

The national standard of treatment is the standard of treatment advocated by certain Latin American states for the treatment of foreigners.<sup>737</sup> This standard stipulates that aliens are entitled to the same treatment granted to nationals and nothing more.<sup>738</sup> The international minimum standard of treatment is the basic or barest minimum standard of human treatment that should not be violated in relation to foreigners.<sup>739</sup> To violate this international standard, however, a state’s treatment of foreigners must

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<sup>730</sup> Tiburcio *supra* n 26 43.

<sup>731</sup> *Ibid.* Examples of such threats or use of force include the threatened intervention by the UK in Iran in 1946 & 1951, the Cairo Riots of 1952 when the UK threatened to intervene in Egypt; the Anglo-French intervention in Egypt in 1956; the Belgian intervention in the Congo in 1960; the evacuation of British citizens resident in Zanzibar in 1964, the US intervention in the Dominican Republic in 1965, the Mayaguez incident when Cambodia seized a US ship which was in Cambodian territorial waters on an espionage mission and the US sent armed forces in 1975; the evacuation of U.S citizens from Lebanon in 1976; the Israeli Raid on Entebbe in 1976 when Israelis entered Uganda on a military operation and freed its hostages; the US attempt to free American hostages held in Iran by military force in 1980 and the UK intervention in the Falkland Islands in 1982. Other examples include the U.S intervention in Grenada in 1983; the proclamation of the Turkish Republic of Northern Cyprus in 1983 and the U.S attack on Libya in 1986.

<sup>732</sup> Or the treatment of foreign nationals.

<sup>733</sup> *Barcelona Traction Case supra* n 26 par 33. This position was endorsed by the GA in 1985 in Res 40/144.

<sup>734</sup> See Harris *supra* n 385 564 and Dugard (2005) *supra* n 1 297.

<sup>735</sup> *le* Latin American & developing States.

<sup>736</sup> *le* Western States.

<sup>737</sup> See Harris *supra* n 385 734; Wallace *supra* n 16 199 & Tiburcio *supra* n 26 45.

<sup>738</sup> Tiburcio *ibid*

<sup>739</sup> See UN Res 40/144 of Dec 1985 and the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990 *supra* n 65.



fall so short of established civilised behaviour that “every reasonable and impartial man would readily recognize its insufficiency.”<sup>740</sup>

### **15.1 The national standard of treatment**

The national standard of treatment was a concept brokered by Latin American countries during the last two centuries.<sup>741</sup> This concept is still in vogue today and is maintained by new and developing States.<sup>742</sup> It is based on absolute equality of treatment.<sup>743</sup> This concept would obviously be advantageous to the non-national if applied evenly. The problem however, is that international law does not regulate a state’s treatment of non-nationals in all activities.<sup>744</sup>

Just as the national standard of treatment has its advantages, it also has its disadvantages. Its disadvantages are however obvious. One of the disadvantages of this concept is that a state could subject a non-national to inhuman treatment and justify such treatment on the grounds that its own nationals are similarly treated.<sup>745</sup> The argument is that a foreign national who seeks entry into the territory of another state must take things as he or she finds them in the country of his or her sojourn or residence.<sup>746</sup> It was accordingly argued that it would be sufficient if he or she was treated on the basis of equality with the citizen of that state in respect of his or her personal or property rights.<sup>747</sup>

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<sup>740</sup> *Neer Claim supra* n 34 213.

<sup>741</sup> I.e the 19<sup>th</sup> and early 20<sup>th</sup> centuries. See Wallace *supra* n 16 199. The Latin American States felt that the international minimum standard concept was used as a means of interference in internal affairs of other states. See e.g Roy, ‘Law of Responsibility; Castaneda, “The Undeveloped Nations and the Development of International Law,” 15 *International Organisations* (1961) 38 & Anand *New States and International Law* (1972) 38.

<sup>742</sup> Wallace *Ibid*.

<sup>743</sup> See Tiburcio *supra* n 26 45. The doctrine of absolute equality of treatment received serious criticism from writers like Borchard. See “The minimum standard of the treatment of Aliens” (1939) *Am Society of Int Law - Proceedings* 51 56. He argued that this equality was purely theoretical and did not work in practice, because no state grants absolute equality or is bound to grant it. But the doctrine was strongly supported by Calvo, an Argentinean jurist, who in a work *Le Droit International Theorique Pratique* 350-51 published in 1896, became known for questioning the concept of diplomatic protection.

<sup>744</sup> Wallace *supra* n 16 199. Eg political activities.

<sup>745</sup> *Ibid*.

<sup>746</sup> Sen *supra* n 52 337.

<sup>747</sup> *Ibid*.

This train of thought seemed to have gathered momentum in the years following the establishment of the UN and the emergence of new nations in Africa and Asia.<sup>748</sup> It was felt that in the context of the Charter of the UNO and the UDHR,<sup>749</sup> every state was expected to accord to its own citizens a certain standard of treatment consistent with a humane sense of justice, and that the national standard of treatment would therefore be appropriate even where foreign nationals were concerned.<sup>750</sup>

However, the adoption of a national standard without any guidance from international patterns as earlier pointed out, could possibly lead to absurd situations namely, that, if nationals can be expropriated without indemnity or compensation, then, the same could happen to aliens. Likewise, if nationals could be jailed without proper trials, then the same could also happen to aliens.<sup>751</sup>

## **15.2 The minimum international standard of treatment**

The minimum international standard of treatment emerged in direct opposition to the national standard of treatment theory.<sup>752</sup> Though not easy to define, the gist of the theory<sup>753</sup> was based on the principle that a state was bound to grant a certain minimum standard of treatment to foreigners, irrespective of the manner in which that state treats its own nationals, in line with the international concept of justice. The interpretation of this concept was however, that, the host country was bound to ensure that certain minimum safeguards were put in place for the personal liberty and property rights of aliens. Failure to do so, would amount to negligence of duty towards the foreigners and the receiving state would be answerable to the home state of the aggrieved alien, which could exercise diplomatic protection on his or her

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<sup>748</sup> *Ibid.*

<sup>749</sup> Although the UDHR was produced as a non- legally binding instrument, it is now universally acknowledged as constituting Customary International Law.

<sup>750</sup> *Sen supra* n 52 337. Another view was that as long as certain fundamental human rights were observed, the receiving state would not incur responsibility to the home state of the alien.

<sup>751</sup> See *Tiburcio supra* n 26 45. This theory can go as far as admitting that the State could kill the individual, torture him, proscribe him for any reason that the State believes right whether the individual is a national or not, as long as he is inside the State, and within its jurisdiction. As already said, this doctrine emanated from Latin American countries trying to encourage immigration and investment at the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century, promising aliens equality of treatment with their nationals.

<sup>752</sup> *Tiburcio ibid* 50.

<sup>753</sup> *Ibid.* See also *Wallace supra* n 16 199.

behalf.<sup>754</sup> It would be no excuse to plead that the the foreigner was treated in the same way as its own nationals.<sup>755</sup>

Traditional international law thus recognised a state's right to bring a claim against another State in respect of the injury caused to the person or property rights of its nationals in violation of the minimum international standard of treatment.<sup>756</sup> As the PCIJ stated in the *Mavrommatis Case*<sup>757</sup>

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.<sup>758</sup>

The minimum international standard of treatment carried with it the expectation that the receiving state should take steps to safeguard both the personal and property rights of a foreigner not only against governmental actions but also against mob violence.<sup>759</sup> It was therefore understood that a state would be held vicariously responsible for any harm or injury inflicted on the person or property rights of an alien as a result of the application of state laws, or by ill-treatment at the hands of state organs, or when such harm or injury was suffered at the hands of private individuals in breach of this minimum international standard of treatment. If the receiving state failed to take action, then, the home state of the injured or aggrieved alien was entitled to exercise diplomatic protection and to demand for reparation from the offending state for the wrong or injury caused to its national.<sup>760</sup>

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<sup>754</sup> Sen *supra* n 52 337.

<sup>755</sup> *Idem* 334/5. For example, the rule of "minimum standard" contemplated that the property of an alien could not be nationalized or expropriated without payment of just and appropriate compensation even if a state does that to its own nationals. Again in the matter of personal liberty, it would be expected that a state should not act in a manner which may amount to a "denial of justice" to the alien such as by subjecting him to arbitrary arrest or detention or by denying him access to the court of justice. See for instance *Roberts Claim supra* n 55.

<sup>756</sup> *Garcia Amador supra* n 26 1.

<sup>757</sup> *Supra* n 36.

<sup>758</sup> At 12.

<sup>759</sup> Sen *supra* n 52 335.

<sup>760</sup> *Ibid.* See *Neer claim supra* n 34. See also *Garcia case* (1926) 4 RIAA 199; & *Robert's claim supra* n 55 77. Sen *supra* n 52 335.

### 15.3 Human rights standard of treatment<sup>761</sup>

After the Second World War, the human rights standard for the treatment of aliens emerged.<sup>762</sup> The difference between the human rights standard and the previous standards<sup>763</sup> was that the human rights standard was based on the Charter of the UN, particularly articles 55 and 56, whereas the others were not. Article 55 of the UN Charter provides that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, the United Nations shall promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56 stipulates that:

All members [of the United Nations] pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55.

As Wright has correctly pointed out, the word “pledge” as used in article 56 of the Charter of the UN, indicates the acceptance of an international legal obligation to protect human rights.<sup>764</sup> This view was confirmed by the ICJ in its Advisory Opinion on Namibia in 1971.<sup>765</sup>

Thus all members of the UN are legally bound to observe and respect human rights and fundamental freedoms, some of which are spelt out in the Charter of the UN itself<sup>766</sup> and others in subsequent instruments.<sup>767</sup>

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<sup>761</sup> See p 10 n 59 *supra*.

<sup>762</sup> See Lee *Consular Law and Practice* (1991) 130.

<sup>763</sup> I.e the national standard, and the minimum international standard of treatment of aliens.

<sup>764</sup> See Wright: “The Strengthening of International Law” 98 *Recueil des Courts* [1980] 111 1 182.

<sup>765</sup> When it said *inter alia*:

Under the Charter of the UN, the former Mandatory had *pledged* itself to observe and respect in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. See Lee *supra* n 760 131.

<sup>766</sup> Eg the treatment of “all” people without distinction as to race, sex, language or religion.

## 16 Synthesis of the standards

Both the “international standard of treatment” and the “national standard” of treatment of aliens have been reformulated and integrated into the new legal rule – the human rights standard, which incorporates the essential elements and serves the main purposes of both.<sup>768</sup> The basis of this synthesis is the “universal respect for, and observance of human rights and fundamental freedoms” referred to in the Charter of the UN and in other general, regional and bilateral instruments.<sup>769</sup>

In relation to diplomatic protection actions, however, a defendant state can no longer be heard to plead in mitigation of damages that it observed either the “national” or the “minimum international” standard of treatment with regards to the injured alien in any action brought for diplomatic protection.<sup>770</sup> The ultimate question is whether the human rights standard was observed.

The object of the “internationalization” of these rights and freedoms is to ensure the protection of the legitimate interests of the individual, irrespective of his or her nationality.<sup>771</sup> Whether the person concerned is a national or a foreigner is immaterial, since human beings as such, are under the direct protection of international law.<sup>772</sup>

Garcia-Amador has, however, warned that just because these two traditional principles have been synthesised does not necessarily imply that states must ignore their essential elements and their basic purposes.<sup>773</sup> On the contrary, the principles

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<sup>767</sup> Although the Charter does not spell out all human rights in detail, subsequent instruments, principally the UDHR and the two International Covenants on Civil and Political Rights and that on Economic, Social, and Cultural Rights, have supplied greater legal precision to the general principles. See Steiner *et al supra* 19 138

<sup>768</sup> Garcia-Amador *et al supra* n 26 4.

<sup>769</sup> *Ibid.* On the point of the merger of the two standards, Dugard *supra* n 1 298 states that “in considering the question of whether an alien has been mistreated, international tribunals may accordingly turn to the jurisprudence of the European Court of Human Rights and similar human rights tribunals for guidance. In this way, the international minimum standard for the treatment of aliens and the human rights standards for the treatment of a state’s own nationals have merged.”

<sup>770</sup> Garcia-Amador *et al supra* n 26 4.

<sup>771</sup> *Ibid.*

<sup>772</sup> *Ibid.*

<sup>773</sup> *Idem* 5.

have only been synthesised and blended into one single standard – the human rights standard.<sup>774</sup> To press a case for either of these standards would be tantamount to ignoring one of the political and legal realities in the contemporary world situation.<sup>775</sup>

The human rights standard of treatment has thus brought greater precision to the treatment of aliens.<sup>776</sup> It is submitted that if this standard is respected and followed by states it will replace the two earlier standards.<sup>777</sup> Accordingly, the human rights standard of treatment has become the contemporary yardstick for measuring the treatment not only of aliens, but of all individuals in international law - nationals and non nationals alike.<sup>778</sup>

## 17 Codification of diplomatic protection

At its first session in 1949, the ILC included the topic of “State responsibility” in its provisional list of topics of international law, selected for codification.<sup>779</sup> In 1953, the General Assembly requested the Commission to undertake the codification of this body of law.<sup>780</sup> Garcia-Amador was appointed Special Rapporteur on the topic.<sup>781</sup> The drafting of articles on diplomatic protection was originally seen as belonging to the study of State Responsibility.<sup>782</sup>

State Responsibility is defined as the obligation imposed on a state by international law for the violation of international obligation by acts or omissions directed towards the nationals of another state, as reparation for injuries suffered by the State itself or

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<sup>774</sup> *Ibid* From a study of Human Rights instruments in which these rights and freedoms have received international recognition, and of the two great declarations and other international instruments defining these rights and freedoms, it has become evident that all of them accord a measure of protection which go well beyond the *minimum international standard* of protection which the ‘international standard of justice’ was meant to ensure to foreigners. On the other hand the equality of treatment principle is also covered in this recognition.

<sup>775</sup> *Ibid*.

<sup>776</sup> The national standard was subjective, the minimum international standard was not easily ascertainable, whereas the human rights standard is objective.

<sup>777</sup> *Ibid* 132.

<sup>778</sup> See Dugard *supra* n 25 76. As already pointed out, the human rights standard is based on the Charter of the UN, the UDHR, and all subsequent international, regional and national human rights instruments. Garcia Amador *et al supra* n 26 6.

<sup>779</sup> See the *Official Records of the G A 4<sup>th</sup> Sess Supp No 10 par 16 UN. Doc. A/925 (1949)*.

<sup>780</sup> Res 799 (VIII) (1953) 12 07 *Official Records of the General Assembly 8<sup>th</sup> Sess Supp No 17 52*.

<sup>781</sup> Garcia-Amador *et al supra* n 26 viii.

<sup>782</sup> See the *Official Records of the G A supra* n 1 22.

its nationals.<sup>783</sup> The Law of State Responsibility for Injuries to Aliens was, therefore, the starting point for the codification of diplomatic protection.<sup>784</sup>

### **17.1 The Law of State Responsibility for injuries to Aliens**

Garcia-Amador submitted six reports to the ILC.<sup>785</sup> In his reports, he incorporated a number of draft articles on “Responsibility of the State for Injuries Caused in its Territories to the Person or Property of Aliens.”<sup>786</sup> Subsequent attempts at the codification of the Law of State Responsibility paid little attention to diplomatic protection, and the final draft articles on this subject expressly stated that the two topics central to diplomatic protection, that is to say, nationality of claims, and the exhaustion of local remedies – would be dealt with more extensively by the Commission in a separate undertaking.<sup>787</sup>

Consequently, Dugard of South Africa was appointed as a Special Rapporteur by the ILC to draft a set of articles on Diplomatic Protection along the lines indicated above – nationality of claims, and the exhaustion of local remedies.<sup>788</sup> The draft articles on Diplomatic protection by Dugard as adopted by the ILC in 2006, is now with the UNGA, pending its adoption as a treaty *via* an international Convention.<sup>789</sup>

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<sup>652</sup> It should be noted that the definition of Diplomatic Protection resembles that of State Responsibility. But they are not the same. The concept and definition of State Responsibility is broader than the definition of Diplomatic Protection or State Responsibility for injuries to aliens. See Tiburcio *supra* n 26 37.

<sup>784</sup> See Dugard *supra* n 1 282. See also Garcia-Amador *et al supra* n 26 5 and the *official Record of the G A supra* n 1 22-23.

<sup>785</sup> Garcia Amador *et al supra* n 26.

<sup>786</sup> See *Official Records of the G A supra* n 1 22. Garcia-Amador's *Draft Convention on the International Responsibility of States for Injuries to Aliens* has 40 articles divided into 9 sections A-I. Section A deals with General Principles and Scope; Section B deals with Wrongful Acts and Omissions; Section C deals with Injuries; Section D deals with Attribution; Section E deals with Exhaustion of local remedies; Section F deals with Presentation of claims by aliens; Section G deals with Espousal and presentation of claims by States; Section H deals with Delay, while Section I, deals with Reparation See *Recent Codification of the Law of State Responsibility for Injuries to Aliens supra* n 26 240.

<sup>787</sup> *Official Records of the G A Fifty-sixth Session, Supplement No 10(A/61/10) 25.*

<sup>788</sup> *Ibid.* See also Dugard *supra* n 1 282.

<sup>789</sup> They are nineteen in number. Art 1 defines diplomatic protection. Art 2 deals with the right to exercise diplomatic protection. Art 3 deals with the question of nationality, and provides that the state entitled to exercise diplomatic protection is the state of nationality. Art 4 deals with natural persons; while art 5 deals with continuous nationality of a natural person. Multiple nationality and claims against a third State are stipulated in art 6, while the issue of multiple nationality against a State of nationality is dealt with in art 7. Art 8 deals with stateless persons and refugees, art 9 deals with the state of nationality of a corporation. Arts 10 & 11 provide for the continuous nationality of a corporation and the protection of shareholders. Art 12 makes provision for direct

## 18 Should diplomatic protection be used to protect human rights?

The answer to the question whether human rights should be protected by way of diplomatic protection is obviously in the affirmative. As earlier indicated, human rights are those rights which are inherent in human nature and without which man cannot live as human beings. The truth is that these rights are so vital and essential to the very existence of the individual in the society that all efforts must be mustered to protect them. In the absence of human rights, human beings cannot fully develop and use their human qualities, their intelligence, their talents and their conscience in order to satisfy both their spiritual as well as physical needs.

Quite apart from the fact that human rights are inherent in human nature, there is no doubt that human rights are a necessary component of any democratic society. The protection of human rights is therefore necessary for democracy. A nation's human rights record has become the yardstick by which its democratic status is measured as already pointed out. Accordingly, democracy is an ideal towards which all civilised nations are striving. In order to realise that ideal or make any recognisable progress in that direction, societies have to ensure protection of human rights of their members.

Fortunately, diplomatic protection has become an important legal tool for the protection of the rights of nationals of a state. Since foreign nationals are particularly vulnerable groups, it is submitted that one of the most important mechanisms that can be used to promote and protect their rights generally, is diplomatic protection.<sup>790</sup> Under the prevailing impact of globalisation, modern developments in technology, modern economic exigencies, and the glaring failure of multilateral human rights treaties to protect the rights of foreign nationals as was envisaged, the need arises for states to adopt as one of their cardinal national policies, the use of diplomatic

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injury to shareholders. Art 13 deals with other legal persons, art 14 deals with the exhaustion of local remedies. Art 15 provides exceptions to the local remedies rule, while art 16 deals with actions or procedures other than diplomatic protection. Art 17 deals with special rules of International Law relating to diplomatic protection, art 18 with the protection of a ships' crew, and art 19 stipulates the practice to be followed by States entitled to exercise diplomatic protection.

<sup>790</sup> See the Judgment of O'Regan J in *Kaunda's case supra* n 688 par 216.



protection, for safeguarding the human rights of their nationals in foreign countries.<sup>791</sup>

Gracia Amador was the first to advocate for the use of diplomatic protection to protect human rights of aliens. Besides, in his first report to the ILC on diplomatic protection, Dugard also advocated for the use of diplomatic protection not only to protect human rights, but also for an obligation to be imposed on states to protect the human rights of their nationals abroad, particularly, where norms of *jus cogens* in international law are violated.<sup>792</sup>

It is not unreasonable therefore to require a State to react by way of diplomatic protection to measures taken by a State against its nationals which constitute grave breach of a norm of *jus cogens*.

It is submitted that this clarion call by the Special Rapporteur deserves serious consideration. Although diplomatic protection has traditionally played a vital role in the protection of the rights of aliens, judicially, it has mostly been exercised for the protection of property rights.<sup>793</sup> It should also be employed more often for the protection of human rights, particularly, as submitted by the Special Rapporteur where norms of *jus cogens* are violated.<sup>794</sup> As has been propounded by different advocates, and accepted in judicial decisions,

Whatever theoretical disputes may still exist about the basis of diplomatic protection, it cannot be doubted that in substance, the true beneficiary of the right that is protected is the individual.<sup>795</sup>

While it is true that since 1945, the protection of human rights under international law has witnessed some improvements, particularly in relation to the position of the

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<sup>791</sup> Economic globalisation does have an impact on the protection of human rights and creates opportunities to end the absolute sovereignty of the state and further the realisation that how a state deals with those within its territory is no longer a matter exclusively within the domestic jurisdiction of a state.

<sup>792</sup> See Dugard's first report to the ILC on Diplomatic Protection *supra* n 9 & Addendum 1. See also *supra* p 41. Other writers who have commented on the use of diplomatic protection for the protection of human rights include Olivier *supra* n 356 238; Pete & du Plessis *supra* n 356 439; & Erasmus & Davidson *supra* n 293 113 to name but a few.

<sup>793</sup> See the cases such as *Barcelona Traction case supra* n 26; *Mavrommatis Palestine Concession case supra* n 36; *Panevezys- Saldutiskiis Railways Case supra* 81.

<sup>794</sup> Erasmus & Davidson *supra* n 293 117 have made similar submission.

<sup>795</sup> See the judgment of Chakalson CJ in *Kaunda's case supra* n 688 par 64.

individual, human rights abuses appear to be on the increase.<sup>796</sup> There is therefore a need for greater use of diplomatic protection to safeguard human rights of individuals against harmful acts by foreign states. This should be based on legal obligation and calls for a new approach to the exercise of diplomatic protection under international law.<sup>797</sup> The call is for the recognition of a state's legal obligation to exercise diplomatic protection in favour of its nationals beyond national boundaries under the circumstances where the life, liberty or property of the national is threatened abroad.<sup>798</sup> It is therefore necessary to revisit the issue of diplomatic protection and human rights in the light of changing times and needs.

The first step should be to reconsider the degree of protection that should be granted to aliens. Right now, it would appear that even violations that “shock the conscience of mankind,”<sup>799</sup> such as genocide or pogrom hardly invoke the urge to exercise diplomatic protection, let alone the violations of such “unimportant” rights as the right to personal liberty, non discrimination or to due process of law. It is submitted that this should not be the case. Violations of any basic right should be considered serious violations, and their denial should command enough sympathy to trigger the exercise of diplomatic protection.<sup>800</sup> This is because a state which hesitates to exercise diplomatic protection on behalf of its nationals in appropriate situations, runs the risk of failing in its basic duty towards its citizens.<sup>801</sup>

What part, therefore, can diplomacy play in the diplomatic protection of human rights in Nigeria and South Africa, for instance?<sup>802</sup> What strategy should be employed in

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<sup>796</sup> The situation in the former Yugoslavia, Rwanda, Sudan, Zimbabwe, Somalia, DRC and other war-torn countries are good examples. See Steiner *et al supra* n 19 ch 14 “Massive Human Rights Tragedies.”

<sup>797</sup> Erasmus & Davidson *supra* n 293 117. The argument that diplomatic protection should focus on the human rights of individuals is not new or revolutionary. Garcia-Amador had muted this idea long ago. See Tiburcio *supra* n 26 73.

<sup>798</sup> This is because the very justification of the existence and exercise of state power should be the acceptance of the duty to protect and promote the human rights of individuals, while the ultimate purpose of the state should be the protection not only of individual's human rights, but also the maintenance of a legal order consistent with the rule of law, and the creation of conditions conducive to the enhancement of human dignity.

<sup>799</sup> *Neer Claim supra* n 34.

<sup>800</sup> The need for a reconsideration of this issue is motivated by the changing international legal order through globalization, privatization of the public sector and the fragmentation of states.

<sup>801</sup> Erasmus & Davidson *supra* n 293 122.

<sup>802</sup> See for instance Shirley “The role of international human rights and the law of Diplomatic Protection in resolving Zimbabwe's land crises” in *Boston College International and Comparative Law Review* vol 27 no 1 (Winter 2004) 161 – 71.

the protection of the human rights of South Africans whose property has been expropriated in Zimbabwe or Lesotho without compensation?<sup>803</sup> What strategy should be employed to resolve the persistent spate of abductions and hostage taking of foreign nationals by militants in the Niger Delta region of Nigeria?<sup>804</sup> The answer is – diplomacy.

It is submitted that there are a number of reasons why states should continue to utilize diplomacy to influence their policies and those of other states with regard to respect for human rights.<sup>805</sup> These reasons include, first and foremost, that diplomacy has much to do with human rights. This is because the main motivation for the post World War II diplomacy and the formation of the UNO was the protection of human rights due to the massive human rights violations and threats to international peace and stability.<sup>806</sup> Therefore, governments should get involved not only in human rights dilemmas in neighbouring states, but also of states at some distance in the interest of their own nationals living there. Unfortunately, however, all too often, human rights diplomacy does not fit comfortably with other foreign policy priorities of most states.<sup>807</sup> Consequently, some states trample on the human rights of aliens in their territories.

Second, disinterest of states in the domestic and international human rights environment, may destabilize not only their own countries, but also those countries where human rights violations occur. This may consequently trigger a centrifugal force, dragging other states into the human rights quagmire. The human rights situations in Zimbabwe and Sudan for instance, have, in recent years, negatively impacted upon the social, as well as the economic position of South Africa and other neighbouring states.

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<sup>803</sup> *Ibid.* See also the land mark judgment of the Pretoria High Court of South Africa in *Crawford von Abo v The Govt. of the Republic of South Africa & Others*[2008] JOL 22219 (T) delivered by Judge Bill Prinslo on Tuesday July 29, 2008. See *LANDMARK WIN FOR FARMER* in the Pretoria News issue of 2008-07-30 1.

<sup>804</sup> See Smith: *Shell in Nigeria and The Odoni People: Text and Materials – International Human Rights* (2007).

<sup>805</sup> See Trimble “Human Rights and Foreign Policy” 46 *St. Louis U L J* (spring 2002) 465.

<sup>806</sup> Forsythe *Human Rights in International Relations* (2006) 152.

<sup>807</sup> Trimble *supra* n 803 465.

## 19 Diplomatic strategies for the protection of human rights

Basically, the technique for conflict resolution falls into two categories; diplomatic procedures and adjudication. The former involves an attempt to resolve differences either by the contending parties themselves, or with the aid of other entities by the use of the discussion and fact-finding method. Adjudication procedures involve the determination by a disinterested third party of the legal and factual issues involved, either by arbitration or by the decision of judicial organs.

Diplomatic methods of resolving human rights issues may take various forms. These include quiet diplomacy, formal protests, negotiations, mediation, conciliation, good offices, *et cetera*. Various diplomatic processes and procedures have evolved over the years for the diplomatic handling of human rights issues.<sup>808</sup> These include:

### 19.1 Quiet diplomacy

A potent strategy for the protection of human rights is the use of “quiet diplomacy.”<sup>809</sup> This is the traditional or classical method of conflict resolution. It involves the holding of confidential talks behind close doors away from the public view.<sup>810</sup> However, the majority of interstate disputes involving human rights are settled by direct negotiation, good offices, mediation or conciliation.<sup>811</sup>

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<sup>808</sup> A distinctive feature of Human Rights law is that unlike other branches of international law, e.g. Diplomatic Law, it was established primarily through multilateral treaties, signed at international diplomatic conferences. Participants in the diplomatic process are usually officials of states or international organizations, and may include heads of state or governments, ministers of foreign affairs and other ministers, diplomatic officials, as well as military officials. The San Francisco Conference of 1945 for instance, where the Charter of the UN was signed, was attended by top diplomats from Europe and America. The creation of the UN, was a mile stone in the determined effort of the international community to use diplomacy in the protection of human rights.

<sup>809</sup> See Forsythe *supra* n 804 152. See also Winter “Human rights diplomacy: ‘quiet’ or totally mute?” (1982) *ABA Journal of Human Rights* 1202 and Derian “Quiet diplomacy is not silent diplomacy” (1980) *Human Rights Quarterly* 16.

<sup>810</sup> This was the type of diplomacy adopted by President Thabo Mbeki of South Africa in trying to resolve the Zimbabwe crises.

<sup>811</sup> See the case of *Kaunda v President of the RSA supra* n 688 pars 25-27 where the Constitutional Court of South Africa accepted the expert report of the Special Rapporteur on Diplomatic Protection that diplomatic protection includes consular action, negotiation, mediation, judicial and arbitration proceedings, etc.

## 19.2 Negotiation

Of all the procedures used to resolve differences between individuals, the simplest and most utilised form is negotiation. Understandably, negotiation is also the primary vehicle for settlement of international disputes.<sup>812</sup> It basically consists of discussions between the interested parties with a view of reconciling divergent opinions, or at least understanding the different positions maintained.<sup>813</sup> In negotiations, there are no established rules or procedures.<sup>814</sup> However, there are general principles and precedents which help define a course for such proceedings. Negotiations are as a rule conducted, through normal diplomatic channels involving only the parties to the dispute.<sup>815</sup> It is eminently suited to the clarification of, or resolution of complicated disagreements.<sup>816</sup>

## 19.3 Good offices and mediation

Good offices and mediation involve the participation of third parties. Technically, good offices are involved where a third party attempts to influence the opposing sides to enter into negotiations, whereas mediation implies the active participation in the negotiation process of the third party itself. In mediation, like negotiation, there are also no technical rules of procedure. The parties are generally expected to abide by general principles and protocols related to international law and justice.<sup>817</sup>

## 19.4 Conciliation

The process of conciliation involves a third party's investigation of the basis of the dispute, and the submission of a report embodying suggestions for settlement.<sup>818</sup> Conciliation reports are only proposals and as such do not constitute binding

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<sup>812</sup> The obligation to enter into negotiation was endorsed in the *North Sea Continental Shelf* cases ICJ Rep 1969 3.

<sup>813</sup> See Shaw *supra* n 175 918.

<sup>814</sup> See Diplomacy ([http://en.wikipedia.org/wiki/Diplomatic\\_relations](http://en.wikipedia.org/wiki/Diplomatic_relations) 6.

<sup>815</sup> Wallace *supra* n 16 314. E.g the Camp David Accord convened in 1978 by President Jimmy Carter of the US to broker peace between Egypt and Israel. See also Shaw *supra* n 175 918.

<sup>816</sup> Shaw *idem* 919.

<sup>817</sup> Wallace *supra* n 16.

<sup>818</sup> *Ibid.*

decisions.<sup>819</sup> Nevertheless, conciliation processes do have a role to play in resolving human rights issues. They are extremely flexible and by clarifying the facts and discussing the proposals, may stimulate negotiation amongst the parties.<sup>820</sup> In modern times, however, much of this work is often carried out by the ICJ or other formal commissions, agencies and tribunals, working under the UN.<sup>821</sup>

Other methods often employed for the diplomatic protection of human rights include consular protection,<sup>822</sup> judicial and arbitral proceedings,<sup>823</sup> reprisals,<sup>824</sup> retortion,<sup>825</sup> severance of diplomatic relations<sup>826</sup> and economic pressure.<sup>827</sup>

### **19.5 Judicial and arbitral proceedings**

As the name implies, judicial and arbitral proceedings involve the settlement of human rights problems by a court of law or by an arbitral tribunal. The ILC has defined arbitration as

A procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.<sup>828</sup>

The main difference between arbitration and judicial settlement is that arbitration parties are more active in the decision-making process of the arbitral tribunal, whereas parties submitting to judicial settlement must accept an already constituted tribunal with its jurisdictional competence and procedure laid down in statute. Thus

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<sup>819</sup> *Ibid.*

<sup>820</sup> *Ibid.* A conciliation procedure was employed in the Iceland – Norway dispute over the continental shelf delimitation. See also the 1929 Chaco Conciliation Commission and the 1947 Franco-Siamese Commission.

<sup>821</sup> Another method is that of “informal diplomacy.” Informal diplomacy has sometimes been used to resolve human rights issues. This entails the recruitment of figures in other nations who might be able to gain and give access to a country’s leadership. In some situations, this type of diplomacy is done through semi-formal channels using interlocutors such as academic members of think tanks. These non officials engage in dialogue with the aim of solving human rights problems.

<sup>822</sup> See *Report of the International Commission on the work of its fifty-second session, 1 May to 9 June and 10 July to 18 August (2000) A/55/10* (ILC report) 15. See also the case of *Kaunda and Others v The President RSA supra* n 688 par 27 See ch 3 *infra*.

<sup>823</sup> See the Statute of the ICJ art 38(1)(c).

<sup>824</sup> See Bowett “Reprisals Involving Recourse to Armed Force.” (1972) 66 *AJIL*, 1.

<sup>825</sup> See Wallace *supra* n 16 294.

<sup>826</sup> See the VCDR art 45.

<sup>827</sup> See *Report of the International Commission on the work of its fifty-second session, 1 May to 9 June and 10 July to 18 August (2000) A/55/10* (ILC rep) 15.

<sup>828</sup> *YBILC* 1953 11 202.

arbitration allows parties a degree of flexibility which is denied to them in judicial settlement.<sup>829</sup> While the ICJ is the principal judicial organ for states, arbitral tribunals have played a vital role in the settlement of disputes between states over the years.<sup>830</sup>

Although the diplomatic strategy<sup>831</sup> may be predominantly persuasive in its impact, it must be borne in mind that often the strategy employed may not be confined to a single instrument or strategy and may involve the use of force.<sup>832</sup> Such use of force as a diplomatic instrument may be in the form of reprisal or counter measure. They are discussed below.

## 19.6 Reprisals

A reprisal is something done by way of retaliation<sup>833</sup> and may be adopted by a State in response to harm suffered by it through the act or omission of another State. Reprisals are often invoked by way of self-help or defence. If for example a guerrilla group from state A attacks state B, state B may retaliate by attacking state A with the aim of destroying the guerrilla bases there. They are regarded as an exercise of diplomatic protection, because the international legal system has no central authority to enforce international law. States, therefore, arrogate to themselves the responsibility of enforcing the rules of international law by reacting to any illegal use of force with equally illegal display of force, so as to deter the aggressive state, ensure compliance with and create respect for international law.<sup>834</sup> Reprisals were defined in *Naulilaa* case<sup>835</sup> as:

acts of self help by the injured state, acts in retaliation for acts contrary to international law on the part of the offending state which have remained unredressed after a demand for amends.

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<sup>829</sup> See Wallace *supra* n 16 316.

<sup>830</sup> See for instance the famous *Alabama Claims Arbitration*, Moore, 1 Int Arb 495 (1872) and the *Island of Palmas* case 2 RIAA 829 (1928).

<sup>831</sup> Murty *The International law of diplomacy: The Diplomatic Instrument and World Public Order* (1989) 16 defines diplomatic strategy as “diplomatic”, “ideological”, “economic” and “military” instruments employed by states to sustain power .

<sup>832</sup> *Ibid.*

<sup>833</sup> See Garner *supra* n 12 659. More commonly referred to as counter- measures.

<sup>834</sup> See Dugard *supra* n 1 279-80.

<sup>835</sup> 2 R I A A 1012 (1928).

Although acknowledged as a form of diplomatic protection, reprisals involving armed force are, however, prohibited as a means of settling international disputes, if such reprisals do not comply with the principles of international law on the use of force.<sup>836</sup>

### **19.7 Retortion**

A countermeasure or reprisal must be distinguished from a retortion. A retortion is distinct from a reprisal or counter-measure in that it is an act which in itself, although unfriendly, is not unlawful. A retortion is therefore a lawful means of expressing displeasure at the conduct of another State.<sup>837</sup>

### **19.8 Severance of diplomatic relations**

Diplomatic relations established by mutual consent may be severed by either party. The severance of diplomatic relations terminates all official communications between the two governments involved, and is generally effected either as a protest against the policies pursued by the other government, as a sanction against breaches of the law by the latter or abuse of the privileges and facilities associated with a diplomatic mission by its officials.<sup>838</sup> A severance may be express or tacit. It is effected expressly by notification or tacitly by actual termination by such acts as closure of one's own diplomatic mission and requiring the other to follow suit.<sup>839</sup>

### **19.9 Economic pressure**

Economic pressure may also be applied on a state as a means of diplomatic protection, particularly during war time. Under such circumstances, the economic

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<sup>836</sup> See the 1970 Declaration on Principles of International law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN GA Res. 2635 (XXV) 1970-10-24. The section on the Principle on the Use of Force par 6 expressly prohibits reprisals. See also the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* ICJ Rep (1996) 226 par 46 and the ILC's Draft Arts on Responsibility of States for Internationally Wrongful Acts 2001 Arts 49 - 52.

<sup>837</sup> Retortion may take the form of severance of diplomatic relations or foreign aid. See Wallace *supra* n 16 294.

<sup>838</sup> See Murty *supra* n 829 253.

<sup>839</sup> *Ibid.*



pressure applied becomes an instrument of coercion. The main concern of a contestant who uses economic pressure in the settlement of disputes is to interrupt the flow of vital goods which might help the enemy war effort.<sup>840</sup> It may also be applied as a means of self defence in accordance with the provisions of article 51 of the UN Charter.<sup>841</sup>

During World War II,<sup>842</sup> for instance, Britain and the US adopted a new economic warfare theory. Under the new concept, economic pressure was not limited to the traditional expedients of contraband interruption and blockade, but was conducted by multifarious other methods and operations in order to effectively weaken the enemy's economic and financial sinews.<sup>843</sup> Similarly during the Nigerian civil war, economic blockade was imposed on the secessionist Biafran regime and this accelerated the war and brought a quick end to human sufferings.<sup>844</sup>

## 20 Appraisal and conclusion

From the foregoing, it is obvious that the legal institution of diplomatic protection serves very useful purposes in the international world order. First and foremost, it serves as a veritable instrument for the protection of rights which are vital and of immense benefit to individuals.<sup>845</sup> Thus, diplomatic protection has not only assisted in the spread of individual freedom, but has also helped in facilitating the smooth movement of people, goods, capital and services across state boundaries.<sup>846</sup>

In this way, diplomatic protection has also promoted international economic relations. The right of states to protect their nationals serves as a warning to states inclined to ignore their treaty or customary law obligations favouring individuals.<sup>847</sup> This has a beneficial effect on the treatment of individuals abroad. The preconditions to

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<sup>840</sup> *Idem* 221.

<sup>841</sup> Art 51 of the UN Charter acknowledges the right of self defence as an inherent right of every state.

<sup>842</sup> Res 3314 (XXIX) of 1974-12-14

<sup>843</sup> Shearer *supra* n 117 530-31.

<sup>844</sup> See Heyns *supra* n 256 1388.

<sup>845</sup> Geck *supra* n 10 1063.

<sup>846</sup> *Ibid.*

<sup>847</sup> *Ibid.*

protection, especially the local remedies rule, serve as checks and balances, and help to prevent frequent use and abuse of the remedy by powerful states.<sup>848</sup>

The institution does have serious flaws. The nationality rule may, for instance, leave millions of persons without any protection; the rule of continuous nationality can also work great hardship on a considerable number of individuals.<sup>849</sup> Besides, few states are willing to undertake an internal legal obligation to protect their nationals abroad even if all the international requirements are met and no overwhelming interests of the state as a whole is at stake.

One can hardly overlook the reluctance of states to protect their nationals even in cases where no impediments exist.<sup>850</sup> It is submitted that the more determined and firm the diplomatic protection in any situation, the stronger the deterrent effect. But, even the greatest firmness and fairness may be to no avail against an obstinate opponent of greater political or economic strength. Needless to say, there have been and still are instances where the right to protect have been used as pretext for political intervention.

The greatest inherent weakness in the institution of diplomatic protection reflects the underlying weakness of international law in general - its lack of adequate sanction or enforcement mechanism.<sup>851</sup> There is often no simple answer to the question whether and to what extent diplomatic protection is justified, and how much reparation is adequate in a particular case.<sup>852</sup> Yet, there is no general obligation for all states to submit their relevant disputes to a peaceful settlement through the binding decision of an independent and neutral authority. Therefore, both the plaintiff and the defendant states often remain *judex in causa sua*, with the result that the outcome of the case, may depend on the relative strength of the parties.<sup>853</sup>

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<sup>848</sup> *Ibid.*

<sup>849</sup> *Idem* 1064. See also Dugard *supra* n 1 286.

<sup>850</sup> Geck *idem* 10.

<sup>851</sup> See Weil *supra* n 231 414.

<sup>852</sup> *Ibid.*

<sup>853</sup> Although states are required under art 2(3) of the UN Charter to “settle their international disputes by peaceful means,” they are however reticent to submit disputes to independent, impartial adjudication and have been cautious in agreeing in advance to the compulsory jurisdiction of an independent judicial body like the ICJ. The same method of dispute settlement is stipulated in article 33(1) of the UN Charter. Apart from these Charter provisions, the 1970 Declaration on the

The general hope that diplomatic protection would become largely superfluous through human rights conventions has so far not materialised. From a realistic perspective, human rights conventions are fashioned in the form of multilateral treaties designed to compel the obligation of State Parties. These treaties establish new and far-reaching material rights for individuals, but not a corresponding basis for diplomatic protection by their home states. They rather give all state parties the right to grant a new kind of humanitarian assistance or protection to all individuals regardless of their nationality.<sup>854</sup> This right has proven almost ineffective for two reasons. In most treaties, the treaty machinery is inadequate,<sup>855</sup> compliance by States inconsistent and worse, State Parties are usually unwilling to use even the inadequate machinery at their disposal.<sup>856</sup>

Another problem with regard to diplomatic protection is to be found in its codification. The nagging question is why it is so difficult to codify the law of diplomatic protection?<sup>857</sup> Despite the various attempts made to codify the subject, no Convention has so far been summoned by the General Assembly for the adoption of a treaty on the subject. Tiburcio is of the opinion that the problem is with the vast and complex nature of the subject<sup>858</sup> but Dugard thinks otherwise.<sup>859</sup> In hind sight, could it be said that the reluctance of states to adopt a Convention on diplomatic protection is borne out of the fear of irrevocably committing themselves to the plight of their nationals living abroad? Are states not prepared to accept responsibility for their actions? Is the subject so complex that it can not be codified? Whatever is the case, diplomatic protection continues to be governed by customary international law.<sup>860</sup> The recent attempt to draft a set of articles on the subject by Dugard, has been

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Principles of International law Concerning Friendly Relations and Co-operation among States also require states to settle their disputes amicably.

<sup>854</sup> Geck *supra* n 10 1064.

<sup>855</sup> E.g the ICESCR and the International Convention on Refugees.

<sup>856</sup> Geck *supra* n 10. Neither the inter-state complaint mechanism in the ICCPR nor that of the African Charter has ever been invoked by States.

<sup>857</sup> As is the case with the law of Diplomatic Relations or that of Consular Relations.

<sup>858</sup> Tiburcio *supra* n 26 37.

<sup>859</sup> According to Dugard, states are not willing to take criminal responsibility for their actions, particularly in relation to the breach of peremptory norms of international law. See n 860 *infra*. See also Shaw *supra* n 175 720.

<sup>860</sup> Since it is not codified.

applauded by the ILC<sup>861</sup> and it is therefore hoped that Dugard's draft will be adopted as a treaty.<sup>862</sup>

In spite of all its shortcomings, however, diplomatic protection remains an indispensable means for improving the legal position of most individuals against foreign state power. Today however, injury to aliens, be they natural or corporate persons, is generally covered by bilateral or multilateral investment treaties (BITs),<sup>863</sup> or by 'friendship, commerce and navigation' treaties, which often provide for international arbitration or adjudication of claims.<sup>864</sup> There are also a number of specialized multilateral treaties covering certain categories of aliens as well as some innovative examples of compensation schemes like the 'lump sum' payments schemes for large scale injuries to aliens.<sup>865</sup> A good example is the Iran–United States Claims Tribunal established to resolve claims related to the detention of 52 United States nationals in the U.S. Embassy in Tehran in 1979 and the freezing of Iranian assets by the United States.<sup>866</sup>

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<sup>861</sup> See the *Official Records of the GA supra* n 1 15-16. Crawford *supra* n 10 51 says that "Dugard was fortunate to have a relatively confined topic, a relatively clean slate on which to write and time in plenary to debate his work. He responded – as anyone would have expected – with his combination of good sense and good humour, dealing with his topic efficiently, responsively and within a decent time frame. The result – whatever positions may be taken on individual issues – is a lucid and workable text, a real contribution to the field and to the ILC's continuing reputation."

<sup>862</sup> Dugard is of the opinion that previous draft articles largely represent a codification of International Law. According to him, "there are some innovative features, particularly in respect of state responsibility for the violation of peremptory norms. Because of these innovations, there has been no rush to refer the draft articles to an international conference for translation into a multilateral treaty as occurred with similar drafts prepared by the ILC, e.g the articles on the law of treaties or diplomatic and consular relations. Instead, it has been considered wise to leave the draft articles as a restatement of the law until there is sufficient support for the draft articles as a whole to make their adoption in treaty form likely." See Dugard *supra* n 1 272 269 -270.

<sup>863</sup> This was acknowledged by the ICJ in the *Barcelona Traction case, supra* n 26. See Dugard (2005) *supra* n 1 306.

<sup>864</sup> Eg art V(4) of the Treaty of Friendship, Commerce and Navigation between the US and the Federal Republic of Germany of 1954.

<sup>865</sup> Dugard (2005) *supra* n.1 306; Harris *supra* n 383 614; Sen *supra* n 52 320; & Shaw *supra* n 175 749-50.

<sup>866</sup> See *Case Concerning the US Diplomatic and Consular Staff in Teheran (The Iran case) supra* n 242 .3 See also *Iran v US No A/18 (Iran – US Claims Tribunal) (1984) 5 Iran – USCTR 251 & SEDCO v National Iranian Oil Co. 10 Iran – USCTR 180 185; 80 AJIL 1986 969.*

## CHAPTER THREE

### The Role of Diplomatic Missions in the Protection of Human Rights

#### 1 Introduction

The term diplomatic protection is, as mentioned in chapter 1, used in a dual sense in this thesis - as an institution, and as a function.<sup>867</sup> As discussed in chapter 2, diplomatic protection is an institution in terms of which states may invoke in protecting their nationals who are injured in other countries. This function is generally performed by states through their diplomatic missions abroad. In this sense, diplomatic missions perform the function of diplomatic protection by protecting the interest of their nationals in the receiving state. This chapter will discuss diplomatic protection as a function of diplomatic missions for the protection of human rights.

Any government which has diplomatic relations with another country does so in its own interest, and in the interest of its nationals living abroad. In order to protect these interests, diplomatic envoys are accredited to those other countries.<sup>868</sup> Diplomatic envoys are officials who are involved in diplomacy on behalf of their countries.<sup>869</sup> The term used for a group of diplomats from one country resident in another country, is a diplomatic mission.<sup>870</sup>

The normal functions of diplomatic missions revolve around the protection of life, liberty and property of their nationals, in addition to their primary function of representing the political interests of the sending state.<sup>871</sup> The scope and content of diplomatic protection of citizens by diplomatic missions have undergone significant

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<sup>867</sup> See chs 1 & 2 *supra*.

<sup>868</sup> The term diplomatic envoys as used in this research includes both diplomatic and consular officers. Thus, diplomatic protection also includes consular protection. See the case of *Kaunda v The President RSA supra* n 686 par 27 where Chaskalson, CJ said *inter alia* "According to the Special Rapporteur's report, diplomatic protection includes, in a broad sense, "consular action, negotiation, mediation" etc.

<sup>869</sup> Diplomacy is the art and practice of conducting negotiations between states or national governments. See Murty *supra* n 829 1.

<sup>870</sup> See Silva *supra* n 10 33.

<sup>871</sup> See art 3 of the VCDR. See also Sen *supra* n 52 73.

changes over the years and this has brought great relief to their nationals living abroad.<sup>872</sup>

## 2 The origin of diplomatic missions

Historically, the origin of diplomacy and diplomatic missions can be traced to two definite periods of time.<sup>873</sup> The first period began in prehistoric times, continued through the middle ages, and terminated in the Renaissance period of the 15<sup>th</sup> century. This period was characterised by the setting up of non-permanent or *ad-hoc* embassies.<sup>874</sup> During this period, European princes normally sent envoys on temporary diplomatic missions, which were terminated as soon as the particular mission was accomplished.<sup>875</sup> The second period began in Italy during the 17<sup>th</sup> century. It witnessed the setting up of permanent diplomatic missions or legation.<sup>876</sup> King Louis XI of France is said to have been the first secular prince to establish a regular system of diplomacy.<sup>877</sup> The establishment of permanent missions contributed greatly to the advancement of international law generally, and the development of diplomatic law in particular.

Under Louis XI of France, and generally during the 17<sup>th</sup> century, diplomacy meant deceit and trickery.<sup>878</sup> The task of a diplomat was not so much how to represent the general interests of his own country, as to find out the secrets of the court to which

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<sup>872</sup> Today, in the context of sovereign equality of all nations, the UN Declaration on the Economic Rights and Duties of States, and the Recognition of Sovereignty of States over their Natural Resources, the practical implications of the concept of diplomatic protection would appear to have undergone fundamental changes. However, some commentators maintain that diplomatic protection strictly so-called does not belong to the normal functions of diplomatic missions. See Dembiski *supra* n 12 41 and Geck *supra* n 10 1051.

<sup>873</sup> Diplomacy as a method of communication between States or recognised agents is an ancient institution. International legal provisions governing it are the result of centuries of state practice. Rules regulating the various aspects of diplomatic relations therefore constitute one of the earliest expressions of International Law. See e.g Shaw *supra* n 175 668; Sen *supra* n 52 6; and Shearer *supra* n 117 383.

<sup>874</sup> See Sen *supra* n 52 6; Barker *The Abuse of Diplomatic Privileges and Immunities: A necessary Evil?* (1996) 4. See also "Diplomacy" in: [Http://en.wikipedia.org/wiki/ Diplomatic\\_relations](http://en.wikipedia.org/wiki/Diplomatic_relations) (2007/09/06).

<sup>875</sup> *Ibid.*

<sup>876</sup> See in this regard Sen *supra* n 52 6; Barker *supra* n 872 24; and Murty *supra* n 829 4.

<sup>877</sup> See e.g Shearer *supra* n 117 383 & Lawrence *Principles of International Law* (1929) 271.

<sup>878</sup> "An ambassador," said Sir Henry Worton in a punning epigram, "is a person who is sent to lie abroad for the benefit of his country." See Lawrence *supra* n 873 272.

he was accredited.<sup>879</sup> As the actual contents of diplomatic relations became clearer, attention was focused on a particularly irksome problem of diplomatic protocol, the problem of precedence of diplomatic envoys. This problem was solved at the Congress of Vienna of 1815 . According to the regulation adopted at that Conference, ambassadors take precedence over envoys extraordinary and ministers plenipotentiary, and envoys and ministers take precedence over *charge d' Affaires*. Within their own class, the precedence dates from the time of presentation of their credentials.

As political interests became separated from the private business of the sovereign or Head of State, the activity of the agent began to lose its character of deceit, sharp practice and espionage.<sup>880</sup> The result was the adoption of a uniform *modus vivendi*, and general rules of negotiation, which has given rise to a perceived measure of equality among States.<sup>881</sup>

### 3 Codification of Diplomatic Law

Developments in diplomatic practice since 1815 rendered necessary the need for new and extensive efforts at codification of diplomatic law and practice.<sup>882</sup> The early 20<sup>th</sup> century witnessed what some regard as a revolutionary transformation in diplomatic methodology,<sup>883</sup> which climaxed in the codification of diplomatic law and the adoption of the Vienna Convention on Diplomatic Relations (VCDR) at the Conference of Vienna in 1961.<sup>884</sup>

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<sup>879</sup> Louis XI of France is said to have told his ambassadors "if they lie to you, lie still more to them ," and Henry VII of England was praised by Coke, his Attorney General as " a wise and politique King" because he would not suffer ambassadors from other States to remain in his court after their immediate business was over. See Lawrence *supra* n 873 272.

<sup>880</sup> Ibid.

<sup>881</sup> *Idem* 136.

<sup>882</sup> Apart from the Vienna Regulations which regulated the ranks and precedence of diplomatic agents, in 1928 14 American States adopted the Havana Convention on Diplomatic Agents. Codification was also attempted by private bodies such as the Institute of International law and the Harvard Law School in 1932. These early attempts led the UN Law Commission (UNILC) to include diplomatic and consular relations among the subjects to be codified during the first session in 1949 as a matter of priority. See Barker *supra* n 872 29-30.

<sup>883</sup> On the transformation of diplomacy in modern times, see generally, Nicholson *Diplomacy* (1949) Chs 2&4. See also Silva *supra* n 10 Ch 2 and Barker *supra* n 872 26.

<sup>884</sup> UN Doc.A/CN4/91. Report on Diplomatic Intercourse and Immunities submitted by Sandstrom Special Rapporteur 11-13.

The Convention codified existing customary law on diplomacy and established new rules.<sup>885</sup> Questions not expressly regulated by the Convention continue to be governed by the rules of customary international law.<sup>886</sup>

In order to ensure the smooth running of diplomatic functions and to promote same, article 22 of the VCDR clearly stipulates that the mission premises<sup>887</sup> must not only be respected at all times, but that it must not be violated or desecrated. The same article further provides that the permission of the Head of Mission must be sought and obtained before the agents of the receiving state should enter the Mission premises. A special duty is also imposed on the receiving state by the VCDR to ensure that the mission premises is not only protected from intrusion or damage, but that its dignity is not impaired.<sup>888</sup>

The Convention is noteworthy, not only because of its comprehensive codification of the customary law on diplomatic relations, but also because according to de Silver, it was a “land mark of the highest significance in the codification of international law”.<sup>889</sup>

The VCDR has become a universally accepted Convention and its provisions are regarded as settled law.<sup>890</sup> The Convention has continued to be used as a point of reference in the development of related areas of international law. Many of its provisions were adopted with appropriate modifications in the VCCR and other international conventions.<sup>891</sup>

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<sup>885</sup> See Denza *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (1998) 3.

<sup>886</sup> See the Preamble.

<sup>887</sup> This includes all the furnishings and means of transport on the premises.

<sup>888</sup> See art 22 (2) of the Convention. In the Sun Yat Sen incident of 1896, the court refused to issue a writ of *habeas corpus* with regard to a Chinese refugee held against his will in the Chinese legation in London. See McNair *International Law Opinions* (1956) vol 1 85. The issue was resolved by diplomatic means. See also Shaw *supra* n 175 671 and the case of *Boos v Barry* 99 L.Ed.2d. 333; 345-6 (1988) 121 I L R 551.

<sup>889</sup> See Silva *supra* n 10 30. See also Denza *supra* n 883 1-2.

<sup>890</sup> At the time of their adoption, they were clearly marked “progressive development” of custom or unresolved points, where practice conflicted. See Denza *supra* n 883 2 and Silva *supra* n 11 30.

<sup>891</sup> Eg Convention on Special Missions and other International Organisations.



Reciprocity continues to form an integral part of diplomacy and constitutes a sensitising influence ensuring that all the rules of the Convention are obeyed.<sup>892</sup> Since every state either sends out or receives diplomatic envoys from other states,<sup>893</sup> it can be said that the diplomatic representatives of every state abroad are, generally speaking, mere hostages.<sup>894</sup> This is because no matter how trivial a misunderstanding may be, in matters relating to protocol or privilege in one state, it may trigger a reciprocal adverse reaction in the sending state and even beyond, giving rise to the exercise of diplomatic protection.<sup>895</sup>

### 3.1 *Theoretical basis of diplomatic law and practice*

A cardinal concept of diplomatic law and practice is that of diplomatic privilege and immunity. In the 15<sup>th</sup> and 16<sup>th</sup> centuries, the leading jurists and text writers of the time sought a comprehensive theory to explain or justify why diplomatic envoys are endowed with privileges and immunity. Various theories were proposed by writers and jurists to justify the practice.<sup>896</sup> It is intended to briefly deal with these theories here, to highlight their basic differences and their relevance to diplomatic protection.

Of the many theories which emerged as an explanation of the juridical basis of diplomatic privilege and immunity, three have been identified as making the greatest contribution to the subsequent development of diplomatic law. These are the “personal representative” or the “representative character” theory, the “extritoriality” theory, and the “functional necessity” theory.<sup>897</sup>

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<sup>892</sup> Denza *supra* n 883 2. Reciprocity generally involves retaliation. In that sense, it constitutes sanction. Diplomatic protection is retaliatory action taken by a state against another state for injury suffered by its national. See also Ghei “The role of Reciprocity in International Law.” *CILJ* vol 36 (2003/2004) 93.

<sup>893</sup> Although these terms are not defined under the Vienna Convention 1961, the “sending State” is the State that accredits the envoy, while the “receiving State” is the state to which the envoy is accredited.

<sup>894</sup> See Denza *supra* n 883.

<sup>895</sup> *Ibid.*

<sup>896</sup> Eg Grotius *De Jure Belli ac Pacis* (Classics of International Law Series, (1925) Scot(ed) Bk II 443; Bynkershoek *De Foro Legatorum*, (Classics of International Law Series) (1964) Scot (ed) 44; Wicquefort *L’Ambassadeur et Les Fonctions* (1681) s XXVII; Vattel *Le Droit Des Gens* (Classics of International Law Series) (1916) Scot (ed) vol III 371.

<sup>897</sup> However, scholars like De Martens, Viswanatha, and even Oppenheim, were of the view that the privileged position of diplomatic envoys was based on religious grounds. See Barker *supra* n 872 32-35.

The “representative character” theory is the theory which ultimately traces immunity to the sovereign of the state which sends the envoy.<sup>898</sup> According to Barker, this theory was the most popular theory in the early years of post-permanent diplomatic relations.<sup>899</sup> Eminent scholars like Grotius, Von Bynkershoek, Wicquefort and Vattel all saw the character of the diplomatic envoy as the representative of an independent sovereign or sovereign body, as being of paramount importance in explaining this phenomenon.<sup>900</sup> In his famous book *De Jure Belli ac Pacis*, Grotius noted that:

Since the views of those who send ambassadors are generally different from the views of those who receive them, and often directly opposed, ambassadors ... are considered to represent those who send them.<sup>901</sup>

The second theory which emerged during this period was the “exterritoriality” theory. The basis of this theory was that the diplomat was considered to be resident outside the jurisdiction of the receiving state.<sup>902</sup> In terms of the exterritoriality theory, diplomatic premises were also considered to be outside the territory of the receiving state, and within the territory of the sending state.<sup>903</sup> This was of course a legal fiction which was rejected by writers of latter days.<sup>904</sup> The theory has also been rejected by the courts.<sup>905</sup> Notwithstanding this rejection, the exterritorial theory carried so much weight in its heydays that it was used to explain many diplomatic nuances; why for example, ambassadors who were involved in plots and other heinous crimes against the receiving states were not killed, but rather deported back home.<sup>906</sup>

The third theory employed by writers and jurists to justify the grant of privileges and immunity to diplomats was the “functional necessity theory” of diplomatic law. The

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<sup>898</sup> *Idem* 35.

<sup>899</sup> *Idem* 38.

<sup>900</sup> *Ibid.*

<sup>901</sup> Bk II Ch. XVIII 443. Barker has however advocated that the representative character theory should be abandoned because it is no longer relevant. See Barker *supra* n 872 202.

<sup>902</sup> See Bynkershoek *supra* n 894 27.

<sup>903</sup> *Ibid.*

<sup>904</sup> See Barker *supra* n 872 54.

<sup>905</sup> See e.g. the case of *R. v Turnbull Ex p. Petroff* (1971) 17 FLR 438.

<sup>906</sup> These included the cases of Don Guerau de Spes, the Spanish Ambassador in England; the Bishop of Ross case, involving the envoy of Mary Queen of Scots; the case of the Spanish Ambassador Mendoza and that of L'Aubspine, the French Ambassador to England. See Barker *supra* n 872 43.

VCDR of 1961 emphasizes the functional necessity theory of diplomatic law.<sup>907</sup> Under this theory, diplomatic privileges and immunity<sup>908</sup> are granted for the efficient conduct of international relations. It also points to the character of the diplomatic mission as representing the State.<sup>909</sup>

The adoption of the “functional necessity” theory of diplomatic law with strong emphasis on the “representative character” theory, points to the fact that the diplomatic mission remains the *alter ego* of the sending state.<sup>910</sup> The competence of the diplomatic mission to afford protection to its nationals in the exercise of the right of its sending state, as entrenched in international law, is now embodied in the VCDR of 1961.<sup>911</sup> Apart from the VCDR, this right may also be embodied in bilateral treaties, or may be adhered to under the rules of customary international law.<sup>912</sup> In cases where bilateral treaties are in force, the scope of diplomatic protection would no doubt be governed by the provisions of such treaties. In the absence of any treaty, however, diplomatic protection of nationals is based on the provisions of the VCDR or on customary international law.<sup>913</sup>

#### 4 Functions of diplomatic missions

The functions of diplomatic missions are listed under article 3 of the VCDR.<sup>914</sup> They include, *inter alia*;

- (a) representing the sending State in the receiving State<sup>915</sup>
- (b) protecting the interests of the sending State in the receiving State and of its nationals, within the limits permitted by international law;<sup>916</sup>

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<sup>907</sup> See the Preamble.

<sup>908</sup> The word “immunity” is used in more than one sense. First, it is used to describe an exemption from local law or jurisdiction, or to denote a benefit over and above that ordinarily granted to nationals. The word “privilege” has the same connotation, and since there is no uniformity in the use of these terms and there is difficulty in applying them consistently, they are used interchangeably.

<sup>909</sup> See the Preamble to the VCDR. See also Shaw *supra* n 175 668-688 & 767 *Third Avenue Associates v Permanent Mission of the Republic of Zaire to the United Nations* 988 *Ed. 2d*, 295 (1993) 99 *ILR* 194.

<sup>910</sup> See Silva *supra* n 10 82.

<sup>911</sup> See *supra* n 52 322. See art 3 VCDR.

<sup>912</sup> See *Ibid.*

<sup>913</sup> See the Preamble & ch 2.

<sup>914</sup> UN Doc A / CN 4 / 91.

<sup>915</sup> Art 3 (1)(a).

<sup>916</sup> Art 3(1)(b).

- (c) negotiating with the Government of the receiving State;<sup>917</sup>
- (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;<sup>918</sup> and
- (e) promoting friendly relations between the sending State and the receiving State and developing their economic, cultural and scientific relations.<sup>919</sup>

#### 4.1 Protection of human rights

Article 3(b) of the VCDR specifically provides that the functions of diplomatic missions shall include *inter alia* -

protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by International Law<sup>920</sup>

It must be emphasized that article 3(b) of the VCDR is concerned with both the protection of the interests of the sending state, and those of its nationals. Since this thesis deals with the issue of diplomatic protection of human rights of nationals the question therefore arises whether the term “interests” as used in the Convention<sup>921</sup> is synonymous with, or includes “human rights,” or is restricted to political, economic and other interests? Another question is the extent and manner in which the protection of these interests are permitted by the Convention.

The dictionary defines “interest” as “concern about something; anything in which one has a share or benefit.”<sup>922</sup> Although the term “rights” is chameleon-hued,<sup>923</sup> many

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<sup>917</sup> Art 3(1)(c).

<sup>918</sup> Art 3(1)(d).

<sup>919</sup> Art 3(1)(e) of the VCDR. Art 3(2) stipulates that “Nothing in the present Convention shall be construed as preventing the performance of consular functions by the diplomatic mission.”

<sup>920</sup> As stated above, the other functions of diplomatic Missions stipulated under art 3 of the VCDR include *inter alia* negotiating with the government of the receiving State; ascertaining by all lawful means conditions and developments in the receiving State and reporting thereon to the government of the sending State, and developing their economic, cultural, and scientific relations.

<sup>921</sup> I.e Art 3 of the VCDR. The VCDR was the codification of Customary International Law practice .

<sup>922</sup> See Garner *supra* n 12 186.

<sup>923</sup> See Hohefeld “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 *Yale L J* 16. According to Hohefeld, the term “right” is an ambitious term use’d to describe a variety of legal relationships. Sometimes, it is used to mean entitlement, sometimes immunity, sometimes it is used to indicate privilege, while at other times it refers to power to create a legal relationship. Vinnogradoff defines “right” as a claim or demand. See “The Foundation of a Theory of Rights” in *Collected Papers* II 367, while Lundstedt defines a “right” simply as the favourable position enjoyed by a person in law. This view is shared by both Holland and Gray. See Holland *Jurisprudence* 83; & Gray *Jurisprudence* 12 18. See also the case of *Bradford Corporation v*

writers have tried to determine whether “rights” are synonymous with “interests” in everyday life. The most prominent of such writers are Ihering<sup>924</sup> and Salmon.<sup>925</sup> Both writers maintain that rights are synonymous with interests that accrue to man as a human being. Heck, a disciple of Ihering defines “interest” as

in its widest connotation as embracing all things that man holds dear and all ideas which guide man’s life. <sup>926</sup>

Dias<sup>927</sup> has warned that “right” may not necessarily be synonymous with “interest”,<sup>928</sup> although he concedes that while the “interest” approach is helpful in determining what rights are, it is not universally true. According to him, very frequently, especially in cases of rights that correlate to statutory duties, interest is the determining factor.<sup>929</sup> Nevertheless, man’s increasing tendency to speak of what is most important to him or her in terms of “rights” and to frame what is dearest to him or her as fundamental “rights”<sup>930</sup> indicate the extent to which rights and interests are inter-related. <sup>931</sup>

Since it is generally agreed that rights and interests are synonymous in human life, it is submitted that the term “interests” as used in article 3(b) of the VCDR is synonymous with, and incorporates human rights. Article 3(b) of the VCDR, is therefore wide enough to include the protection of human rights of nationals by diplomatic missions. It is further submitted that the right to diplomatic protection is based on and derived from article 3(b) of the VCDR under conventional law. The

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*Pickles* (1895) AC 587. To Kameka, rights are claims that have achieved a special kind of endorsement or success. See Kakema, “Human rights: Peoples rights” in Crawford (ed) *The Rights of Peoples* (1988) 127.

<sup>924</sup> See Iherig *Geist des romischen Rechts* III 39.

<sup>925</sup> Salmon *Jurisprudence* 217.

<sup>926</sup> See Heck “The Jurisprudence Of Interests: An Outline,” in *20<sup>th</sup> Century Legal Philosophy Series II* 33.

<sup>927</sup> Dias *supra* n 669 252.

<sup>928</sup> His comments on this theory may be summarized as follows: (a) The right does not necessarily coincide with interest. In the case of a trust, both law and equity recognize the legal right in the trustee, although the interest is admittedly not in him, and the common law gives no right to the beneficiary, who has the interest; (b) not all interests are protected rights. The combined effect of points (a) and (b) is that interests cannot serve as a test of rights, for their recognition is a matter of law.

<sup>929</sup> See the cases of *Knapp v Railway Executive* [1949] 2 All E. R. 508 515; & of *Hartley v Mayoh* [1954] 1 Q B 383.

<sup>930</sup> See Glendon *RightsTalk* (1999) 3-4.

<sup>931</sup> *Ibid.*

boundaries or limits of article 3 of the Convention as a whole, however, still have to be considered in the context of a number of other articles.<sup>932</sup>

## 5 Limits of protection

The VCDR expressly provides that the diplomatic mission shall exercise its right of protection “within the limit permitted by international law.”<sup>933</sup> Dembiski asserts that “the terms used here are very general and it is difficult to determine the real content of the provision,”<sup>934</sup> because the words “*within the limits permitted by international law*” makes the provision diverse and “varied.”<sup>935</sup> He believes that foreign missions may be handicapped by this limitation clause and that any exercise of the function of “protecting” is invariably restricted to the intermediary of the Ministry of Foreign Affairs of the receiving state only. He believes also that such “protection” is limited to mere protest and nothing more.<sup>936</sup>

It is, however, submitted that article 3 (b) of the VCDR is not limited to protests only, but can go beyond.<sup>937</sup> This is because the choice of means for diplomatic protection is often determined by various factors.<sup>938</sup> Even in the rare cases where the claimant state has a legal obligation to grant protection under international law, there is much discretion in the choice of means. Thus, if protests are to no avail, the next step open to the mission is to inform the home state who may prefer an international claim on behalf of its aggrieved national.<sup>939</sup>

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<sup>932</sup> These include (a) the performance of consular functions by diplomatic missions (b) where a distinction is to be drawn between functions of a mission and personal activities of its members (c) where a distinction is to be drawn between diplomatic functions and commercial activities and (d) where the function in question is a novel one. See e.g. the case of *Propend Finance Property v Sing and The Commissioner of the Australian Federal Police* Judgement of Laws 1996-04-14 (Unreported). See also arts 9 & 41 on proper limits to diplomatic activity.

<sup>933</sup> Art 3(1) (b).

<sup>934</sup> Dembinski *supra* n 12 41.

<sup>935</sup> *Ibid.*

<sup>936</sup> *Ibid.*

<sup>937</sup> Tiburcio *supra* n 26 43 maintains that diplomatic protection may involve resort to all forms of diplomatic intervention, ranging from negotiation, good offices to the actual use of force. It must be borne in mind that the Mission is part of the Executive arm of government. But Dugard has warned that diplomatic protection must be exercised by lawful and peaceful means only. See the commentary to draft art 1 *Official Record of the GA supra* n 1 par 8 26-27.

<sup>938</sup> Art 1 of the ILC Draft speaks of “the invocation by a State through diplomatic protection or other means of peaceful settlement...”.

<sup>939</sup> Silva *supra* n 10 62.

Thus the right of diplomatic protection which a state exercises through its mission may go beyond mere protest. As already indicated, the mission is the *alter ego* of the state. Although the mission is part of the executive branch of government, since it operates in a foreign state, it is not in a position *ex hypothesi*, to confront the receiving state directly.<sup>940</sup> It can nevertheless make an effective representation by liaising with the sending state. A protest is however often the first step in registering objection in diplomatic circles.<sup>941</sup>

## 6 When nationals seek diplomatic protection

The intervention of a diplomatic mission on behalf of its national is often required when the rights of the individual concerned, whether a natural or legal person is violated.<sup>942</sup> The right violated must be of such a nature that immediate action is required.<sup>943</sup> Such instances are innumerable, and include: (a) Cases of arbitrary arrests and detention; (b) cases of denial of justice; (c) cases of infringement of property rights, and (d) cases where the receiving state fails to afford adequate protection against acts of private persons or mob violence.<sup>944</sup> Instances mentioned above will now be discussed.

### (a) *Cases of arbitrary arrest and detention*

The most common examples of situations in which the mission's protection or assistance may be sought are cases of deprivation of personal liberty through arrest or detention by the authorities of the receiving State. Although the alien is subject to the laws of the State in which he or she resides, the general rule of international law is that he or she should be afforded equal protection of the law, and should therefore not be subjected to arbitrary arrest or detention. This is also a violation of the national law of the receiving state. For instance, he or she should not be arrested without being informed of the grounds of his or her arrest, nor should he or she be arrested on flimsy charges without being given the opportunity to defend his or

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<sup>940</sup> *Ibid.*

<sup>941</sup> A protest can either be formal or informal. This may be done by a formal note or informally, in the course of an interview. See *supra* n 52 371-2

<sup>942</sup> *Ibid.*

<sup>943</sup> *Ibid.*

<sup>944</sup> *Ibid.*

herself.<sup>945</sup> This certainly would be repugnant to the rules of natural justice, equity, and good conscience and against international law because such an arrest may infringe article 9 of the ICCPR and article 9 of the UDHR..<sup>946</sup>

Whether such arrests are permissible under the laws of the receiving State, or whether the State treats its own nationals in the same manner is immaterial. In *Roberts Claim*,<sup>947</sup> for instance, Roberts, an American national, was arrested and held, without trial, in Mexico for seven months in a small cell, together with 30 or 40 Mexicans. Ventilation was poor, sanitary and ablution arrangements primitive, food scarce and raw, and exercise denied. When sued by the US for its mistreatment of Roberts after diplomatic efforts to obtain his release had failed, Mexico responded that he was treated in the same way as his fellow Mexican prisoners. In upholding the claim of the US, an international tribunal stated:

Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. The test is broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.<sup>948</sup>

(b) *Cases of deportation and expulsion*

Other situations often requiring the urgent attention of the diplomatic mission are cases of deportation or expulsion of their nationals by the receiving state. It is conceded, however, that a state has unqualified liberty in matters pertaining to the admission of foreigners into its territory. The right to expel or deport a foreigner from

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<sup>945</sup> See ICCPR art 9. See also *Filartiga v Pena-Irala supra* n 136.

<sup>946</sup> See *supra* n 52 374.

<sup>947</sup> 4 RIAA 77 (1926); *Asian Agricultural Products Ltd case* (1990) 30 ILM 577 and *Quintanilla Claim (Mexico v US)* 4 RIAA . 101 (1926).

<sup>948</sup> When certain South African nationals were arrested in the DRC in 2006, it was the diplomatic efforts exerted on their behalf by the South African Ambassador in the DRC that secured their release. See generally *Pinochet's case R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)* [2001] 1 AC 119. See also the *Arrest Warrant case*, where the DRC protested against the arrest warrant issued for the arrest of its Minister for Foreign Affairs by Belgium. *Case Concerning the Arrest Warrant of 11 April 2000 ( DRC V Belgium)* ICJ Rep 3 (2002)41 ILM 536. A distinction should however be drawn between the arrest of an ordinary foreigner and a foreigner with a diplomatic status. While the former is permitted, the latter is not.



its territory is also unquestionable. However, it is firmly established that this liberty or discretion should be exercised judiciously by a state.<sup>949</sup> There are judicial *dicta* to the effect that states must give convincing reasons for expelling an alien.<sup>950</sup> For example, in the *Boffolo* case<sup>951</sup> which concerned an Italian national expelled from Venezuela, it was held that although states possess a general right of expulsion, it could only be resorted to in extreme circumstances and accomplished in a manner least injurious to the person affected.

Apart from legal considerations, human conscience dictates that when an alien is to be expelled or deported, it should be done in a very humane manner. The process adopted should not only be reasonable, but the expulsion itself should be effected in such way that the pain, suffering and agony associated with it is minimised.<sup>952</sup> It is necessary to ensure that reasonable time is afforded to a person who has lived in a territory for a certain length of time, and has established either business or professional links there to fold up his or her business.<sup>953</sup> Likewise, an alien who is to be expelled or deported should not be humiliated or disgraced before or during the course of such deportation or expulsion.<sup>954</sup> If this happens, then, the envoy has a right to intervene. Thus, where the means adopted for the expulsion reveals that the alien has been tortured or tormented, the diplomatic envoy of his or her state of nationality reserves the right to question such capricious or unreasonable exercise of power.<sup>955</sup>

(c) *Cases of denial of justice*

Most frequently, claims are laid on the basis of what is termed “denial of justice.”<sup>956</sup> In a broad sense, the expression covers all injuries inflicted on foreign nationals abroad in violation of international justice whether by judicial, executive or legislative

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<sup>949</sup> See for instance Reg No 72/194 EEC Council Directive of May 18 1972 [1972] OJ L121/32 1972-05-26. See Sen *supra* n 52 366.

<sup>950</sup> See e.g. *Dr Breger's case* Whiteman *Digest* vol VIII 861.

<sup>951</sup> 10 RIAA (1930) 538.

<sup>952</sup> Sen *supra* n 52 366.

<sup>953</sup> *Idem* 367.

<sup>954</sup> *Ibid.*

<sup>955</sup> See Lauterpacht *The Function of law in the International Community*. (1933) 284 & Oppenheim *supra* n 244 Vol 1 691.

<sup>956</sup> Sen *supra* n 52 376.

organs.<sup>957</sup> In its narrow and more technical sense, however, it connotes misconduct or inaction on the part of the judicial agencies of the respondent state, denying to the citizens or the claimant state the benefits of due process of law. To constitute a denial of justice in the narrow sense, there must be some abuse of the judicial process or an improper administration of justice.<sup>958</sup>

In *Chattin's Claim*,<sup>959</sup> for instance, Chattin, a US citizen, was arrested for embezzlement in Mexico. His trial was consolidated with those of several other Americans and Mexicans who had been arrested on similar charges. He was convicted and sentenced to two years' imprisonment and his appeal was rejected. Chattin escaped from jail during an uprising and returned to the US. In asserting Chattin's claim, the US argued that the arrest was illegal, that he was mistreated while in prison, that his trial was unreasonably delayed, and that there were irregularities during the trial. The Claims Commission held that there was denial of justice in the trial, and ordered Mexico to pay damages to the US. Similarly, in the *Cutting Case*,<sup>960</sup> the US intervened with Mexico in regard to the trial of an American citizen who had been arrested on a charge of criminal libel.<sup>961</sup>

Thus, although an alien cannot complain if he or she is punished under local law for an offence he or she has been found to have committed, this principle is subject to two exceptions. The first exception is that it is not applicable where the rules of natural justice are not observed during the trial.<sup>962</sup> The other concerns where the alien in question is subjected to a sentence which may be regarded as unduly harsh or barbarous according to civilized standards.<sup>963</sup> In such instances, the diplomatic mission can intervene.

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<sup>957</sup> E.g. mistreatment in jail, or arbitrary confiscation of property.

<sup>958</sup> E.g. wrongful arrest and detention, obstructing access to courts, unwarranted delays in procedure, a manifestly unjust judgement of the court, a refusal to hear the defendant, or a grossly unfair trial. See *Sen supra* n 52 378. See also *Harris supra* n 385 736.

<sup>959</sup> *Supra* n 32 667. See also *Cutting Case* (1880) Moore's *Digest of International Law* (1906) Vol II 228.

<sup>960</sup> Moore's *Digest of International Law* (1906) Vol II 228. See also *Pope's case* 8 Whiteman 709.

<sup>961</sup> A mere error in the judgment of an international tribunal does not amount to a denial of justice: See *Salem case* (1932) *United Nations Reports of International Arbitral Awards* Vol. II 1202.

<sup>962</sup> Eg *Chattins Claim supra* n 32.

<sup>963</sup> E.g. *Neers Claim supra* n 34.

(d) *Infringement of property rights*

Although property rights are not listed as human rights in terms of the ICCPR or the ICESCR, the UDHR clearly identifies property rights as human rights.<sup>964</sup> It must be recalled that all rights are indivisible and inter-related.<sup>965</sup> Interestingly, diplomatic missions have been geared more towards the protection of property rights than civil or political rights over the years.<sup>966</sup>

Assistance of the envoy is often sought where the properties are acquired, expropriated or confiscated<sup>967</sup> by the receiving State. Such assistance is also sought where the properties are damaged, destroyed or where the rights over them are extinguished.<sup>968</sup> In *Texaco v Libya*,<sup>969</sup> for instance, in 1973 and 1974 Libya nationalised all the property rights, assets and interests of the two claimants<sup>970</sup> both of US nationality. It was held that Libya was in breach of the concession agreement and that the appropriate remedy under the circumstance was that of *restitutio in integrum*<sup>971</sup>

Again, in his representation to the Mozambican government over the expropriation of British assets in Maputo, the British Ambassador to Mozambique made it abundantly clear to the Mozambican government that his government was entitled to claim prompt, adequate, and effective compensation.<sup>972</sup> Likewise, the British Ambassador to Sri Lanka also demanded for compensation from the Sri Lankan government over the nationalisation of tea estates in that country.<sup>973</sup> This was also the case in Chile when British assets were expropriated in 1981.<sup>974</sup> It must be stated that the properties or property rights that may be sought to be protected, may be those of nationals of the home state, who are resident in the territory of the receiving state, or

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<sup>964</sup> See UDHR art 17.

<sup>965</sup> See the Vienna Declaration and Programme of Action par 5 adopted at the Vienna Conference on Human Rights 1993 *supra* n 214.

<sup>966</sup> See Erasmus & Davidson *supra* n 293 80.

<sup>967</sup> See the cases of *Certain German Interests in Polish Upper Silesia* PCIJ Rep ser A No 7 (1929) 22; *Amoco International Finance Corp. v Iran* *supra* n 33; *Liamco case* *supra* n 33; *Aminoil case Kuwait v American Independent Oil Co.* 21 ILM 976 (1978) etc.

<sup>968</sup> See Sen *supra* n 52 381.

<sup>969</sup> (1977) 53 ILR 389; (1978) 17 ILM 1.

<sup>970</sup> *Texaco Overseas Petroleum Co & California Asiatic Oil Co v Libya*.

<sup>971</sup> Par 91.

<sup>972</sup> Sen *supra* n 52 385.

<sup>973</sup> *Ibid.*

<sup>974</sup> *BYIL* Vol LII (1981) 498.

those of non-resident nationals or companies incorporated in the home state of the envoy.<sup>975</sup>

(e) *Injury at the hands of private persons*

A foreign national may be injured through the act of a private individual. Those class of cases will be discussed forthwith. No doubt, a foreign national may sustain severe bodily harm as a result of being assaulted by a private individual. Such a person may also be injured in a riot or may be mobbed during an uprising. In the same vein, the person may lose his or her home, business or property as a result of looting or demolition. It is not uncommon that a person may become a victim as a result of his or her race or nationality.<sup>976</sup>

The general rule of international law in relation to state responsibility is that a State is not responsible for acts committed by one of its citizens against a foreigner where the wrongful act is not imputable to the State.<sup>977</sup> The individual may of course be liable for criminal prosecution in the municipal courts, and indeed, the government concerned may be held internationally responsible if it fails to discharge its duty of “diligently prosecuting and properly punishing” the offender.<sup>978</sup>

Nevertheless, in cases of riot or civil commotion, the diplomatic envoy will be well within his or her rights to ask the government of the receiving state to take adequate measures to protect the lives and properties of the envoy’s nationals, and to protest to the government if it fails to do so. It is to be expected that the authorities of the receiving State shall afford the foreigner adequate protection in respect of his or her life and property. Failure to do so may trigger diplomatic intervention.<sup>979</sup>

(f) *Refusal of entry visa*

Normally, states refrain from laying complaints on the bases that their national is being denied entry into another state, because, the granting or refusal of entry visa under international law is strictly within the exclusive domestic jurisdiction of the

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<sup>975</sup> E.g. *Barcelona Traction case supra* n 26.

<sup>976</sup> The xenophobic attack on foreigners in South Africa in May 2008 is a good example *Ibid.*

<sup>977</sup> Provided that the person involved is not a policeman or a government official.

<sup>978</sup> See *Noyes Claim* 6 RIAA, 308 311 (1933); & *Neer Claim supra* n 34 60.

<sup>979</sup> See *Sen supra* n 52 42.

receiving state. As a result, such complaints or protests are rarely made the basis for the exercise of diplomatic protection.<sup>980</sup>

However, cases of refusal of entry visas by the receiving state may be handled by the diplomatic envoy. In this connection, the plight which the individual concerned is facing, coupled with the suffering which may be visited upon him or her as a result of the refusal of entry visa, may be brought to the attention of the government of the receiving state by the envoy, for reconsideration.<sup>981</sup> In order to safeguard the rights of their nationals and ensure their entry into the territory of other states, states have sometimes entered into treaties of friendship and commerce in advance, wherein the right of entry to each other's nationals is guaranteed.<sup>982</sup>

(g) *Protection of interests of nationals by a mission of a third State*

Article 45 of the VCDR provides that if diplomatic relations are broken off between states, or if a mission is permanently or temporarily recalled, the sending state may entrust the protection of its interests and those of its nationals to a third state acceptable to the receiving state.<sup>983</sup> Article 46 provides that a sending state may, with the prior consent of a receiving state, and at the request of a third state not represented in the receiving State, undertake the temporary protection of the interests of the third State and its nationals. It can be seen that the protection of the rights or interests of nationals in discharge of its protecting function falls squarely on the mission.<sup>984</sup>

It is important, however, for the envoy to know in what type of case he or she would be justified in intervening on behalf of his or her nationals and the appropriate

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<sup>980</sup> *Sen supra* n 52 346.

<sup>981</sup> If for instance a foreign student who had been studying for a higher degree in the receiving State suddenly discovers, after a brief absence from the country that his or her entry into the receiving State has been blocked as a result of refusal of entry visa, thereby foreclosing his or her chances of graduating, the envoy may lodge a complaint against the policy adopted by the receiving state and plead on behalf of the stranded student. See *Sen supra* n 52 346.

<sup>982</sup> In some countries, the law and practice allows free entry and right of residence to nationals of certain groups of states. For instance, in the past, citizens of Commonwealth countries were allowed to enter Britain and reside there without restriction. *Sen supra* n 52 324.

<sup>983</sup> Eg when the Libyan Embassy was closed after the Yvonne Fletcher shooting incident, the embassy and interests of Libyans living in Britain were protected by Saudi Arabia. See *Barker supra* n 870 4.

<sup>984</sup> Particularly under art 3(1) (b) of the VCDR.

occasions for such representation.<sup>985</sup> This will necessarily depend on whether the right infringed is a fundamental right which an alien is entitled to enjoy in the receiving state under municipal and international law.<sup>986</sup>

## **7 Ways of effecting diplomatic protection of human rights by diplomatic missions**

Diplomatic envoys protect the human rights or interests of their nationals in practical ways.<sup>987</sup> Situations in which diplomatic envoys are normally expected to intervene in order to protect the human rights or interests of their nationals have been highlighted. The more formal manner of approach is by means of lodging a protest when the rights of foreigners are violated. Protests are usually lodged where, in the opinion of the sending state, the attitude of the receiving state towards a particular individual, or towards the nationals of the sending state in general is outrageous, falls below expectation and is not consistent with the tenets of international law.<sup>988</sup> A protest exposes the deep disagreement with the negative policies of the government of the receiving state and highlights its negligence of duty towards the sending state in international law.<sup>989</sup>

Approaches to such matters are first made informally in the shape of seeking information and requesting relief, an exercise in persuasion, rather than confrontation.<sup>990</sup> If no redress is forthcoming by such informal approaches, a formal protest may be lodged.<sup>991</sup> Ultimately, in certain circumstances, other measures may be invoked if no relief is obtained even after exhausting such local remedies as may be available under the municipal laws.<sup>992</sup> The exercise of diplomatic protection as already emphasized, however, may involve resort to both amicable and non-amicable ways of conflict resolution. These may range from diplomatic negotiations,

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<sup>985</sup> *Sen supra* n 52 323.

<sup>986</sup> *Ibid.*

<sup>987</sup> *Ibid.*

<sup>988</sup> E.g. when the receiving State expropriates property without paying compensation, when it is responsible for denial of justice, or fails in its duty of affording protection to aliens.

<sup>989</sup> *Sen supra* n 52 388.

<sup>990</sup> *Ibid.*

<sup>991</sup> *Ibid.*

<sup>992</sup> *Idem* 389.

good offices, resort to international tribunals and, finally, to the threat or actual use of force.<sup>993</sup>

Occasions which may call for protests include situations where the receiving state repeatedly ignores previous complaints made by the sending state, where foreigners are treated in such a way as to constitute a flagrant disregard of the principles of international law, or where there is a clear case of a rape of justice, calling for prompt and instant protest.<sup>994</sup> Thus, situations such as an unjustified arrest, or the confiscation of alien property against the rules of natural justice and the fundamental human rights of their owners, could constitute the platform for the lodging of protests.<sup>995</sup> Under such circumstances, a representation may be made in respect of the interests of the nationals of his or her country generally, or in respect of a particular individual.<sup>996</sup>

## 8 Preferment of claims

In practice, a foreigner whose rights have been violated by the receiving state takes the matter up with the embassy of his or her own country or nationality. The embassy may try to assist the person by making representations on behalf of the injured individual. If the embassy is unable to solve the problem, or if there is a denial of justice, the embassy may refer the matter to the Ministry of Foreign Affairs of the sending state which may, in turn, refer the matter to the executive arm of government.

If the government believes that there has been a violation of international law and that the rights of its citizen which have been infringed, are under international law or treaty “protected right,” it may then take the matter up through diplomatic channels with the foreign office of the defaulting/receiving state. If no settlement is reached at

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<sup>993</sup> See Tiburcio *supra* n 26 43.

<sup>994</sup> Sen *supra* n 52 389.

<sup>995</sup> *Ibid.*

<sup>996</sup> In situations where the interests of nationals are generally affected, the occasion for representation may arise when the government of the receiving state has introduced, or is contemplating the promulgation of any law which is likely to affect the interest of all its nationals in that state, such as nationalisation decrees, taxation laws, or laws relating to business or profession. Sen *ibid.*

this stage, it may institute an international claim in an international court or tribunal.<sup>997</sup>

The sending state is deemed to be injured through its subjects or to be asserting its right to ensure respect for the rules of international law *vis-à-vis* its nationals.<sup>998</sup> Once the intervention is made or the claim laid, the matter becomes one that concerns the two states alone.<sup>999</sup> In *Mavromatis Palestine Concession Case*<sup>1000</sup> for instance, the PCIJ observed that

Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter, the State is sole claimant.

The claim may be for damages for breach of contract, restitution in kind for property wrongfully taken, specific performance of an obligation which the receiving state has wrongfully failed to discharge, or for a restraint from further wrongful conduct.<sup>1001</sup> In such a claim, the reparation sought or demanded is designed to re-establish the situation which would have prevailed if the wrongful act or omission had not occurred.<sup>1002</sup>

Where restitution is not possible, payment of damages is the only remedy that can be claimed.<sup>1003</sup> In some cases, damages are claimed in addition to restitution. Damages are meant to restore the injured alien or his or her legal representatives to as good a position in financial terms, as that in which the person would have been, if the wrongful act had not taken place. It may also aim at providing satisfaction for the wrong or injury suffered by him or her due to the conduct of the receiving state.<sup>1004</sup>

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<sup>997</sup> *Idem* 390.

<sup>998</sup> This is the famous *Mavromatis* principle which is said to be a fiction. See the *Official Record of the GA supra* n 1 25.

<sup>999</sup> See also the case of *Panevezys-Salutiskis Rly Case, supra* n 81. Some writers such as Weis *supra* n 52 38 and Borchard *supra* n 1 358 hold the view that since the right of diplomatic protection belongs to the State, even if the injured national waives his or her right for compensation, the State of his or her nationality can nonetheless proceed to prosecute the claim. See Tiburcio *supra* n 26 59.

<sup>1000</sup> *Supra* n 36 12.

<sup>1001</sup> *Sen supra* n 52 389-390.

<sup>1002</sup> This is known as *restitutio in integrum* See the case of *Texaco v Libya supra* n 986 par 93.

<sup>1003</sup> *Ibid.*

<sup>1004</sup> E.g. the nationalisation of assets belonging to American oil co. by Libya. See *Texaco v Libya, supra* n 968.



It is very likely that the receiving state may settle with the sending state once the claim is preferred. However, in cases where the receiving state proves to be adamant, the claim could be pursued through the usual means for settlement of international claims between states,<sup>1005</sup> such as by having recourse to the ICJ<sup>1006</sup> or by resorting to an international arbitration<sup>1007</sup> or, in rare cases to war. As was held in the *Saldutiskis Railways Case*<sup>1008</sup>

The right of every sovereign state to protect its subjects who have been injured by acts contrary to international law on the part of other states and who have been unable to obtain satisfaction by remedies under municipal law, is an unabridged right

## **9 Scope or extent of diplomatic protection of human rights by diplomatic missions**

Certain basic factors must be taken into consideration whenever a diplomatic mission is contemplating the dimension to which it may go in procuring protection for nationals of its home state. These factors include state practice, the policy of the sending state towards diplomatic protection, instructions from Head Office, as well as judicial and arbitral decisions.<sup>1009</sup> Article 3(b) of the VCDR, however, expressly provides that diplomatic missions should protect the interests of their State and nationals “within the limits permitted by international law.”

The question, however, is the legal effect of the words “within the limits permitted by international law” in article 3 (b) of the VCDR, on the exercise of diplomatic protection by diplomatic missions. Has it watered down the power of diplomatic missions to effectively protect their nationals abroad?

Denza has thrown some light on the origin of the provision in the text of the VCDR.<sup>1010</sup> According to her, there was prolonged debate at the Vienna Conference

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<sup>1005</sup> See *supra* n 52 390.

<sup>1006</sup> E.g. cases such as *Barcelona Traction case supra* n 26; *Mavrommatis Palestine Concession case supra* n 36 or *Saldutiskis Railways case supra* n 81 etc.

<sup>1007</sup> For other diplomatic ways of protecting personal or property rights, see ch 2.

<sup>1008</sup> *Supra* n 81 16.

<sup>1009</sup> See *Sen supra* n 52 323.

<sup>1010</sup> See *Denza supra* n 883 30.

as to whether the function of “protecting in the receiving state the interests of the sending state and of its nationals” should be qualified by some reference to the rules of international law. The demand for such a reference came from states which had more frequently been defendants to diplomatic claims, and wished for political reasons, to circumscribe the right to diplomatic protection. The ILC had earlier addressed the point by inserting, in its commentary, a paragraph stating that, the inclusion of the function of protection did not prejudice the latter provision prohibiting interference in the internal affairs of the receiving State, or the International Law rule requiring the exhaustion of local remedies.<sup>1011</sup>

Denza goes further to explain that

“India, Mexico and Ceylon<sup>1012</sup> proposed to the conference an express qualification in the text, referring to the rules of international law. Other states doubted the need for amendment on the grounds that all the functions of the mission could only be exercised within the limits permitted by international law, and that the entire convention operated within the framework of customary international law rules, unless they were expressly altered. The insertion of such a *proviso* in one sub-paragraph of a single article, some delegates felt, would be open to misconstruction. Ultimately, however, most delegates accepted the need for reassurance in this particular context and the words “*within the limits permitted by international law*” were added to the draft of the ILC by the Conference”.<sup>1013</sup>

Has this provision watered down the power of diplomatic missions to effectively protect their nationals abroad? It is submitted that it has not. This is because the provision has not subtracted from or otherwise circumscribed the limits of diplomatic protection by diplomatic missions under customary international law.<sup>1014</sup> As already said, there is practically no limit for the exercise of diplomatic protection.<sup>1015</sup>

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<sup>1011</sup> *Ibid.*

<sup>1012</sup> Now Myanmar (Burma).

<sup>1013</sup> Denza *supra* n 883 31.

<sup>1014</sup> See Silva *supra* n 10 66. This was the general consensus at the Vienna Conference of 1961 See Denza *ibid.*

<sup>1015</sup> See Tiburcio *supra* n 26 43. For a contrary view however, see the commentary to par 8 Draft Articles 1 on Diplomatic Protection 2006 *Official Records of the GA supra* n 1 27 which states *inter alia*: “The use of force prohibited by art 2 par 4 of the Charter of the UN is not a permissible method for the enforcement of the right of diplomatic protection.” See also *supra* n 935.

In cases where bilateral treaties are in force, however, the scope of diplomatic protection will no doubt be governed by the provisions of such treaties.<sup>1016</sup> Such cases are however, still very rare, and the mission would most often need to fall back on customary and conventional rules.<sup>1017</sup>

## 10 Consular protection of nationals abroad

As already mentioned, diplomatic protection includes consular protection.<sup>1018</sup> Although diplomatic protection was traditionally conducted through the medium of ambassadors and their staff, the growth of trade and commercial intercourse necessitated the establishment of the consular office, which was expanded to incorporate the function of protection of nationals abroad. Consuls are agents of a state in a foreign country. Although they are not diplomatic agents, the protection they afford is generally regarded as diplomatic protection.<sup>1019</sup>

The primary duty of a consul, therefore, goes beyond the protection of the commercial interests of his or her appointed state to the protection of the interests of the consul's nationals as well.<sup>1020</sup> The role played by the consul in safeguarding the interests of nationals of his or her home state abroad has been highly acclaimed. It has been published in many books, affirmed by many commentators and confirmed by state practice.<sup>1021</sup> In his commentary on the role of consuls in safeguarding the interest of their nationals abroad, Pradier-Fodere said:

“It is a consul's duty to see that his national's rights are respected in a foreign land and to take all measures which he deems necessary and useful to accomplish this end; it is through its consuls that the state extends its protecting arm over the entire surface of the globe”.<sup>1022</sup>

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<sup>1016</sup> *Sen supra* n 52 323.

<sup>1017</sup> *Ibid.*

<sup>1018</sup> *See* n 866 *supra*.

<sup>1019</sup> *Ibid.* *See also supra* n 15.

<sup>1020</sup> *Ibid.* *See also* art 5(a) of the VCCR.

<sup>1021</sup> *Lee supra* n 760 124.

<sup>1022</sup> *See Pradier-Fodere Traite de droit international Public* (8vols, 1888) IV 555 (translation by Stuart 372).

According to Lee,<sup>1023</sup> Commander Ribeiro dos Santos referred to the consul's right to protect as the most "sacred and noble attribute of consuls".<sup>1024</sup> while Oppenheim called it "a very important task" of consuls.<sup>1025</sup>

A consul's right to protect nationals of his or her country is often embodied in bilateral treaties between the States concerned. In the absence of a treaty, however, a consul's right to protect nationals of his or her country may be based on customary international law,<sup>1026</sup> or on the assistance often contained in the "most-favoured – nation" treatment clause in instructions other than treaties.<sup>1027</sup>

It is not clear whether or not a national of a consul's home state can compel the consul to render the required protection to him or her as of right.<sup>1028</sup> There are, however, two schools of thought on this issue. While some commentators argue that nationals have no right to demand protection from consuls, others argue to the contrary.<sup>1029</sup> The US, Brazil, Hungary, and the UK practice discussed below, for example, seem to indicate that it is the duty of a consul to provide the necessary assistance to his or her countrymen even without any formal request.<sup>1030</sup>

In order to ensure that no US citizen is denied protection, US consular instructions provide that if there is any doubt as to the identity of any individual or the facts in issue, such cases should be referred to the US government for decision. Otherwise temporary relief should be given to the affected individual while instructions from headquarters is being awaited.<sup>1031</sup> However, US consuls are duty-bound to protect once the identity of the individual as a US citizen is firmly established.<sup>1032</sup> To ensure that US citizens, arrested or imprisoned abroad, are given due protection, the

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<sup>1023</sup> *Supra* n 760 124.

<sup>1024</sup> See de Cussy *Reglements consulaires* ( 1920) 20.

<sup>1025</sup> Lee *supra* n 760 124.

<sup>1026</sup> See Preamble to VCCR.

<sup>1027</sup> Lee *supra* n 758 124.

<sup>1028</sup> *Ibid*

<sup>1029</sup> *Ibid*.

<sup>1030</sup> *Ibid*

<sup>1031</sup> *Ibid*

<sup>1032</sup> *Ibid*. See s 253 1 of 7 FAM 1100 Appendix E. which reads "generally the establishment of the claim to United States nationality also establishes the right to receive the protection of this government abroad."

Department of State in 1980 sent complete instructions regarding consular services and functions relating to their protection to all Foreign Service posts.<sup>1033</sup>

Brazilians residing abroad are empowered by Brazilian law to demand protection from their consular officials as of right.<sup>1034</sup> Consular officials are also conferred with both the right and the obligation not only to assist and protect Brazilian citizens abroad, but to ensure that their rights under treaties, custom and international law are safeguarded and preserved.<sup>1035</sup>

Instructions given to British consular officials are more comprehensive and far reaching.<sup>1036</sup> In their protective capacity, British consular officials are *inter alia* expected not only to advise, but to help their nationals in their transactions with local authorities; to keep them abreast of all laws which may affect them personally or their business interests; to place a list of lawyers at the disposal of those who may be in need of legal advice or assistance; to safeguard their interests as entrenched in treaties, international customs, norms and usages, so that their welfare is not compromised or placed at a disadvantage *vis-à-vis* nationals of the receiving state; to refer doubtful cases to diplomatic personnel for advice and to inform them of any inability to obtain local remedies. They are to intervene in judicial proceedings where (a) a clear case of miscarriage of justice is established (b) all local remedies have been exhausted and (c) an appeal to a higher court would clearly be a waste of time.<sup>1037</sup>

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<sup>1033</sup> These were subsequently published in ch 400 Vol 7 "Overseas Citizens Services" of the *Foreign Affairs Manual* and the Dept of State *Digest* 1980 360-76 now revised. The list of matters covered is very comprehensive and includes issues such as notification of arrests, the provisions of the VCCR relating to arrests, bilateral consular treaties, relations with local authorities, access to detained persons and provision of legal services, personal visits to arrested persons within 48 hours of notification, telephone contacts where possible, visit by volunteers or consular agents where available, list of attorneys, providing Instructional materials on Judicial procedures, on confiscation of prisoner's personal property, on the condition of the prisoner and the environment i.e prison conditions, on the health of the prisoners, nutrition, medical and dental care, morale, etc.

<sup>1034</sup> Brazil, *Consolidation of the laws, Decrees, Circulars and Decisions referring to the Exercise of the Brazilian Consular Functions*. (Decree No.360 of Oct 1953). This has been updated.

<sup>1035</sup> Art 69 of the Hungarian Constitution provides "Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary during his/her legal staying abroad." Even before the UK ratified the VCCR, its *Foreign Service Instructions* provided (VIII-9) "It is the duty of a foreign service officer to watch over and take all proper steps to safeguard the interests of British subjects and British protected persons within his district".

<sup>1036</sup> See Lee *supra* n 760 125.-126.

<sup>1037</sup> *Ibid.*

Nigeria has in principle adopted the provisions of article 5 of the VCCR and does not issue any special guidelines to its consular offices with regard to the protection of her nationals abroad. However, what South African consular officers can do for South Africans detained or arrested abroad is clearly spelt out.<sup>1038</sup> They include:

- To establish contact with the detainee as soon as possible after verifying South African citizenship;
- Provide general information about the legal system of the country of arrest;
- Maintain contact with the arrested South African citizens abroad, with due observance of the laws and regulations of the arresting state;
- Undertake prison visits. The frequency of prison visits depends on current policy, the location, culture and laws of the arresting state, the prevailing security situation in the country and/or the prison and subject to the mission's operational circumstances;
- Contact family or friends, to a maximum of three, only if authorised to do so by the detainee / prisoner in writing;
- Assist with the transfer of funds;<sup>1039</sup> and
- Ensure that medical problems are brought to the attention of the prison authorities.<sup>1040</sup>

## 11 Consular functions

Consular functions are listed under article 5 of the VCCR 1963.<sup>1041</sup> They include:

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<sup>1038</sup> See *Advice to South African Citizens in the event a South African is arrested or jailed abroad* <http://O-www.dfa.gov.za.innopac.up.ac.za/consular/arrest.htm> 20009/02/09 1-2.

<sup>1039</sup> A maximum amount of R2,000.00 per month per detainee / prisoner may be deposited by designated family members / friends. See *supra* n 1033 2.

<sup>1040</sup> What Consular officers cannot do for South Africans detained / arrested abroad include: (1) Institute or intervene in court proceedings or judicial process (2) obtain or give legal advice (3) organise a release from prison or bail (4) travel to dangerous areas or prisons for prison visits (5) Investigate crimes (6) instruct next of kin or friends to transfer money. See *supra* n 1035 3.

<sup>1041</sup> Until the adoption of the VCCR in 1963, consular relations were governed by rules of Customary International Law. Often they were regulated by conflicting bilateral treaties and occasionally by regional treaties. Like the VCCR, the adoption of the VCCR was undoubtedly the single most important event in the history of consular institution. Today, consular relations are governed by the VCCR. This instrument constitutes a general framework which can be supplemented by bilateral or multilateral conventions or agreements. The process for codification was the same as that of the VCCR. The ILC started work in 1955. The final draft was submitted to the UNGA in 1961, while the Convention was convened and adopted in 1963. See Lee *supra* n 760 241.

- (a) protecting the interests of the sending State and of its nationals, both individuals and body corporate in the receiving State within the limits permitted under International Law;
- (b) furthering the development of commercial, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention; and
- (c) ascertaining, by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State
- (d) reporting thereon to the government of the sending State and giving information to interested persons.<sup>1042</sup>

Other consular functions include issuing passports and travelling documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State

- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending state.<sup>1043</sup>

This list is more elaborate than its counterpart in the VCDR.<sup>1044</sup> This is easily explained by the fact that consuls have more limited but more technical functions than diplomats.<sup>1045</sup> In connection with the function of protection of nationals abroad, article 5(a) of the VCCR specifically empowers the consul to protect *inter alia*:

in the receiving state, the interest of the sending State and of its nationals both individual and corporate bodies within the limit permitted by international law.

Article 5(e) provides that the consul's function shall also consist of:

helping and assisting nationals, both individuals and bodies corporate of the sending State.

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<sup>1042</sup> These are similar to s 3 of the VCDR.

<sup>1043</sup> See Art 5(f) – (m) for other consular functions under the VCCR.

<sup>1044</sup> While art 3 of the VCDR contains 5 functions (a – e) art 5 of the VCCR contains 13 functions (a – m).

<sup>1045</sup> Harris *supra* n 385 362.

This function of protection was reemphasized in the *Case Concerning U.S Diplomatic and Consular Staff in Tehran*,<sup>1046</sup> where the ICJ forcefully stressed the importance of the function of diplomatic and consular missions in protecting nationals of the sending State. In connection with the two private American citizens detained with the staff of the embassy, the court noted that:

The seizure and detention of these individuals in the circumstances alleged by the US, clearly falls within the scope of the provision of Article 5 of the VCCR 1963 expressly providing that consular functions include protecting, assisting, and safeguarding the interest of nationals and whereas, the purpose of these functions is precisely to enable the sending State through its consulates, to ensure that its nationals are accorded the treatment due to them under general law, as aliens within the territory of the foreign state.<sup>1047</sup>

The mandate under article 5(a) of the VCCR to protect is similar to the mandate under the provisions of article 3(b) of the VCDR. In other words, the provisions of article 5(a) of the VCCR is similar to the provisions of article 3(b) of the VCDR.<sup>1048</sup> It is submitted that the “interests” of nationals referred to in article 5 of the VCCR also incorporates and includes human rights as is the case under article 3(b) of the VCDR.<sup>1049</sup> Specific aspects of consular functions of protection will now be discussed.

### **11.1 Communication and contact with nationals**

A major protective function of consuls is to communicate with and contact nationals of the sending state freely and to have access to them.<sup>1050</sup> Failure to do so is a breach of duty and has resulted in action being initiated before the ICJ by Germany and Paraguay against the US. In *Paraguay v US*<sup>1051</sup> and in *Germany v US*<sup>1052</sup> the ICJ held that the US was in breach of its obligations under the provisions of article

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<sup>1046</sup> *Supra* n 242.

<sup>1047</sup> Order of (1979) 12 15 ICJ Rep 1979 par 19.

<sup>1048</sup> Both deal with the protection of the interest of the sending State and their nationals within the limit permitted by International Law.

<sup>1049</sup> See the argument in support of this point pp 129 - 131 *supra*.

<sup>1050</sup> The VCCR art 36.

<sup>1051</sup> (1998) ICJ 248.

<sup>1052</sup> (*La Grande case*) 40 ILM 1069 (2001) *supra* n 398.



36(1) of the VCCR in that it had not informed the La Grand brothers of their rights under article 36(1) ‘without delay.’<sup>1053</sup>

The term “freedom of communication”<sup>1054</sup> with nationals may be defined as the freedom from interference with, and censorship of communications.<sup>1055</sup> In consular usage, such freedom is founded upon the same principles which underlie the inviolability of consular correspondence and archives.<sup>1056</sup> Freedom of communication between consuls and their co-nationals may be regarded as so essential to the consular exercise of functions that its absence would render the establishment of consular relations meaningless. Thus, even in the absence of a treaty, the right of consuls to communicate with nationals of their State in peace time is implicit in consular office.<sup>1057</sup>

This function has assumed growing importance as more and more people travel abroad – aided by reduced barriers to movement, relatively cheaper transport, and the tourists and package –travel industry.<sup>1058</sup> As the number of tourists and travellers soar, so does the number of those who infringe the law and get arrested.<sup>1059</sup> The causes of arrests and detention of foreign nationals range from drunken brawling, to drug, and espionage charges.<sup>1060</sup> As already indicated, essential to the fulfilment of a consul’s protective functions are his right to be informed immediately of a detention of a national of the sending state.<sup>1061</sup> His duty includes visits to them in prison, and assistance rendered to them in legal and other matters.<sup>1062</sup>

In the case of Lawrence Simpson, a US citizen and a seaman, who was arrested on board the US steamship *Manhattan* upon arrival in Hamburg in June 1935 and charged with high crimes, the US Consul General in Hamburg was given permission

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<sup>1053</sup> Art 36(1)(b) provides *inter alia* that “the said authorities shall inform the person concerned without delay of his rights under this sub – paragraph.” See also *Avena* (Mexico v US) *supra* n 398.

<sup>1054</sup> See art 35 VCCR.

<sup>1055</sup> Lee *supra* n 760 133.

<sup>1056</sup> See the Harvard Research *Draft* p 306. See Lee *supra* n 760 133.

<sup>1057</sup> *Ibid.*

<sup>1058</sup> *Ibid.*

<sup>1059</sup> *Ibid.*

<sup>1060</sup> *Ibid.*

<sup>1061</sup> See *supra* n 991.

<sup>1062</sup> Article 36(1)(c).

to see him at a concentration camp.<sup>1063</sup> The Consul General was assured that Mr Simpson could communicate with him in writing and could be visited by other representatives of the consulate if necessary. Simpson was sentenced to three years in the penitentiary, after admitting that he had imported communist propaganda material into Germany. His sentence was later commuted due to the energetic efforts on his behalf by the US Consular General. In yet another incident, upon the complaint of the Mexican Embassy in 1934 that officials in California had refused to permit the Mexican consul to visit a Mexican citizen in jail, the Department of State wrote to the Governor of California and the Mexican consul was subsequently allowed to visit the prisoner.<sup>1064</sup>

## 11.2 Espionage cases

A frequent exception to the consular right to protect nationals and visit them in prison is in cases of spying and espionage.<sup>1065</sup> Before the VCCR came into force, no consular protection was afforded to persons who were accused of espionage<sup>1066</sup> In one of the most mysterious and intriguing cases in espionage history, Adolph Arnold Rubens, also called Donald Louis Robinson, and not known to be an American citizen,<sup>1067</sup> obtained a fraudulent US passport for himself, his wife, and two deceased children and entered Russia *via* France, with valid visas.

Their disappearance and subsequent imprisonment *incommunicado* in Moscow, pending trial for espionage charges prompted the American Secretary of State to instruct the US *Charge d' Affaires* in Moscow, to call Soviet attention to a letter, written by Maxim Litvino,<sup>1068</sup> dated November 16 1933, to the US President. In this letter the Soviet Union assured President Roosevelt of the US that American nationals would be granted rights with regards to legal protection which would not be

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<sup>1063</sup> Lee *supra* n 760 136

<sup>1064</sup> *Idem* 135.

<sup>1065</sup> *Idem* 151.

<sup>1066</sup> *Ibid.*

<sup>1067</sup> It may be of interest to note that the US Secretary of State, in 1862 Steward, was of the view that the US Consul should be allowed to visit any prisoner *claiming* American citizenship, so that should his citizenship be verified, the consul could lend his good offices or bring the case before the US government. See Lee *supra* n 760 135.

<sup>1068</sup> Soviet People's Commissar for Foreign Affairs.

less favourable than those enjoyed in the Soviet Union by nationals of the nation the most favoured in this respect.

Subsequently, the US consul in Moscow was allowed to interview Mrs Rubens.<sup>1069</sup>

Another case of espionage was that of Colonel Rudolf Ivanovich Abel, a Soviet spy who was convicted of espionage and sentenced to thirty years imprisonment in the United States. A fine of \$3,000,<sup>1070</sup> was also imposed on him. He was denied the right of visitation. Since the adoption of the Vienna Convention, however, like those accused of any other crime,<sup>1071</sup> no exception is made in cases of those detained or imprisoned for espionage related offences as consular protection and visits are extended to all.

### **11.3 Prisoners exchange programme**

Another area where consular influence is felt by nationals living abroad is in the international prisoners exchange program of the UN which is coordinated and implemented by consuls. The exchange programme was achieved in 1995 at the fifth session of the UN Congress on Prevention of Crime and Treatment of Offenders.<sup>1072</sup> The programme was adopted to improve the quality of life of prisoners. Imprisonment is never a happy experience. Imprisonment in foreign countries is worse because of language barriers, an unfamiliar judicial system and cultural, social, and educational disparities. Unaccustomed dietary and sanitary standards, differing rehabilitatory training, recreational facilities and approaches, and last but not least, separation from close friends and relatives whose regular visits, frequently

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<sup>1069</sup> For the report of the interview see Dept. of State *Press Release* of 1938- 02 -12) 260. As a footnote to this long and tortuous case, Mrs. Rubens was released from the Moscow prison on 1939- 06 -10. She visited the US Embassy on 1939-06-19 and on three other occasions, but declined to accept a passport for return to the US. She became a Soviet citizen on 1939-10 -10. See Lee n 760 136.

<sup>1070</sup> *Ibid.* 151 When three Americans Robert Vogeler, Israel Jacobson and Edger Sanders allegedly confessed to espionage activities as charged by the Hungarian authorities, they were held in prison *incommunicado*. In the case of William Oates, who was charged with spying, the Czechoslovakian authorities did not permit any US officials to visit him for months. *Idem* 152.

<sup>1071</sup> *Idem* 153.

<sup>1072</sup> *Idem* 174.

provide the only source of comfort for prisoners, are other problems associated with imprisonment in a foreign land.<sup>1073</sup>

The need, therefore, arose for an arrangement under which each country agreed to assume responsibility by enabling its nationals to serve out their sentences at home. Such an arrangement is beneficial to both the prisoners involved and consuls by freeing consuls to perform other duties.

#### **11.4 Group protection**

While consular protective functions are usually performed on behalf of individual nationals of the sending state, occasionally, such functions may also be required in group situations. An example is the xenophobic attacks on foreigners which occurred in SA in May 2008, when many foreigners were attacked and killed by black South African youths.<sup>1074</sup> During that incident the Nigerian consulate in Johannesburg played a crucial role in saving the lives of Nigerian nationals.<sup>1075</sup> Another example was the mass expulsion of foreigners in Nigeria in 1983.<sup>1076</sup> In that incident, all aliens without valid papers were given two weeks to normalize their papers or leave the country.<sup>1077</sup> Those who could not were subsequently expelled.<sup>1078</sup> Again, when people of Asian origin were expelled from Uganda in 1972, by Idi Amin, British and Asian consuls played a crucial role in their protection and rehabilitation.<sup>1079</sup>

#### **11.5 Cases of death of nationals abroad**

The phenomenal growth of international trade and travel in recent decades has resulted in the death of many people outside their own countries whether or not due

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<sup>1073</sup> *Ibid.*

<sup>1074</sup> See "Violence Against Nigerians continue in South Africa" *The Punch* 2008-05-19 10; "Immigrants Flee South Africa's Wave of Violence" *PM News* 2008-05-23 8; "Attacks on Foreigners spread in South Africa." *The Punch* 2008-05-22) 53.

<sup>1075</sup> *Ibid.*

<sup>1076</sup> See Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedure* (1996) 140.

<sup>1077</sup> *Ibid.*

<sup>1078</sup> Another example was the Jamestown incident in Guyana in which more than 900 Americans perished in a "mass suicide" in 1978. See Lee *supra* n 760 180.

<sup>1079</sup> See Tiburcio *supra* n 26 150.

to natural causes.<sup>1080</sup> Such deaths have entailed extra responsibilities for consuls. Such responsibilities include the notification of the next of kin, arrangement for autopsies where circumstances allow, preparation for local burial, encasement or cremation of the bodies, repatriation of the remains with appropriate documents, taking custody of personal effects of the deceased, and the filling of reports to appropriate officers.<sup>1081</sup>

## 12 Other consular functions

It is perhaps trite to state that consular treaties and regulations always reflect the changing needs of the time and the particular conditions and requirements of different countries. Thus, while treaties and regulations do recognise consular functions which are time honoured, and universally accepted, they may assign other uncommon duties to consuls. An example - is the UK–Italian Consular Convention of 1954<sup>1082</sup> which required consuls “to aid and advise nationals of the sending state in regard to their rights under the social security legislation of the receiving state,” or to “further the development of the political, economic and cultural relations between the two states.”<sup>1083</sup>

## 13 Amalgamation of diplomatic and consular functions: Effect on diplomatic protection

Diplomatic and consular functions have to a large extent been amalgamated. The relevant provisions stipulate that diplomats can exercise consular functions and *vice versa*.<sup>1084</sup>

Article 3 of the VCCR provides that

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<sup>1080</sup> See Lee *supra* n 760 184.

<sup>1081</sup> The American Consular Instructions contains elaborate instructions on what to do in case of the death of an American national abroad. It is however not settled whether an inquest can be conducted when a diplomat dies. See “Overseas Citizens Services” of the *Foreign Affairs Manual* and the Department of State *Digest* (1980) 360-76. See Lee *supra* n 760 184.

<sup>1082</sup> Art 21.

<sup>1083</sup> See art 5(m) of the VCCR which provide *inter alia* “performing any other functions entrusted to the consular post by the sending state.”

<sup>1084</sup> See the VCCR art 3(2) & the VCCR.art 70(1).

Consular functions are exercised by Consular Posts. They are also exercised by diplomatic missions in accordance with the provisions of this convention.

Article 3 (2) of the VCDR states that

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

Article 70 (1) of the VCCR also provides that

the provisions of the present Convention apply also so far as the context permits, to the exercise of consular functions by diplomatic missions.

Therefore, to the extent that a member of a diplomatic mission performs specifically consular functions, he or she does so in accordance with the terms of the Consular rather than the Diplomatic Convention.<sup>1085</sup> However, in determining the legal rules applicable to members of a diplomatic mission exercising consular functions, it must be borne in mind that there are no clear dividing lines between consular and diplomatic functions.<sup>1086</sup>

Many of the detailed functions listed in article 5 of the VCCR could be regarded as aspects of “protecting” the interests of the sending state and its nationals in the receiving state. The key factor is usually not so much the nature of the function, but how it is performed.<sup>1087</sup> However, despite the amalgamation, political, economic and social factors have affected the consular institution negatively in recent years.<sup>1088</sup>

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<sup>1085</sup> *Ibid.*

<sup>1086</sup> See the commentary to art 1 of the Draft Arts on Diplomatic Protection *official Records of the GA supra* n 1 27 which states *inter alia* that “Diplomatic protection....differs from consular assistance in that it is conducted by the representatives of the State acting in the interest of the State in terms of a rule of general International Law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interest of the individual , acting in terms of the VCCR.”

<sup>1087</sup> The commentary to art 1 of the Draft Arts on Diplomatic Protection “Although it is in theory possible to distinguish between diplomatic protection and consular assistance, in practice this task is difficult.” See Denza *supra* n 883 2.

<sup>1088</sup> On the positive side, the amalgamation has introduced the interchangeability and rotation system for the personnel of these two services. This has the effect of putting a consul on par with diplomatic personnel who used to enjoy a higher prestige than a consul. Moreover, the system has infused new blood and talent into the consular world. On the negative side however, chief among the factors that have adversely affected the consular institution in recent years are the fundamental conflict between nations, which are political as well as economic in nature. Politically, the consular institution has, more than ever before, become a pawn in the game of international politics. Political differences between states have led to actions and reactions,

Economically, in countries where economic life is regulated by a rigorous central planning board, and where the export-import trade is a government monopoly, consular functions have lost much of their original purpose and usefulness.<sup>1089</sup> The exchange of trade delegations and trade agencies for purposes of purchasing, selling, or bartering goods or overseeing commercial relations between states, have also declined somewhat.<sup>1090</sup>

## 14 Diplomatic and consular privileges and immunity

To protect diplomats and consuls from intimidation or harassment in the course of their assignments or functions, including the exercise of diplomatic protection, diplomats and consuls are endowed with certain privileges and immunities.<sup>1091</sup> These diplomatic and consular privileges and immunity have been in existence from time immemorial.<sup>1092</sup>

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culminating in the closure of many consulates the world over and the expulsion of consuls for political reasons. In addition to these factors, consular offices and personnel have become favourable targets of mob violence. Often consular officials receive less rigorous training than diplomats.

<sup>1089</sup> *Sen supra* n 52 318.

<sup>1090</sup> *Ibid.*

<sup>1091</sup> Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of the local courts and other authorities for both official and, to a large extent, their personal activities. See *What is diplomatic immunity?* [http://www.calea.org/Online/newsletter/No73/what\\_is\\_diplomatic\\_immunity.htm](http://www.calea.org/Online/newsletter/No73/what_is_diplomatic_immunity.htm) 2007/09/06.

<sup>1091</sup> According to Satow, in general, a privilege denotes some substantive exemption from laws and regulations such as those relating to social security, whereas an immunity does not imply any exemption from substantive law but confers a procedural protection from the enforcement process of the receiving state. See *Satow's Guide to Diplomatic Practice* (1979) 120.

<sup>1092</sup> For the *rationale* for Diplomatic privileges and immunity, see "Theoretical Basis of Diplomatic Law and Practice," 126-128 *supra*. Since diplomatic missions represent the states that send them, they are granted privileges and immunity as a mark of recognition, respect and honour accorded the sovereign or head of state that sent them. Besides diplomatic missions are expected to function efficiently in the conduct of international relations. Privileges and immunity are therefore granted them for the efficient performance of their duties. Moreover, the need to arrest the increasing number of serious crimes against diplomatic envoys and diplomatic missions such as murder and kidnapping of envoys, and attacks directed against the premises of legations, have made immunity and privileges inevitable. Furthermore, it must be borne in mind that real world negotiations are very different from intellectual debates in a university where an issue is decided on the merits of the arguments and negotiators make a deal by splitting the difference. Though diplomatic agreements can sometimes be reached among liberal democratic nations by appealing to higher principles, most world diplomacy has traditionally been heavily influenced by hard power. Therefore diplomats need protection.

Article 22 of the VCDR specifically declares that the premises of the mission are inviolable and that agents of the receiving state may not enter them without the permission of the Head of Mission. This provision seeks to facilitate the operations of normal diplomatic activities in the receiving state. The receiving state is also under a duty to protect the person of the diplomat, because the person of the diplomat is also inviolable.<sup>1093</sup> Hence, he or she shall not be liable to any form of arrest or detention. The receiving state shall treat him or her with due respect and shall take all appropriate steps to prevent any attack on his or her person, freedom or dignity.<sup>1094</sup>

Similarly, subject to certain qualifications, consuls are entitled to the same privileges and immunities as diplomats under the VCCR.<sup>1095</sup> Article 31 of the VCCR for instance, emphasizes that consular premises are inviolable and may not be entered by the authorities of the receiving State without consent. Like diplomatic premises, they must be protected against intrusion and impairment of dignity.<sup>1096</sup>

The principal difference between diplomats and consuls is that whereas, in the absence of any special agreement, consuls are immune from arrest, detention and the criminal process only in respect of acts and omissions done in the performance of their official functions, diplomats are immune from the jurisdiction of the receiving state whether they are carrying out their official functions or not.<sup>1097</sup>

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<sup>1093</sup> Art. 29 VCDR. See Denza *supra* n 883 210-211.

<sup>1094</sup> Art 29. Art 30 provides for the inviolability of the residence and property of a diplomatic agent, while art 31 endows the diplomatic agent with immunity from the jurisdiction of the receiving state. This immunity covers the diplomatic agent from giving evidence in court, and prevents the execution of any court process on him or her. The only caveat is that the immunity does not exempt him or her from the jurisdiction of the sending state. Arts 34 & 36 of the VCDR provide that diplomatic agents are exempt from all dues and taxes other than certain taxes and charges set out in art 34 and also from custom duties. The latter exemption was formerly a matter of comity or reciprocity.

<sup>1095</sup> Arts. 49 & 50.

<sup>1096</sup> Art 31(3). The Kasenkina incident of 1948 and the resultant development have led to the adoption of a new and uniform policy by Britain, US, and France. In a dispute over the alleged kidnapping and forced custody of Mrs. Oksana Stepanova Kasenkina in the Soviet Consulate in New York, the Soviet Union accused the US of violating international law by among other things dispatching the police to enter the Soviet Consulate in New York and there making investigation of Mrs Kasenkina's "suicide" attempt. Note also the Security Council Res 11993 (1998) condemning the Taliban authorities in Afghanistan for the capture of the Iranian Consular-General.

<sup>1097</sup> Art 29.



These diplomatic privileges and immunity have however often been abused.<sup>1098</sup> Such abuses have impacted negatively on the institution of diplomatic protection itself. In the Iranian hostage incident, during a demonstration on November 4 1979, several hundred armed individuals overran the US embassy compound in Tehran. Fifty two American nationals were taken as hostages. Iranian security personnel failed to counter the attack, and in the subsequent case before the ICJ for diplomatic protection, the lack of protection afforded to the mission was held to be directly attributable to the Iranian government.<sup>1099</sup> The ICJ therefore declared that under the 1961 Convention

Iran was placed under the most categorical obligation as a receiving state, to take appropriate steps to ensure the protection of the United States Embassy and Consulates and their staff.<sup>1100</sup>

The court stressed in particular the seriousness of Iran's behaviour and the conflict between its conduct, and its obligations under

the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm.<sup>1101</sup>

In another incident, during a peaceful demonstration outside the Libyan Embassy in London, on 17 April 1984, shots were fired from the Embassy which killed a police woman.<sup>1102</sup> When the embassy was searched later, in the presence of the Saudi Arabian diplomat and after the Libyan diplomats had left, weapons and other relevant forensic evidence were found.<sup>1103</sup> In yet another incident, on May 8 1999,

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<sup>1098</sup> Mostly by diplomats and the receiving States. See Barker *The abuse of Diplomatic Privileges and Immunities: A necessary Evil?* *Supra* n 872 1-7. See eg the Iran Hostage case *supra* n 242, the shooting of WPC Yvonne Fletcher at St James Square in London on April 17 1984, and the Umaru Dikko incident which occurred in London in the same year. These incidents are discussed *infra*.

<sup>1099</sup> At 30.

<sup>1100</sup> See case *Concerning US Diplomatic and Consular Staff in Tehran* 1980 (Judgment) *supra* n 242 par 61.

<sup>1101</sup> At 568 of the judgment. This incident is a good illustration of the impunity with which diplomatic and consular privileges may be violated by a receiving State

<sup>1102</sup> See Barker *supra* n 872 1. The incident involved the shooting of Yvonne Fletcher.

<sup>1103</sup> *Idem* 2. In res 53/97 of Jan 1999 for instance, the UNGA strongly condemned acts of violence against diplomatic and consular missions and representatives, while the Security Council issued a presidential statement condemning the murder of nine Iranian diplomats in Afghanistan.

during the Kosovo campaign, the Chinese Embassy in Belgrade was bombed by the US. The US declared that it was a mistake and apologised.<sup>1104</sup>

Furthermore, although all states recognise that the protection of diplomats is of mutual interest to all,<sup>1105</sup> some states have often violated the inviolability rule against diplomats and consuls.<sup>1106</sup> For instance, the US took some steps towards the indictment of an Ambassador prior to the termination of his official accreditation in 1987 following an accident involving two US nationals, one of whom was seriously injured. At the time of the incident, the ambassador was said to be drunk.<sup>1107</sup>

Ambassador Abisinito, Papua New Guinea's Extraordinary and Plenipotentiary to the US, was charged at the District Court of Columbia by the police for "failing to pay full time and attention to driving" in the citation. Ambassador Abisinito was however recalled by his State on February 17, 1987 and his accreditation to the US ceased as of February 24, 1987.<sup>1108</sup>

Apart from the violation of diplomatic and consular privileges and immunity by the receiving States, these privileges and immunity are often abused by diplomats and consuls themselves. In 1973, for instance, the Pakistan Ministry of Foreign Affairs informed the Iraqi Ambassador of evidence that arms were being brought into

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<sup>1104</sup> See Shaw *supra* n 175 673 and Harris *supra* n 385 367. In Dec 1999, the US and China signed an agreement providing for compensation of \$28m to be paid to the latter by the former. At the same time China agreed to pay \$2.87m to the US to settle claims arising out of rioting and attacks on the US Embassy in Beijing, the residence of the US consulate in Chengdu and the consulate in Guangzhou. Shaw *ibid*.

<sup>1105</sup> This is based on functional necessity and reciprocity. See the conclusions of both the British and US investigations into "Diplomatic Immunities and Privileges" of 1984. See eg "Diplomatic Immunities and Privileges: Government Report on Review of the Vienna Convention on Diplomatic Relations. Reply to "The Abuse of Diplomatic Immunities and Privileges." Cmnd 9497 (1985) (Government Report). See also Higgins "UK Foreign Affairs Report on Abuse of Diplomatic Immunities and Privileges: Government Response and Report." 80 *AJIL* 35 (1986).

<sup>1106</sup> The Iran Hostage Case *supra* n 242 is a typical example.

<sup>1107</sup> In the summer of 1991, one of Thailand's embassy staff in London was apprehended by customs officers at the Heathrow Airport for allegedly possessing and attempting to illegally import heroine. In 1997 a diplomat from the state of Georgia was held responsible for the death of a 16-year old American girl in a car accident.

<sup>1108</sup> See Barker *supra* n 872 7 and *Washington Post*, Feb. 14-15, 1987 2. See also *Columbia Journal of Law* 1988; Larschan "The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity" 26 *CJTL* 283 & Pecoraro "Diplomatic Immunity: Application of the Restrictive Theory of Diplomatic Immunity." (1988) 29 *HIJL* 533. The purpose of these privileges and immunities however, is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing States. See the Preamble to the VCDR.

Pakistan under diplomatic immunity and stored at the Embassy of Iraq in Islamabad.<sup>1109</sup>

When the Ambassador refused permission for a search, a raid by armed police took place and huge consignment of arms – apparently destined for rebel tribes in Baluchistan – were found stored in crates.<sup>1110</sup> The Pakistan government sent a strong protest to the Iraqi government, declared the ambassador *persona non grata*, and recalled their own ambassador.<sup>1111</sup>

Yet another such incident was the infamous Umaru Dikko Affair which occurred in London in July 1984.<sup>1112</sup> This involved an attempted abduction and kidnapping of Alhaji Umaru Dikko, a former Nigerian Minister, who was abducted from his London home and was later found drugged and bound in a wooden crate to be flown to Nigeria on a Nigerian Airways flight.<sup>1113</sup>

In the US, apart from the Abisinio incident, other incidents of abuse of diplomatic and consular privileges have occurred. One such incident was the shooting of Kenneth W. Skeen, a US national, in Washington DC by the grandson of the Brazilian Ambassador to the United States.<sup>1114</sup>

## **15 Abuse of diplomatic and consular privileges and immunity: Effect on diplomatic protection**

The abuse of diplomatic and consular privileges and immunity has given cause for concern as far as diplomatic protection is concerned.<sup>1115</sup> It has prompted states to reassess their obligations under the existing law on diplomatic relations and provoked a serious attempt to review the Vienna Conventions in an attempt to determine whether the privileges and immunity granted to diplomats should be

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<sup>1109</sup> See Denza *supra* n 883 354 & Harris *supra* n 385 365.

<sup>1110</sup> *Ibid.*

<sup>1111</sup> *Ibid.*

<sup>1112</sup> See Barker *supra* n 872 4.

<sup>1113</sup> *Ibid.*

<sup>1114</sup> *Idem* 6.

<sup>1115</sup> These abuses have given rise to a review of the provisions of the VCDR. See Barker *supra* n 872 650.

curtailed.<sup>1116</sup> This exercise was embarked upon by both the British Parliament and the United States Congress.<sup>1117</sup>

In their investigations, both the US and British governments were too aware of the overall need for protection of their diplomats and missions abroad against terrorism, mob violence and intrusive harassment from unfriendly states, to dispense with the special armour provided by the Vienna Convention.<sup>1118</sup> Therefore, after a comprehensive review of the provisions of the Convention, they decided not to interfere with them.<sup>1119</sup>

The British and US responses were rather to tighten administrative controls and supervision of foreign missions, to use the remedies already provided in the Convention more vigorously, to invoke counter measures on a basis of reciprocity, and to build up coalitions in order to apply pressure to States flouting normal rules of international conduct.<sup>1120</sup> Though the Convention was left in tact, it was strengthened by the systematic re-examination it had undergone. Nevertheless, these incidents of abuse definitely put some constraints on the relationship between the states concerned and the institution of diplomatic protection itself. In the Iran Hostage case, for instance, the US, apart from instituting an action at the ICJ, also made a failed attempt to rescue the 52 hostages in Iran.

## 16 Conclusion

The incidents highlighted above have had tragic consequences for diplomatic protection. First of all, they have destroyed the confidence in the institution built over

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<sup>1116</sup> I.e the VCDR of 1961 and the VCCR of 1963.

<sup>1117</sup> The Fletcher incident led to the instigation of an investigation by the House of Commons Foreign Affairs Committee in Britain into "Diplomatic Immunities and Privilege." The Umaru Dikko incident provoked further public interest on the subject. In the US on the other hand, the Skeen incident, and yet another incident - the "Abisinio Affair" also provoked a serious attempt to review the Vienna Convention of 1961 by the US Congress, to determine the adequacy or otherwise of diplomatic privileges and immunities. See the Helm's and Solaz Amendment Bills of 1984 which were Congressional attempts to amend the Diplomatic Privileges and Immunities Act of 1976.

<sup>1118</sup> See n 1114 *supra*.

<sup>1119</sup> See Barker *supra* n 872 12.

<sup>1120</sup> *Ibid*.

many centuries which is so fundamental in the interrelationship of states and their continued peace and security.<sup>1121</sup> As the ICJ said in the *Iran Hostage Case*.<sup>1122</sup>

Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day.<sup>1123</sup>

The court also said that:<sup>1124</sup>

The Institution of diplomacy....has proved to be an instrument essential for enabling states, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means

The question, however, is the extent to which diplomats and consuls have protected the human rights of their nationals abroad? Sen maintains that:

To the person who is resident abroad, the diplomatic agent of his country is his friend in need, and it is to the envoy that he has to turn when he suffers harm or his interests are adversely affected either by reason of some action of the government or government agencies or in the hands of private persons<sup>1125</sup>

According to McClanahan;

All diplomats and their families and indirectly the citizens of each country living abroad should be thankful for the well established Institution of diplomatic [protection], and for the Vienna Conventions of 1961 and 1963 in particular, which have done so much to promote the Human rights and fundamental freedoms of foreigners.<sup>1126</sup>

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<sup>1121</sup> As a result of their investigations, both the UK & US Governments came to the conclusion that stricter application of the enforcement regime of the 1961 Convention was the key to dealing with problems of abuse of diplomatic privileges and immunity. See *supra* n 1102 & 1114 respectively.

<sup>1122</sup> *Supra* n 242.

<sup>1123</sup> At par 92.

<sup>1124</sup> At 40.

<sup>1125</sup> See Sen *supra* n 52 77.

<sup>1126</sup> McClanahan *Diplomatic Immunity: Principles, Practices, Problems* (1989) 184.

In the 21<sup>st</sup> century, the global society has witnessed an ever increasing need to cope with the by-product of the “Information Age”. The telephone, the television, the computer, and the internet in particular, have brought about a structural revolution in the practice of diplomacy and diplomatic protection.<sup>1127</sup>

Such structural revolution has created a global village and has: enhanced the sense of global involvement in world affairs; (2) created an increased awareness of humanitarian needs and concern for the environment, and (3) created a new sense of diplomacy and public relations for the diplomat.<sup>1128</sup> This communications revolution has helped to internationalize science and technology as well as business activities through the medium of the television and the Internet. The Internet, in particular, has created a global sense of political awareness.<sup>1129</sup>

This development has also stimulated the creation of special diplomatic missions, designed to be sent to particular areas for specific purposes.<sup>1130</sup> This has not however diminished the utility of the permanent diplomatic mission. Contrary to popular belief that the coming of the Information Age<sup>1131</sup> has diminished the traditional importance of diplomatic personnel, the reverse is the case.<sup>1132</sup> Rather than diminish, modern communication systems have contributed to the efficiency and effectiveness of diplomats by improving and strengthening their *modus operandi*, particularly in connection with the practice of diplomatic protection.<sup>1133</sup>

Diplomats and consuls thus retain their usefulness in the protection of their nationals abroad. The rise of terrorism, the adverse relationship between the world’s resources and population, the threat to the global environment, the ease and speed of the

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<sup>1127</sup> See Feltham *Diplomatic Handbook* (1998) 1. See also Clerk *Corps Diplomatique* (1973) 24.

<sup>1128</sup> Feltham *Ibid.*

<sup>1129</sup> *Ibid.*

<sup>1130</sup> Clerk *supra* n 1124 24.

<sup>1131</sup> I.e establishment of the telephone, telegraph, telex, fax and Internet services.

<sup>1132</sup> Shaw *supra* n 175 669. See also Hevener (ed) *Diplomacy in a Dangerous World: Protection for Diplomats under International Law* (1986) 54.

<sup>1133</sup> Apart from creating more means of communication, modern communication gadgets have made communication easier. In exercise of diplomatic protection, a diplomat can use the telephone, email, telex or other means of communication in order to communicate faster. See Clerk *supra* n 1124 26.

proliferation of weapons of mass destruction in this century, have, however, ushered in strange new dimensions to diplomatic law and diplomatic protection.<sup>1134</sup>

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<sup>1134</sup> Other destabilizing features of the 21<sup>st</sup> century as far as diplomatic protection is concerned include the problem of identifying nationality with large scale immigrations. See Hevener *supra* n 1087 55.

## CHAPTER FOUR

### International and Regional Instruments for the Diplomatic Protection of Human Rights.

#### 1 Introduction

Diplomatic protection is often dealt with under the subject of “Treatment of Aliens,”<sup>1135</sup> since it deals with the violation of the rights of foreigners. In chapter 3, the instruments often employed by diplomatic missions for the protection of their nationals abroad were discussed.<sup>1136</sup> These instruments include both the VCDR of 1961 and the VCCR of 1963.

In this chapter, human rights instruments designed by international and regional bodies for the promotion and protection of human rights are examined.<sup>1137</sup> State parties are expected to ratify, adopt and incorporate these international and regional instruments into their municipal law for the protection of the human rights of all in their territories.<sup>1138</sup>

Human rights instruments are documents drawn up by human rights bodies or institutions for the promotion and protection of human rights.<sup>1139</sup> They may be drawn

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<sup>1135</sup> See the *Official Records of the GA supra* n 1 22.

<sup>1136</sup> I.e the VCDR of 1961, and the VCCR of 1963.

<sup>1137</sup> The main international human rights instruments for the protection of human rights generally are:- The UDHR (1948); The ICCPR (1966), the two Optional Protocols of (1966)and(1990) respectively;as well as the ICESCR (1966) Others are *inter alia* CERD (1965); CEDAW (1979); CAT (1984); CRC (1989); Resolution 40/144: Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live (1985) ; and International Convention on the Protection of Human Rights of all Migrant Workers and members of their families, CMW (1990). The main regional instruments for the protection of human rights generally on the African continent include:The Constitutive Act of the African Union (200); The OAU Convention (1969); The ACHPR (1981); Protocol on African Court of Human and People’s Rights, (1998); Protocol on Womens Rights (2003); and the African Children’s Charter (1999).

<sup>1138</sup> I.e. foreigners and nationals alike. See chs 1 & 2 *supra*.

<sup>1139</sup> See Rehman *supra* n 28 8 and Malan “The nature of human rights treaties: Minimum protection agreements to the benefit of third parties.” (2008) *De Jure* 81 82.



up in the form of treaties or may exist as decisions or declarations of international organisations.<sup>1140</sup>

At the international level, the principal body responsible for the protection of human rights and consequently for the adoption of human rights instruments is the UN,<sup>1141</sup> whereas on the regional level, human rights instruments are fashioned by regional bodies such as the European, Inter-American and the African human rights bodies.<sup>1142</sup> Regional human rights instruments are based upon UN human rights standards and are expected to conform to them.<sup>1143</sup>

In this thesis, emphasis will be placed upon those instruments meant for the protection of the rights of foreigners because it is the violation of the rights of foreigners by receiving states that often trigger the exercise of diplomatic protection by the affected state.<sup>1144</sup>

International instruments which protect the rights of foreigners discussed here include the Convention on the Protection of the Rights of Migrant Workers and members of their Families,<sup>1145</sup> and the Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live.<sup>1146</sup> These instruments were adopted specifically to protect foreign nationals wherever they are and to set a standard for state parties to emulate in their treatment of non-nationals within their territories.

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<sup>1140</sup> Human Rights treaties are multilateral treaties in the nature of *stipulations alteri* (agreements for the benefit of third parties) and provide *minimum protection* for such third parties which are individuals under the jurisdiction of contracting states. See Malan *supra* n 1136 82.

<sup>1141</sup> The progression of International Human Rights Law is generally related to the developments that took place at the end of the second World War. After the war, the UN was established “to save succeeding generations from the scourge of war.” The UN Charter requires that ECOSOC “shall set up commissions in the economic and social field for the promotion of human rights.” See Rehman *supra* n 28 24 & 35.

<sup>1142</sup> *Idem* 4 135 203 & 235 *et seq.* See also Steneir *et al supra* n 19 925.

<sup>1143</sup> Steneir *et al ibid.*

<sup>1144</sup> On behalf of their injured nationals. As already indicated, diplomatic protection involves the violation of the rights of foreigners. See n. 1132 *supra*

<sup>1145</sup> Adopted by the UNGA res 45/158 of 1990-12-10.(Hereafter referred to as the CMW.) see *supra* n 1132.

<sup>1146</sup> Res 40/144, adopted by the UNGA on 1985-12-13. The reason why these two instruments are highlighted is because they are the only international instruments adopted so far specifically for the protection of human rights of foreigners.

## 2 Objective and approach adopted

The main objective of this examination is to identify international and regional instruments meant for the protection of human rights of foreigners specifically and to analyse them within the context of diplomatic protection. The purpose of this analysis is to determine the extent to which these instruments have set the required standards envisaged, are able to protect the human rights of foreigners, or to influence states in their treatment of foreigners.

In the process of analysing these instruments, the rights which foreigners enjoy under international law are identified. It is then determined whether or not these rights can be diplomatically protected and if so to what extent. The scope and extent to which the rights may be enjoyed by or denied to foreigners in countries where they live, the circumstances under which they may be enforced, derogated from or limited, are also examined and critically analysed.

The approach adopted is first to identify international human rights instruments designed to protect the rights of foreigners specifically. These instruments are analysed against the backdrop of general international human rights instruments formulated by the UN to apply to human society generally irrespective of race, colour, sex, language, birth or other status,<sup>1147</sup> before the regional instruments are discussed. With regard to the regional instruments, the emphasis is placed on Africa. Hence the African Charter on Human and Peoples' Rights (ACHPR) and the Constitutive Act of the African Union (CAAU) will be the primary focus.<sup>1148</sup>

A deductive approach is adopted in the analysis. This deductive approach makes it easy to draw a fair and accurate conclusion with regard to the extent to which these international and regional instruments have fulfilled the purpose for which they were designed. The question that arises is whether or not there is any necessity for a

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<sup>1147</sup> See Wali JSC "Democracy, human rights and administration of justice" in Ladan (ed) *Law, Human Rights and Administration of Justice* (2001) 21.

<sup>1148</sup> Emphasis is placed on those instruments because this study has a lot to do not only with inter-states relations *inter se*, but also with how African states protect the human rights of individuals.

double set of instruments to exist for the protection of human rights at the international and regional levels, as far as diplomatic protection is concerned.<sup>1149</sup>

The chapter has two sections. The first section is primarily devoted mainly to a discussion of international instruments for the protection of the rights of foreigners in particular, and instances where their violations have given rise to the exercise of diplomatic protection. However, human rights instruments adopted by states for the protection of human rights of all within their territories are also discussed.<sup>1150</sup>

The second section deals with regional instruments.<sup>1151</sup> These are analysed in the same way as the international instruments. Those rights designated for investigation in this thesis are also examined to determine the extent to which their violation can trigger diplomatic protection.

## SECTION ONE

Any meaningful discussion of human rights instruments, whether regional or international in scope, it is submitted, must start with a discussion of the Universal Declaration of Human Rights (UDHR). This is because the UDHR is the very foundation upon which all human rights instruments are built, and the prism through which all human rights programmes and activities are reflected. In this regard, the instruments will be discussed under legally binding and non-legally binding instruments for purposes of clarity and elegance.

### 3 The UDHR

Envisaged as a “standard setting” document, the Preamble mentions that it sets “a common standard of achievement for all peoples and nations”. Although not initially intended to be legally binding, its status and prestige are such that it is not only regarded as a yardstick by which to measure compliance with human rights

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<sup>1149</sup> One meant to protect the human rights of nationals, and another meant to protect those of foreigners. A corollary to this question is whether or not the instruments meant for the protection of nationals also protect foreigners.

<sup>1150</sup> See n 1134 *supra*.

<sup>1151</sup> *Ibid*.

standards, but has also come to be viewed as a legally binding instrument.<sup>1152</sup> Most states and scholars would agree that failure to respect its provisions constitutes a violation of international law.<sup>1153</sup>

The rights spelt out in the UDHR are diverse, and include, *inter alia*, the right to life,<sup>1154</sup> liberty and security of the person,<sup>1155</sup> freedom from slavery or servitude,<sup>1156</sup> freedom from torture or cruel, inhuman or degrading treatment or punishment,<sup>1157</sup> recognition as a person before the law,<sup>1158</sup> the right to nationality,<sup>1159</sup> the right to own property,<sup>1160</sup> freedom of thought, conscience and religion,<sup>1161</sup> the right to participate in government,<sup>1162</sup> the right to social security,<sup>1163</sup> the right to work<sup>1164</sup> and the right to education.<sup>1165</sup> The rights and freedoms are to be enjoyed without “distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social.”<sup>1166</sup>

The provisions of the UDHR are backed up by two treaties, the ICCPR and the ICESCR adopted by States for the protection of human rights. The ICCPR deals with civil and political rights, while the ICESCR deals with economic, social and cultural rights.<sup>1167</sup> These two conventions were adopted to give legal force to the UDHR and must be distinguished from each other.<sup>1168</sup>

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<sup>1152</sup> *Ibid.* See the case of *Sei Fuji v California* (1952) 19 ILR 312.

<sup>1153</sup> Amien & Farlam *supra* n 1373 6.

<sup>1154</sup> Art 3. Art 6 of the ICCPR.

<sup>1155</sup> Art 3. Art 6 of the ICCPR. See Jayawickrama *supra* n 149 27.

<sup>1156</sup> Art 4. Art 8 of the ICCPR.

<sup>1157</sup> Art 5. Art 7 of the ICCPR.

<sup>1158</sup> Art 6. Art 16 of the ICCPR.

<sup>1159</sup> Art 15. Art 24 of the ICCPR.

<sup>1160</sup> Art 17 Jayawickrama *supra* n 149 discusses this right 908-920.

<sup>1161</sup> Art 18. Art 18 of the ICCPR.

<sup>1162</sup> Art 21. This is contained in art 25 of the ICCPR.

<sup>1163</sup> Art 25. Now art 9 of the ICESCR.

<sup>1164</sup> Art 23. Art 6 of the ICESCR. See Smith *supra* n 801 295.

<sup>1165</sup> Art 26. Now art 13 of the ICESCR. See Tomasevski *Human Rights Obligation in Education* (2006) 115.

<sup>1166</sup> Art 2.

<sup>1167</sup> Along with the Universal Declaration, the ICCPR and the ICESCR are what are normally referred to as the International Bill of Rights. These documents were drafted in response to the fact that the Charter of the UN did not contain a Bill of Rights, although it contained a number of references pertaining to human rights.

<sup>1168</sup> See *infra*.

## 4 International instruments for the protection of human rights of foreigners

### 4.1 Rights of foreigners<sup>1169</sup>

As already pointed out, although states possess absolute discretion in the admission of aliens into their territories, a state that admits a foreign national into its territory, whether a natural or juristic person, is bound to extend to them the equal protection of the law. International responsibility therefore arises to the receiving state for failure to do so.<sup>1170</sup>

Aliens are therefore entitled to be protected by the law in countries of their residence.<sup>1171</sup> Under international and comparative law, there are certain rights accorded specifically to foreigners as of right, while other rights may be denied to them.<sup>1172</sup>

Some of the most important rights conferred upon foreigners in countries where they live include the right to life,<sup>1173</sup> the right not to be discriminated against,<sup>1174</sup> and the right to be free from torture or any inhuman treatment or punishment.<sup>1175</sup> These rights are fundamental rights - a core of norms from which no derogation is allowed under any circumstances even in times of national emergencies. These rights are guaranteed in all international human rights instruments adopted by states.<sup>1176</sup>

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<sup>1169</sup> The generic term 'foreigners' is used here to denote individuals who voluntarily go to live in countries in which they are not nationals, in contradistinction to refugees for instance, who are forced by circumstances such as wars, famine, etc to flee from their countries of nationality. See res 40/144 & the Refugee Convention of 1951.

<sup>1170</sup> See Dugard *supra* n 1 296. See also *Barcelona Traction case supra* n 26 par 33.

<sup>1171</sup> E.g Under res 40/144 and the CMW.

<sup>1172</sup> Eg political rights This may appear as discrimination. But it is generally believed that all rights are not equal. In the United States for instance, the Supreme court has distinguished between "acceptable" and "unacceptable" discrimination. The Equal protection clause only prohibits "invidious discrimination" i.e. arbitrary and capricious discrimination. Reasonable discrimination, on the other hand, is allowed. Denial of political rights to foreigners is not unreasonable, capricious or arbitrary because it is a liberty which has to do with sovereignty and national security.

<sup>1173</sup> Art 5(a) of res 40/144 & art 9 of CMW.

<sup>1174</sup> Art 5(c) of res 40/144 & art 7 of CMW.

<sup>1175</sup> Art 6 of res 40/144 & art 10 of CMW.

<sup>1176</sup> See eg the ICCPR arts 6, 5 & 26; the UDHR art 5; the CAT art 1; the CERD art 1, the CADW art 2, etc

With regard to the rights of foreigners specifically, the legally binding instrument examined is the Convention on the Protection of the Rights of Migrant Workers and Members of their Families.<sup>1177</sup> Another international instrument which deals specifically with the rights of foreigners examined here, although not legally binding, is the Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which They Live.<sup>1178</sup> The rights discussed particularly are those designated rights namely (a) fundamental rights; (b) property rights; and (c) procedural rights.

## **5 Legally binding international instrument for the protection of the rights of foreigners.**

### ***5.1 International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families***

An international human rights instrument specially adopted for the protection of the human rights of foreigners, is the International Convention for the Protection of the Rights of all Migrant Workers and Members of their Families (CMW). Unlike resolution 40/144, this human rights instrument is a treaty and, therefore, binding on state parties. The Convention on Migrant Workers was adopted to protect the human rights of persons belonging to groups which have been rendered vulnerable, to eliminate all forms of discrimination against them, and to facilitate effective means of implementing the existing human rights instruments with regard to these people.<sup>1179</sup> Thus, states have the obligation to create and maintain measures at the national level for the promotion and protection of the rights of persons in this vulnerable sector of their population to ensure the participation of those among them who are interested in finding a solution to their own problems<sup>1180</sup>.

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<sup>1177</sup> Adopted 1990-12-18. GA Res 45/158 reprinted 30 ILM (1991) 517. It is noteworthy that neither Nigeria nor the South Africa has ratified the CMW. See pp 282 & 371 See also p 202 *infra* for the definition of a migrant worker

<sup>1178</sup> Adopted by the UNGA on 1985-12 -13. Although not a treaty and as such not binding on states, its status is discussed below. See "Declarations & Resolutions of the GA" *infra*. See also the Draft Articles on State Responsibility for Injuries to Aliens in Garcia Amador *et al supra* n 26 244.

<sup>1179</sup> See the Preamble to the Convention. See also pars 33- 35 of the World Conference on Human Rights (Vienna Convention) of June 1993 *supra* n 214.

This Convention was adopted in 1990.<sup>1181</sup> Migrant workers are those persons who have received or are receiving remuneration for work in a State of which they are not nationals.<sup>1182</sup> The Convention consists of ninety-four articles.<sup>1183</sup> It guarantees the civil, political, economic, social and cultural rights of all migrant workers. Article 7 enjoins State Parties to undertake to ensure to all migrant workers and their families, the rights provided for under the Convention without distinction of any kind.<sup>1184</sup>

Article 8 grants to all migrant workers and members of their families the right of ingress and egress in both the state where they work, and the state of their origin. Article 9 of the Convention stipulates that the right to life of all migrant workers and members of their families shall be protected by law. Article 10 provides that no migrant worker or member of his or her family shall be subjected to torture, cruel, inhuman, degrading treatment or punishment.

Article 11 provides against slavery and servitude. Article 12 guarantees freedom of thought, conscience and religion, while article 13 provides that all migrant workers and members of their families shall have the right to hold opinions without interference. Article 14 stipulates that no migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence, or other communications, or to unlawful attacks on his or her honour and reputation.

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<sup>1180</sup> See par 24 of the World Conference on Human Rights *ibid*.

<sup>1181</sup> *Supra* n 1157.

<sup>1182</sup> See art 2(1). By art 3 of the Convention, persons sent or employed by International Organizations, persons sent or employed by a state or on its behalf outside its territory, i.e. diplomatic envoys, persons taking up residents in a state different from their state of origin, refugees and stateless persons, students and trainees, as well as seafarers and off-shore workers, are not migrant workers and therefore not covered by the Convention.

<sup>1183</sup> Part 1 (arts 1-6) deal with the scope and definitions; part II (art 7) deals with non-discrimination with respect to rights; part III (arts 8- 35) deals with human rights of all migrant workers and members of their families; .part IV (arts 36-56) deals with other rights of migrant workers and their families; part V (arts 57-71) are provisions applicable to particular categories of migrant workers and members of their families; part VI (arts 64- 71) deals with the promotion of sound, equitable, humane and lawful conditions in connection with international migrations of workers and members of their families. Part VII (arts 72-8) deals with the application of the Convention; Part VIII (arts 79-84) are General Provisions; while Part IX (arts 85-93) are final provisions.

<sup>1184</sup> I.e. without any discrimination as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

With regard to the right to own property, article 15 stipulates that no migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Article 16 guarantees to all migrant workers and members of their families the right to liberty and security of their person. It also guarantees to them protection against violence, physical injury, threats and intimidation from official or private sources.

Under the provision of article 16, migrant workers and members of their families shall not be subjected to individual or collective arrest or detention and shall be brought promptly before a judge or other judicial officer if arrested. Article 17 provides that migrant workers who are deprived of their liberty should be treated humanely.

In relation to their procedural or due process rights, article 18(1) of the Convention provides, *inter alia*, that in the determination of any criminal charge against them, or of their rights and obligations in a suit at law, they shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Article 18(2) provides that migrant workers and members of their families who are charged with a criminal offence shall be presumed innocent until proven guilty according to law, while article 18(3)(c) stipulates that in the determination of any criminal charge against them, migrant workers are to be tried without undue delay.

In terms of article 22, migrant workers and members of their families shall not be subjected to measures of collective expulsion, and shall be expelled only in pursuance of a decision taken by the competent authority in accordance with law. The person involved shall have the right to submit the reason why he or she should not be expelled and have his or her case reviewed by a competent authority if expelled. All migrant workers and members of their families shall have the right to communicate with their consular or diplomatic missions in case of need, and shall be informed of this right promptly <sup>1185</sup>

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<sup>1185</sup> Art 23.



## **6 Non-legally binding instruments for the protection of the human rights of foreigners**

### ***6.1 The Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live***

The Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live is the second instrument to be examined. As the name implies, this instrument, is a declaration of the UN General Assembly, and is discussed here to determine first, the legal effects of declarations and resolutions of the UN General Assembly on States and secondly to see whether this instrument has evolved into customary international law for purposes of diplomatic protection.<sup>1186</sup> To determine the binding effect of this instrument on states, the legal status of a declaration or resolution in international law is first explained.

## **7 Legal effect of declarations and resolutions of the General Assembly**

A General Assembly Declaration is:

a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.<sup>1187</sup>

A resolution is:

An event or a complex set of events which influences in a significant way the establishment of customary law on the matter dealt with by the resolution.<sup>1188</sup>

It must be noted however, that the Charter of the UN contains a strong presumption against the legally binding character of General Assembly resolutions by designating them as recommendations.<sup>1189</sup> Nevertheless, declarations by international and regional organizations and the historical reasons for adopting such declarations can

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<sup>1186</sup> Diplomatic Protection is governed by Customary International Law. The extent of state practice and *opinio juris* will determine whether or not the declaration has become Customary International Law.

<sup>1187</sup> See 34 U.N. ESCOR supp (No 8) 15 U.N. Doc. E / cn / 4/ 610 (1964) (memorandum of Office of Legal Affairs UN Secretariat).

<sup>1188</sup> See Murty *supra* n 829 619. See also Church, Schulze & Strydom, *supra* n 159 173.

<sup>1189</sup> See art 13.

be valuable sources of reference and proof of the importance of such issues to mankind..<sup>1190</sup> This is because declarations adopted by the international community often represent the first concrete step in establishing state consensus in the process of drawing up a binding multilateral convention.<sup>1191</sup>

Furthermore, declarations create expectations of adherence, and in so far as the expectation is gradually justified by state practice, a declaration may by custom become recognized as laying down rules binding upon states.<sup>1192</sup>

General Assembly declarations and resolutions are valuable sources of information internationally in several respects. First, they are the main instruments for adoption as treaties. The treaties are then open for adherence by member states and other states.<sup>1193</sup> Besides, they normally contain references to the historical processes prior to the adoption and to the reasons that inspired the adoption of the Declaration.<sup>1194</sup> In addition, states voting patterns for such a resolution in the General Assembly can shed some light on the involvement of the requisite *opinio juris* in the formation of customary law.

In so far as General Assembly resolutions are potential sources of customary international law, the following remarks by the ICJ in its advisory opinion in the *Nuclear Weapons* case<sup>1195</sup> are instructive:

The court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can in certain circumstances provide evidence important for establishing the existence of a

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<sup>1190</sup> See Rehman *supra* n 28 60. See also Church *et al supra* n 159 172.

<sup>1191</sup> Church *et al supra* n 159 *ibid*.

<sup>1192</sup> *Ibid*. See 34 U N ESCOR *supra* n 1170.

<sup>1193</sup> Declarations and Resolutions are “soft law.” The term has come to describe the great variety of international instruments, declarations, observations, guidelines, etc, which though not binding as a matter of current International Law, may nevertheless indicate what International Law may or should become. What is however in question is the legal force of such declarations of law, whether general or particular. Could they be regarded as “binding” when the Assembly lacked constitutional authority to adopt mandatory decisions concerning the subject dealt with? If not binding, are they authoritative in some other sense? Another question is whether unanimity required for their authority. If nearly all states agree on what the law is or should be, is there a sufficient reason to deny effect to that determination? These and related questions have given rise to official perplexity and a considerable body of legal analysis. See Church *et al supra* n 159 160.

<sup>1194</sup> Declarations are adopted by way of resolutions. See eg the UDHR.

<sup>1195</sup> *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* case *supra* n 832.

rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption: it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule<sup>1196</sup>

In assessing how far a resolution represents customary law, the following factors may have to be taken into consideration:

- (a) The event that culminated in the adoption of the resolution, the claims and counter-claims presented, the responses of competent decision-makers on the claims and counter-claims, and the extent to which the responses disclose a consensus in favour of the policy articulated in the resolution,<sup>1197</sup> and
- (b) the tenor and content of the resolution; whether it purports merely to articulate linguistically the practice that has already become established along with the requisite *opinio juris*, or to promulgate a new rule or policy for the future.<sup>1198</sup> The accuracy of the statements in the resolution, such as that it is an articulation of a practice already established, should however be open for questioning and enquiry.

Other factors to be taken into consideration in assessing the importance of a resolution are:<sup>1199</sup>

- (c) The pattern of voting on the Resolution; whether it was adopted unanimously or by what majority, whether all the important interests involved had voted for it, who had voted against it, and who had abstained. The basis of power available to those who voted in favour and those against, must also be taken into consideration in implementing the policy articulated in the resolution or opposing its implementation<sup>1200</sup>
- (d) The subsequent response to the resolution, and the extent of the implementation given to the policies articulated in the resolution, and.

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<sup>1196</sup> Church *et al supra* n 159 204 -205.

<sup>1197</sup> Murty *supra* n 829 619.

<sup>1198</sup> *Idem* 620.

<sup>1199</sup> See Rehman *supra* n 28 58-9.

<sup>1200</sup> *Ibid.*

- (e) The general approbation it has received and whether any acts have been done in the implementation of the resolution.<sup>1201</sup> Here, one should observe not merely the responses of states but also those of international organizations, including the reaffirmations made by the organ that had initially adopted the resolution.<sup>1202</sup>

As already stated, the Charter of the UN designates General Assembly resolutions as recommendations and therefore not legally binding on states.<sup>1203</sup> Resolutions are also not a formal source of law within the explicit categories of Article 38(1) of the Statute of the ICJ. However, the General Assembly as the central forum for the international community, with the competence to discuss all questions of international concern, has become a major forum of states for articulating their national interests and seeking general support for them.<sup>1204</sup> The conception of General Assembly resolutions as expressions of common interests and the “general will” of the international community has therefore become a natural consequence.

The *Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they live* was adopted after the mass expulsion of persons of Asian origin from Uganda by Idi Amin in 1972.<sup>1205</sup> The UN Commission on Human Rights then began a study of the implications of extending international human rights instruments to non-citizens, and appointed Baroness Elles to write a report on the subject.<sup>1206</sup> The report was first published in 1980 as a Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in which They Live

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<sup>1201</sup> What normally adds to the force of a resolution is the concomitant State practice showing compliance with such a resolution. A classic example is the way in which states complied with GA resolutions imposing sanctions against South Africa during the apartheid years. See Church *et al supra* n 159 160.

<sup>1202</sup> There was discussion at one time whether the resolutions adopted by the U.N. General Assembly on the peaceful uses of outer space represented customary international law and in that connection, the theory of “instant customary law” was postulated. The question in so far as it concerned outer space may not be considered academic because of the adoption of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies 1967 by the G A in 1966.

<sup>1203</sup> See *supra* n 1191 & 1195

<sup>1204</sup> Under arts 11 & 12 of the UN Charter, the GA is authorised to discuss all questions of international concern.

<sup>1205</sup> See Tiburcio *supra* n 26 56.

<sup>1206</sup> *Ibid.*

and was later adopted by consensus as Resolution 40/144 in 1985.<sup>1207</sup> Because of its relevance to this research, its provisions shall be highlighted *in extenso*.

## **8 Provisions of the Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live**

Article 1 of Resolution 40/144 defines an alien as any individual who is not a national of the State in which he or she is present. Article 2 prohibits illegal immigration and authorizes states to enact laws on immigration which should conform to international law. Article 3 provides that “every State shall make public its national legislation or regulations affecting aliens,” while article 4 provides that:

Aliens shall observe the laws of the state in which they reside, or are present and regard with respect, the customs and traditions of the people of that state.

Article 5 enumerates the rights which aliens must be allowed to enjoy in a foreign land. These include: (a) The right to life and security of person, (b) the right to protection against arbitrary or unlawful interference with privacy, family, home, or correspondence; (c) the right to be equal before the courts, tribunals, and other organs of administration of justice; (d) the right to choose a spouse, to marry, to found a family; (e) the right to freedom of thought, opinion, conscience, and religion; (f) the right to retain their language, culture and tradition; and (g) the right to transfer their earnings, savings, and other personal monetary assets abroad. Article 5(2) further guarantees to aliens the freedom to leave the country, freedom of expression, the right to peaceful assembly, and the right to own property. Freedom of movement, and the right to choose a place of residence are also guaranteed under this subsection.

Article 6 forbids aliens to be subjected to torture, or cruel, inhuman or degrading treatment or punishment while Article 7 provides that an alien who is lawfully in any

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<sup>1207</sup> G A Res 144 U N GAOR 40<sup>th</sup> Ses Supp No 53 U N Doc A RES/ 40/144 (1985). The draft prepared by Baroness Elles was in response to Economic Social and Cultural Council resolutions which questioned the application of contemporary international human rights instruments to non-nationals on the same basis as nationals, due to the controversy on whether human rights instruments should be applied equally to aliens and nationals, as these instruments do not expressly equate aliens to nationals. See Tiburcio *supra* n 26 56 See also Wallace *International Human Rights Text and Materials* (1996) 413.

foreign country shall not be expelled without due process of law. Article 8 expands the rights of an alien lawfully resident in a country to include, *inter alia*, the right to safe and healthy working conditions, fair wages, and equal remuneration for work done; (ii) the right to join trade unions; and (iii) the right to health protection, medical care, social security and services, education, rest and leisure.

Article 9 provides that “No alien shall be arbitrarily deprived of his or her lawfully acquired assets,” while article 10 allows any alien to communicate with the consulate or diplomatic mission of which he or she is a national. Most of these rights are however subject to limitations.

It can therefore be seen that the provisions of Resolution 40/144, and those of the CMW have much in common despite the fact that the latter is a formal source of international law while the former is only a recommendation. Their common source is the UDHR.<sup>1208</sup> However, the provisions of the Convention on the rights of Migrant workers are more comprehensive.<sup>1209</sup> Thus, article 1(2) of the Convention on the Rights of Migrant Workers shall apply during the entire migration process. The migration process comprises preparation for migration, departure, transit and the entire period of stay and enumerated activity in the State of employment, as well as return to the State of origin or State of habitual residence.<sup>1210</sup>

Having examined the international instruments adopted specifically for the protection of the human rights of aliens, what follows is a brief examination of the international instruments adopted to regulate the protection of human rights by states within their domestic jurisdictions.

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<sup>1208</sup> See Dugard *supra* n 1 297-8.

<sup>1209</sup> While res 40/144 has ten arts, the CMW has 93 arts.

<sup>1210</sup> Art 72.

## 9 Legally binding international instruments regulating the protection of human rights of all individuals

The growth and expansion of human rights law has brought about a radical change in the protection of human rights by states. How a country treats its citizens is no longer a matter of its own exclusive determination but a concern of the international community also.<sup>1211</sup> State parties are, therefore, obliged to ratify human rights treaties and incorporate them into their domestic law. These treaties constitute the international human rights instruments discussed in this chapter.<sup>1212</sup> The most important of these instruments are the UDHR, the ICCPR and the ICESCR.

The UDHR has already been discussed.<sup>1213</sup> The search light will now focus on both the ICCPR and the ICESCR.

### 9.1 The ICCPR

The ICCPR incorporates and expands on the civil and political rights contained in the UDHR.<sup>1214</sup> Where the UDHR, for example, provides for the right not to be arbitrarily detained, the ICCPR adds a right against arbitrary imprisonment,<sup>1215</sup> a right not to be imprisoned for debt,<sup>1216</sup> a right to be informed of the reason for arrest and detention,<sup>1217</sup> a right to counsel<sup>1218</sup> and a right to *habeas corpus*.<sup>1219</sup>

The rights protected under the ICCPR include the rights to life,<sup>1220</sup> liberty and security,<sup>1221</sup> to equality before the courts,<sup>1222</sup> to peaceful assembly,<sup>1223</sup> to marry and

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<sup>1211</sup> See Lauterpacht *International and Human Rights* (1950) 61, Rehman *supra* n 28 8 & Stenier *et al supra* n 19 144.

<sup>1212</sup> See *supra* n 1132.

<sup>1213</sup> See *supra* p 198.

<sup>1214</sup> See Stenier *et al supra* n 19 152 & Rehman *supra* 28 64.

<sup>1215</sup> Art 14.

<sup>1216</sup> Art 11.

<sup>1217</sup> Art 9(4).

<sup>1218</sup> Art 14(3).

<sup>1219</sup> Art 9(4).

<sup>1220</sup> Art 6 See Harris & Joseph *International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 155-184.

<sup>1221</sup> Art 9 See Jayawickrama *supra* n 149 369 – 424.

<sup>1222</sup> Art 14 *idem* 816 – 841.

<sup>1223</sup> Art 21 See Harris & Joseph *supra* n 1398 459 - 464.

found a family<sup>1224</sup> and to vote.<sup>1225</sup> The freedoms articulated therein include those of association,<sup>1226</sup> thought, conscience and religion<sup>1227</sup>. The covenant explicitly prohibits torture, cruel, inhuman or degrading treatment or punishment,<sup>1228</sup> slavery, servitude and forced or compulsory labour.<sup>1229</sup>

Concerning the right to life, article 6 of the ICCPR provides that

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Concerning the right to be free from torture, the ICCPR provides that

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Concerning freedom from discrimination, article 26 of the ICCPR provides that

all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

The due process rights are contained in article 14 of the ICCPR

## 9.2 *The ICESCR*

The ICESCR was adopted in 1966 and came into force in 1976. It incorporates and expands on the economic, social and cultural rights provided for by the UDHR.<sup>1230</sup> What the ICCPR does in respect of the civil and political rights,<sup>1231</sup> the ICESCR does in respect of Economic, Social and Cultural rights. It guarantees those rights spelt out in Articles 22- 27 of the Universal Declaration, for example, the right to work,<sup>1232</sup>

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<sup>1224</sup> Art 23 *Ibid* 491 – 534.

<sup>1225</sup> Art 25. *Idem* 535 –561.

<sup>1226</sup> Art 22. *Idem* 465 – 490.

<sup>1227</sup> Art 18 *Idem* 355 –390.

<sup>1228</sup> Art 5. See Smith *supra* n 801 219.

<sup>1229</sup> Art 4 Other important international human rights instruments include (a) CERD 1973; (b) CEDAW 1984; (c) CAT 1989; & (d) CRC.

<sup>1230</sup> Rehman *supra* n 28 106.

<sup>1231</sup> *Ibid*.

<sup>1232</sup> Art 6 See generally Steiner, *et al supra* n 19 263 particularly at 275. See also de Burca & Wittle *Social Rights in Europe* 2005; Rameharan *Judicial Protection of Economic, Social and Cultural Rights* (2005) 237.



to just and favourable conditions of work,<sup>1233</sup> and rights to medical and social services and social security.<sup>1234</sup> Article 4 of ICESCR provides that these rights are subject “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”<sup>1235</sup>

### 9.3 *An analysis of the obligations imposed by ICESCR and ICCPR*

The ICESCR simply requires each “State Party ... to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights in the covenant,”<sup>1236</sup> whereas, each State party to the ICCPR is obliged to “respect and to ensure to all individuals within its territory, and subject to its jurisdiction the rights recognized in the covenant without discrimination.”<sup>1237</sup>

Further, States’ compliance with the provisions of the ICESCR is monitored solely by reports which the state parties are required to submit to the Economic and Social Council of the UN,<sup>1238</sup> while parties’ compliance with the ICCPR is monitored not only by country report, but also by procedures allowing other state parties to lodge a complaint.<sup>1239</sup> There are provisions in the Optional Protocol to the Covenant, which permit individuals to lodge applications alleging violation of their human rights.<sup>1240</sup> There is also a Second Optional Protocol, aimed at the abolition of the death penalty.<sup>1241</sup>

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<sup>1233</sup> Art 7 *ibid* 273.

<sup>1234</sup> Art 9. See Gauri “Social Rights and Economics: Claims to Health Care and Education in Developing Countries” Alston & Robinson (eds) *Human Rights and Development. Towards Mutual Reinforcement* (2005) 65. See also Jayawickrama *supra* n 149 119.

<sup>1235</sup> See for instance Neir *Social and Economic Rights: A Critique* 13/2 *Hum.Rts. Brief* (2006). See also Plant: “Social and Economic Rights Revisited” 14 *King’s College L. L.* (2003) 1 13 and White “Social Rights and the Social Contract – Political Theory and the new Welfare Politics” 30 *Brit. J. Pol S.* (2000) 507 509.

<sup>1236</sup> Art 2(1).

<sup>1237</sup> Art 2(3). See Norwak *U.N. Covenant on Civil and Political Rights: CCPR Commentary.* (2005) 215.

<sup>1238</sup> Arts 16 – 25.

<sup>1239</sup> See art 41 of the ICCPR.

<sup>1240</sup> The Protocol came into operation on 1976-03-23 and by 2002-03-31, there were 101 State parties to it. See Rehman *supra* n 28 89.

<sup>1241</sup> The second Optional Protocol prohibits the execution of any person and requires States to take all necessary measures to abolish the death penalty. See Jayawickrama *supra* n 149 56.

Neither the ICCPR nor the ICESCR has made any provision concerning the right to own property. A question, however, arises whether or not these international human rights instruments highlighted here for the protection of nationals also apply to foreigners? While some commentators believe that they do because their provisions, mention “everyone,”<sup>1242</sup> as beneficiaries with rare exceptions, other commentators however think differently.<sup>1243</sup> They argue that the International Bill of Rights does not protect aliens, because nationality is not listed as a prohibited ground for differentiation.<sup>1244</sup> Concerning the terms of the above mentioned conventions, it seems that in most cases, the rights are granted to everyone, nationals and non-nationals alike.<sup>1245</sup>

The existence of the instruments granting rights to aliens alone<sup>1246</sup> casts some doubt on this viewpoint.<sup>1247</sup> It must be noted however that other vulnerable groups such as women and children have been protected through separate conventions. The question is, if these international human rights instruments are applicable to everybody, why then was it necessary to adopt those specific or particular instruments for the protection of foreigners and other vulnerable groups? Why would the UN adopt instruments for the protection of specific groups of people if they were already protected under the general international human rights instruments?<sup>1248</sup> Are the instruments for the protection of foreigners motivated by the same spirit?

The better view however, is that as these international human rights instruments provide for guarantees for “everyone”, foreigners are also included.<sup>1249</sup> The duplication of these rights in separate or specific instruments is simply to emphasize the importance of the rights to the beneficiaries concerned and to remind the

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<sup>1242</sup> Lillich *supra* n 1 25. See Tiburcio *supra* n 26 56.

<sup>1243</sup> Tiburcio *ibid*.

<sup>1244</sup> See McKean *Equality and Discrimination under International Law* (1983) 199.

<sup>1245</sup> This is the general consensus. See Tiburcio *supra* n 26 56.

<sup>1246</sup> Such as res 40/144 & the CMW.

<sup>1247</sup> See Tiburcio *supra* n 26 56.

<sup>1248</sup> As was done with the rights of children, women, racial discrimination, etc. See Tiburcio *supra* n 26 57.

<sup>1249</sup> Tiburcio *idem* 268. See however art 2(3) of the ICECR on the issue of non-nationals and the obligations of developing countries. The art stipulates that “developing countries with due regard to human rights and their national economy may determine to what extent they would guarantee the economic rights recognized in the present covenant to non-nationals.” See also art 25 of the ICCPR which restricts the enjoyment of that right only to citizens.

international community in general that these groups of people are “endangered.” This is the generally accepted UN practice.<sup>1250</sup>

The specific rights designated for examination in this chapter, will now be discussed. These are fundamental rights, right to property, and procedural rights.

## 10 Fundamental rights

### 10.1 *Right to life and security of the person*

The right to life and security of the human person are dealt with together under article 5(a) of Resolution 40/144, and they will therefore be discussed together.<sup>1251</sup>

The right to life appears in virtually every international human rights instrument because of its fundamental importance. This right is said to be “the supreme right of the human being”.<sup>1252</sup> It is the right from which all other rights flow, and is therefore basic to all human rights. It is one of the rights which constitute “the irreducible core of human rights”<sup>1253</sup> The right to life is, therefore, non-derogable even in times of public emergency which threaten the life of any nation.<sup>1254</sup>

The interpretation of the term “life” has given rise to some difficulties.<sup>1255</sup> The problem common to all instruments containing a right to life is its abstract character.<sup>1256</sup> The argument is whether the term should be given a wide<sup>1257</sup> or a

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<sup>1250</sup> According to Harris *supra* n 385 204 “The proliferation of international instruments protecting specific human rights can be seen as an indication of the growing awareness that the broad instruments protecting a wide variety of rights may not be sufficient to protect some rights which do not easily fit within that scheme. Many treaties enable states and others, to focus on the need to protect a specific right or rights. This proliferation, is also an example of the constant evolution of the international society as its members begin to understand about those who are oppressed within the society and who require the protection of human rights instruments.”

<sup>1251</sup> This is similar to art 9 of the CMW.

<sup>1252</sup> See the case of *Camargo v Colombia* Human Rights Committee, Communications No 45/1979 HRC (1982) Report Annex XI.

<sup>1253</sup> Per Weeramantry J, *Legality of the threat or Use of Nuclear Weapons* case *supra* n 834 506.

<sup>1254</sup> This is confirmed by the provisions of the Second Optional Protocol to the ICCPR which is aimed at abolishing the death penalty. See the Annex to GA Res 44/128. Reprinted in 29 ILM (1990) 1464.

<sup>1255</sup> See Robertson (ed) *Human Rights for South Africans* (1991) 31.

<sup>1256</sup> *Ibid.*

<sup>1257</sup> E.g. to include the right to the dignity and security of the human person.

restricted meaning.<sup>1258</sup> Some have argued that the term “life” should be construed in a strict sense, and that the right to life should concern only two issues: the termination and preservation of life.<sup>1259</sup> It would therefore be more realistic to speak of the right not to be deprived of one’s life, and the corresponding duties on the State to take all reasonable steps to prevent untimely death. Emphasis might ultimately depend on a very narrow interpretation of the term that all what the state owes to the individual is merely the duty not to take his or her life arbitrarily.

This narrow biological view was, however, criticised and rejected as far back as 1877 by the US Supreme Court in the case of *Munn v Illinois*.<sup>1260</sup>

By the term ‘life’ as here used (14<sup>th</sup> Amendment) something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The prohibition equally prohibits the mutilation of the body by the amputation of an arm or leg or the pulling out of the eye or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation of not only life but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question....

This decision conforms squarely with the views of those who argue that the right to life should be construed more liberally to include all those attributes that make life wholesome and worth living.<sup>1261</sup> On a wider interpretation, therefore, the right to life might mean that the State should abolish the death penalty, and on the widest interpretation possible, the right to life might mean that the State should take steps to reduce the incidence of death by preventable causes.<sup>1262</sup>

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<sup>1258</sup> See Robertson *supra* n 1195 31. It is however submitted that the term “life” has material, spiritual, psychological and other dimensions.

<sup>1259</sup> Robertson *ibid*.

<sup>1260</sup> *Munn v Illinois* 94 US 113 1877 142 per Field J. (dissenting opinion).

<sup>1261</sup> Those who agitate for a liberal interpretation of the right to life argue that man has an inherent right to life. This inherent right to life is intended to emphasize the supreme character of this right—a right which is not conferred on the individual by society or by the State, but which inheres by reason of one’s humanity. It follows therefore that one’s right to life cannot be taken away by the State or waived, surrendered or renounced by him, since a human being cannot be divested, nor can he divest himself of his human nature. See Robertson *supra* n 1195 32.

Judicial decisions in recent times have even given the term “life” a relatively broader interpretation.<sup>1263</sup> It includes (a) *Right to dignity*, because the right to life is more than mere existence. In international and comparative law, the right to life incorporates the right not to be subjected to torture, not to be held in slavery, and not to be arbitrarily arrested. In relation to aliens, this right is mostly violated in immigration and extradition cases.<sup>1264</sup> That is why article 7 of resolution 40/144 provides that aliens should not be expelled without due process of law. This liberal interpretation implies that it is a right to be treated as a human being with dignity because, without dignity, human life is substantially diminished.<sup>1265</sup>

(b) *Right to Livelihood*. The right to life also includes the right to livelihood. This right should therefore be protected by law. There is no gainsaying that human life has some relationship with the material needs of a human being. Few will dispute that a person in abject condition, deprived of adequate means of subsistence or denied the opportunity to work, suffers profound affront to his or her sense of dignity and intrinsic worth.

The question however, is to what extent will states go in protecting the right to life of foreigners against unwarranted actions by public or private persons in their territories, and to what extent will international law go to enforce this right?<sup>1266</sup> The answer is that states are internationally obliged to protect the right to life of

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<sup>1262</sup> By improving its health and welfare services, prohibiting or limiting the sale of alcohol, cigarettes, firearms, and by educating its citizens against the spread of HIV/ Aids and other fatal diseases. Robertson *idem* 34.

<sup>1263</sup> See the *dictum* of O'Regan J in *The State v Makwanyane* 1995 1 LRC 269 where she said *inter alia* “..It is not life as a mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of the broader community, to share in the experience of humanity.”

<sup>1264</sup> Often by extraditing people to States where they are exposed to real risk of being deprived of their right to life, their right to life is threatened. See e.g *Mohammed v The President of the R SA* 2001 (7) BCLR 685 (CC) & *Soering v UK*. July 7, 1989, RUDH 99 (1989). See Jayawickrama *supra* n 149 265. Besides, conditions at extradition centers in many countries are very poor and can lead to premature death. See Klaaren “SAHRC Report on the treatment of persons arrested or detained under the Alien Contron Act.”(1999) 15 *SAJHR* 131 where it is stated *inter alia* that “Common complaints about detention conditions ...include lack of adequate nutrition, inadequate medical care and...being subjected to degrading treatment or intimidation.” See *infra* p 400.

<sup>1265</sup> See the case of *The State v Makwanyane supra* n 1203 269. where O'Regan J. of the Constitutional Court of South Africa also said that the right to life is in one sense, antecedent to all other rights. “Without life in the sense of existence it would not be possible to exercise rights, or be bearers of them.” A similar view was expressed in the Constitutional Court of Hungary. (Case No. 23/1990, A.B. ) See Jayawickrama *supra* n 149 258.

<sup>1266</sup> See UN doc A/2929 ch VI s 4.

foreigners.<sup>1267</sup> Even if a state is not a member of the UN or a signatory to any international human rights convention, such a state is still bound to respect the right to life under customary international law.<sup>1268</sup> This should be done by enacting appropriate laws to criminalize the intentional taking of life generally, and by ensuring that such laws are enforced. Therefore, when a case of arbitral taking of life is brought against a state at the international level, such a state should be severely sanctioned.<sup>1269</sup>

Needless to say, the right to life generally, and those of foreigners in particular, is often threatened when such an individual is under arrest, or is held in custody and the authorities fail to take appropriate measures to protect the life of such a person.<sup>1270</sup> The right to life of a foreigner may also be threatened during migration, extradition or deportation processes.<sup>1271</sup>

With regard to detention in the migration context, the court in *Anuur v France*<sup>1272</sup> held that the power of the State to control the entry of foreigners can be limited by international law.<sup>1273</sup> In that case, an individual was held in detention in an international area of the airport in France soon after his arrival. The Court decided that the mere existence of this area did not violate the provisions of article 5 of the European Convention.<sup>1274</sup> Nevertheless, the court considered that France was in breach of article 5, because the detention was prolonged, there was no possibility of submitting this detention to judicial review, and because no possibility of judicial or social assistance was given to the alien in accordance with the rules then in force.<sup>1275</sup>

In the case of *Scott v Spain*,<sup>1276</sup> the court examined the issue of the length of the period of detention in a situation involving both an extradition request and a rape

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<sup>1267</sup> See O'Regan in *Makwanyane supra* n 1203.

<sup>1268</sup> The violation of the right to life is a breach of *jus cogens*, which operates at customary international law.

<sup>1269</sup> See Jayawickrama *supra* n 149 160

<sup>1270</sup> *Idem* 263.

<sup>1271</sup> See *supra* n 1266.

<sup>1272</sup> Decision of 1996-06-25 (1996) RUDH 144. See also (1997) RUDH 9

<sup>1273</sup> *Ibid.*

<sup>1274</sup> Art 5 of the ECHR deals with the right to the liberty and security of the person.

<sup>1275</sup> At 150.

charge. In that case, Mr. Scott was kept in detention for more than four years. The court held that the detention followed domestic requirements, and in view of the new evidence obtained in the rape case, was not arbitrary.<sup>1277</sup> However, despite the fact that the right of States to control immigration has been widely recognised, the European Court has held that where the right to personal integrity of an individual was violated during immigration process, the defendant State would be held liable.<sup>1278</sup>

The length of time a person may be detained before he or she is deported during extradition proceedings has been adjudicated upon several times by the European Court of Human Rights.<sup>1279</sup> In the case of *Quinn v France*,<sup>1280</sup> for instance, the Court determined that the length of the provisional detention must be reasonable.<sup>1281</sup> That notwithstanding, this rule does not apply to extradition proceedings if they are conducted with diligence.<sup>1282</sup> Likewise, in the case of *Kolompar v Belgium*,<sup>1283</sup> the Court decided that the detention in an extradition case, which lasted two years and eight months did not violate article 5 of the European Convention as duration of the proceedings was affected by the many appeals filed by the alien himself.

If a state takes a decision to extradite a person within its jurisdiction and the necessary and foreseeable consequence is that that person's right to life is in jeopardy in another jurisdiction, then that state will be in violation of its obligation to protect the right to life, if it extradites the person.<sup>1284</sup> Thus in *Soering v UK*,<sup>1285</sup> the court decided that a state party was in violation of article 3 of the Convention when it decided to extradite an individual to a state where personal security could not be guaranteed. The same argument was used in the case of expulsion<sup>1286</sup> and in a

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<sup>1276</sup> LXVIII *British Yearbook of International Law* (1997) 429.

<sup>1277</sup> *Ibid*

<sup>1278</sup> See *Soering v UK supra* n 1202 99.

<sup>1279</sup> See eg *Quinn v France supra* n 1220 *infra* & *Kolompar v Belgium infra* n 1223.

<sup>1280</sup> Lassirat-Coustere, *La Jurisprudence de la Cour Europeenne des Droit de L'Homme en 1995*, XLI *Annuaire Francais De Droit International* 491 (1995).

<sup>1281</sup> In accordance with art 5 of the AU Convention. See *Tiburcio supra* n 26 83.

<sup>1282</sup> *Supra* n 1220 491.

<sup>1283</sup> Decided 1992- 09- 24.

<sup>1284</sup> See art 5 of CAT. See also the case of *Mohammed v The President of the R SA supra* n 1204 .

<sup>1285</sup> *Ibid*.

<sup>1286</sup> *Cruz Varas case* March 20 (1991) RUDH 209 (1991).

denial of entry – “refoulement”<sup>1287</sup> case, because the State would be exposing the individual to torture, or inhuman and degrading treatment or punishment in the state of destination. In the South African case of *Mohammed v President of the Republic of SA*, the same decision was reached.<sup>1288</sup>

From the above cases and decisions, it can be concluded that international law is guided by the principles of reasonableness and national security in the protection of the rights of aliens. If the action taken by a state is reasonable in the circumstances of the case, international law will support it. Otherwise the action will be condemned.<sup>1289</sup> The right to freedom from torture is discussed next.

## **10.2 Freedom from torture, cruel, inhuman and degrading treatment or punishment**

Article 6 of resolution 40/144 forbids aliens to be subjected to torture, or cruel, inhuman or degrading treatment or punishment.<sup>1290</sup> The word “torture” is used to describe any treatment which is aimed at eliciting information or confession.<sup>1291</sup> Torture also includes non-physical treatment such as anguish or stress produced by mental suffering<sup>1292</sup> *The Oxford English Dictionary* defines “cruel” as “causing or inflicting pain without pity”, “inhuman” as “destitute of natural kindness or pity, brutal, unfeeling, savage, barbarous”, and “degrading” as “lowering in character or quality, moral or intellectual debasement.”<sup>1293</sup>

The UN Convention against Torture or Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as

Any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a

<sup>1287</sup> *Vilvarajah* case October 30 1991. RUDH 537 (1991).

<sup>1288</sup> *Mohammed v The President of the RSA supra* n 1204. See also the cases of (1) *Chahal v UK* (Decision of (1996) 11 15; *D v UK* (1997) 2; *HLR v France* (Decision of the European Court (1997) 10 30. *Journal De International* 226-7 (1998); 3 *Paez v Sweden* Decision of the European Court of October 30 1977 *Journal de Droit International* (1998) 226-7; *Case R.B. v France*, decided on 1998-09-7 *Journal De Droit International* 217-218 (1999).

<sup>1289</sup> The situation in Nigeria and the Republic of South Africa will be discussed in chs 5 & 6 *infra*.

<sup>1290</sup> This is similar to art 10 of the CMW.

<sup>1291</sup> See the *Oxford English Dictionary* (1996) 186.

<sup>1292</sup> See *Robertson supra* n 1195 41.



third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity. It does not include pain or suffering arising from, inherent in, or incidental to, lawful sanctions.<sup>1294</sup>

Although “cruel, inhuman, or degrading treatment or punishment” is not defined in human rights instruments, different bodies have laid down the various components of this prohibition.<sup>1295</sup> What constitutes this prohibition is, therefore, subjective.<sup>1296</sup> When all is said and done, however, cruel and degrading punishment is not a static notion. It reflects the evolving standards of decency that mark the progress of a maturing society.<sup>1297</sup>

Cruel and degrading treatment therefore amounts to acts designed to lower the victim in the eyes of other people or that of the victim him or herself. This humiliation or debasement of the victim must, however, be far beyond the usual element of humiliation experienced in the ordinary operation of the criminal justice system.<sup>1298</sup> A great majority of countries grant to everyone in their legislations the right not to be tortured, and not to be subjected to cruel, inhuman or degrading treatment or punishment.<sup>1299</sup>

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<sup>1293</sup> At 160.

<sup>1294</sup> Art. 1(1) of CAT.

<sup>1295</sup> See Chenwi *Towards the Abolition of the Death Penalty: A Human Rights Perspective* (2007) 97.

<sup>1296</sup> *Ibid.*

<sup>1297</sup> See Schabas “International legal aspects” in Hodgkinson & Rutherford (eds.) *Capital Punishment: Global Issues and prospects* (1996) 21. See also Chenwi *supra* n 1235 98.

<sup>1298</sup> Robertson *supra* n 1195 41. In the interpretation of the Eighth Amendment to the US Constitution which prohibits the infliction of “cruel and unusual punishment”, the US Supreme Court has recognized that the meaning of this prohibition is highly elastic, and that its meaning will be determined by “evolving standards of decency that mark the progress of a maturing society.”

<sup>1299</sup> France for instance, introduced an amendment to the Aliens Act and maintained in its 1998 law the rule that, an alien, seriously ill should not be deported or expelled, unless very grave reasons of national security demanded otherwise. Additionally, whenever an alien is expelled or deported to a certain country, generally to his or her country of origin, and if in his or her country his or her life, physical freedom or integrity is threatened, the expulsion or deportation cannot take place. Additionally, French courts applied this guarantee, established in art 3 of the European Convention, even before the above mentioned change in domestic legislation. See Tiburcio *supra* n 26 87.

A plethora of international human rights instruments already referred to prohibit torture or cruel, inhuman or degrading treatment or punishment.<sup>1300</sup> In relation to the human rights of foreigners, the rule against torture, cruel, and inhuman treatment or punishment also becomes very relevant in migration, extradition and deportation cases or proceedings.<sup>1301</sup> Cases abound of arbitrary administrative decisions to torture or imprison aliens before deportation.<sup>1302</sup> Even if such imprisonments are considered to be in accordance with the basic principles of law, should the individual remain in prison custody indefinitely without the case being submitted to the judiciary for determination? <sup>1303</sup>

As demonstrated above, in many immigration cases, detention may last longer than it should be or may be ordered arbitrarily. Such detentions constitute inhuman and degrading treatment, and are therefore contrary to international law. International law sets forth that detention has to be authorised by local legislation and should not last longer than is reasonable.<sup>1304</sup>

Regarding the time limit for detention, international law also determines that there should be a duration.<sup>1305</sup> It does not, however, establish the precise time limit. Therefore, the criteria set by international law may give rise to some difficulties with reference to their applicability. In *Mezei's*, case<sup>1306</sup> for instance, Mezei was kept in Ellis Island for two years by the orders of the Attorney General but the detention was upheld by the US Supreme Court.

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<sup>1300</sup> See for instance art 1 of CAT; art 5 of the UDHR; & art 7 of the ICCPR. See also the Human Rights Committee General Comment on art 7 of the ICCPR & the Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman and Degrading Treatment or Punishment adopted by the UN G A Res 3452 (XXX) of 1975 -12- 9.

<sup>1301</sup> Tiburcio *supra* n 26 88.

<sup>1302</sup> *Ibid.*

<sup>1303</sup> In accordance with the 1998 amendment, France permits only 12 days of imprisonment, the UK has established no time limit to such detention whereas Germany sets a time limit of 6 months extendable to 12 months. Belgium, Austria, Sweden, and Luxemburg determine a period of 2 to 6 months, while Spain, Norway, and the Netherlands have a limit of 15 to 40 days. See Tiburcio *supra* n 26 90. Nigeria and South Africa have no time limit for such detentions. In case of South Africa, see See Klaaren "SAHRC Report on the treatment of persons arrested or detained under the Alien Contron Act."(1999) 15 *SAJHR supra* n 1204 131. On the Nigerian situation, see Chenwi *supra* n 1235 168.

<sup>1304</sup> See art 14(1) of the ICCPR.

<sup>1305</sup> Art 14(2) of the ICCPR.

<sup>1306</sup> *Mezei case Shanglemessy v US* 345 US 206.

That decision did not however, escape scrutiny. According to the dissenting opinion of Justice Jackson

no free man should be imprisoned, disposed, outlawed, or exiled, save by the judgement of his peers, or by the law of the land

That notwithstanding, in many instances, aliens are kept in prison for various reasons which are difficult to explain. Some countries keep aliens in transit camps for months on end.<sup>1307</sup> However, in Australia, the High Court in *Lim's case*<sup>1308</sup> decided that the section of the Immigration Act which confers upon the executive the power to detain an alien in custody for the purposes of expulsion or deportation has to be interpreted as having limits imposed by what is reasonable.<sup>1309</sup>

In a case involving the deportation of an individual suffering from a serious disease, the Administrative Court of France decided that the EU Convention prohibited such deportation, if the treatment can not be continued in the country of destination.<sup>1310</sup> However, in Canada, an alien convicted of a serious crime was ordered to be deported by the authorities in accordance with the Aliens Act, which determines that an alien may be deported if he or she is sentenced to a term of imprisonment for more than 5 years.<sup>1311</sup>

The convict appealed to the Supreme Court of Canada alleging that his expulsion would amount to cruel and unusual punishment or treatment prohibited by the Canadian Charter because he was a permanent resident of the country.<sup>1312</sup> The Court, however, replied that as an alien has no right to reside in the country of residence, the country can establish the conditions and requirements leading to his or her deportation or expulsion.<sup>1313</sup>

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<sup>1307</sup> See n 1204 & 1243 *supra*.

<sup>1308</sup> 15 *Australian Yearbook of International Law* (1994) 549.

<sup>1309</sup> In that case, the judge indicated that the 273 days time limit was an appropriate time to ensure that the power of detention was adequately limited *ibid*.

<sup>1310</sup> The Administrative Tribunal of Versailles, decision of 1996-09-26. 87 *Revue Critique In Droit International Prve* 688 (1998). See also the case of *B B v France* decided on 1998- 09- 07.

<sup>1311</sup> See the case of *Minister for Employment and Immigration v Chiarelli* 1992-03-26. File no 21/920

<sup>1312</sup> *Ibid*.

<sup>1313</sup> See Tiburcio *supra* n 26 88.

In *Canada (Minister of Justice) v Burns and Another*,<sup>1314</sup> the Canadian Supreme Court had occasion to reconsider its position with regard to the extradition of fugitives to a country where they would face the death penalty. In that case, the respondents, whose extradition was sought, were wanted for murder in Washington State where, if found guilty, they faced either life imprisonment without parole or the death penalty.

After evaluating the respondents' particular circumstances, the Minister of Justice of Canada ordered their extradition without seeking or obtaining assurances from the US as required under article 6 of the Extradition Treaty between the two countries.<sup>1315</sup> The respondents appealed against the Minister's decision to extradite them and the Court of Appeal set aside the extradition order on the grounds that it was unconstitutional. On further appeal to the Supreme Court, the decision of the Court of Appeal was affirmed.<sup>1316</sup>

### **10.3 Right not to be discriminated against<sup>1317</sup>**

Article 5 (c) of resolution 40/144 guarantees the right of aliens to be equal before the courts, tribunals, and other organs of administration of justice in the receiving state. This means that they should not be discriminated against as far as their access to the law and to the courts of law are concerned.

Discrimination means any discernment or distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying, or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.<sup>1318</sup>

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<sup>1314</sup> (2001) SCC 7; (2001)5 LRC 19.

<sup>1315</sup> I.e that the death penalty will not be imposed and if imposed, will not be carried out.

<sup>1316</sup> The Supreme Court, after weighing the factors in favour and against the extradition without assurances, held unanimously that the unconditional extradition of the respondents to a country where the death penalty is not abolished without assurance that the death penalty would not be imposed, violated s 7 of the Canadian Charter. (pars 130 & 132) The situation in Nigeria and the Republic of South Africa will be discussed in chs 5 & 6 *infra*.

<sup>1317</sup> See art 7 of the CMW.

<sup>1318</sup> See art 1(1) of CERD.

The issue of discrimination is an issue that has concerned the international community for decades. Many non-discrimination instruments have therefore been adopted by the UN to curb this menace. These include the Convention Against Racial Discrimination,<sup>1319</sup> the Convention on Discrimination against Women,<sup>1320</sup> and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>1321</sup> Several other international instruments contain express provisions prohibiting discrimination. They include (a) The Convention Relating to the Status of Refugees<sup>1322</sup> (b) The Convention Relating to the Status of Stateless Persons of 1954<sup>1323</sup> and (c) The ILO Convention relating to Discrimination on Professions of 1958<sup>1324</sup> *et cetera*.

Article 2 of the UDHR goes further to provide that everybody is entitled to all the rights and freedoms enumerated therein without discrimination. Therefore, the race, colour, gender, etcetera of a person should not determine whether he or she should enjoy legal rights in the country in which he or she lives, because all are equal before the law.

A significant purpose of these various provisions on equality or non discrimination is to instruct governments to adopt measures for the promotion of equality. This is because, the world community views discrimination as morally wrong, as fundamentally unjust, and an evil which ought to be eradicated.<sup>1325</sup> The European Court of Human Rights, for instance, in the *Belgium Linguistics* case,<sup>1326</sup> held that the rights and freedoms protected by the European Convention are to be secured without discrimination. The court held further that “equality of treatment is violated if the distinction has no objective and reasonable justification”<sup>1327</sup> since discrimination is the negative side of equality of treatment.

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<sup>1319</sup> CERD.

<sup>1320</sup> CEDAW.

<sup>1321</sup> Adopted in 1981. GA Res 36/55, 36 UN GOAR Upp. (No.4) at 171 UN Doc. A/36/51. See Robertson *supra* n 1195 26.

<sup>1322</sup> Art 3.

<sup>1323</sup> *Ibid*.

<sup>1324</sup> Art 1 par 1.

<sup>1325</sup> Robertson *supra* n 1195 26.

<sup>1326</sup> *Belgian Linguistic Case* 5 Eur Ct H R (ser A) (1968). See also Bayefsky *The Principles of Equality or Non-Discrimination in International Law*. 11 *HUM. RTS. L. J.* 1-34 (1990).

The rule against discrimination is part of the general principles of international law. Consequently, many states have expressed in their constitutions the right to equality before the law and/or prohibition against discrimination. In the US, for instance, the rule is contained in the Fourteenth Amendment – the equal protection clause. The US Supreme Court has also decided the exact meaning of equality before the law on several occasions.<sup>1328</sup>

With regard to aliens, the US Supreme Court has not established that equal protection prohibits discrimination against aliens as such, because it may be legitimate to treat aliens and nationals differently under certain circumstances.<sup>1329</sup> Nevertheless, it should be said that any legislation treating nationals and foreigners differently should be carefully analysed to determine whether it constitutes invalid discrimination.<sup>1330</sup>

In France, the French Constitution states, *inter alia*, that “the law must be the same for all whether it punishes or protects.” But, in the *Social Measures* case<sup>1331</sup> the *Conseil Constitutionnel* decided that legislation may establish specific distinctions, with regard to foreigners and that only when the *Conseil* believes that the difference in treatment is the result of arbitrary legislation, will it be deemed to violate the rule against equality.<sup>1332</sup>

Brazilian legislation grants equality before the law both to nationals and resident aliens alike.<sup>1333</sup> The situation in Nigeria and South Africa will be discussed in

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<sup>1327</sup> *Belgian Linguistic Case supra* n 1266 par 10.

<sup>1328</sup> See the cases of *Hurtado v California* 110 US 516 (1884); *Maxwell v Dow* 178 US 581 (1900); *Twining v New Jersey* 211 US 78 (1908); *Powell v Alabama* 287 US 45 (1932); and *Palko v Connecticut* 302 US 319 (1937).

<sup>1329</sup> Such as in the area of political rights. See *Tiburcio supra* n 26 98.

<sup>1330</sup> Because of this, s 722 of the Revised *Restatement* deals specifically with the topic of aliens in the following terms:

- 1) *An alien in the United States is entitled to all the guarantees of the Constitution of the United States other than those expressly reserved to citizens*
- 2) *Under Sub-section (1), an alien in the United States may not be denied the equal protection of the laws, but equal protection does not preclude reasonable distinction between aliens and citizens, or between different categories of aliens.*

<sup>1331</sup> Decided on 1990-01-12.

<sup>1332</sup> See *Soltész Implications of the Conseil Constitutionnel's Immigration and Asylum Decisions of August 1993* 18 B C INT'L & COMP.L.REV. 271(1995) 283-4. Another decision of the *Conseil Constitutionnel* of (1990) 01 9 states that simply being a foreigner places a person in a different legal situation and thus warrants different treatment under the law. See *Soltész* 289.

<sup>1333</sup> Art 5 of the 1988 Constitution.

subsequent chapters of this thesis, but suffice it to say that both Nigerian and South African Constitutions grant equality of treatment to all.<sup>1334</sup> Nevertheless, despite the fact that the right not to be discriminated against is clearly entrenched in international law, many countries still grant this right only to their nationals through national legislations.<sup>1335</sup> There are however certain states that prohibit discrimination against nationals and foreigners alike in their laws.<sup>1336</sup>

## 11 Right to own property

Property rights are granted to foreigners under article 5(2) of resolution 40/144 and article 15 of the CMW.<sup>1337</sup> The right to own property comprises the right to own fixed and movable assets, and the right to inherit and dispose of such property. As already indicated, the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, discusses the concept of property as comprising all movable and immovable assets, whether tangible or intangible, including industrial, literary and artistic property, as well as rights and interests in such property.<sup>1338</sup>

The Harvard Draft interpretation conforms to the practice of some states and judicial decisions.<sup>1339</sup> Thus, in the national jurisprudence of several states, the term “property” has been given a wide and liberal construction to include not only concrete rights to property, but also abstract rights,<sup>1340</sup> such as the right to manage a company,<sup>1341</sup> choses-in-action,<sup>1342</sup> money,<sup>1343</sup> contract,<sup>1344</sup> and even judgement

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<sup>1334</sup> See s 42 of the Nigerian Constitution & s 9 of the SA Constitution. See chs 5 & 6 *infra*.

<sup>1335</sup> E.g Belgium, Austria, China. See Tiburcio, *supra* n 26 100.

<sup>1336</sup> E.g Brazil, Germany, Liberia. etc. See Tiburcio *ibid*

<sup>1337</sup> See also art 15 of the CMW.

<sup>1338</sup> 55 *AJIL* 1961 548 art 10(7).

<sup>1339</sup> *Ibid*.

<sup>1340</sup> See s 25(4)(b) of the South African Constitution.

<sup>1341</sup> See the case of *Attorney General v Lawrence* Court of Appeal of St. Christopher & Nevis (1983) 31 WR 176 [1985] LRC (Const) 921.

<sup>1342</sup> Such as a debt of a banker to a customer. See the case of *Attorney-General v Jobe* Privy Council on appeal from The Gambia [1985] LRC (Const) 556.

<sup>1343</sup> *Lilleyman v Inland Revenue Commissioners* Supreme Court of British Guyana (1964) 13 WLR 224. See also *State of Bihar v Kameshwar Singh* Supreme Court of India [1952] SCR 889.

<sup>1344</sup> *Shar v Attorney-General (No 2)* High Court of Uganda [1970] EA 523.

debt.<sup>1345</sup> In the *Liamco* case<sup>1346</sup> for instance, the arbitration specifically mentioned concession rights as forming part of incorporeal property.<sup>1347</sup>

Resolution 40/144 not only mentions the right of aliens to own property, but also guarantees the right of protection against any deprivation. Article 9, therefore, provides that “No alien shall be arbitrarily deprived of his or her lawfully acquired assets.” Deprivation within this context means divesting, keeping out of enjoyment, or causing loss of the right.<sup>1348</sup> The concept of “deprivation” not only covers formal expropriation, but also *de facto* expropriation.<sup>1349</sup>

Under international and comparative law, the right to hold property is not granted without limitations.<sup>1350</sup> Therefore, an alien can be excluded from acquiring property if public interest so requires.<sup>1351</sup> But, once acquired, and if allowed by local law, the property cannot be expropriated without compensation.<sup>1352</sup> In general, however, the great majority of restrictions imposed on aliens lie in the area of real property. It has been said that allowing an alien to own part of the soil of a foreign country has some bearing on the concept of sovereignty and national security.<sup>1353</sup>

National laws in respect of ownership of landed property by aliens differ, but in general, the difference lies in the degree of limitations imposed on aliens.<sup>1354</sup> As a rule, making a will and transmitting property are not denied to aliens, but if the heir is also an alien, restrictions are often imposed on alien property.<sup>1355</sup> In Peru, for instance, aliens cannot acquire or hold lands, waters, mines, or minerals within a fifty

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<sup>1345</sup> *Ibid.*

<sup>1346</sup> *Supra* n 179.

<sup>1347</sup> At 145.

<sup>1348</sup> Eg by taking away, by destruction, or extinction of property rights i.e by expropriation or nationalisation.

<sup>1349</sup> I.e a measure which can be assimilated to a deprivation of property. See Sen *supra* n 52 382.

<sup>1350</sup> Tiburcio *supra* n 26 114.

<sup>1351</sup> *Ibid* This is a general rule of both National and International Law.

<sup>1352</sup> As far as aliens are concerned, the question is whether such deprivation is against the International Law rule which prohibits discrimination, or whether such deprivation is within the exceptions admitted under International Law i.e national security, national interests and public order?

<sup>1353</sup> As Borchard *supra* n 1 86 puts it “fear that control of national territory by foreigners opened too great a danger of foreign influence, domination and conflict.”

<sup>1354</sup> See Tiburcio *supra* n 26 106.

<sup>1355</sup> See Tiburcio *idem* 137.



kilometre zone along the frontiers.<sup>1356</sup> Aliens cannot hold or acquire rural property in the border provinces or in the immediate vicinity of military installations.<sup>1357</sup> Foreign investment in assets is permitted subject to prior authorisation, and such investments should be registered with the appropriate authorities.<sup>1358</sup>

In this regard, reference can be made to the national legislation of states. In Argentina, for example, foreigners can buy, sell and own real property,<sup>1359</sup> In Brazil however, article 5 of the Brazilian Constitution of 1988 guarantees to Brazilians and foreigners alike, the right to property.<sup>1360</sup> Under that provision, everyone is equal before the law, without any distinction whatsoever. In Greece, according to article 4 of the Greek Civil Code, aliens are also granted the same rights as nationals in respect to the acquisition of real property. However, internal legislation forbids individual aliens or legal entities from the acquisition or lease of real property in rural areas.<sup>1361</sup>

Zimbabwe is another notable example. Although foreigners were allowed to own landed property, following the nationalization policies of the Zimbabwean Administration, the expropriation and confiscation of the property of aliens without the payment of compensation has given rise to a serious internal and international political, legal and socio-economic crisis in the country.<sup>1362</sup>

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<sup>1356</sup> *Ibid.*

<sup>1357</sup> *Ibid.*

<sup>1358</sup> *Idem* 138.

<sup>1359</sup> Art 20 of the Argentinean Constitution 1853.

<sup>1360</sup> Tiburcio *supra* n 26 110.

<sup>1361</sup> Law no 3250 of 1924 EL 1366 of 1938. See Tiburcio *supra* n 26 141. Other countries establish in their legislations that distinction may be created by further legislation in general terms. They include Denmark which in its Constitution of 1953 states; "article 44(2) The extent of the right of aliens to become owners of real property shall be laid down by statute." In Canada the Civil Code of 1866 art 25 grants aliens the same rights to property as are granted to British subjects. In Mexico, as regards land ownership in general, the 1917 Constitution restricts acquisition of land by foreigners and in the USA several restrictions on land ownership are imposed. See Tiburcio *supra* n 26 142- 3. In South Africa, the situation is governed by s 25(6) & (9) of the Constitution which empowers Parliament to enact legislation with regards to property rights of those deprived.

<sup>1362</sup> Mugabe has accused Britain and America of imposing sanctions on Zimbabwe and trying to bring down his government because of this Nationalisation Policy. Towards that end, the Constitution of Zimbabwe has been amended in art. 16 to include art 16A which defines property in relation to land to mean improvements on land and not bare land, to justify the massive land seizures orchestrated in that country of foreign commercial farms without compensation A lot of litigation have also arisen because of this policy. See for instance the case of *Von Abo v The Government of the RSA supra* n 801. See also the case of *Campbell (Pvt) Ltd v The Republic of Zimbabwe SADC (T) Case No 2/2007*. The situation in Nigeria and the Republic of South Africa will be discussed in chps 5 & 6 *infra*.

It may therefore be concluded from this analysis that all civil rights of aliens do not have the same level of protection as those of nationals under national law. Although fundamental rights are often recognised and respected, the right to property has received a lower degree of protection and enforcement.<sup>1363</sup> As already said, perhaps, the rationale lies in the fear of undermining the very concept of sovereignty or national security. Nevertheless, if granted, such rights are often subject to several restrictions.<sup>1364</sup> Otherwise, in many countries, the right of aliens to own private property may be completely denied or restricted, or granted upon very strict conditions or requirements.<sup>1365</sup>

## 12 Procedural rights

Procedural rights are rights which guarantee the enforcement of substantive rights.<sup>1366</sup> They present the mode or procedure for enforcing a legal or substantive right, as distinguished from a corollary or adjectival right.<sup>1367</sup> These procedural rules are of fundamental importance, as they guarantee compliance with all other rights, including rights considered non-derogable and fundamental. In practice, their importance is so great that some legal commentators consider them non-derogable.<sup>1368</sup> The right to due process of law is the right discussed within this category.

The due process right discussed here is the right to a fair hearing or fair trial. The two aspects of the right to fair hearing discussed are (a) The right to presumption of innocence; and (b) the right to be tried within a reasonable time. These rights are analysed in general terms particularly within the context of article 7 of resolution 40/144, which provides that an alien who is lawfully in any foreign country shall not be expelled without due process of law. Thus, in expulsion, extradition or even immigration cases, international law demands that aliens should be entitled to some

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<sup>1363</sup> Tiburcio *supra* n 26 144.

<sup>1364</sup> *Ibid*

<sup>1365</sup> *Ibid*. See ch 1 19 - 21 for cases and materials from other jurisdictions.

<sup>1366</sup> Tiburcio *supra* n 26 245.

<sup>1367</sup> *Ibid*.

<sup>1368</sup> See Oraa *Human Rights in States of Emergency in International Law* 115 (1996) and Meron *Human Rights Law-Making in the United Nations* 186 (1986).

procedural rights, and should not be expelled without due process of law. But, in most cases, the main issue or problem for foreign nationals to contend with regarding this right, is the ouster clauses often contained in national legislations preventing them from access to a fair trial.<sup>1369</sup>

### 12.1 *Right to due process of law*

The right to due process of law is difficult to define in objective terms. It means that a person should be given an opportunity to a fair judgement with all the guarantees deemed necessary to be able to present one's defence. In its broadest meaning therefore, the right to due process of law embraces many procedural rights.<sup>1370</sup>

Article 7 of Resolution 40/144 guarantees due process of law to any alien who is lawfully in any country from which he or she is to be expelled.<sup>1371</sup> Thus, except where compelling reasons of national security require otherwise, an alien should be allowed to submit reasons against his or her expulsion and to have his or her case reviewed by the appropriate authorities. Unfortunately, however, in situations having to do with expulsion, deportation, or entry of aliens, this rule is not always taken into consideration.<sup>1372</sup>

Generally, aliens whose residence in a country is stable and lawful are entitled, like nationals, to lead a normal family life.<sup>1373</sup> Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in a prescribed manner and only on prescribed grounds.<sup>1374</sup> Since such restrictions must, *inter alia*, be consistent with other recognized rights,<sup>1375</sup> a

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<sup>1369</sup> See the case of *Von Abo supra* n 801.

<sup>1370</sup> Eg the right to be informed promptly and in detail of the charges, the right to be present at one's trial, the right of presumption of innocence, the right of appeal, the right to be tried within a reasonable time, etc.

<sup>1371</sup> See also art 13 of ICCPR and the case of *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (African Commission on Human and People's Rights Comm No 71/92 (1996).

<sup>1372</sup> *Tiburcio supra* n 26 255.

<sup>1373</sup> See *Jayawickrama supra* n 149 469.

<sup>1374</sup> See art 8 of the MWC.

<sup>1375</sup> *Ibid.*

state cannot by restraining an alien or deporting him to a third country arbitrarily prevent his return to his own country.<sup>1376</sup>

An alien is therefore free at any time to communicate with the consulate or diplomatic mission of the state of which he or she is a national or with the consulate or diplomatic mission of any other state entrusted with the protection of the interests of the state of which he or she is a national whenever he or she feels that his or her rights are threatened or are being violated in the receiving State.<sup>1377</sup>

The right not to be expelled without due process of law is, however, enjoyed only by those aliens who are lawfully in the territory of the state.<sup>1378</sup> In determining the scope of this protection, national law concerning the requirement for entry and stay, will need to be considered.<sup>1379</sup> If, however, the legality of an alien's entry or stay is in dispute, any decision on that matter leading to his expulsion or deportation will also have to be reached in accordance with due process of law.<sup>1380</sup>

An alien who is lawfully in any country can thus only be expelled only in pursuance of a decision reached in accordance with due process of law.<sup>1381</sup> This means that the grounds for the expulsion of an alien must have a legal basis, and the procedure leading to the expulsion must be prescribed by law.<sup>1382</sup> A separate decision must therefore be reached in respect of each alien, thereby invalidating collective or mass expulsion.<sup>1383</sup> The reference to "law" in this context is to the domestic law of the state concerned, though the relevant provisions of the domestic law must be compatible with the relevant human rights instruments.<sup>1384</sup>

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<sup>1376</sup> The general rule is that an alien who is expelled must be allowed to leave for any country that agrees to take him. Human Rights Committee, General Comment 15 (1986) See also Rashid's case (*Jeebhai v Minister of Home Affairs*) 2007 (4) SA 294.

<sup>1377</sup> Res 40/144 art 10.

<sup>1378</sup> Illegal aliens are not vested with this right.

<sup>1379</sup> Illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not within this scope.

<sup>1380</sup> Human Rights Committee General Comment 15 (1986).

<sup>1381</sup> *Jayawickrama supra* n 149 469.

<sup>1382</sup> UN document A/2929 Chapter VI s 63.

<sup>1383</sup> Human Rights Committee General Comments 15 (1986).

<sup>1384</sup> Otherwise it will be null and void.

An alien must therefore be given full facilities for pursuing his or her remedy against expulsion, so that this right will, in all the circumstances of his or her case, be an effective one.<sup>1385</sup> However, the circumstances surrounding the arrest and deportation of Anna Maroufidou, a Greek citizen who sought asylum in Sweden in 1976 did not seem to meet this requirement. She was granted a residence permit in 1976. In April 1977, she was arrested on suspicion of being involved in a terror plot to abduct a former member of the Swedish government. The central immigration authority therefore applied for her expulsion from Sweden on the grounds that there was reason to believe that she belonged to or worked for a terrorist organisation or group, and that there was a danger that she would be involved in Sweden in a terrorist act of a kind referred to in the Aliens Act.<sup>1386</sup>

A lawyer was appointed to represent her in the proceedings under the Act. On May 5, 1977 the Swedish government decided to expel her and the decision was immediately executed. Nevertheless, the Human Rights Committee held that the decision to expel her was “in accordance with law.”<sup>1387</sup> It would appear however that in view of the grave allegation levelled against her, and the fact that a lawyer was appointed to defend her, the requirement of due process was met in this case.<sup>1388</sup>

In the case concerning Pierre Giry who was expelled from the Dominican Republic, his expulsion was said to be without due process of law.<sup>1389</sup> Giry was a French citizen residing in Saint Barthelemy in the Antilles. He arrived in the Dominican Republic and stayed there for two days. When he went to the airport to buy a ticket for his return home, he was arrested by two uniformed agents who took him to the airport police office where he was searched. After two hours and forty minutes, he was taken out by the back door leading directly to the runway and forced to board a plane bound for Puerto Rico.

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<sup>1385</sup> Human Rights Committee General Comments 15 (1986).

<sup>1386</sup> The Aliens Act of Sweden of 1954 provided that an alien may be expelled “if there is reason to assume that he belongs to, or works for, a terrorist organisation or group” and if “there is a danger considering what is known about his previous activities or otherwise that he will participate in Sweden’s terrorist act.”

<sup>1387</sup> See *Maroufidou v Sweden* Human Rights Committee Communication No 58/1979 Report Annex IX C.

<sup>1388</sup> Maroufidou had a summary trial. The question is whether that trial was fair. Although it is generally said that justice delayed is justice denied, it is submitted that a very quick trial may also have a negative effect.

Upon his arrival in Puerto Rico, Giry was arrested, charged, and convicted of conspiracy to import cocaine into the US and of the use of a communications facility, the telephone, to commit the crime of conspiracy. He was sentenced to twenty eight years' imprisonment and fined \$250,000.<sup>1390</sup> The Human Rights Committee observed that irrespective of whether the action taken by the Dominican government was termed expulsion or extradition, there was no due process of law.<sup>1391</sup>

Due process demands that an alien who is about to be expelled must be allowed to submit reasons why he or she should not be expelled, and to have his case reviewed by the appropriate authorities.<sup>1392</sup> He or she should also be allowed to have the benefit of legal representation. The right of an alien to submit reasons against his or her expulsion or to have his or her case reviewed and to be represented for that purpose, may only be departed from when "compelling reasons of national security" so require.<sup>1393</sup>

In Madagascar, a French national who had been a practising attorney for nineteen years, was arrested at his law office by the political police. He was held incommunicado in a basement cell in the political prison for three days before he was notified of an expulsion order issued on that day by the minister of the interior.<sup>1394</sup> He was taken under guard to his house where he had two hours to pack his belongings. He was deported on the same evening to France.<sup>1395</sup>

A subsequent application by him to have the expulsion order revoked was rejected by the Madagascar Supreme Court on the grounds that he had

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<sup>1389</sup> See *Giry v Dominican Republic* Communication No 193/1985 HRC 1990 Report Annex IX C.

<sup>1390</sup> *Ibid.*

<sup>1391</sup> At 35. The committee noted with concern that based on information received from the State, the decision to expel Hammel appeared to have been linked to the fact that he had represented persons before the committee.

<sup>1392</sup> ICCPR art 13.

<sup>1393</sup> *Ibid.* See also UN document A/2929 ch VI s 63 and Human Rights Committee General Comment 15 (1986).

<sup>1394</sup> See *Hammel v Madagascar* Communication No 155/1983 HRC 1987 Report, Annex VIII A.

<sup>1395</sup> See Jayawickrama *supra* n 149 473.

made use both of his status as a corresponding member of the Amnesty International and as a barrister, to discredit Madagascar.<sup>1396</sup>

The Human Rights Committee, however, found no compelling reasons of national security to deprive him of an effective remedy to challenge his expulsion.<sup>1397</sup>

All relevant facts and circumstances must, therefore, be taken into consideration in their entirety whenever the expulsion of an alien is under consideration. In Finland, where a foreigner who had been staying in the country without a visa or residence permit was ordered by the ministry of interior to be deported, the Supreme Administrative Court found that doctors' statements were facts which ought to have been, but were not taken into consideration when ordering his deportation.<sup>1398</sup> According to the doctors' statements, he had been hospitalised in Finland on at least ten occasions because of severe depression, and had been entertaining thoughts of suicide, and was therefore in need of repeated treatment,<sup>1399</sup> accordingly, the court held that the deportation would be "inhuman."<sup>1400</sup> Under the circumstances, the court held that there were not sufficient grounds to deport him from the country, and that to do so would violate his rights.<sup>1401</sup>

### 13 The right to a fair trial

Article 18 of the CMW and article 7 of Resolution 40/144 guarantee the right of fair trial to aliens. The importance of the right to fair trial in the protection of human rights of aliens is underscored by the fact that the implementation of all other rights depends upon the proper administration of justice. The right of every individual to a fair trial is recognized without any distinction whatsoever as to race, colour, sex,

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<sup>1396</sup> *Ibid.*

<sup>1397</sup> *Ibid.* The committee noted further that it would be both untenable and incompatible with the spirit of the ICCPR and the Optional Protocol for State parties to take exception to anyone acting as legal counsel to the committee

<sup>1398</sup> Decision no 2743 of the Supreme Administrative Court of Finland, Fourth Chamber, 27 June 1995 (1995) 2 *Bulletin on Constitutional Case-law* 154.

<sup>1399</sup> Decision no 2743 of the Supreme Administrative Court of Finland, Fourth Chamber, 27 June 1995 (1995) 2 *Bulletin on Constitutional Case-law* 154.

<sup>1400</sup> See Jayawickrama *supra* n 149 473

<sup>1401</sup> At 172.

language, religion, political or other considerations, national or social origin, means, status, or other circumstances.

That said, the requirements inherent in the concept of ‘fair hearing’ are not necessarily the same in cases concerning the determination of rights and obligations in a suit at law, as in cases concerning the determination of a criminal charge. There is greater latitude when dealing with civil cases concerning civil rights and obligations, than when dealing with criminal cases.<sup>1402</sup> In fact, the requirement of fair hearing in the determination of a criminal charge elaborated in international and regional instruments,<sup>1403</sup> are minimum guarantees, the observance of which is not always sufficient to guarantee fairness of hearing.<sup>1404</sup>

It is submitted, however, that the right to a fair hearing embraces a concept of “substantive fairness” broader than these minimum requirements.<sup>1405</sup> A judge’s instructions to the jury, for instance, must meet particularly high standards as to their thoroughness and impartiality in a case in which a sentence of death may be pronounced on the accused.<sup>1406</sup> Irrespective of whether the proceeding is civil or criminal in nature, the broader concept of fair hearing includes not only the obligation of impartiality and independence on the part of judicial authorities, but also respect for the principles of adversarial proceedings,<sup>1407</sup> of equal protection and of expeditious proceedings.<sup>1408</sup>

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<sup>1402</sup> *Societe Levage Prestations v France* European Court (1996) 24 EHRR 351.

<sup>1403</sup> See ICCPR arts 14(2) - 14(7) & 15; ECHR arts 6(2) & 6(3); ACHPR art 7.

<sup>1404</sup> Human Rights Committee General Comment 13 (1984) See also *De Weer v Belgium* European Court (1980) 2 EHRR 439; *Artico v Italy* European Court (1980) 3 EHRR 1; *Jespers v Belgium* European Commission (1981) 5 EHRR 305.

<sup>1405</sup> See the case of *S v Zuma* C C SA Reports [1995] 1 LRC 145.

<sup>1406</sup> *Pinto v Trinidad and Tobago* Human Rights Committee, Communication No. 232/1987, HRC 1990 Report, Annex IX H. In a trial by jury, it is important that all jurors are placed in a position in which they may assess the facts and the evidence in an objective manner so as to be able to return a just verdict.

<sup>1407</sup> The principles of adversarial proceedings mean that each party to a criminal or civil trial must have the opportunity not only to make known any evidence needed for his or her claims to succeed, but also to have knowledge of and comment on all evidence adduced or observation filed with a view of influencing the court’s decision. Adversarial proceedings also imply the observance of the rules of natural justice. See *Mantovanelli v France* European Court (1997) 24 EHRR 370.

<sup>1408</sup> *Fej v Columbia* Human Rights Committee Communication No 514/1992 HRC 1995 Report Annex X1. The situation in Nigeria and the Republic of South Africa will be discussed in chs 5 & 6 *infra*.



The discussion of this right will be restricted to two aspects, namely, the right to be presumed innocent and the right to be tried within a reasonable time.

### **13.1 The right to presumption of innocence**

The right to be presumed innocent at common law means that the prosecution has the burden of establishing the guilt of the accused person beyond reasonable doubt.<sup>1409</sup> If, at the conclusion of the case, there is any reasonable doubt on any element of the offence charged, the accused person must be discharged and acquitted.<sup>1410</sup> In a more refined sense, the presumption of innocence gives the accused person the benefit of the right to remain silent and the ultimate benefit of any reasonable doubt.<sup>1411</sup>

The presumption of innocence comprises three fundamental components. These are: (i) That the onus of proof lies with the prosecution; (ii) that the standard of proof is beyond reasonable doubt; and (iii) that the method of proof must accord with fairness.<sup>1412</sup> The purpose of the presumption of innocence is to minimize the risk that innocent persons may be convicted and imprisoned.<sup>1413</sup> It does so by imposing on the prosecution the burden of proving the essential ingredients of the offence charged beyond reasonable doubt, thereby reducing to an acceptable level the risk of error in a court's overall assessment of evidence tendered in the course of the trial.<sup>1414</sup>

Article 18(2) of the CMW provides that a person shall be presumed innocent until proved guilty by law. The presumption of innocence implies the right to be treated in accordance with this principle. Thus, where public authorities prejudged a trial where the accused had not yet been convicted, it was held that the trial court may not necessarily find him or her guilty.<sup>1415</sup>

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<sup>1409</sup> See Jayawickrama *supra* n 149 535

<sup>1410</sup> *Ibid.*

<sup>1411</sup> *Ibid.*

<sup>1412</sup> *R v Oakes* Supreme Court of Canada [1987] LRC (Const) 477 489.

<sup>1413</sup> See *Woolmington v DPP* [1935] AC 462.

<sup>1414</sup> See *State v Manamela* C C SA 2000 (5) LRC 65.

<sup>1415</sup> See the case of *Barbera, Messegue and Jabardo v Spain* European Court, (1988) 11 EHRR 360.

The presumption of innocence is applicable only in criminal cases.<sup>1416</sup> The presumption of innocence may be breached not only by a judge or a court, but also by other public authorities.<sup>1417</sup> Thus, where, shortly after an arrest of a person, a senior police officer referred to him as “one of the instigators of a murder” during a press conference, the European Court of Human Rights described the conduct as “clearly a declaration of guilt”<sup>1418</sup> and therefore, a breach of the right of presumption of innocence.<sup>1419</sup>

In *State v Manamela*<sup>1420</sup> for instance, the South African Constitutional Court declared a reverse onus of proof placed on persons found in possession of goods suspected to have been stolen under section 37 of the General Law Amendment Act<sup>1421</sup> to be invalid. In assessing whether the interference with the right to be presumed innocent by section 37 of the General Law Amendment Act was reasonable,<sup>1422</sup> the Court weighed the risk that might have operated against innocent people being erroneously convicted contrary to the clear purpose or intent of the Act (namely to eradicate a flourishing market in stolen goods). The majority, therefore, came to the conclusion that the statutory reverse burden of proof should be invalidated.<sup>1423</sup>

### **13.2 The right to be tried without undue delay**

The right to be tried within a reasonable time encompasses the principles of expeditious proceedings which in turn, requires that justice be rendered without undue delay.<sup>1424</sup> The purpose of this right is to minimize the adverse effect which a pending criminal charge may have on the person charged.<sup>1425</sup> The right, therefore,

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<sup>1416</sup> Jayawickrama *supra* n 149 550. *Quare* whether deportation cases are criminal or civil cases *strictu sensu*? See Rasheed's case *supra* n 1316.

<sup>1417</sup> E.g Administrative Tribunals.

<sup>1418</sup> See also the case of *International Pen and others (on behalf of Ken Saro-Wiwa) v Nigeria*. Communication 48/90, 50/91, 52/91, 89/93, 13<sup>th</sup> Annual Activity Report: 1999-2000 (2000) AHRLR 297 (ACHPR 1999).

<sup>1419</sup> Because firstly, it encouraged the public to believe him to be guilty, and secondly, it prejudiced the assessment of facts by the judicial authorities.

<sup>1420</sup> Constitutional Court of South Africa [2000] 5 LCR 65.

<sup>1421</sup> 62 of 1955.

<sup>1422</sup> At 75.

<sup>1423</sup> At 83. The situation in Nigeria and the Republic of South Africa will be discussed in chs 5 & 6 *infra*.

<sup>1424</sup> *Hermoza v Peru* Human Rights Commission, Communication No. 203/1986, HRC 1995 Report, Annex X.1.

<sup>1425</sup> Jayawickrama *supra* n 149 550.

recognizes that, with the passage of time, a pending criminal charge gives rise to restrictions on liberty, inconvenience, social stigma, and pressures detrimental to mental and physical health of the individual.<sup>1426</sup> The time awaiting trial can be an agonizing experience for an accused person and his immediate family. If this happens in a foreign land, it may heighten the tension of the situation considerably.

Article 18(3)(c) of the Convention on Migrant Workers and Members of their Families therefore provides that a migrant worker accused of a crime should be tried without undue delay. The right to a trial without undue delay is the right to a trial which also produces a final judgement and sentence without undue delay.<sup>1427</sup>

A trial held within a reasonable time has its own intrinsic value. The accused person should be discharged and acquitted with the minimum disruptions to his social and family relationships if he or she is found to be innocent. If guilty, he or she should be convicted, and appropriate punishment imposed without undue delay. This is because, society has a collective interest in making certain that those who commit crimes are brought to trial quickly and dealt with fairly and justly.<sup>1428</sup>

## SECTION TWO

### Regional Instruments for the protection of human rights: The African System

#### 14 Introduction

The focus in the first section, was on the international instruments adopted by the UN for the protection of human rights. In this section, the focus is on regional instruments adopted for the protection of human rights. Although the Charter of the UN makes provision for regional arrangements in the maintenance of international

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<sup>1426</sup> *Idem* 508.

<sup>1427</sup> *R v Mac Dougall* Supreme court of Canada [2000] 1 LRC 390.

<sup>1428</sup> *R v Askov* Supreme Court of Canada [1990] 2 SCR 119. The situation in Nigeria and South Africa will be discussed in chaps 5 & 6 *infra*.

peace and security,<sup>1429</sup> it is silent on the establishment of regional institutions for the protection of human rights.

Article 52(1) of the UN Charter states, *inter alia*,

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.<sup>1430</sup>

However, whether or not regional human rights institutions were foreseen at the time the Charter was drafted, several factors have made such a development necessary.<sup>1431</sup> Regional institutions such as the EU, OAS and the OAU were created, which adopted instruments for the protection of human rights.<sup>1432</sup> The focus in this thesis however, is on the OAU and the African system, since Nigeria and South Africa, the countries under review in this research, are in Africa.

The OAU was launched in 1963 with the adoption of a Charter that proclaimed the aims of ending colonization and *apartheid* promoting solidarity among African states, providing a forum for cooperation in development, and ensuring the sovereignty and territorial integrity of independent states of Africa.<sup>1433</sup> The OAU Charter was adopted by a conference of African Heads of State and Governments in Addis Ababa, Ethiopia.<sup>1434</sup>

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<sup>1429</sup> See ch VIII of the UN Charter.

<sup>1430</sup> Art 52(2) of the Charter reads “The members of the United Nations entering into such regional arrangements or constituting such agencies, shall make every effort to achieve peaceful settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council”.

<sup>1431</sup> These factors are geographical, historical, cultural and legal in nature. See Steiner *et al supra* n 19 926-28. See also Rehman *supra* n 28 235-6.

<sup>1432</sup> They include the European Convention on Human Rights and Fundamental Freedoms, the African Convention on Human and Peoples’ Rights and the Inter-American Convention on Human Rights.

<sup>1433</sup> See the Preamble.

<sup>1434</sup> The Charter was signed by 23 states. It is reprinted in 3 *International Legal Materials* (1984) 1116.

That notwithstanding, diplomatic efforts aimed at the creation of a legal instrument for the protection of human rights in Africa took twenty years to materialise.<sup>1435</sup> The process began in 1961 with a unanimous resolution by the International Commission of Jurists at the African Conference on the Rule of Law held in Lagos, Nigeria,<sup>1436</sup> calling on African Governments to study the possibility of adopting an African Convention on Human Rights.<sup>1437</sup>

The process gathered momentum thereafter, and culminated in 1981 with the Assembly of Heads of State and Government of the OAU (now AU)<sup>1438</sup> adopting the African Charter on Human and Peoples Rights.<sup>1439</sup> Africa consequently became the third region in the world to achieve some result in its moves to constitute a regional human rights system.<sup>1440</sup> The African Charter possesses some unique features.<sup>1441</sup>

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<sup>1435</sup> See Nanjira, "The protection of human rights in Africa: The African Charter on Human and Peoples' Rights." Symonides (ed) *Human Rights: International Protection, Monitoring, Enforcement* (2003) 219.

<sup>1436</sup> The so-called "Law of Lagos". The idea was to give full effect to the UDHR. See Umozurike, *The African Charter on Human and Peoples' Rights*, (1996) 24.

<sup>1437</sup> Europe was the first region to constitute such a regional human rights system, followed by American States.

<sup>1438</sup> In 1999 member states of the OAU agreed on a new organization known as the African Union (AU). In 2000 the Assembly adopted the Constitutive Act of the African Union, which provides for "non-indifference" instead of "non-interference" in the internal affairs of member countries where human rights violations and security issues are concerned. See Haas *International Human Rights* (2005) 311. See also Murray *Human Rights in Africa: From OAU – African Union* (2004) 25.

<sup>1439</sup> The "African Charter" or the "Banjul Charter" named after Banjul, the capital of the Gambia, the city where it was drafted. The Charter received a sufficient number of ratifications to enter into legal force in 1986. By the end of 2001, 52 states had ratified it. The Charter is reprinted in *Human Rights Law Journal* 7 (1988) 403. See Heyns *supra* n 256 86.

<sup>1440</sup> See Nmehielle *The African Human Rights System – Its Laws, Practice and Institutions* (2001) 10.

<sup>1441</sup> The need for an African convention on human rights was very pressing at the time. First and foremost, there was a need to give full effect to the UDHR which had been proclaimed by the UN since 1948. Secondly, after attaining political independence, some African leaders became even more dictatorial than their erstwhile imperialist European colonial masters and set out to demonstrate their superiority in brutal actions against the very people they ruled. Besides, the massive human rights violations in post colonial Africa was embarrassing to some African elite and leaders who were ashamed at the uncivilized and primitive behaviour of their peers, who denied the continent not only the dignity it deserved in the eyes of the world, but also the necessary adjustment to the changing times and circumstances of the post WW II era. Consequently, they felt the need to do something in order to ensure respect for the rule of law and to protect Africa's image by restoring African liberties and rights in the post colonial period. The ACHPR, it was hoped, would be the answer to that aspiration.

## 15 OAU and human rights

The Charter of the OAU<sup>1442</sup> did not explicitly include human rights as part of its mandate. The OAU member states were only required to have “due regard” to the human rights set out in the UDHR.<sup>1443</sup> In this way, the UN human rights initiative became relevant to Africa.<sup>1444</sup> In spite of this oversight however, some of OAU’s notable successes have been in the field of human rights.<sup>1445</sup> Initially, emphasis was placed on the right to independence of colonial African “peoples,” and on the unity of the newly independent African states.<sup>1446</sup>

To this end, African states made tremendous diplomatic efforts at the UN to protect human rights on the continent.<sup>1447</sup> Efforts were made for instance, to pressurize Rhodesia (Zimbabwe) and apartheid South Africa to stop their racist policies, and ultimately persuaded the world to impose economic sanctions against these regimes.<sup>1448</sup> These efforts were extended to fight colonial policies in South West Africa (Namibia)<sup>1449</sup> and the then remaining Portuguese colonies of Angola, Guinea Bissau, Mozambique, and other countries still under colonial rule.<sup>1450</sup> These efforts helped to bring about the restoration of majority rule in those countries.<sup>1451</sup>

Empowered by the African Charter, the OAU adopted a number of human rights-related instruments for the protection of human rights in Africa. They include, *inter alia*, the OAU Convention Governing the Specific Aspects of Refugee Problems in

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<sup>1442</sup> The OAU was launched with the adoption of a Charter in 1963, that proclaimed the aims of ending colonization and *apartheid*; promoting solidarity among African states; providing a forum for cooperation in development; and ensuring the sovereignty and territorial integrity of independent states of Africa. See Haas *supra* n 1439 311.

<sup>1443</sup> Art. 2(1) (e) of the OAU Charter. The Preamble to the OAU Charter also recognizes the UDHR as the foundation of peaceful and positive cooperation between states.

<sup>1444</sup> Apart from the endorsement in the OAU Charter, African nations, have either signed or ratified various other UN human rights Instruments. Their ratification of the UN Charter has often been followed by inserting the UDHR in their Constitutions and ratifying other covenants.

<sup>1445</sup> See Heyns *supra* n 256 386.

<sup>1446</sup> See Heyns *supra* n 256 386-7. The OAU’s human rights initiative between 1963 and 1981 related to four main areas, *viz* the eradication of colonialism from Africa; Self determination of African people; a collective effort to rid Africa of apartheid in South Africa; and tackling African refugee problems.

<sup>1447</sup> See Forsythe *Human rights in International Relations* (2000) 132-3.

<sup>1448</sup> *Ibid.*

<sup>1449</sup> See the South West Africa Cases (*Ethiopia v South Africa; Liberia v South Africa*) (Preliminary Objections) ICJ Rep. 1962 319.

<sup>1450</sup> Forsythe *supra* n 1449 132 – 3.

Africa;<sup>1452</sup> the Bamako Convention on the Ban of Import into Africa and Control of Trans-boundary Movement and Management of Hazardous Waste within Africa;<sup>1453</sup> the African Charter on the Rights and Welfare of the Child;<sup>1454</sup> and the Protocol on the Rights of Women.<sup>1455</sup> The African Charter, together with the above instruments, comprise what is generally referred to as the “African regional human rights system”.<sup>1456</sup>

## 16 Resolutions, declarations and decisions of OAU Heads of State and Governments (The Assembly)

Just as the UN has adopted numerous treaties, resolutions and declarations for the protection of human rights internationally, so have African States also adopted several resolutions and declarations for the diplomatic protection of human rights in Africa.<sup>1457</sup> As already indicated, although resolutions and declarations are not binding on states, they help in sensitizing human conscience towards the action sought to be promoted or prohibited.

## 17 Constitutive Act of the AU

The OAU was replaced in 2000 by the AU.<sup>1458</sup> The AU became a legal reality in May 2001 when its Constitutive Act, adopted in 2000, entered into force. The Constitutive Act was intended to reform and update the provisions of the OAU Charter, in particular, by placing greater emphasis on principles of democracy, good governance and human rights, and by limiting the sovereignty of member states with provision for intervention on humanitarian grounds.<sup>1459</sup>

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<sup>1451</sup> *Ibid.*

<sup>1452</sup> The ‘OAU Refugee Convention.’

<sup>1453</sup> The ‘Bamako Convention.’

<sup>1454</sup> The ‘African Children’s Charter.’

<sup>1455</sup> A draft Protocol on Women’s Rights was adopted by the African Commission on Human Rights and forwarded to the OAU for discussion in 2003. The draft sought to respond to the Beijing Principles (UN) and Plan of Action. The Protocol on Womens Rights was finally adopted in 2005 See Smith *supra* n 802 See also Heyns *supra* n 256 495.

<sup>1456</sup> See Heyns *supra* n 256 386.

<sup>1457</sup> Between 1964 and 2002, about 66 resolutions, declarations and decisions on human rights were adopted by the Assembly of Heads of State and Governments of Africa.

<sup>1458</sup> The Constitutive Act of the African Union, which was accepted in Lome, Togo on 2000-07-11 entered into force on 2001-05-26. CAB/LEG 23 15.

<sup>1459</sup> See Heyns, *supra* n 256 99.

The Constitutive Act of the AU has also replaced the OAU Charter. The establishment of the AU was partially informed by the desire to amalgamate the OAU and the African Economic Community (AEC).<sup>1460</sup> The Constitutive Act of the AU(CAAU) has become yet another principal instrument for the diplomatic protection of human rights in Africa.<sup>1461</sup>

## 18 The African Charter on Human and People's Rights (ACHPR)

The principal instrument for the protection of human rights in Africa is the ACHPR. The ACHPR is a unique instrument of human rights diplomacy. It encompasses an absolute endorsement of certain civil and political rights familiar to Western liberalism,<sup>1462</sup> a conditional endorsement of other civil and political rights that are limited by 'claw back' clauses, permitting deviation<sup>1463</sup> from international standards, on the basis of national laws, national security, public health and morality.

It mentions fundamental economic and social rights requiring considerable material resources for their application, a list of individual duties, and a list of "people's" rights such as the right to existence, self determination, and disposal of natural resources not hitherto mentioned in other regional human rights conventions.<sup>1464</sup> It reaffirms the "African spirit," which can best be described as the spirit of African "brotherhood", built on a solid rock of kinship and communalism, which transcends everything African.<sup>1465</sup>

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<sup>1460</sup> Otherwise known as the Abuja Treaty. The AEC was established as an integral part of the OAU as a 34-year plan for Africa's economic, social and cultural development, recovery and integration and to create a framework for the development and mobilization of material and human resources in Africa.

<sup>1461</sup> According to the Constitutive Act of the AU, the Assembly of Heads of State and Government is the supreme organ of the AU and the AEC. Its role is to determine the common policies of the Union and monitor their implementation and compliance by member states. The Assembly may impose sanctions on any member state and authorize intervention to prevent war crimes, genocides, and crimes against humanity. Thus, the Assembly has continued to promote and protect human rights through diplomatic channels.

<sup>1462</sup> See Legesse, "Human Rights in African Political Culture" in Thomson (ed) *The Moral Imperatives of Human Rights* (1980) 124.

<sup>1463</sup> But not derogations.

<sup>1464</sup> See Forsythe *supra* n 1449 133. See also Nmehielle *supra* n 1442 219.

<sup>1465</sup> See Nkurumah *The Revolutionary Path* (1973) 216. The drafters of the ACHPR were guided by the principle that the Instrument should reflect the African concept of human rights and should not only take as a pattern the African philosophy of law, but should also meet African social & cultural



Apart from the Preamble, the ACHPR comprises 68 articles<sup>1466</sup> divided into three sections. The first section is on “Rights and Duties” and comprises 29 articles.<sup>1467</sup> The second section comprises 33 articles<sup>1468</sup> and deals with “Measures of Safeguard” of human rights, while the third section is on “General Provisions;” measures designed to deal with the signing and ratification protocol to the Charter.

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## 19 Implementation of the African Charter - The African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights (The African Commission) is the main executive organ of the African Charter and is also responsible for the supervision and enforcement of the provisions of the Charter. The Commission consists of eleven members chosen from among :

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needs. See OAU CAB/LEG rev 11. Perhaps it is this same basic communal spirit that Savigny of the historical school of Jurisprudence referred to as the “volksgeist”.

<sup>1466</sup> According to art 1, state parties are enjoined to recognise the rights, duties and freedoms in the Charter and to adopt legislative and other measures to comply therewith. The subsequent arts deal with the followings rights: Art 2 The right to non-discrimination; art 3: The right of equality before the law; art 4: The right to respect for life and integrity of the person; art 5: Freedom from exploitation and degradation, including slavery, torture and cruel, inhuman and degrading punishment; art 6: The right to liberty and security of the person; art 7(1): The right to a fair trial; art 7(2): Freedom from retrospective punishment; art 8 freedom of conscience, the profession and free practice of religion; art 9(1): The right to receive information; art 9(2): The right to express and disseminate opinion; art.10 freedom of association; art 11 freedom of assembly; art 12(1) freedom of movement; art 12(2): Right to leave any country and the right to return; art 12(3): Right to seek and obtain asylum; art 12(5): Prohibition of mass expulsion; art 13(1): The right to participate in government; art 13(2): The right to equal access to the public services; art 13(3): The right to equal access to to public property and to public services; art 14: Right to property; art 15: The right to work; art 16: The right to health; art 17(1): The right to education; art 17(2): The right to participate in the cultural life of ones community; art 17(3): The duty of the state to to promote and protect the moral and traditional values; art 18(1): Recognition of family as the natural unit and basis of society; art 18(2): Family to be assisted as a custodian of morals and traditional values; art 18(3): Protection of the rights of women and children; art 19: Peoples’ right to equality; art 20(1): Peoples’ right to existence; art 20(2)-(3): People’ right to self-determination; art 21(1): Peoples’ right to dispose of their wealth and natural resources; art 22: Peoples’ right to economic, social and cultural development; art 23: Peoples’ right to national and international peace; & art 24: Peoples’ right to a general satisfactory environment.

<sup>1467</sup> Arts 1 – 29.

<sup>1468</sup> Arts 30 – 63.

<sup>1469</sup> The Preamble states that the parties are convinced that it is essential to pay particular attention to the right to development. It also notes that civil and political rights cannot be dissociated from economic, social and cultural rights. It blazes the trail, by being the first Human Rights Charter in the world so far, to combine all types of rights in one instrument.

African personalities of highest reputation known for their high morality, integrity, impartiality, and competence in matters of Human and Peoples' rights; particular consideration being given to persons having legal experience.<sup>1470</sup>

Members of the Commission are elected by Heads of State and Governments of the member states for a renewable term of six years, from a list of persons nominated by state parties.<sup>1471</sup> The Commission then appoints a Chairman and a vice Chairman for a two-year term.<sup>1472</sup>

On election, the Commissioners make a solemn declaration of impartiality and faithfulness.<sup>1473</sup> They serve in their individual capacities, not as agents of their national states, and mediate between governments and individuals.<sup>1474</sup> They must be available to carry out their functions and must be impartial.<sup>1475</sup> Attendance at sessional meetings, participation in human rights conferences, and other promotional activities are evidence of availability.<sup>1476</sup>

The promotional functions of the Commission include the collection of documents and the undertaking of studies and research on African human rights problems, as well as the formulation and establishment of principles and rules for the solving of human rights disputes. It is also obliged to forge cooperation links with other regional and international human rights agencies.<sup>1477</sup>

Human rights violations may be brought to the attention of the Commission by an inter-state communication.<sup>1478</sup> The Commission must investigate the matter with a view to reaching an amicable settlement.<sup>1479</sup> If reconciliation fails, the Commission must report on the matter to the Assembly of Heads of State and Government and also submit a report on the matter to the states concerned. Any report submitted to

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<sup>1470</sup> Art. 31.

<sup>1471</sup> Arts 33 & 36. Note that a Commissioner's work is part-time.

<sup>1472</sup> Art 42.

<sup>1473</sup> Art 38.

<sup>1474</sup> Art 31(2).

<sup>1475</sup> Art 39(2).

<sup>1476</sup> See Umozurike *supra* n 1438 68.

<sup>1477</sup> Art 45(1) of the Charter.

<sup>1478</sup> *Ibid* art 47.

<sup>1479</sup> *Idem* arts 51 & 52.

the Assembly of Heads of State and Government in terms of any measure taken shall remain confidential until the Assembly of Heads of States and Government authorise its publication.<sup>1480</sup>

Apart from inter-state communications, there are 'other communications'<sup>1481</sup> which can be considered by the Commission on certain conditions.<sup>1482</sup> This refers to individual communications, although there is no clear indication of this in that provision. At its third session, the Commission established a procedure for dealing with individual communications.<sup>1483</sup>

## **20 The African Charter and diplomatic protection: Rights of foreigners under the African Charter**

Does the African Charter encourage diplomatic protection? Are there provisions envisaging diplomatic protection in the Charter? It is pertinent to take a critical look at the provisions of the African Charter before these questions are answered.

Of particular interest to a foreigner in the African Charter are the provisions of articles 2, 3, 7 and 12 of the Charter. Article 2 provides that

every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3 stipulates that

every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

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<sup>1480</sup> Art 59.(1).

<sup>1481</sup> *Idem* art 55.

<sup>1482</sup> *Idem* art 56.

<sup>1483</sup> See Umozurike *supra* n 1438 163.

Article 7 provides, *inter alia*, that every individual shall have the right to have his cause heard, while article 12 stipulates that

- (1) Every individual shall have the right to freedom of movement and residence within the borders of a state, provided he abides by the law.
- (2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.
- (3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.
- (4) A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
- (5) The mass expulsion of non nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Thus, the mass expulsion of non-nationals is prohibited under the Charter. The mass expulsion of nationals is defined as “one aimed at national, racial, ethnic or religious groups.” Since it is the maltreatment of foreigners that often gives rise to diplomatic protection, it can be said without any fear of contradiction that the drafters of the African Charter envisaged situations of wrongful treatment of foreigners and, therefore that diplomatic protection was contemplated in the Charter.<sup>1484</sup>

However, there have been cases of mass expulsions of foreigners from African countries in the recent past for such reasons as increase in crime rate by foreigners, rampant vagrancy, increased unemployment in the affected countries, unfair competition from foreigners,<sup>1485</sup> *et cetera*, without any action being taken by the affected states on behalf of their nationals. On several occasions, Ghanaians have been expelled from the Ivory Coast, and *vice versa*.<sup>1486</sup> The mass expulsion of Nigerians from Ghana in 1969, and the mass expulsion of Ghanaians from Nigeria in

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<sup>1484</sup> The word non-nationals is used instead of “aliens” or “foreigners,” perhaps in the spirit of African brotherhood. See Umozurike *supra* n 1436 38.

<sup>1485</sup> See Ankumah *supra* 1073 140.

1983 and 1985 are further examples. The collective expulsion of Nigerians, Cameroonians and other foreign nationals from Gabon in 1994, is yet another example.<sup>1487</sup> The xenophobic attacks on foreigners in South Africa in 2008 and 2009 are still fresh in the memory.<sup>1488</sup>

In the case of *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia*,<sup>1489</sup> for instance, the issue of mass expulsion of non nationals came up for determination before the African Commission. In that case, the plaintiff, a Senegalese NGO brought proceedings before the African Commission on behalf of 517 West African nationals against the Zambian government for alleged mass expulsion of those West Africans from Zambia.

The Zambian government argued that the case should be declared inadmissible, because domestic remedies had not been exhausted. The Commission overruled the objection on the grounds that no domestic remedies were available in the first place to be exhausted.<sup>1490</sup> According to the Commission, the mass nature of the arrest, the fact that the victims were kept in detention prior to their expulsion, and the speed with which the expulsion were carried out gave the complainants no opportunity to establish the legality of these actions in the courts.<sup>1491</sup>

The Commission found that Zambia breached articles 2, 7, 1(a), and 12(5) of the African Charter by deporting the West Africans.<sup>1492</sup> However, it was a Senegalese NGO that instituted the action on behalf of the expelled West Africans in this case. Their government took no diplomatic action on their behalf. The question is whether

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<sup>1486</sup> *Ibid*

<sup>1487</sup> Ankumah *supra* n 1073 140 has given a detailed account of incidents of expulsion of non-nationals in Africa in the recent past. When Nigeria expelled non-nationals in 1983 and 1985, these were the reasons advanced for her action. See Ankumah *ibid*. The same reasons were advanced for the xenophobic attacks on foreign nationals in South Africa in 2008. See Enobong "Immigrants flee South Africa's wave of violence" *P M News* 2008-05-23 3; Azubuike "Attacks on foreigners spread in South Africa" *The Punch* 2008-05-22 53.

<sup>1488</sup> See *supra* n 1486.

<sup>1489</sup> See <http://wwwl.umn.edu/humanrts/africa/comcases/71-92.html> (accessed 2009/05/19).

<sup>1490</sup> *Ibid*

<sup>1491</sup> *Ibid* 2.

<sup>1492</sup> *Ibid* 4. See also the case of *Institute for Human Rights and Development in Africa v Angola* (2008) ACHLR 43 (ACHPR 2008) where the Commission came to the same conclusion in respect of the mass expulsion of non-nationals from Angola..

the action taken by the NGO amounted to diplomatic protection and if not, whether there has been any reported case of diplomatic protection on African soil?<sup>1493</sup>

Before the civil, political and the socio-economic rights entrenched in the African Charter are examined, the right to asylum as contained in article 12(3) of the Charter will be discussed. The article provides that:

Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

Notwithstanding the availability of this provision, however, the question is whether it is justiciable and, if so, whether it can engender diplomatic protection. If some Nigerians for instance, migrate to Togo to seek asylum based on their alleged persecution in Nigeria, but they are not only refused asylum in Togo, but are molested, tortured and even killed in that country. Can they claim to be entitled to diplomatic protection by Nigeria? If not, who can protect them? Can they bring any Communication before the African Commission for redress under article 12 of the African Charter?

It is interesting to note that article 12(3) speaks of “in accordance with the law of those countries and International Conventions,” and not “in accordance with the provisions of this Charter.” Be that as it may, there is no doubt that the issue of asylum in general and that of diplomatic asylum in particular, is a controversial

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<sup>1493</sup> It would appear that the only unique case of diplomatic protection on African soil occurred in Uganda. That was the Entebbe Raid of 1976 in which the Israeli government undertook a rescue mission to save the lives of 103 Israeli nationals who were hijacked by Palestinian and German militants. The French airliner in which the Israelis were travelling was first diverted to Benghazi in Libya and then to Entebbe Airport in Uganda. (Operation Thunderbolt) The hijackers had threatened to kill all the hostages if their prisoners release demand was not met. The Israeli Commandos stormed Entebbe airport and released the hostages. See [en.wikipedia.org/wiki/Operation\\_Thunderbolt](http://en.wikipedia.org/wiki/Operation_Thunderbolt). The other case was the invasion of Uganda by Tanzania in 1978/9. The question however is whether the invasion of Uganda can be described *strictu sensu* as a case of diplomatic protection? This is because the move was made by Tanzania to oust the dictator, Idi Amin, from power and not to protect Tanzanian nationals. However some commentators maintain that Idi Amin had encroached into and annexed part of Tanzanian territory along the Ugandan -Tanzanian border and that the move to oust him was also a move to protect the human rights of those Tanzanians living in the occupied territory. Needless to say, the OAU denounced the Tanzanian invasion of Uganda. See [en.wikipedia.org/wiki/Ugandan%E2%80%3Tanzanian\\_War](http://en.wikipedia.org/wiki/Ugandan%E2%80%3Tanzanian_War).

subject in international law. In the *Asylum* case,<sup>1494</sup> for instance, the ICJ, in declining to find a custom relating to diplomatic asylum stated that the practice

has been so much influenced by considerations of political expediency ... that it is not possible to discern in all this any constant and uniform usage, accepted as law<sup>1495</sup>

Diplomatic asylum apart, the issue of political asylum is also problematic. If asylum seekers are regarded as refugees, though they may not qualify for diplomatic asylum, they can still be diplomatically protected in international law under the draft articles on diplomatic protection.<sup>1496</sup> This is because, article 8 of the draft articles on diplomatic protection permits the diplomatic protection of stateless persons and refugees. Refugees are people, who alleging persecution by their own governments, leave their own countries to seek asylum in other countries.<sup>1497</sup>

Article 8(2) of the draft article stipulates that

A State may exercise diplomatic protection in respect of a person who is recognised as a refugee by that state when that person at the time of injury and at the date of the official presentation of the claim is lawfully and habitually resident in that state.

In the hypothetical example given above, however, it would appear that those Nigerians who escape to Togo to seek asylum may be left without any protection whatsoever because article 8(3) of the draft articles cancels the effect of article 8(2) by stipulating that

Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the state of nationality of the refugee.

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<sup>1494</sup> (1950) ICJ Rep 266.

<sup>1495</sup> At 274.

<sup>1496</sup> See art 8 of the ILC's draft arts on diplomatic protection.

<sup>1497</sup> An example was the xenophobic attacks on Zimbabwean nationals resident in Cape Town in Nov 2009. The Zimbabwe government appeared to have said nothing about the incident. Another example was "Operation Thunderstorm" mounted by the Singapore Armed Forces to prevent refugees fleeing from South Vietnam after the fall of Saigon in 1975 from entering into Singapore. Following the fall of Saigon, large numbers of refugees fled to Singapore for fear of persecution, heralding the arrival of the Boat People. But they were sent back. Their government could not protect them.

Besides, state practice does not support the exercise of diplomatic protection under such circumstances by Nigeria, the country of nationality of the refugees, against Togo, the country of refuge.<sup>1498</sup>

Draft article 8(3) forbids Togo, the state of refuge, to exercise diplomatic protection against Nigeria, the state of nationality of the asylum seekers. The rationale is that to allow such claims would contradict the very basis of diplomatic protection generally and the draft articles on diplomatic protection in particular. It “would open the floodgates for international litigation” and the fear of demands for such action might deter states from accepting refugees.<sup>1499</sup> It can thus be said that though the right to asylum is not a justiciable right in international law, it is however capable of being diplomatically protected.

## **21 Civil and political rights: Can a violation of civil or political rights under the African Charter trigger diplomatic protection?**

Given the right to asylum under the African Charter, it leads to the question whether other civil and political rights can be diplomatically protected? Civil rights must be distinguished from political rights for purposes of diplomatic protection. Civil rights are rights which belong to all human beings whether they are citizens or not, whereas political rights are those rights which require the status of a citizen to be enjoyed.<sup>1500</sup> The ACHPR guarantees virtually all the established civil and political rights mentioned in the UDHR and the ICCPR.<sup>1501</sup> Each Member State is expected to respect the rights, freedoms and duties enshrined in the Charter, adopt legislation and other measures to give effect to them.<sup>1502</sup>

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<sup>1498</sup> Draft art 8 par 6 on Diplomatic Protection states that refugees are “unable or unwilling to avail [themselves]of the protection of their State of Nationality.” See the *Official Records of the GA supra* n 1 50.

<sup>1499</sup> Commentary to draft art on Diplomatic Protection art 8 par 10 *idem* 51.

<sup>1500</sup> They include the right to vote and be voted for, the right of access to public jobs, the right to serve in the armed forces etc. See Tiburcio *supra* n 26 xiv.

<sup>1501</sup> See Umozurike *supra* n 1436 29.

<sup>1502</sup> Art.1 There are two groups of rights – those that may be restricted and those that must not be restricted. The restrictions are not by way of derogations, but by claw-back clauses. Umozurike *ibid*.



An example of a civil right under the Charter that may not be restricted is the right of non-discrimination.<sup>1503</sup> Another is the right of equality before the law and equal protection of the law.<sup>1504</sup> The Charter affirms the right to human dignity and to the recognition of one's legal status, and prohibits all forms of degradation, including torture, cruel, inhuman or degrading punishment and treatment.<sup>1505</sup> The Charter also prohibits slavery and slave trade.<sup>1506</sup> Obviously, these rights can be diplomatically protected, since they are justiciable. They are rights which must be respected in all circumstances and if violated especially on a large scale, the right to diplomatic protection arises.

The same cannot be said of political rights contained in article 13 of the Charter. Article 13 provides, *inter alia*,

- (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law,
- (2) Every citizen shall have the right of equal access to the public service of his country, and
- (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

As already indicated, political rights are rights specifically reserved for citizens and in many countries, foreigners are not entitled to them. Foreigners cannot therefore complain if they are denied political rights in countries where they reside. It is submitted therefore that this is also the case under the African Charter. A foreigner in Africa cannot complain of being denied political rights so as to ground diplomatic protection.

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<sup>1503</sup> Whether based on "race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, wealth, birth or other status." See art 2.

<sup>1504</sup> Art 3.

<sup>1505</sup> Art.5.

<sup>1506</sup> *Ibid.*

## 22 The protection of socio-economic rights under the African Charter

Another burning question is whether the socio-economic rights provided for in the African Charter can be diplomatically protected. In relation to socio-economic rights, the Charter emphasizes that

the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights<sup>1507</sup>

It therefore provides that :

every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.<sup>1508</sup>

The Charter also protects the right to enjoy the best attainable state of physical and mental health and to medical attention in case of sickness<sup>1509</sup> as well as to unlimited education up to any level.<sup>1510</sup>

The conclusion is that a foreigner who is denied employment in the country where he or she resides or, if employed, is paid less than the citizens of that country, or who is not allowed to enjoy the same medical facilities as the citizens, or whose children are not allowed into certain public or private schools in that country, cannot complain to his or her home government. If any complaint is made, it is submitted that his or her government cannot take diplomatic action to protect him or her. In other words, the violation of socio-economic rights cannot *ipso facto* ground the right to diplomatic protection in Africa.<sup>1511</sup> The rights meant for special investigation in this thesis *vis-à-vis* diplomatic protection are examined below.

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<sup>1507</sup> See the preamble.

<sup>1508</sup> Art 15.

<sup>1509</sup> Art 16(2).

<sup>1510</sup> Art 17. This includes the right to primary, secondary, vocational, adult and tertiary education. It also includes the right to education for illiterate adults, and the right to special education. See Umozurike *supra* n 1436 47.

<sup>1511</sup> Note however that the African Commission has made it abundantly clear that economic, social and cultural rights are justiciable. See eg the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 2004. See also the cases of *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endrois Welfare Council v Kenya* (Communication 276/2003, 27<sup>th</sup> Activity Report (2009) and *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60. (ACHPR 2001) to name but a few instances where the African Commission has emphasized that state parties should incorporate into domestic law and fully

## 23 Fundamental rights

Fundamental rights have already been defined and distinguished from mere human rights.<sup>1512</sup> The first of the fundamental rights under the ACHPR to be discussed here is the right to life.

### 23.1 *Right to life under the ACHPR*

The ACHPR guarantees the right to life. Article 4 of the Charter provides that human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

As already said, all international human rights instruments emphasize the fundamental nature of this right.<sup>1513</sup>

The importance of the right to life in Africa cannot be overemphasized. This is more so, because it is a right which has been violated with impunity by successive brutal regimes in Africa.<sup>1514</sup> A well known case was the brutal hanging of Ken Saro-Wiwa a Nigerian writer and President of the Movement for the Survival of the Ogoni People (MOSOP).<sup>1515</sup> In that case, Saro-Wiwa was arrested, detained, and tortured by the military administration in Nigeria. He was chained hands and feet, denied medical attention and access to his lawyers. He was later hanged. The African Commission found a violation of article 4 on the grounds that the execution rendered the deprivation of life arbitrary because the trial of Saro-Wiwa violated article 7 of the Charter. According to the Commission

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implement the provisions of regional and international treaties on economic, social and cultural rights.

<sup>1512</sup> See ch 1 21 *supra*. See also the case of *Ezoukuru v Ezeonu* (1991) 6 NWLR 708.

<sup>1513</sup> *Idem* ch 1 22 *supra*.

<sup>1514</sup> According to one report, during the period 1992 – 1993 the UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions documented evidence of arbitrary executions in 27 African countries. See Nmehielle *supra* n 1439 191. See also Ankumah *supra* n 1071 112.

<sup>1515</sup> See the case of *International Pen and others (on behalf of Ken Saro-Wiwa) v Nigeria supra* n 1357.

given that the trial which ordered the execution itself violates article 7 any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4.

In *Amnesty International and others v Sudan*,<sup>1516</sup> the Commission found the execution of prisoners after summary and arbitrary trials to be in violation of article 4 of the Charter. Again, in *Forum of Conscience v Sierra Leone*,<sup>1517</sup> the Commission found that an execution after a trial that was in violation of due process of law as guaranteed under article 7(1)(a) of the Charter, constituted an arbitrary deprivation of life under article 4 of the Charter.

Political rivalry is another factor that has threatened the right to life in Africa. Attempts to stifle opposition have often led politicians to threaten or take the lives of their opponents arbitrarily, in breach of article 4 of the African Charter. A well known case was the case of *Orton and Vera v Malawi*<sup>1518</sup> in which Mr and Mrs Chirwa, prominent opposition figures in the government of Malawi, were abducted by security forces from Zambia. Orton and Vera Chirwa were tried in Malawi and given death sentences which were later commuted to life imprisonment. The Chirwas were held in solitary confinement, given poor food, inadequate medical care, shackled for a long period of time in their cells, and prevented from seeing each other for years. Mr Chirwa later died in jail.<sup>1519</sup>

Mention should also be made of *Tsvangirai's case*.<sup>1520</sup> Tsvangirai, an opposition leader of the Movement for Democratic Change (MDC), together with two others<sup>1521</sup> were accused of treason, an offence that carries the death penalty in Zimbabwe. Although Tsvangirai was later acquitted, the events surrounding the case pointed to

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<sup>1516</sup> Annual Activity Report: 1999-2000 (2000) AHRLR 297 (ACHPR 1999) *ibid*.

<sup>1517</sup> Communication 223/98, 14<sup>th</sup> Annual Activity Report; 2000-2001; (2000) AHRLR 293 (ACHPR 2000) par 20.

<sup>1518</sup> Communication 64/92, 68/92 & 72/92 filed by Amnesty International on behalf of the victims. Opinion of 3 Nov 1994 (16<sup>th</sup> Ordinary Session) 28 June 1995. (AHG/Res 240 (XXXI)).

<sup>1519</sup> See Chenwi *supra* n 1235 196.

<sup>1520</sup> *Idem* 195.

<sup>1521</sup> Ncube, Secretary General of the MDC and Gasela, spokesman of the MDC.

the fact that the charge of treason was a means of intimidating an opposition leader.<sup>1522</sup>

One thing is clear, although article 4 of the Charter provides that no one may be arbitrarily deprived of his or her life, it does not define what constitutes the arbitrary taking of life. It appears however that the general understanding of arbitrary deprivation of life is extra-judicial killing.<sup>1523</sup> This is because the subject of extrajudicial killings is of particular concern in Africa.<sup>1524</sup> As already said, it is a right which has been violated with impunity by successive brutal regimes in Africa over the years. The general consensus in the interpretation of the right to life in human rights instruments is that it is not derogable except in certain judicially recognized circumstance or resulting from lawful acts of war or self-defence.<sup>1525</sup>

In relation to diplomatic protection, the violation of this right especially on a large scale should trigger the exercise of diplomatic protection in Africa more than the violation of any other right.<sup>1526</sup> Regrettably, it does not. Many wars have been fought, many empires have risen and fallen, and countless treaties have been signed because of the violation of this right. Yet the violation continues unabated.<sup>1527</sup>

The right to the integrity of the person is appended to the right to life. This is not accidental. It must be read and understood in the context of wholesome life and not mere physical existence. It is hoped that the African Commission will develop sufficient jurisprudence, and that the African Court of Human and People's Rights

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<sup>1522</sup> According to Chenwi *supra* n 1235 195-6 on 13 June four prisoners convicted of murder were hanged at the prison complex where Tsvangrai was being held, prompting allegations that Mugabe was seeking to intimidate his political rivals.

<sup>1523</sup> See Ankumah *supra* n 1073 112.

<sup>1524</sup> *Ibid.*

<sup>1525</sup> See Davidson *The Inter-American Human Rights System* (1997) 262 -263 for the interpretation of this right under the Inter-American system. See also Chenwi *supra* n 1235 58.

<sup>1526</sup> Such a violation would amount to a breach of the norm of *jus cogens*.

<sup>1527</sup> This brings to mind the Rwanda massacre of 1994 where thousands of lives were lost. See Steiner *et al supra* n 19 1273-4. It is on record that after the Entebbe raid of 1976, Idi Amin, the then leader of Uganda believing that Kenya had colluded with Israel in planning the raid, ordered the massacre of hundreds of Kenyans living in Uganda soon after. See [en.wikipedia.org/wiki/Ugandan%2%80%3Tanzanian\\_War](https://en.wikipedia.org/wiki/Ugandan%E2%80%3Tanzanian_War) The incident that led to the Nigerian civil war was no exception. After the military coup of 1966, there was a wide spread killing of people of southern extraction who were resident in northern Nigeria. The killings were generally regarded as a pogrom. See Heyns *supra* n 256 1387- 9. The list is endless.

will establish sufficient case law on this subject so as to forestall future unlawful deprivation of life.

### ***23.2 Freedom from torture, cruel, inhuman and degrading treatment or punishment***

Freedom from torture, cruel, inhuman and degrading treatment or punishment is enshrined under article 5 of the Charter. The article provides *inter alia*:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman and degrading treatment or punishment shall be prohibited.

The ACHPR does not define the word torture, but the CAT defines torture *inter alia* as:

Any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession ...<sup>1528</sup>

Although the African Charter does not offer any definition of torture,<sup>1529</sup> generally certain acts are assumed as amounting to torture, cruel, inhuman or degrading punishment or treatment provided they are intentionally done to inflict physical or mental suffering or orchestrated as a violation of human rights.<sup>1530</sup> Like the right to life, cases involving violations of the right to freedom from torture are very conspicuous in Africa.<sup>1531</sup>

Freedom from torture is a core human rights. It should not be derogated from, even in times of national emergencies. However, the right is often violated without remorse in Africa.<sup>1532</sup> In many African states, the right is violated by the use of torture as a political weapon. Opponents are tortured to submission or to obtain

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<sup>1528</sup> See art 1(1).

<sup>1529</sup> See however the provisions of arts 60 & 61 of the Charter. See also art 1 of CAT.

<sup>1530</sup> See the case of *Ireland v UK* (1978 ) ECHR A 25 par 167 for the definition of torture.

<sup>1531</sup> *Ankumah supra* n 1073 118.

incriminating evidence. This is illustrated by both the Nigerian case involving Ken Saro-Wiwa, and the Malawi case of *Orton and Vera* discussed above.

Most African national constitutions prohibit cruel, inhuman or degrading treatment or punishment. However, some constitutions do not make provision for this important right.<sup>1533</sup> Besides, all constitutions in African countries do not use the same terminology.<sup>1534</sup> While some constitutions employ the words “treatment” and “punishment” together,<sup>1535</sup> other constitutions omit them altogether.<sup>1536</sup>

In Nigeria, for instance, the words “cruel” and “punishment” are omitted.<sup>1537</sup> It has been submitted that the variation in terminology does not and should not undermine the underlying concept – to protect persons from unnecessary and undue suffering.<sup>1538</sup> In South Africa, the Constitution provides that:

Everyone has the right to freedom and security of the person which includes the right -

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.<sup>1539</sup>

As stated later,<sup>1540</sup> the SA provision is more comprehensive than the Nigerian provision. It is hoped that the African Court of Human and People’s Rights will deal with cases of torture appropriately when such cases are brought before it.<sup>1541</sup>

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<sup>1532</sup> In countries like Nigeria, Sudan and Mauritania for instance, the provision is violated through the application of Sharia law.

<sup>1533</sup> Constitutions which do not prohibit cruel, inhuman or degrading treatment or punishment include those of Equatorial Guinea (1991), Liberia (1984), Madagascar (1998), Rwanda (1991), Senegal (2001), Tanzania (1995), & Tunisia (1991). See Chenwi *supra* n 1233 106.

<sup>1534</sup> See Chenwi *supra* n 1235 106.

<sup>1535</sup> Such as the Constitution of South Africa s 12(1)(e) which provides *inter alia*. “not to be treated or punished in a cruel, inhuman or degrading way.”

<sup>1536</sup> E.g the Constitution of Cameroon.

<sup>1537</sup> See the Nigerian Constitution s 34(1)(a).

<sup>1538</sup> See Hudson “Does the death row phenomenon violate a prisoner’s rights under international law?” (2000) 11 *European Journal of International Law* 817.

<sup>1539</sup> S 12(1).

<sup>1540</sup> See ch 7 *infra*.

<sup>1541</sup> It is submitted that safeguards against torture in Africa should include laws against detention *incommunicado*, grant of access without prejudice to investigation by persons such as doctors, lawyers, and family members; laws requiring that detainees be held in publicly recognized places, and that their names and places of detention entered in a civil register; and laws excluding evidence obtained through the use of torture. Important issues which the African Commission should address in developing the jurisprudence on this subject include, the following: (1) Whether long periods of detention without charge constitute torture, cruel, inhuman and degrading

The pain and suffering associated with torture attracts sympathy and pity.<sup>1542</sup> States are often ready to protect their nationals from torture, cruel, inhuman or degrading treatment or punishment inflicted on them abroad particularly when and where the vital interests of the State are affected.

### **23.3 Right not to be discriminated against**

Interestingly, non-discrimination and tolerance of others is a duty under the Charter. This is reflected in articles 19 and 28 of the Charter.<sup>1543</sup> It is trite that the right to equality and non-discrimination forms the basis of modern human rights law. Although the right to equality is an individual right, it may also be applied to support particular group members *qua* individuals.<sup>1544</sup>

Article 2 of the ACHPR protects against discrimination. The article reads:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed under the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

It would appear that with reference to the 'rights and freedoms in the Charter', it is clear that article 2 can not be invoked unless one of the substantive rights in the Charter is in issue. For full effect, article 2 must therefore be read together with article 3 of the Charter. Article 3 reads:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

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treatment or punishment in violation of article 5; (2) Whether the practice of female genital mutilation also constitutes torture, cruel, inhuman and degrading treatment or punishment in violation of this provision and (3) Whether corporal punishment of children in schools and at home constitutes torture. The African Court when operational, should also address these issues. See Ankumah *supra* n 1073 118-9.

<sup>1542</sup> See Chenwi *supra* 1235 99.

<sup>1543</sup> See also arts 29(7).

<sup>1544</sup> See Ankumah *supra* n 1073 175.



It should be pointed out that the non-discrimination provision under the African Charter is only concerned with the equal enjoyment of the substantive rights and freedoms enshrined under the Charter.<sup>1545</sup> Article 3 is however concerned with the application and enforcement of rights and freedoms. Unlike the non-discrimination provision which deals with substantive rights, equality before the law involves procedural aspects of the law.<sup>1546</sup>

Equal protection as provided for in paragraph 2 of article 3 is concerned with the implementation of the law.<sup>1547</sup> In connection with the right not to be discriminated against, the obligation goes beyond individual responsibility to other individuals. Thus individuals are under an obligation to preserve the harmonious development of the family, serve the community, preserve and strengthen national independence and territorial integrity.<sup>1548</sup>

## **24 Right to property under the African Charter: Are aliens protected?**

In contrast to the ICCPR and the ICESCR, the African Charter protects the right to property, but states that it may be encroached upon in the interest of public need or the general interest of the community and in accordance with the provisions of appropriate laws.<sup>1549</sup> There is no mention of the standard for compensation payable upon encroachment.<sup>1550</sup>

The right of aliens to own property has gained considerable approval in international law as a human right. The recognition of the right under the African Charter is followed by a provision that empowers the State to encroach upon such private property only for public or community interest in accordance with appropriate laws.

The Charter fails to define “public or community interest.” In addition, the instrument does not contain an express provision for the payment of compensation in situations where such properties are encroached upon by the State. The fact that such

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<sup>1545</sup> *Idem* 173-4.

<sup>1546</sup> *Ibid.*

<sup>1547</sup> *Ibid.*

<sup>1548</sup> *Idem* 160.

<sup>1549</sup> Art 14.

encroachment by the State should be in accordance with appropriate laws does not necessarily mean that compensation will be paid nor does it suggest the standard for such payment. It is submitted that the international standard for payment of compensation should apply.<sup>1551</sup> In relation to diplomatic protection, expropriation without compensation is among the most notable causes of diplomatic intervention. The *Anglo-Iranian Oil Co* case is a good example.<sup>1552</sup>

## 25 Procedural rights under the African Charter

Among the procedural rights guaranteed by the Charter are the rights to fair hearing. These include the right of appeal, the presumption of innocence, the right to defence by a counsel of one's choice, and the right to be tried by an impartial court or tribunal. No one may be tried for an act or omission which did not constitute an offence at the time it was committed.<sup>1553</sup> Some rights may however be limited under certain circumstances as permitted under the UDHR<sup>1554</sup> Thus under article 4 of the Charter, no one may be deprived of his or her life or integrity. But this right is subject to law, and may be denied in circumstances prescribed by law.

The right to a fair trial will now be discussed. The two aspects of this right examined are the right to be presumed innocent until proved guilty, and the right to be tried within a reasonable time. Failure to observe these rules constitutes deprivation of justice which may trigger diplomatic protection in appropriate situations.

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<sup>1550</sup> Whether "prompt, effective and adequate" as understood in the traditional Western sense?

<sup>1551</sup> See *Chorzow Factory Case supra* n 33 29. Apart from the issue of acquisition of private property and payment of compensation by the State, article 14 presents a number of questions with regards to property inheritance in Africa especially as it affects women. This is because in many African countries women are not entitled to inherit property, even where they are survivors of their parents. One wonders whether article 14 contemplates that kind of situation See Nmehielle *supra* n 1442 120 See also Ankumah *supra* n 1073 46.

<sup>1552</sup> (1951) ICJ Rep 89; 1952 ICJ Rep 93.

<sup>1553</sup> Art 7.

<sup>1554</sup> See art 29(2).

## 25.1 *The right to a fair trial*

The right to a fair trial is the very cornerstone of justice in any society.<sup>1555</sup> A fair trial is a basic element of the notion of the rule of law.<sup>1556</sup> In Africa, however, the right to a fair trial has been grossly undermined by structural deficiencies in the criminal justice systems.<sup>1557</sup> This has greatly increased the risk of unfair trial proceedings on the continent.<sup>1558</sup>

The fairness of the legal process has a particular significance in the legal system, particularly in criminal cases. Article 7 of the African Charter, therefore, provides that

- 1) Every person shall have the right to have his cause heard. This right shall embrace *inter alia*...
  - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal...
  - (d) the right to be tried within a reasonable time by an impartial court or tribunal.

The right to a fair trial under the African Charter, as in all other human rights instruments, is fundamental in the judicial protection of all persons in a democratic society.<sup>1559</sup> It embraces the right of due process of law which is a necessary prerequisite to ensure adequate protection of those persons whose rights or obligations are pending determination before a court or tribunal.<sup>1560</sup> The consequences of failure to respect the right to a fair trial are so grave that they can destroy or erode the parameters of proper administration of justice.<sup>1561</sup>

Consequently, the dispensation of justice may become discriminatory, disproportionate and/or arbitrary.<sup>1562</sup> It is submitted that the concept of a fair trial ought to be applied to all judicial guarantees in the Charter and in the domestic

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<sup>1555</sup> See Jayawickrama *supra* n 149 480.

<sup>1556</sup> Ovey & White *The European Convention on Human Rights* (2002) 139.

<sup>1557</sup> *Ibid.* See also Chenwi *supra* n 1235 149.

<sup>1558</sup> Chenwi *idem* vi.

<sup>1559</sup> *Ibid.*

<sup>1560</sup> The African Commission has dealt with fair trial rights in its resolutions and in a number of cases. See for instance the cases of *Amnesty International (On behalf of Orton and Vera Chirwi) v Malawi supra*, n 1516 *International Pen and others (on behalf of Saro-Wiwa) v Nigeria* and others *supra* n 1357.

<sup>1561</sup> Tiburcio *supra* n 26 245.

legislation of all African states. As already indicated, the two aspects of the right to fair trial discussed under the African Charter are (a) the right to be presumed innocent and (b) the right to be tried within a reasonable time.<sup>1563</sup>

## **25.2 The right to be presumed innocent**

The presumption of innocence provided for under article 7(1) (b) of the African Charter is fundamental to the protection of human rights in Africa. The burden of proof is thus placed on the prosecution to establish the guilt of the accused beyond reasonable doubt.<sup>1564</sup> Since the burden is generally placed on the prosecution to prove the guilt of the accused, a court has the responsibility of conducting the trial without forming any opinion on the guilt or innocence of the accused in advance.<sup>1565</sup>

The right to be presumed innocent requires that the respondent should refrain from making open statements prior to or during the trial at press conferences or at public gathering regarding the guilt of the accused.<sup>1566</sup> In the *Saro-Wiwa's* case,<sup>1567</sup> for example, the African Commission found the government of Nigeria to be in violation of this right, because the government pronounced the accused guilty of the crime in question at various press conferences and before the UN prior to the trial.<sup>1568</sup>

The constitutions of many African states also recognise this right.<sup>1569</sup> According to Ankumah, however, in many of these states<sup>1570</sup> the attitude towards accused persons is that “there is no smoke without fire.”<sup>1571</sup> Article 7(1) (b) is closely related to article 26, which requires that states should guarantee the independence of the courts.<sup>1572</sup>

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<sup>1562</sup> *Ibid.*

<sup>1563</sup> See p 26 *supra* n 188 & 189.

<sup>1564</sup> Ankumah *supra* n 1073 125.

<sup>1565</sup> See Chenwi, *supra* n 1297 172.

<sup>1566</sup> *Ibid.*

<sup>1567</sup> *International Pen and others (on behalf of Saro-Wiwa) v Nigeria supra* n 1357.

<sup>1568</sup> See Communication 137/94, 139/94, 154/96 and 161/97, 12<sup>th</sup> Annual Activity Rep: 1998-1999; (2000) AHRLR 212 (ACHPR 1998) par 96. See Chenwi *supra* n 1233 172.

<sup>1569</sup> Ankumah *supra* n 1073 125.

<sup>1570</sup> *Ibid.*

<sup>1571</sup> *Ibid.*

<sup>1572</sup> As pointed out by Chenwi *supra* n 1235 171, the right to be presumed innocent is directly linked to the right to be tried within a reasonable time because “to give effect to the former, the accused has to be tried within a reasonable time. Respect for the latter right mitigates the tension between

### 25.3 *The right to be tried within a reasonable time*

Article 7(1)(d) of the African Charter guarantees the right to be tried within a reasonable time by a competent court or tribunal. The right to a speedy trial has a strong *rationale*.<sup>1573</sup> It minimizes, *inter alia*, oppressive pre-trial incarceration or restrictive bail, the anxiety of the person awaiting trial, and the deterioration of the evidence necessary to enable the accused to answer fully or make a full defence.<sup>1574</sup> Undue delay between arrest and punishment may also have a detrimental effect on rehabilitation.<sup>1575</sup>

This right relates not only to the time within which a trial should commence, but also the time within which it should be completed and judgment rendered.<sup>1576</sup> All stages of the proceedings must take place “without undue delay” or within a reasonable time.<sup>1577</sup> To ensure the effectiveness of this right, it is submitted that a procedure must be available to ensure that the trial will proceed without undue delay both at the court of first instance and on appeal.<sup>1578</sup>

Factors such as the nature and complexity of the case, the availability of state resources, and the kind of prejudice suffered by the accused, have to be taken into consideration in determining whether or not this right has been violated.<sup>1579</sup> Unfortunately, criminal trials in Africa take many years because accused persons are not brought before a court within a reasonable time.<sup>1580</sup>

In Nigeria, for instance, although section 35(3) of the 1999 Constitution provides that detained persons must be brought before a court of law within 24 hours, and further

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the presumption of innocence and the publicity of the trial, thus rendering the criminal justice system more coherent and fair.”

<sup>1573</sup> Chenwi *idem* 166.

<sup>1574</sup> *Ibid.*

<sup>1575</sup> See generally the case of *Stogmuller v Austria* 11 EHRR 155 (1979-80); and the Canadian decision in *R v Askov* (1990) 59 CCC (3d) 449.

<sup>1576</sup> Chenwi *supra* n 1297 166.

<sup>1577</sup> UN Human Rights Committee, General Comment No. 13. See Chenwi *supra* n 1235 167.

<sup>1578</sup> CCPR General Comment No. 13. See Chenwi *ibid.*

<sup>1579</sup> This is because it is very difficult to establish undue delay. Delay *per se* does not amount to a violation of this right. See the case of *Sanderson v A-G* [1997] 12 BCLR 1675.

<sup>1580</sup> See Chenwi *supra* n 1297 167.

that an accused person must be tried within two months of the date of arrest or detention, this is not the case in practice.<sup>1581</sup> The pre-trial time in detention is rarely less than six months to one year.<sup>1582</sup>

Since it is difficult to establish undue delay because it is governed by circumstances surrounding the case<sup>1583</sup> it was held in *Smyth v Uhsewakunze*<sup>1584</sup> that the right to be tried within a reasonable time is of a constitutional value of supreme importance that must be interpreted in a broad and creative manner.<sup>1585</sup> Delay, in itself, might not constitute a violation of the right to a trial within a reasonable time.<sup>1586</sup> However, the cases that have come before the African Commission in respect of article 7(1)(d) of the Charter<sup>1587</sup> reveal that the Commission holds the view that in circumstances where the state deliberately denies a detained person access to justice, no delay may be excused.<sup>1588</sup>

*Chattin's case*<sup>1589</sup> must be borne in mind in relation to diplomatic protection. Referring to undue delay in that trial, the Commission said, *inter alia*,

Irregularity of court proceedings is proven with reference to absence of confrontation, withholding from the accused the opportunity to know all of the charges brought against him, *undue delay of the proceedings*, making the hearings in open court a mere formality<sup>1590</sup>

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<sup>1581</sup> *Idem* 168.

<sup>1582</sup> *Ibid* 168. In *Pagnouille (on behalf of Mazou v Cameroon)*, Communication 39/90, 10<sup>th</sup> Annual Activity Report, 1996-1997; (2000) AHRLR 57 (ACHPR, 1997) par 19, it was held by the African Commission that two years without any hearing or projected trial date constitutes a violation of art. 7(1)(d). The Commission came to that conclusion based on the fact that no reason had been given for the delays.

<sup>1583</sup> Eg the nature and complexity of the case, the availability of state resources with regard to investigation or prosecution of the case, and the kind of prejudice suffered by the accused, etc.

<sup>1584</sup> (1998) 4 LRC 120.

<sup>1585</sup> At 129b.

<sup>1586</sup> Eg in *Sanderson v A-G* [1997] 12 BCLR 1675 it was held that failure to bring an accused person to trial two years after his first appearance did not constitute a violation of the right to a trial within a reasonable time. See also the case of *Asakitkpi v The State* (1993) 6 SCNJ 201.

<sup>1587</sup> See e.g the case of *Orton & Vera v Malawi supra* n 1516. See also *Pagnouille (on behalf of Mazou v Cameroon)* Communication 39/90; 10<sup>th</sup> Annual Activity Report; 1996-1997 (2000) AHRLR 57 (ACHPR 1997) par 19.

<sup>1588</sup> See Communication 64/92, 68/92, 78/92, Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) Amnesty International (on behalf of Orton Chirwa and Vera Chirwa v Malawi) par 44 *supra* n 1516.

<sup>1589</sup> *Supra* n 32.

<sup>1590</sup> Emphasis mine.

## 26 Conclusion

The rights enshrined in international and regional human rights instruments are meant to set the required standard to be followed by states. In their day to day activities, states are expected to fashion their legislative, administrative and judicial acts in conformity with the provisions of these instruments, failing which they will be deemed to be acting in violation of international law.<sup>1591</sup>

With regard to aliens, it appears that, apart from political and property rights which some states often limit or restrict to some degree under international and comparative law, the range of rights specifically allowed to aliens under the instruments discussed above is sufficiently wide enough.<sup>1592</sup> These rights range from civil and procedural rights to such socio-economic rights as the right to work and the right to healthy working conditions, fair wages and equal remuneration for work done,<sup>1593</sup> It also includes the right to communicate with their consular or diplomatic missions in case a need arises.<sup>1594</sup> It is hoped that the right to communicate with the consular and/or diplomatic missions of foreign nationals will further enhance the prospects of diplomatic protection.

Since states are required to make public, laws affecting aliens in their territories,<sup>1595</sup> the provisions of such laws, it is submitted, should not only be spelt out clearly but the rights and obligations placed on aliens, should also be guaranteed. Enforcement mechanisms must also be created, otherwise, such laws may become mere innocuous rules.<sup>1596</sup> National legislation affecting aliens should, therefore, not only have a controlling influence, but must be protective in their overall effect on aliens irrespective of their status, sex, religion or nationality.<sup>1597</sup>

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<sup>1591</sup> Tiburcio *supra* n 26 xvi.

<sup>1592</sup> I.e res 40/144 & the CMW.

<sup>1593</sup> To those individuals who are not migrant workers.

<sup>1594</sup> Art 10 of res. 40/144; art 23 of the CMW.

<sup>1595</sup> See art 3 of res.40/144. Dugard has pointed out that res 40/144 itself has not provided any mechanism for the enforcement of the instrument. See Dugard *supra* n 25 78.

<sup>1596</sup> Tiburcio *supra* n 26 272.

<sup>1597</sup> See art 3 of res 40/144.

A question nevertheless, remains, regarding the effectiveness of the African Charter, namely, whether, apart from the provisions of article 12(5), other provisions of the Charter protect the rights of foreigners. It is further questionable whether there is any political will or commitment by African leaders to enforce the provisions of the Charter for the benefit of foreigners. It is submitted that although the Charter provides generally that “every individual” is protected or that “no one” shall be denied the benefits of those rights, it is doubtful whether there is any political will or commitment on the part of African states and the African Commission in particular to effectively implement the provisions of the Charter.<sup>1598</sup>

It must however be borne in mind that when states join any convention regime, they should commit themselves to upholding the norms of the convention, supporting and strengthening them and not to undermine them.<sup>1599</sup> This undermining tendency may ultimately be the undoing of the African Charter.

In her seminal book *African Commission and Human Rights*<sup>1600</sup> Ankumah has pointed out some of the deficiencies inherent in the fair trial/fair hearing provisions of the African Charter.<sup>1601</sup> It is encouraging to note that the Commission has taken steps to rectify some of these anomalies.<sup>1602</sup> It is hoped that the African Court on

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<sup>1598</sup> The Commission is said to be poorly funded, its independence subjugated, and its powers limited. See Ankumah *supra* n 1071 18. See also Murray *supra* n 1438 49. Furthermore, the remedies it provides are said to be weak and, at times slow in coming. According to Ngcobo J in *Kaunda's case supra* n 688 par 166 “An individual may lodge a complaint with the African Commission concerning the violation of a fundamental human right guaranteed in the African Charter. However in circumstances where urgent action is required, procedure that has to be followed in processing the complaint may result in delays. What is more, its powers are to make recommendations to the offending state. This points to the urgent need to establish a Court of Justice to enforce the rights guaranteed in the African Charter.” Par 166.

<sup>1599</sup> See Barker *supra* n 872 12.

<sup>1600</sup> *Supra* n 1073.

<sup>1601</sup> She points out that there are some *lacuna* in some of the provisions of the Charter. These include *inter alia* with particular reference to the fair trial/hearing provisions, the right of individuals to have free access to an interpreter if they cannot speak the language used in the court, the right of individuals to have adequate time and facilities for the preparation of their defence, the right to legal aid, the right to a public hearing by a legally constituted, competent, independent and impartial judicial body, the right to consult and be represented by a legal representative or other qualified persons of one's choice at all stages of the proceedings, the right of an appeal to a higher judicial body when necessary. Other suggestions made by Ankumah include compensation to victims of torture, etc. See Ankumah *supra* n 1073 particularly 123-132.

<sup>1602</sup> The African Commission has dealt with the fair trial/ hearing rights in some of its resolutions. Such resolutions incorporate and expand the fair hearing rights contained in the African Charter. These include e.g the Resolution on the Right to Recourse and Fair Trial of 1992 (Resolution on the Right to Recourse and Fair Trial, 11<sup>th</sup> session in Tunis, Tunisia 2-9 March 1992.) In 1999 the African Commission adopted another resolution on the Right to a Fair Trial and Legal Assistance



Human and Peoples' Rights will help to strengthen the enforcement mechanism of the African Charter.

As for the international instruments, although they play important roles in extending protection to both aliens and nationals alike in the territories of respective state parties, they should be enforced by domestic courts in Africa who are parties to these treaties, since there is no international Court of Human Rights to enforce them.. A call is hereby made for the establishment of an international court of human rights. Such a court will not only help in determining human rights issues on appeal from decisions of regional courts or decisions of the Human Rights Committee under articles 41 and 42 of the ICCPR,<sup>1603</sup> but will go a long way towards fulfilling the dreams and aspirations of the founding fathers of the UN in “promoting and encouraging respect for human rights and fundamental freedoms for all.”<sup>1604</sup>

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in Africa (Resolution on the Right to a Fair Trial and Legal Assistance in Africa, 26<sup>th</sup> session in Kigali, Rwanda 1-15 Nov1999) In addition, in 2003 the Commission adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Aid in Africa (African Commission's principles and Guidelines adopted at its 33<sup>rd</sup> ordinary session in Niamey, Niger in May 2003). See Chenwi *supra* n 1233 158-160. These resolutions have addressed some of the various deficiencies observed by Ankumah on the fair hearing provisions of the Charter.

<sup>1603</sup> Art 42(1)(a) stipulates that if a matter referred to the Human Rights Committee in accordance with art 41 of the ICCPR is not resolved to the satisfaction of the parties, a 'Commission' should be set up to handle the matter. It is submitted that such matters should go to the International Human Rights Court instead. With its judicial authority, an international court of human rights will bring finality to any lingering international human rights dispute. Fortunately or otherwise, no inter-state complaint has so far been received by the Committee. Besides, the International Criminal Court (ICC) has been established to take care of gross violations of human rights – genocide, war crimes, and crimes against humanity.

<sup>1604</sup> See art 1(3) of the UN Charter.

## CHAPTER FIVE

### Diplomatic Protection of Human Rights in Nigeria: Legal and Constitutional Issues

#### 1 Introduction

The research question in this thesis deals with diplomatic protection in Nigeria and South Africa. In other words, how these states apply the international legal principles pertaining to diplomatic protection in their domestic jurisdictions. In order to establish such relationship, it is necessary to examine the common theory underpinning the status of international law in municipal law of the respective states.

This chapter will proceed to analyse the position in Nigeria. The question addressed is whether there are provisions under the Nigerian law guaranteeing diplomatic protection to Nigerian citizens.<sup>1605</sup> The issues for determination include: (1) Whether the Nigerian government is constitutionally required to exercise diplomatic protection on behalf of its nationals living outside Nigeria; (2) the extent to which the Nigerian government is prepared to act in order to protect its citizens; (3) whether Nigeria has incorporated human rights norms into its domestic law so as to protect the rights of both nationals and aliens diplomatically; and (4) the instruments from which their protection derives.

The subject will be discussed from four main perspectives namely: (1) The Constitutional perspective; (2) a governmental policy perspective; (3) the perspective of state practice; and (4) the judicial perspective. To address these issues, a didactic approach will be adopted. However, an attempt is first made to determine the relationship existing between international law and Nigerian law in order to establish the nexus between them. That is to say whether international law is part of Nigerian

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<sup>1605</sup> The Constitutions of many states recognise the right of the individual to receive diplomatic protection for injuries suffered abroad. These states include Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Laos People's Democratic Republic, Latvia, Lithuania, Poland, Republic of Korea,

law and the processes established for the incorporation of international law into the Nigerian legal system.<sup>1606</sup>

## 2 Relationship between international law and municipal law: A theoretical framework

In terms of international law theory, there are two schools of thought concerning the relationship between international law and municipal law generally. The major propositions regarding the relationship between international and municipal law are reflected in the opposing doctrines termed monism,<sup>1607</sup> and dualism.<sup>1608</sup> These two doctrines are also the two principal theories involved in the application of international law in municipal legal system.<sup>1609</sup>

Advocates of monism view all law<sup>1610</sup> as a single unity, composed of binding legal rules, irrespective of whether those rules are binding on states, on individuals, or on entities other than states.<sup>1611</sup> In their view, the science of law is a unified field of knowledge.<sup>1612</sup> Since international law is law, it is regarded as automatically forming part of this *corpus* of rules. According to this monist theory, there is no difference between international law and municipal law.<sup>1613</sup> The two systems emanate from one and the same source.<sup>1614</sup> In this scheme of things, international law and municipal law are therefore related parts of the same legal structure.<sup>1615</sup>

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Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Vietnam and Yugoslavia. See Dugard *supra* n 25 81.

<sup>1606</sup> This discussion is not state specific and will apply to both Nigeria and South Africa to the same degree. International law within this context means customary international law and international treaties.

<sup>1607</sup> According to the doctrine of monism, international law and state law are concomitant aspects of the same system of law in general. See Shearer *supra* n 117 65.

<sup>1608</sup> According to dualism, international law and municipal law represent two entirely distinct legal systems of law. Shearer *supra* n 117 64.

<sup>1609</sup> See Green *International Law* (1982) 8. See also Shearer *supra* n 117 67.

<sup>1610</sup> I.e International law & municipal law.

<sup>1611</sup> See Green *supra* n 1611 8.

<sup>1612</sup> *Ibid.* See also Dugard *supra* n 1 47 and Shearer *supra* n 117 67.

<sup>1613</sup> Shearer *Ibid.*

<sup>1614</sup> *Ibid.*

<sup>1615</sup> See Maluwa "The incorporation of international law and its interpretational role in municipal legal system: An exploratory survey." (1998) 23 *SAYIL* 45.

The monists therefore argue that international law needs no transformation whatsoever before it becomes part of municipal law because there is no fresh creation of rules of municipal law, but merely a prolongation, or an extension of that single act of creation of law which commenced at the international level.<sup>1616</sup> Monists submit that a delegated authority is granted to each state either by constitutional process, or by rules of international law to determine when the rules of international law are to come into force in any state, and the manner in which they are to be embodied in the state law.<sup>1617</sup> The procedure and methods to be adopted by the state for this purpose are a continuation of the process begun with the evolution of that rule at the international level.<sup>1618</sup> Thus the monist theory, proceeding as it does on the postulate of the hierarchical order of legal norms, assert the supremacy of international law in both international and municipal spheres.<sup>1619</sup>

Dualism proclaims that international law and municipal law constitute strictly separate and structurally different systems and that the question of which of the two separate legal orders should prevail over the other is relative, depending on the forum in which the matter arises.<sup>1620</sup> Since international law and state law are different systems, as a general rule, dualists accord international law primacy over municipal law in the international sphere while municipal law enjoys primacy over international law in the municipal system.<sup>1621</sup> International law cannot impinge upon state law unless the latter allows its constitutional machinery to be used for that purpose.<sup>1622</sup> Therefore, the rules of international law cannot be applied directly *ex proprio vigore* within the municipal sphere by state courts or any other organ of state,<sup>1623</sup> unless such rules undergo a transformation by the process of “specific adoption” by, or “specific incorporation” into municipal law.<sup>1624</sup> The specific method of incorporation is often spelt out in a country’s constitution.<sup>1625</sup> Simply put, to the

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<sup>1616</sup> Kelson, Vendross & Scelle were the original exponents of this view. See Shearer *supra* n 117 67. See also Dugard *supra* n 1 47.

<sup>1617</sup> Shearer *ibid.*

<sup>1618</sup> *Idem.*

<sup>1619</sup> Maluwa *supra* n 1617 49.

<sup>1620</sup> ie whether it is a domestic court or an international tribunal.

<sup>1621</sup> Maluwa *supra* n 1617 49.

<sup>1622</sup> Shearer *supra* n 112 66.

<sup>1623</sup> *Ibid.*

<sup>1624</sup> The chief exponents of dualism were Anzilotti & Triepel. See Dugard *supra* n 1 47.

<sup>1625</sup> The Constitution of the Federal Republic of Nigeria *supra* n 459 s 12 & the Constitution of the Republic of South Africa *supra* n 459 s 231(4).

dualist, international law can never automatically be assumed to form part of municipal law.<sup>1626</sup>

Some authorities have pointed out that the antithesis between monist and dualist approaches to the relationship between international and municipal Law must be viewed with some caution.<sup>1627</sup> Moreover, the theories must be assessed against the backdrop of three general observations. First, it must be emphasized that the effects of international law generally, and that of treaties in particular, will, for the most part, depend on a rule of municipal law.<sup>1628</sup> Secondly, between the extreme versions of monism on the one hand, and dualism on the other, there lies a wide range of intermediate relationships which do not lend themselves to ready classification.<sup>1629</sup> Finally, it has been suggested that a facile distinction between dualist and monist systems may conceal the fact that domestic courts often, even in monist systems, fail to give effect to treaties which are binding under international law.<sup>1630</sup>

Be that as it may, the procedure by which treaties or more exactly, the rights and obligations arising under a treaty are “transformed,” “incorporated,” or “take effect” in municipal law varies from state to state.<sup>1631</sup> A distinction must however be made between the incorporation of a treaty and customary international law into municipal law<sup>1632</sup> because different rules often apply.<sup>1633</sup> The general principle is that once a matter becomes the subject of a treaty, it falls out of domestic jurisdiction *pro tanto* into the arena of international concern. A state can be bound only if it is a party to a treaty. Secondly, unlike treaties, states do not explicitly consent to customary international law norms. A treaty thus overrules an existing customary rule. In fact, between custom and treaty, the later in time prevails.<sup>1634</sup>

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<sup>1626</sup> Maluwa *supra* n 1617 49.

<sup>1627</sup> *Idem* 48.

<sup>1628</sup> The fundamental principle in almost all legal systems is that the internal application of treaties is governed by domestic Constitutional Law.

<sup>1629</sup> Alternative doctrines have been proposed to describe these intermediate positions, e.g the so-called radical monism, inverted monism and harmonisation theories. See Maluwa *supra* n 1614 50.

<sup>1630</sup> Maluwa *ibid.*

<sup>1631</sup> See Green *supra* n 1611 10. Compare and contrast the provisions of s 12 of the Nigerian Constitution for instance with the provisions of s 231 of the SA Constitution.

<sup>1632</sup> See Shearer *supra* n 117 68. See also Green *supra* n 1611 10.

<sup>1633</sup> See the *Advisory Opinion in the Nationality Decrees Issued in Tunis and Morocco*(1923) *PCIJ Rep Series B No 4* 42.

<sup>1634</sup> *Ibid.*

A state that becomes a party to a treaty, does so as a matter of free choice.<sup>1635</sup> Once a state has elected to ratify or accede to that treaty, it is bound to honour their treaty obligations. Some states provide in their constitutions that their laws should be “in conformity with international law,”<sup>1636</sup> and most states ensure by one means or another that the rules of international law are resorted to for the resolution of appropriate disputes before their national courts.<sup>1637</sup> From a dualist perspective however, the question is the extent to which a municipal court may give preference to rules of international law within its municipal sphere where there is a conflict between the two systems.<sup>1638</sup>

It has been asserted however that the relationship between international law and municipal law depends upon the jurisdiction before which the matter is brought for adjudication.<sup>1639</sup> If the matter is brought in a national arena, municipal law will govern.<sup>1640</sup> However, if it is brought in an international arena, then international law will prevail.<sup>1641</sup> The following discussion establishes how the above theories are applied in Nigeria.

### 3 Incorporation of International Law into Nigerian domestic law

The incorporation of international law into municipal law by African states has been determined in part by their respective colonial experiences and the inherited colonial

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<sup>1635</sup> Even human rights treaties, are voluntarily entered into by states. See *Ubani v Director SSS* (1999) 11 NWLR 129 746. See also Malan *supra* n 1136 82.

<sup>1636</sup> See eg the S A Constitution 1996 ss 231, 232, 233 & s 39(1).

<sup>1637</sup> E.g South Africa. See *supra* n 1633. See Green *supra* n 1608 8.

<sup>1638</sup> The question is; which law will apply if e.g. an alien is injured in a state of residence and he or she brings proceedings before the municipal courts of the state where the incident occurred. Is it international law or municipal law? If for instance there is a conflict between municipal law and the international obligation of the defendant State, will the judge apply municipal or international law? If the court applies municipal law to the detriment of the alien and the matter is taken before an international tribunal by the authorities of the alien's state of nationality, will the international tribunal apply municipal or international law?

<sup>1639</sup> Green *supra* n 1608 8.

<sup>1640</sup> *Ibid.*

<sup>1641</sup> Green *ibid.* Although this is the correct position, it is submitted that national courts will apply international law only to the extent to which it forms part of the municipal law of the state in question. However, the doctrine of opposability allows domestic law to be pleaded and argued before international tribunals and *vice versa*. See Shearer *supra* n 117 80. See also the case between Nigeria and Cameroon. The case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening Judgment, ICJ Reports (2002).*

legal cultures and systems.<sup>1642</sup> As a former British colony, Nigeria has been influenced by British legal practice. This is where the shared common law experience and perceptions applies. Under British practice, a distinction is drawn between the incorporation of rules of customary international law and that of treaties into municipal law because different rules apply.<sup>1643</sup> In this discussion, rules governing the incorporation of customary international law into Nigerian law will first be examined, followed by rules governing the incorporation of treaties.

### **3.1 Incorporation of customary international law into Nigerian municipal law**

Similar to many other Commonwealth nations, Nigeria inherited the English common law rules governing the municipal application of international law. Therefore, the practice of Nigerian courts on this subject-matter is based on British practice.<sup>1644</sup> The approach of English courts to customary international law has at times been problematic and controversial. The Blackstonian doctrine of incorporation in terms of which the law of Nations is held to be part of the law of the land<sup>1645</sup> has never been consistently and universally accepted by English courts.<sup>1646</sup>

One approach follows the doctrine of full incorporation,—by which rules of international law are automatically part of English law unless they are in conflict with an Act of Parliament.<sup>1647</sup> The opposing approach holds to the doctrine of transformation whereby rules of international law are not to be considered part of

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<sup>1642</sup> Maluwa *supra* n 1617 50.

<sup>1643</sup> *Ibid.* The general principle is that once a matter becomes the subject of a treaty, it falls out of the domestic jurisdiction *pro tanto* into the arena of international concern. A treaty thus overrules an existing customary rule. See the *Advisory Opinion in the Nationality Decrees Issued in Tunis and Morocco*, by *The PCIJ supra* n 1632.

<sup>1644</sup> Nigeria incorporated the common laws of England, the doctrines of equity and statutes of general application that were in force in England by 1900-01-01 into its legal system. According to British practice, the rule pertaining to Customary International Law is that customary rules of international law are deemed to be part of the law of the land, and will be applied as such by British municipal courts. See Shearer *supra* n 117 68.

<sup>1645</sup> The Blackstonian doctrine states that “[the] Law of Nations, wherever any problem arises which is properly the object of its jurisdiction, is here adopted in its full extent by the Common Law and is held to be part of the law of the land.”

<sup>1646</sup> See the case of *Trendtex Corporation v Central Bank of Nigeria supra* n 561 529 & Maluwa *supra* n 1617 51.

<sup>1647</sup> *Ibid.*

English law unless they have been specifically transformed by an Act of Parliament and adopted by decisions of judges and long established custom.<sup>1648</sup>

A long line of cases stretching back two and a half centuries,<sup>1649</sup> to more recent decisions<sup>1650</sup> reveal that courts have vacillated between the two doctrines. In the *Trendtex* case<sup>1651</sup> for instance, Lord Denning's dramatic departure from previous decisions, best exemplifies the equivocal and uncertain approach of the English courts. Having advocated the transformation doctrine in *Thakrar's* case<sup>1652</sup> decided three years earlier, Denning MR made a complete *volte face* in *Trendtex*, accepting the doctrine of incorporation as the more correct approach.<sup>1653</sup> On rare occasions on which domestic courts have been seized with the question in Nigeria, they have tended to follow the approach favoured by British courts at that specific time.<sup>1654</sup>

### **3.2 Incorporation of treaties into Nigerian municipal law**

Nigeria also follows the British practice in the incorporation of treaties into its municipal law. With regard to treaty law, British courts have consistently held that a treaty concluded by the United Kingdom does not become part of the municipal law except and in so far as it is incorporated by an Act of Parliament.<sup>1655</sup>

Thus in Nigeria, an international treaty entered into by the government does not become binding until it is enacted into law by the National Assembly.<sup>1656</sup> This is in

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<sup>1648</sup> *Idem*.

<sup>1649</sup> See for instance the case of *Buvot v Barbuit* (1737) Cas t Talb 281.

<sup>1650</sup> See the case of *Trendtex Corporation v Central Bank of Nigeria supra* n 561 529.

<sup>1651</sup> *Ibid*.

<sup>1652</sup> *R v Immigration Officer ex parte Thakrar* (1974) 2 WLR 593.

<sup>1653</sup> For a perceptive critique of those decisions see Collier "Is International Law really part of the law of England?" (1989) 38 *ICLQ* 924. It should however be noted that British practice has been updated by the State Immunity Act of 1978 to conform with the seemingly rebellious but forward looking judgment of the icon.

<sup>1654</sup> See the case of *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR 124.

<sup>1655</sup> Under the unwritten British Constitution where Parliament is supreme, it can legislate on any issue whatsoever. That sovereignty has however been limited by the the impact of the European Community Act of 1972. Hence, parliament in Britain is no longer supreme. Parliamentary supremacy has been surrendered by implication by the signing of the Union Laws. See *Ubani v Director SSS supra* n 1637 747.

<sup>1656</sup> See the cases of *General Sani Abacha v Chief Gani Fawehinmi* [2000] 6 NWLR 228 & *Fawehinmi v Abacha* [1996] 9 NWLR 710.



compliance with the provisions and tenor of section 12(1) of the 1999 Constitution which provides *inter alia* that:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

Nigeria, therefore follows a dualist approach to international law.<sup>1657</sup> In other words, the incorporation or transformation doctrine theory also forms part of Nigerian law as far as treaties are concerned.

The case of *Chief Gani Fawehinmi v Sani Abacha*<sup>1658</sup> illustrates the circumstances under which treaties are enforceable in Nigeria by Nigerian courts. In that case, the appellant, a legal practitioner, human rights activist and pro - democracy campaigner, was arrested and detained for approximately one week on the orders of the Inspector General of Police. An application was filed at the Federal High court in Lagos for his release and the enforcement of his fundamental human rights. Included in the relief sought was a declaration that the detention was contrary to articles 5, 6, and 12 of the African Charter on Human and People's Rights which had been adopted and incorporated into Nigerian law.<sup>1659</sup>

The respondents filed a preliminary objection challenging the jurisdiction of the court to entertain the case based on the provisions of a decree which ousted the jurisdiction of the court.<sup>1660</sup> The trial judge, after hearing arguments on the objection, upheld it and struck out the suit. The appellant consequently appealed to the Court of Appeal against this decision of the trial court.<sup>1661</sup>

It was held by the Court of Appeal, *inter alia*, that the African Charter was clothed with a greater vigour and strength than the decree, and should be given due

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<sup>1657</sup> See Oyeboade *International Law and Politics: An African Perspective* (2003)149. In most Francophone and lusophone African countries however, the monist theory of international law prevails. See Heyns *supra* n 256 420.

<sup>1658</sup> *Supra* n 1656. The same provision was enshrined in the 1979 Constitution.

<sup>1659</sup> See the African Charter on Human and People's Rights (Ratification and Enforcement Act 1983) Cap 10 Laws of the Federation of Nigeria 1990.

<sup>1660</sup> State Security (Detention of Persons) Decree No 2 of 1984 as amended.

<sup>1661</sup> See suit No CA/L/141/96.

recognition and enforced because it had not only been adopted, but was also enacted into Nigerian law. The Appeal Court therefore declared the detention of the appellant unconstitutional. On further appeal to the Supreme Court, the judgment of the Appeal Court was affirmed.<sup>1662</sup> The Supreme Court held further that where an international treaty entered into by Nigeria is enacted into law by the National Assembly, it becomes binding, and Nigerian courts must give effect to it in the same manner as all domestic laws.<sup>1663</sup> In other words, by its incorporation, the ACHPR had become part of Nigerian law.

Again in *Ubani v Director SSS*,<sup>1664</sup> the appellant was arrested in his house in Lagos by some plain clothed operatives of the State Security Services (SSS). His apartment was thoroughly searched and some valuable properties including books, documents and an international passport were carted away. He was detained at the office of the Director SSS in Lagos.

Ubani filed a Fundamental Rights application at the Federal High Court in Lagos praying that his arrest and detention without trial by the first respondent be declared unconstitutional null and void.<sup>1665</sup> He also sought a declaration that his continuous detention was a violation of his freedom of movement under the 1979 Constitution<sup>1666</sup> and the African Charter on Human and Peoples' Rights.<sup>1667</sup>

As in *Fawehinmi's* case, the respondents filed a notice of preliminary objection challenging the jurisdiction of the court to entertain the suit based also on the ground that the appellant was detained under the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984, which ousted the jurisdiction of the court. After hearing the parties on the objection raised by the respondents, the trial court also

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<sup>1662</sup> See the case of *General Sani Abacha v Chief Gani Fawehinmi supra* n 1657. This case is the *locus classicus* on this point of law in Nigeria. The importance of the judgment lies in the fact that the courts ruled against a ruthless military head of state.

<sup>1663</sup> *Abacha v Fawehinmi supra* n 1657 248.

<sup>1664</sup> (1999) 11 NWLR 129.

<sup>1665</sup> At 131.

<sup>1666</sup> Chapter VI of 1979 Constitution which dealt with "Fundamental Rights" had been suspended by s 4 (2) of the State Security (detention of Persons ) Decree which provided that "Chapter VI of the Constitution of the Federal Republic of Nigeria is hereby suspended for purposes of this Act and anything done or proposed to be done in pursuance of this Act shall not be inquired into by any court of law."

<sup>1667</sup> Article 7(1).

upheld the objection and dismissed the application. Aggrieved by the dismissal, the appellant appealed to the Court of Appeal.<sup>1668</sup>

Citing *Fawehinmi's* case<sup>1669</sup> with approval, the Court of Appeal held that the High Court ought not to have recognised the ouster provisions of the decree since the provisions of the African Charter were superior to the decrees of the Federal Government.<sup>1670</sup> The Court said, *inter alia*,

The High Court when called upon to consider issues bordering on the infraction of the fundamental rights as protected under the African Charter on Human and Peoples' Rights, ought not to have thrown its hands in a state of surrender and helplessness in the face of the ouster provisions of the Decree of the military government.<sup>1671</sup>

According to Oguntade JSC:

It seems to me that the learned trial judge erroneously acted when he held that the African Charter contained in Cap 10 of the Laws of the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military Government.<sup>1672</sup>

The court declared that:

In coming to this conclusion we had followed the reasoning of this court in *Fawehinmi v Abacha* (1996) 9 NWLR 710 at pp746-747.<sup>1673</sup>

The *rationale* for the decision was that:

No government will be allowed to contract out by local legislation its international obligations<sup>1674</sup>

Also in *Attorney General of the Federation v Godwin Ajai*,<sup>1675</sup> the respondent's passport was seized by an officer of the State Security Service (SSS) at the Murtala

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<sup>1668</sup> CA/1/260/96.

<sup>1669</sup> At 147 pars A-C.

<sup>1670</sup> *Ibid.*

<sup>1671</sup> *Ibid.*

<sup>1672</sup> Per Oguntade JSC at 147-149

<sup>1673</sup> *Ibid.*

<sup>1674</sup> *Ibid.*

<sup>1675</sup> [2000] 12 NWLR 509.

Mohamed Airport in Lagos while waiting for a flight to Edinburgh in Scotland to attend the 8<sup>th</sup> Biennial Conference of the International Bar Association. As a result, he was unable to travel to Scotland to attend the Conference.

He filed a Fundamental Rights application at the Federal High Court Lagos seeking for a declaration that the seizure of his passport by the respondent was a contravention of his right of freedom of movement under section 38 of the 1979 Constitution<sup>1676</sup> and article 12(2) of the African Charter on Human and Peoples' Rights, an immediate return of his passport, and for special and exemplary damages.<sup>1677</sup>

Leave of court was granted to him to enforce his fundamental rights.<sup>1678</sup> He filed his motion on notice and the application was set down for hearing on the 26<sup>th</sup> of June 1995. On that day, the case was further adjourned to the 3<sup>rd</sup> July 1995, but neither appellant nor his counsel was present in court.<sup>1679</sup>

The case was adjourned for judgment. On the adjourned date, counsel for the appellant appeared and sought to enter appellant's defence.<sup>1680</sup> The court, however, refused and delivered its judgement, granting the reliefs sought by the respondent.<sup>1681</sup> Dissatisfied with the judgment, the appellant appealed to the Court of Appeal.<sup>1682</sup> The appeal was dismissed and the judgment of the High court was upheld, while the cross appeal was allowed.<sup>1683</sup>

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<sup>1676</sup> Section 41 of the 1999 Constitution.

<sup>1677</sup> At 513.

<sup>1678</sup> *Ibid.*

<sup>1679</sup> *Idid.*

<sup>1680</sup> *Idem* 525.

<sup>1681</sup> *Idem* 537 par B-C except the amount of damages claimed by the respondent.

<sup>1682</sup> CA/L/3/96. The respondent also cross appealed on the *quantum* of damages awarded to him by the court. See 514 & 523 *idem*.

<sup>1683</sup> *Idem* 534 par A-B. The appellant did not however challenge the applicability of the African Charter. Rather, he based his appeal on the grounds *inter alia* that the lower court's refusal to entertain his application to argue his defence amounted to a denial of fair hearing.

## 4 Diplomatic protection and Nigerian Law

### 4.1 Constitutional provisions

There is no specific provision under the Nigerian Constitution guaranteeing diplomatic protection to Nigerian citizens.<sup>1684</sup> It can, however, be argued that sections 2,<sup>1685</sup> 14(1),<sup>1686</sup> 14(1)(b),<sup>1687</sup> 25,<sup>1688</sup> and 41<sup>1689</sup> of the Constitution may apply<sup>1690</sup> given the modern context where international commerce, communication, and globalization prevail.<sup>1691</sup> The content and possible application of these provisions are discussed below.

Nigeria is a democracy based upon principles of social justice as provided by section 14(1) of the Nigerian Constitution. The security and welfare of the people are the “primary purpose of government” as stated by section 14(1)(b) of the same Constitution. Section 25 of the Constitution makes provision for the right to citizenship, while section 41 provides for freedom of movement in and out of Nigeria. Section 41(1) of the Constitution provides, *inter alia*, that

Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom.

It is submitted that section 25 of the Constitution should be read liberally along with section 41(1) to guarantee diplomatic protection to Nigerian nationals. This submission is supported by the decision of the Supreme Court of Nigeria in the case

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<sup>1684</sup> Unlike the Constitutions of those countries mentioned in *supra* n 1604.

<sup>1685</sup> S 2 identifies Nigeria as an indivisible and indissoluble sovereign state.

<sup>1686</sup> S 14(1) guarantees the rights to safety and security to all Nigerians. This section deals with “Fundamental Objectives and Directive Principles of State Policy” and provides that ‘the Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice.’

<sup>1687</sup> The section provides that “the security and welfare of the people, shall be the primary purpose of government.”

<sup>1688</sup> This section deals with citizenship. It bestows the right to citizenship on all Nigerians.

<sup>1689</sup> This section deals with freedom of movement, and the right to travel in and out of the country. See the Constitution of Federal Republic of Nigeria *supra* n 459 23.

<sup>1690</sup> See Erasmus & Davidson *supra* n 293 who have made submissions along these lines concerning Diplomatic Protection under the South African Constitution.

<sup>1691</sup> See Erasmus & Davidson *supra* n 293 125.

of *Director SSS v Agbakoba*<sup>1692</sup>

In that case, the Supreme Court of Nigeria interpreted the right of ingress and egress to mean a right to a Nigerian passport. A passport was defined as a document of protection and authority to travel, issued by competent Nigerian officials to Nigerians wishing to travel outside Nigeria.<sup>1693</sup>

Since a passport is a document of protection which enables a Nigerian citizen to leave the country and travel to another country, it is also a request from the country to grant entry to the bearer - an internationally accepted document of nationality and identity issued by the Nigerian authorities.<sup>1694</sup>

It can therefore be argued that if a passport is a document of protection, it stands to reason that the right to freedom of movement and of egress and ingress guaranteed by section 41(1) of the Constitution would be meaningless if Nigeria fails to protect the individual concerned where he or she is injured abroad.<sup>1695</sup>

It is hardly conceivable that a right can be given without the facility of actualizing and protecting it. As stated by the court in *Agbakoba's* case,<sup>1696</sup>

The Constitution cannot condescend to details in its description of the fundamental rights and freedoms it guarantees. It prescribes the outlines or framework, leaving the minute details to be filled in. In setting up this framework, the framers of the Nigerian Constitution undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men and women, those fundamental purposes which the instrument itself discloses.<sup>1697</sup>

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<sup>1692</sup> [1999] 3 NWLR 314. See also the case of *Attorney-General of the Federation v Ajayi supra* n 1677.

<sup>1693</sup> At 361 pars. B-D. See also the Immigration Act Cap 171 and Passport (Miscellaneous Provisions) Act Cap 343 Laws of the Federation of Nigeria 1990 s 6.

<sup>1694</sup> *Ibid.*

<sup>1695</sup> The right of a Nigerian to hold a Nigerian Passport is a corollary to his or her right to move in and out of the country guaranteed under the 1999 Nigerian Constitution s 41(1), the ACHPR art 12(2) and the UDHR art 13(2). See *Director SSS v Agbakoba supra* 1693.

<sup>1696</sup> *Supra* n 1694

<sup>1697</sup> Per Ogundare JSC 357 par D-F. It is submitted that although these cases were decided under the 1979 Constitution, the same decision would be reached today if those same facts came before court under the 1999 Constitution. In other words, the doctrine of *stare decisis* would apply.

## 4.2 The foreign policy dimension

Diplomatic protection concerns foreign policy. Thus, the decision whether or not to exercise diplomatic protection on behalf of a national who is injured abroad is often a foreign policy decision taken by the Ministry of Foreign Affairs,<sup>1698</sup> it would therefore appear that section 19 of the Nigerian Constitution has some bearing on the subject of diplomatic protection.<sup>1699</sup> That section deals with Nigeria's foreign policy objectives.

In the early years of Nigerian independence, Nigerian foreign policy was based on the principles of non-alignment.<sup>1700</sup> This policy was later abandoned in response to the changing international environment and the country's domestic conditions.<sup>1701</sup> The change in policy was reflected in the 1979 Nigerian Constitution, which provided, *inter alia*, that Africa should be the centrepiece of Nigeria's foreign policy. The same policy was carried over into the 1999 Constitution. Section 19(b) of the 1999 Constitution therefore states:

The foreign policy objectives shall be -

- (b) promotion of African integration and support for African unity;

One thing is clear, however. Despite this constitutional injunction that the security and welfare of the people are the "primary purpose of government" and a mandate to promote and protect the national interest, over the years, Nigeria's foreign policy

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<sup>1698</sup> See Erasmus & Davidson *supra* n 293 128. In *Kaunda's case supra* n 688, it was said that a decision as to whether, and if so, what protection should be given, is an aspect of foreign policy, which is essentially the function of the executive.

<sup>1699</sup> Other foreign policy objectives include promotion of African integration and support for African unity, promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations, respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, and adjudication, and promotion of a just world economic order. See s 19 of the Constitution.

<sup>1700</sup> The policy of Non-Alignment was the policy of non affiliation with any of the super-powers involved in W W II. The movement was started by Tito of Yugoslavia and nearly all third world countries joined. Africa tended towards that policy and Nigeria followed suit.

<sup>1701</sup> During the Nigerian civil war, no Western power (except the British Labour government) supported the Nigerian government. However, Africa's support to the Federal Government was crucial. Hence Nigeria decided to make Africa the center- piece of its foreign policy objective. See Oyeboade *supra* n 1659 283.

strategies have not been people-oriented.<sup>1702</sup> This observation is based on the fact that economic issues, rather than concern for the welfare of its nationals abroad, dominated Nigeria's foreign policy. As a result, Nigerians suffered untold hardships in foreign lands, because the state failed or neglected to protect them. For instance, in countries like Libya, Equatorial Guinea, South Africa, *et cetera*, Nigerians were reported to have been attacked, molested or killed. They were thrown aboard at sea on their way to Europe, while others were deported *en mass* from countries like Gabon, but the state failed or neglected to do anything to protect them either directly, or through its diplomatic and consular missions abroad.

It must be said, however, that the majority of Nigerians who suffered some harm abroad were those who were involved in drug trafficking.<sup>1703</sup> This indifference on the part of the Nigerian government, nevertheless, aroused adverse publicity, disenchantment and outrage against the government of the day.<sup>1704</sup> The adverse publicity and condemnation prompted Nigeria to adopt a new foreign policy objective called "citizen diplomacy," which is said to be "people oriented."<sup>1705</sup> It is geared towards "protecting" the image and integrity of Nigeria. "Citizen diplomacy" is said to be based on reciprocity.<sup>1706</sup> By that doctrine, individual Nigerians are the main focus of any foreign policy endeavour.<sup>1707</sup>

According to this new foreign policy objective, every Nigerian abroad is assured of protection,<sup>1708</sup> and any country that portrays Nigeria and Nigerians in a bad or negative light, will face negative consequences.<sup>1709</sup> The reason for this is that:

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<sup>1702</sup> See "Globalisation and Nigeria's foreign policy" being the text of a lecture delivered by Ambassador Olusola Sanu during a seminar on the future of Nigeria's foreign policy at the NIIA Lagos where he called for a change in Nigeria's attitude towards its nationals abroad in *The Comet* 2005-10-19 14.

<sup>1703</sup> See for instance Giwa "Guinea detains 51 Nigerians – for drug trafficking" *Thisday* 2001-08-02 1.

<sup>1704</sup> See for instance Akintola "Save Nigerians Abroad" *The Guardian* 2004-12-17 2; Fafowora "Treatment of Nigerians Abroad" *Thisday* 2004-12-15; Adekunle "The plight of Nigerians abroad" *The National Concord* 1990-10-5 5.

<sup>1705</sup> See "FG Begins "Citizenship Diplomacy" *Thisday* (ed) 2007-28-8 5. See also "Nigeria to Adopt 'Citizenship Diplomacy'" *Thisday* (ed) 2007-12-9 3.

<sup>1706</sup> By reciprocity is meant that Nigeria will respond in like manner towards any state as it deals with Nigerians abroad. I.e measure for measure. See "A 'new' foreign policy thrust?" *The Guardian* (ed) 2007-20-9 16.

<sup>1707</sup> *Ibid.*

<sup>1708</sup> *Ibid.*

<sup>1709</sup> See Akinterinwa "Nigeria's new foreign policy guidelines" *Thisday* 2007-11-04 14.



any nation worth its salt should take the security, plight and lives of its nationals seriously everywhere in the world.<sup>1710</sup>

Thus, any maltreatment or act of injustice meted out to Nigerian nationals will be met with retaliatory actions. This policy is to be implemented by ensuring that the course of justice is followed, and that the rights of Nigerians are respected. In other words, “enlightened self interest” shall henceforth be the operative principle of Nigeria’s foreign policy. According to Maduekwe, the minister for Foreign Affairs

We are not changing the fundamentals of our foreign policy, but we are changing the branding. It is now “citizen diplomacy” or the diplomacy in which the citizen is the focus.<sup>1711</sup>

It can thus be seen that Nigeria’s policy on diplomatic protection is subsumed in her foreign policy objective. An examination of how Nigeria has responded to actual situations in which it was called upon to exercise diplomatic protection on behalf of its nationals now follows.

### 4.3 State practice

By state practice is meant a certain pattern of behaviour by a state towards a particular issue.<sup>1712</sup> Technically speaking, the commonly accepted view of international law is that state practice, followed out of a sense of legal obligation, can create an international obligation for a state.<sup>1713</sup> In the formation of customary international law, state practice is the “material element,” while the sense of legal obligation is the “psychological element.”<sup>1714</sup> With regard to Nigerian practice, the

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<sup>1710</sup> *Ibid.*

<sup>1711</sup> See Dapo “Maduekwe, Democracy and Nigeria’s foreign policy” *The Guardian* 2007- 09-16 24. It is believed that this policy will improve the consular protection of Nigerian citizens living abroad and assist, not only in the decision making processes, but also in the promotion and protection of Nigeria’s national image at home and abroad. It is a policy based on the desire to give the nation’s image renewed refulgence.

<sup>1712</sup> Generally, it is the practice of the executive branch of government, and in particular that of the Ministry of Foreign Affairs, that determines what constitutes State practice. In this regard, actions or statements by the President, and diplomatic notes by Heads of Missions, are very important. However, the practice of national legislatures and courts may also be helpful in establishing state practice.

<sup>1713</sup> See Shearer *supra* n 117 33. See also Murty *supra* n 829 252.

<sup>1714</sup> The psychological element is often referred to by its Latin phrase, *opinio juris sive necessitatis* or simply *opinio juris*. It differentiates legal norms from “habits” or “usages,” which are not followed

Bakassi Peninsula incident of 2002,<sup>1715</sup> her response to the xenophobic attacks on foreign nationals in South Africa in 2008,<sup>1716</sup> and the British Airways incident of March of the same year,<sup>1717</sup> will be used as examples to illustrate Nigeria's state practice in respect of diplomatic protection. Before these incidents are discussed however, the principle of extraterritoriality are first examined.

## 5 The principle of extraterritoriality

Extraterritoriality implies the invocation by a state of its constitutional provisions to protect its citizens who are injured outside its territory.<sup>1718</sup> The question whether a state is prepared to act extraterritorially to protect its nationals has important practical consequences, because it is related to the issue of jurisdiction. In other words, it has to do with the danger of violating the territorial sovereignty and integrity of other states in an attempt to protect its nationals.<sup>1719</sup> The question is whether Nigeria is prepared to act constitutionally outside its borders in order to protect its nationals abroad and if so, to what extent? The answer to this question will be revealed by a discussion of Nigeria's handling of the incidents mentioned above.

Under the general principles of Public international law, the laws of a state ordinarily apply only within its territory. Sovereignty empowers a state to exercise its functions only within a particular territory.<sup>1720</sup> A state that exercises its jurisdiction beyond its territorial boundaries or limits, interferes with the exclusive territorial jurisdiction of another state.<sup>1721</sup> Thus, if an individual is outside the territory of the state of his or her nationality, the state of his or her nationality cannot invoke its constitutional

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out of a sense of legal obligation. See the *Asylum* case *supra* n 1493 266. See also the *North Sea Continental Shelf* case ICJ Rep (1969) 3.

<sup>1715</sup> The case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening Judgment, ICJ Reports, (2002) supra* n 1643.

<sup>1716</sup> See for instance Igboaka "Violence against Nigerians continues in South Africa" *The Punch* 2008-05-19 10; Ehikioya "Attacks on foreigners spread in South Africa" *The Punch* 2008-5-22 53; Eke "Curtailing the xenophobes in South Africa" *Punch* 2008-05-22 64; Bola "Immigrants flee South Africa's Wave of Violence" *P M News* 2008-05-23 3; Wale "Xenophobia in South Africa" *The Nation* 2008-06-5 48; Chikwe "S'African police arraign Nigerian's killers" *The Punch* 2008-06-7 8

<sup>1717</sup> See Omoh "Nigerian authorities silent over British Airways." *Daily Champion* 2008-05-23 19. See also Ogoigbe "Surviving as a Nigerian abroad." *Punch* 2008-05-31 62.

<sup>1718</sup> See Coomans & Kamminga *Extraterritorial Application of Human Rights Treaties* (2007) 42.

<sup>1719</sup> *Ibid.*

<sup>1720</sup> See Dugard *supra* n 1 133.

<sup>1721</sup> See the case of *SS Lotus* (1927) PCIJ Series A No 10 (France v Turkey).

provisions to protect him or her.<sup>1722</sup> If however international law is breached, in that case, the aggrieved state can invoke its right of diplomatic protection..

Examples abound where states have acted outside their borders and intervened in other states in order to protect their nationals.<sup>1723</sup> Some states have intervened militarily in other states, wars have been waged, property taken away from some states by state's agents, territories have been occupied and individuals apprehended or rescued by some states in the territory of other states in the exercise of diplomatic protection or self help.<sup>1724</sup> The Bakassi incident in which Nigeria sought to protect its nationals abroad, is hereunder discussed as an attempt by Nigeria to accord diplomatic protection to its nationals in the Bakassi Peninsula against the Cameroons.

## 6 The Bakassi Peninsula incident

Although Nigeria has over the years been criticized for neglecting her nationals abroad, her determined effort to protect the human rights of Nigerians in the Bakassi Peninsula in 2002, and at the same time keep the Peninsula as part of its territory,<sup>1725</sup> was diplomatically commendable. The Bakassi Peninsula incident has been described as the greatest test of Nigeria's diplomatic skill or ability to protect its nationals.<sup>1726</sup>

The Bakassi Peninsula forms the southernmost tip of the Cross River State of Nigeria, jutting out into the Gulf of Guinea, at the Nigeria – Cameroon frontier. It is rich with oil deposits and aquatic resources. The Peninsula stretches for about 1,000

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<sup>1722</sup> Extraterritorial application of the Constitution must be distinguished from the extraterritorial nature of diplomatic protection in international law. See the *dictum* of O'Regan in *Kaunda's case supra* n 688 par 231.

<sup>1723</sup> See Booyen "Extra-territorial application of Constitutional Rights in respect of Aliens" (1989-1990) 13 *SAYIL* 184.

<sup>1724</sup> Booyen *supra* n 1710 186. For instance, the Israeli raid on Entebbe Airport in 1976 to rescue its nationals, the Anglo-French invasion of Suez in 1956, the abortive US hostage rescue mission in Iran in 1980, and its intervention in both Grenada (1983) and Panama.(1989) are good examples of force being used to protect nationals extraterritorially.

<sup>1725</sup> The Bakassi Peninsula had always been regarded as a Nigerian territory by all Nigerians. See Nigeria's argument to the ICJ in the the case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) supra* n 1640 par 311.

<sup>1726</sup> See Okuwa "Bakassi: Test of Nigeria's quality of diplomacy." *Nigerian Tribune* 2004-07-28 8.

kilometres into mangrove swamp and was populated by an estimated 250,000 people,<sup>1727</sup> about 90 percent of whom were Nigerians.

There had been an ongoing dispute between the two states over the ownership of the Peninsula. The two countries laid claim to the Peninsula based on contradictory history and geography. These counterclaims prompted the Cameroonian gendarmes to frequently and violently molest Nigerians living in the area over the years. In 1982 for instance, Cameroon gendarmes killed many Nigerian soldiers at the Bakassi and, had it not been for the effective handling of the matter by the then Nigerian government, a shooting war could have ensued between the two states.<sup>1728</sup> Thereafter, hostilities between the two states escalated. This prompted Nigeria to deploy soldiers to the area in 1994 to protect her nationals, thereby further heightening and escalating the tension.<sup>1729</sup>

Diplomatic steps were, however, followed to resolve the conflict peacefully.<sup>1730</sup> A series of unsuccessful meetings took place between Nigerian officials and their Cameroonian counterparts following heightened tension between the two countries. Both Togo and Gabon tried to intervene in the dispute, but no agreement could be reached.<sup>1731</sup>

Cameroon formally approached the OAU to intervene in the conflict, but the OAU could not resolve the matter.<sup>1732</sup> Cameroon then requested Security Council mediation on the matter, but Nigeria is said to have stalled the consideration of the matter by the Security Council.<sup>1733</sup> At the height of the tension as already said, Nigeria deployed troops to the Bakassi Peninsula, thus compelling Cameroon to take the matter to the ICJ in 1994.<sup>1734</sup> The government of the Republic of Cameroon

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<sup>1727</sup> 1998 figure. See *The World Almanac and book of facts* (2003) *supra* n 284 824.

<sup>1728</sup> About 12 Nigerian soldiers were killed in that incident. See Nigeria's counter-claim at par 310 of the judgment.

<sup>1729</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) Judgment, ICJ Reports, (2002) supra* n 1640 Nigeria claimed to have acted in self defence. See par 311 of the judgment.

<sup>1730</sup> See Aimufua "Diplomacy and the battle for Bakassi Peninsula" *The Vanguard* 1995-08-21 26.

<sup>1731</sup> *Ibid.*

<sup>1732</sup> *Ibid.*

<sup>1733</sup> *Ibid.*

<sup>1734</sup> See par 1 & 310 of the judgment. . Murty *supra* n 829 221 asserts that while the diplomatic instrument is basically persuasive, it must be remembered that often the strategy employed by a

asked the ICJ for a declaration that sovereignty over the Bakassi Peninsula belonged to her.<sup>1735</sup> Nigeria filed its counterclaim in 1999 following the ICJ's refusal to uphold her preliminary objection on the question of jurisdiction.<sup>1736</sup> Nigeria sought, *inter alia*, the following reliefs and declarations:

(a) that sovereignty over the Bakassi Peninsula is vested in the Federal Republic of Nigeria

(b) that the ICJ should declare Cameroon's claim for reparation unfounded and instead, that the ICJ should hold Cameroon responsible for specified acts of aggression, invasion and/or claim of sovereignty over the Peninsula.

Issues were joined, and thereafter, the suit was set down for hearing in February 2002.

Although the Bakassi was not the only issue in contention in the case, it was the focus for the two states and the international community generally, because of its oil rich deposits, its natural resources, including aquatic life, and because it provided access to the sea for Nigeria.<sup>1737</sup>

Delivering its judgment on the 10<sup>th</sup> of October 2002, the ICJ ruled that sovereignty over the Bakassi was vested in the Cameroon.<sup>1738</sup> The Court primarily based its judgment on the Anglo-German Treaty of March, 1913, whereby Nigeria's seaward boundary with Cameroon was fixed by the erstwhile colonial masters.<sup>1739</sup> The court

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group is not confined to the use of a single instrument or strategy. Coercion is another diplomatic instrument.

<sup>1735</sup> See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* *supra* n 1643. Cameroon also asked the ICJ for the following relief *inter alia* "(b) that the occupation of the Peninsula and other islands in the Lake Chad region by Nigeria had violated and had continued to violate the fundamental principles of respect for frontiers inherited from colonisation, otherwise referred to as *utis possidetis juris*, other treaty obligations, and Customary International Law, (c) that Nigeria was obliged to effect immediate and unconditional withdrawal from these territories, (d) that Nigeria should be held accountable and should be made to pay reparation for these violations, (e) that the ICJ should specify definitely the frontier between Nigeria and Cameroon from Lake Chad to the sea, and (f) that the ICJ should proceed to delimit Nigeria's maritime boundary with Cameroon."

<sup>1736</sup> At 313.

<sup>1737</sup> See Mbagwu "The Bakassi episode" *Daily Champion* 2002-10-14 11; Ani "Bakassi , Nigeria & the ICJ ruling" *Punch* (ed) 2002-10-17 14; Eme "Bakassi in a pan-Africanist's eyes" *Daily Champion* 2002-12-17 11 & "The ICJ verdict on Bakassi" *Thisday* (ed) 2002-10-13 40

<sup>1738</sup> At 455.

<sup>1739</sup> *Idem* pars 57, 60, 61 & 325. The court rejected the theory of historical consolidation put forward by Nigeria and accordingly, refused to take into account the doctrine of effective occupation relied

therefore held that Nigeria was occupying the Bakassi Peninsula illegally and was therefore under an obligation to expeditiously and without condition, withdraw its administration and its military and police forces from the Bakassi.<sup>1740</sup>

The judgment of the ICJ in respect of the Bakassi Peninsula stirred divergent emotions and reactions among Nigerians, ranging from outright condemnation to calls for military action.<sup>1741</sup> Others philosophically called for the acceptance of the judgment in good faith.<sup>1742</sup> However, public opinion was generally against the judgment.<sup>1743</sup> The Nigerian government rejected the judgment on the grounds that it was based on political considerations.<sup>1744</sup> While assuring its citizens of its constitutional commitment to protect them, Nigeria pledged that on no account would she abandon her people and their interests, because for Nigeria, it is not a matter of oil and natural resources on land or in coastal waters, it is a matter of the welfare and wellbeing of her people on their land.<sup>1745</sup>

The hardship of the judgment was felt mainly by Nigerians who had been living on the Peninsula for centuries.<sup>1746</sup> One can imagine the physical, social, political, economic and psychological effects that the judgment must have had on them, being

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upon by Nigeria. It however ruled that in the absence of acquiescence by Cameroon, these effectivities could not prevail over Cameroon's conventional titles.

<sup>1740</sup> *Idem* 456 .

<sup>1741</sup> See "Nigeria and the ICJ verdict" *The Comet* (ed) 2002-10-21 17

<sup>1742</sup> See "The ICJ verdict on Bakassi" *Thisday* (ed) 2002-10-13. "The verdict by the President of the World Court" Statement to the press by President Gullaume, the Hague, October 10 2002 *The Guardian* 2002-10-11 3; Mbagu "The Bakassi episode" *Daily Champion* 2002- 10-14 27.

<sup>1743</sup> See Akinteriwa: "Nigerians reject ICJ Verdict" *Thisday* 2002-10-29 3. See also Ogbodo, "Nigerians react to judgment, urge caution, peace", *The Guardian* 2002-10-11 6; Modestus "Will Nigeria give up Bakassi?" *Sunday Champion* 2002-10-13 3.

<sup>1744</sup> See "Statement issued by the Government of the Federal Republic of Nigeria in respect of the judgment by the International Court of Justice in the Hague *In the case concerning the land and Maritime boundary between Cameroon and Nigeria (Cameroon v Nigeria Equatorial Guinea Intervening)*": info@nigeria-law.org. See also Daniel " Nigeria rejects ruling on Bakassi: Questions judges' integrity" *The Guardian* 2002-10-24 9. Odivwri & Adedoja, "Bakassi: ICJ verdict unacceptable, says FG" *Thisday* 2002-10-24 1; Koroma "Judgment based on political considerations" *Daily Champion* 2002-11-6 37; Okocha & Umar "Bakassi: Judgment difficult to accept – FG" *Thisday* 2002-10-12 17.

<sup>1745</sup> See "Statement issued by the Government of the Federal Republic of Nigeria in respect of the judgment by the International Court of Justice *supra* n 1729. See also Ajayi "It is not a matter of oil, but welfare of the people says govt" *The Guardian* 2002-10-24 54.

<sup>1746</sup> This was the main thrust of Nigeria's defence to the action. Nigeria had submitted that the territory had been under its effective political, legal, and administrative control from time immemorial - par 311. Nigeria however further contended that even if the Court should find that Cameroon had sovereignty over the areas in dispute, the Nigerian presence there was the result of a "reasonable mistake" or "honest belief." See par 311 of the judgment.

suddenly displaced, rendered homeless, transformed into illegal aliens overnight, and forced to vacate their ancestral homeland and relocate. They therefore expected and demanded serious reprisal action from the Nigerian government.<sup>1747</sup> They felt that they should be diplomatically protected by Nigeria, and demanded the Nigerian government to exercise diplomatic protection on their behalf.<sup>1748</sup> They also vowed to resist the handover of the Bakassi Peninsula by Nigeria to Cameroon if their expectation of diplomatic protection was not met.<sup>1749</sup>

The date set for the withdrawal of Nigerian troops from the Bakassi Peninsula was 15 September 2004. Nigerians in Bakassi, however, went to court on several occasions asking the court to compel the Nigerian government to refuse to hand over the Bakassi Peninsula to the Cameroon.<sup>1750</sup> These displaced Nigerians lobbied the National Assembly, which adopted several resolutions, asking the Federal Government not to hand over the Bakassi Peninsula.<sup>1751</sup> Besides, the Nigerian government itself, using delaying tactics and reticence, vacillated, and put off the handover date several times.<sup>1752</sup>

A series of diplomatic negotiations took place between Nigeria and Cameroon in a bid to find a diplomatic solution to the implementation of the ICJ judgment. This culminated in the adoption of the Green Tree Accord<sup>1753</sup> in 2006, brokered by Kofi

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<sup>1747</sup> See Johnson "Bakassi residents threaten secession" *The Comet* 2002-10-31 3; Odenyi, Uganwa & Okon-Emmanuel "Bakassi residents threaten secession" *The Comet* 2003-11-5 10; See also Madunagu "Bakassi people threaten secession" *The Punch* 2002 -10-7 1.

<sup>1748</sup> *Ibid.*

<sup>1749</sup> See Ogbu "Bakassi vows to resist handover to Cameroon." *Thisday* 2004-09-14 8;. Moses "We are ready to Die here – Bakassi people." *Champion* 2002-10-19 5; Eno-Abasi "Bakassi indigenes protest ruling" *Guardian* 2002-10-14 42.

<sup>1750</sup> See Umana "Ahead of the September 15 handover: Bakassi natives head for Supreme Court." *Punch* 2004-09-12 5; Soniyi "Bakassi: Court can't stop withdrawal of Nigerian Troops –Judge." *Punch* 2004-09-3 13; In August 2006 seven residents of Bakassi filed an action at the Federal High Court, Abuja asking the court to stop the handover of the Bakassi. See the *Guardian* 2006-08-8. See also Eno-Abasi "Bakassi Returnees sue govt. want exclusion from April polls." *The Guardian* 2007-03-27; "Bakassi Indigenes Sue Govts. Over state Law." *The Pioneer* 2008-04-28 24.; Ige "Bakassi natives slam N456 bn suit against FG" *Vanguard* 2008-04-23.

<sup>1751</sup> See for instance Kola "Senate rejects Bakassi handover" *Daily Champion* 2008-11-12 2; & Nkwazema "Bakassi: House sends treaty back to Yar'Adua." *Thisday* 2008-07-18 11.

<sup>1752</sup> See Johnson "Bakassi: A handover deferred at last." *The Guardian* 2004-09-17 26; Rotimi "Bakassi: Nigeria shelves hand-over" *Punch* 2004-09-15; Nwosu "Jubilation in Bakassi as Nigeria shelves handover" *The Guardian* 2004-09-16 1;.& Bonny "Uncertainty trails Nigeria's exit from Bakassi" *The Guardian* 2003-11-5 35.

<sup>1753</sup> Named after the Green Tree Resort in Long Island, New York, the venue of the meeting. This was the accord reached by the Nigerian leader and his Cameroonian counterpart in New York for the

Annan, the then Secretary General of the UN. Under that agreement, Nigeria finally agreed to withdraw its troops from the Bakassi Peninsula.<sup>1754</sup> A special transitional provision was accepted and put in place for five years in favour of Nigerians after the cessation of the Nigerian administration in the Bakassi to enable them to have access to the Peninsula without formalities.<sup>1755</sup>

Article 3 of the agreement stipulated that Cameroon would (a) not force Nigerian nationals living in the Bakassi Peninsula to leave the zone or to change their nationality; (b) respect their culture, language and beliefs; (c) respect their right to continue their agricultural and fishing activities; (d) protect their property and their customary land rights; (e) not levy in any discriminatory manner, any taxes or any other dues on Nigerian nationals living in the zone; and (f) take every necessary measure to protect Nigerian nationals living in the zone from any harassment or harm.<sup>1756</sup> Nigeria eventually began its withdrawal from Bakassi on August 14, 2006, while the final withdrawal was achieved on August 14, 2008.

The question is whether the action taken by the Nigerian government amounted to effective diplomatic protection of its nationals in the Bakassi Peninsula under the circumstances? Although a resettlement plan was put in place, and a sum of six billion Naira was voted for the purpose of resettling the Bakassi residents in the Cross River State of Nigeria, the people felt that they were betrayed by the Nigerian nation. They felt abandoned, rejected, cheated and neglected.<sup>1757</sup>

The affected Nigerians queried why a government to whom they had pledged their allegiance and to which they had supported and paid taxes over the years could not protect them. They vehemently argued that they had an inalienable right to self

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resolution of the deadlock over the implementation of the ICJ judgment. The accord was reached on 12 June, 2006.

<sup>1754</sup> See Uchegbu "Why we have to cede Bakassi – OBJ" *Daily Champion* 2006-06-15 1; "The surrender of Bakassi to Cameroon" *The Guardian* (ed) 2006-08-22 2; Anya "No going back on Bakassi Handover, says Ajibola" *Punch* 2007-11-30 5. Other conditions included *inter alia* that the two islands of Atabong and Abana which formed the western part of Bakassi would continue to be administered by Nigeria for two years after the withdrawal of Nigerian troops.

<sup>1755</sup> See the text of the special broadcast of President Obasanjo to the nation in the *Daily Champion* of 2006-06-15 1.

<sup>1756</sup> A follow-up committee composed of representatives from Nigeria, Cameroon, the UN and the witnessing states was set up to monitor the implementation of this agreement.

<sup>1757</sup> See *supra* n 1732- 1735.



determination and unequivocally demanded a referendum or plebiscite to be conducted by the UN to determine their preferred nationality before the judgment of the ICJ was implemented.<sup>1758</sup>

It has however been argued that Nigeria had no option in the circumstances.<sup>1759</sup> It was mandatory that she should comply with the judgment of the ICJ. It is submitted that although the political implication of complying with the judgment portrayed Nigeria as vulnerable and incapable of effectively or diplomatically protecting and defending her interests and those of her nationals in the Bakassi Peninsula, it nevertheless portrayed the country as a faithful and law-abiding member of the international community.<sup>1760</sup> It was argued that it would have been dishonourable for Nigeria, having participated fully in the court's proceedings, to refuse to implement the judgment.<sup>1761</sup> The only alternative would have been war.

Koffi Annan, the Secretary General of the UN, is said to have played a significant role in the solution of the Bakassi problem. In the course of negotiating for the Greentree Accord, Kofi Annan is alleged to have flattered and threatened Obasanjo at the same time. Among other things, the UN scribe is said to have told Obasanjo that Nigeria would be setting a bad precedent in Africa if it failed to comply with the judgment of the ICJ and that many would perceive Nigeria as flaunting her might if it refused to hand over the Peninsula as directed by the World Court. In that case, the Security Council would be prepared to take a joint military action against Nigeria to enforce the judgment. Annan is said to have further appealed to Obasanjo to live up to his role as an African elder statesman to whom other leaders looked up. Touched by Annan's plea, Obasanjo acquiesced.<sup>1762</sup>

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<sup>1758</sup> Those were some of the issues canvassed by them in their several law suits. See Ige "Bakassi natives slam N456 bn suit against FG" *Vanguard* 2008-04-23 & Sagay "Bakassi case and its aftermath: Critical issues." *The Comet* 2003-04-31 33.

<sup>1759</sup> This was the view of Oyeboode, Head, Dept of Jurisprudence and International Law, University of Lagos. See Okosun "Mixed feelings over agreement on Bakassi" *The Comet* 2006-06-19 11.

<sup>1760</sup> *Ibid.*

<sup>1761</sup> *Ibid.*

<sup>1762</sup> See Amana "Annan's role in implementing agreement on Bakassi" *The Comet* 2006-06-16 11; & Uchegbu: "Why we have to cede Bakassi – OBJ" *Daily Champion* 2006-06-15 1.

A discussion of Nigeria's reaction to the xenophobic attacks on foreign nationals in South Africa will now follow.

## 7 Nigeria's reaction to the xenophobic attacks on foreigners in 2008

Another incident that illustrates Nigeria's attitude towards the diplomatic protection of the human rights of its nationals was the manner in which she handled the xenophobic attacks on foreign nationals, including Nigerians, in South Africa in May 2008.<sup>1763</sup> The incident is said to have started in Johannesburg<sup>1764</sup> but spread across the entire length and breadth of South Africa.<sup>1765</sup>

Reports indicated that youth groups armed with stones and bottles and other dangerous weapons had threatened foreigners including Nigerians, beating them up, and destroying their property.<sup>1766</sup>

News of the xenophobic attacks surprised, shocked and angered many Nigerians.<sup>1767</sup> It generated explosive reactions in the Nigerian news media.<sup>1768</sup> Initial reports indicated that many Nigerians had been killed while many more were wounded.<sup>1769</sup> This prompted Nigerians to seek asylum at the Nigerian consulate in Johannesburg and in nearby churches. In Johannesburg where the attacks began, it was reported that the police fired rubber bullets to disperse the attacking mob, but when that did not stop the violence, troops were then deployed to handle the situation.<sup>1770</sup> In all, about sixty two foreigners were killed in the violence, and thousands more were injured or displaced.<sup>1771</sup>

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<sup>1763</sup> See for instance Aninih "Violence against Nigerians continues in South Africa" *Punch* 2008-05-19 10; Basseyy "Attacks on foreigners spread in South Africa", *Punch* 2008-5-22 4; Etim "Immigrants flee South Africa's Wave of Violence" *P M News* 2008-05-23 3. etc. See *supra* n 1703.

<sup>1764</sup> See See Bathembu "All quiet in Alexandra" *The Citizen* 2008-06-13 7.

<sup>1765</sup> See Mbedzi "39,235 Mozambicans flee SA" *The Citizen* 2008-06-13 4; Mnguni "Xenophobic retaliation?" 2008-06-11 5; Tissen "Xenophobic pet victims look for homes" *The Citizen* 2008-08-20 10; Tlali "Over 1000 in court after xeno attacks" *The Citizen* 2008-06-24 8; Citizen reporter "Response to Xenophobia" *The Citizen* 2008 -06-24 2; Mboyisa "SA govt 'investigated attacks' " *The Citizen* 2008-06-09 3; Tau "Xenophobia: SA govt is responsible" *The Citizen* 2008-06-18 5.

<sup>1766</sup> Osagie "Attacks on foreigners spread in South Africa" *Punch* 2008-5-22 53

<sup>1767</sup> *Ibid.*

<sup>1768</sup> See *supra* n 1762.

<sup>1769</sup> *Ibid.*

<sup>1770</sup> *Ibid* See also Bathembu "All quiet in Alexandra" *The Citizen* 2008-06-13 7.

<sup>1771</sup> See Umoh "62 killed in SA xeno attacks" *Thisday* 2008-06-15 2. See also Ogen vos "Xenophobia still lurks in SA" *The Citizen* 2008-06-18 5 where it is stated *inter alia* that "At least 62 people lost

The initial response by the Nigerian government was to summon the South African High Commissioner to Nigeria and express its displeasure over the attacks on Nigerians in South Africa.<sup>1772</sup> Briefing newsmen later at a news conference, the minister of Foreign Affairs, Mr. Maduekwe, promised to do whatever was necessary to protect the rights of Nigerians residing in South Africa.<sup>1773</sup> According to the honourable Nigerian minister

despite the invitation of the South African envoy, the government would, through diplomatic channel, demand for compensation on behalf of those who lost their property in the mishap.<sup>1774</sup>

On another occasion, the minister said that the Federal government was “seriously” considering other measures, including the evacuation of Nigerians residing in South Africa.

It is government’s hope that the South Africa Authorities will bring the situation under permanent control.<sup>1775</sup>

However, in a statement in Abuja, Nigeria, on Friday 23 May 2008, at the opening session of the Nigerian-South African Bi-National Commission, the then South African Deputy President, Phumzile Mlambo-Ngcuka, apologized for the ugly situation faced by Nigerians and other foreigners in South Africa. She said:

I want to apologise to those who have been affected and I want to give the assurance that those who are responsible will be dealt with by law. The acts over the last few weeks are nothing else but criminal and we will not allow them to destabilize the country and our relations with the citizens of all other countries.<sup>1776</sup>

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their lives, hundreds more were injured and tens of thousands were displaced in the xenophobic violence that gripped the country” & “Refugees in mass suicide threat” *The Citizen* 2008-06-09 3 where he stated “Government inaction is driving those displaced by xenophobic violence to the brink of despair with hundreds threatening mass suicide as tensions begin to flare anew.”

<sup>1772</sup> See Akan “Attacks on Nigerians: FG Parleys S’African Envoy.” *Thisday* 2008-05-6 10; Oluwa “FG, S-African envoy hold talks over harassment of Nigerians”. *Vanguard* 2008- 05-7 6.

<sup>1773</sup> *Ibid.*

<sup>1774</sup> *Ibid.*

<sup>1775</sup> Okafor “FG to evacuate Nigerians in South Africa if .”. *Punch* 2008-05-29 8.

<sup>1776</sup> See Essien “South Africa apologises for attacks on Nigerians.” *Punch* 2008-05-24 11.

President Yar’dua of Nigeria later paid a two-day state visit to South Africa where he addressed a joint session of the South African parliament. In his address, Yar’Adua said that violence against immigrants was capable of threatening Africa’s integration. He asked South Africans to appreciate the fact that no country could be an economic island in this age of globalisation. He also advocated for a democratic consolidation of Africa. Referring to the xenophobic violence, Yar’dua said *inter alia*:

This obvious need for more robust integration informs my pleasure at President Mbeki’s unambiguous condemnation of the recent unfortunate developments in parts of South Africa. These incidents which have the potential of undermining our collective resolve to build enduring foundations for holistic African integration, have fortunately been effectively checked by the South African authorities.<sup>1777</sup>

Later, the South African President is said to have apologized in the following terms during talks with Yar’Adua on how to strengthen Nigeria - South Africa relations:

We extend an apology to the President [of Nigeria] with regard to those attacks that have taken place in some parts of our country, attacks against other Africans in particular.<sup>1778</sup>

Many Nigerians had expected the Nigerian President to condemn the attacks and to demand compensation for the affected Nigerians during his meeting with his South African counterpart.<sup>1779</sup> That, however did not happen. Although no Nigerian was killed in the attacks as previously reported,<sup>1780</sup> some are of the view that the xenophobic attacks would have been contained if Nigeria had put pressure on South Africa as soon as the violence began.<sup>1781</sup> Nevertheless, even though the diplomatic strategy adopted by Nigeria may be described as “soft diplomacy,” under the circumstances, it cannot be dismissed with a wave of the hand because, it at least evoked some apology from the South African authorities.<sup>1782</sup>

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<sup>1777</sup> See Ikuomola “Nigeria, South Africa bound by history” - President Umaru Yar’Adua’s address to the South African parliament.” *The Nation* 2008-06-4 5.

<sup>1778</sup> See Zana “South Africa to Nigeria: we’re sorry for attacks.” *The Nation* 2008-06-6 1.

<sup>1779</sup> *Ibid.*

<sup>1780</sup> Many however lost their properties. See *supra* n 1770.

<sup>1781</sup> See Barrett, “South Africa’s Madness: Who is to blame?” *Daily Sun*. 2008-05-29 9.

<sup>1782</sup> It has been said that in diplomatic protection cases, the interests of the affected individuals and those of the state are not co-terminous. See *Barcelona Traction case supra* n 26 par 78 & 79.

## 8 The British Airways incident

A similar episode though not of the same magnitude as the xenophobic attack in South Africa was the British Airways incident of 27 March 2008. In that incident, a British Airways captain ordered approximately 136 Nigerian passengers on board the British Airways flight from London to Lagos<sup>1783</sup> off the aircraft, after they had complained about the arrest and inhuman treatment of a Nigerian deportee on board the plane.<sup>1784</sup>

According to news reports, the deportee was complaining of maltreatment by the British security forces, shrieking at the top of his voice, when a fellow Nigerian passenger intervened, querying why the deportee should be so ill-treated. The deportee was then taken off the plane, but, before the plane departed, the Nigerian who intervened on behalf of the deportee was arrested by four British security officers. This caused consternation and commotion among the other Nigerian passengers. As the commotion continued, some British security officers tried to restore calm. The British pilot, however, ordered all the Nigerian passengers off the plane. When all the Nigerian passengers had disembarked, the deportee was then brought in, and the flight left for Lagos.<sup>1785</sup>

When the Nigerian President was briefed about the incident, he directed that the matter be immediately and fully investigated. At the same time, he demanded an apology from the British Airways.<sup>1786</sup> Some regard this incident as clearly demonstrating the Nigerian Government's genuine sympathy and regard for the feelings of its nationals.<sup>1787</sup>

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While the affected individual would like to be compensated for his or her losses, an apology is often enough for the affected state. See Tiburcio *supra* n 26 62-3.

<sup>1783</sup> Flight BA 0075.

<sup>1784</sup> See *supra* n 1704

<sup>1785</sup> The intervener was one Omotola, a consultant with IT. He was detained for eight hours and as a result he missed his brother's wedding which he had intended to attend. He was also banned for life by the airline as a result of the incident. His luggage was damaged and the money taken from him during the search was never returned. See Omoh "Nigeria Authorities silent over British Airways." *Supra* n 1704.

<sup>1786</sup> *Ibid.*

<sup>1787</sup> The A-G was dispatched to London to see the Mayor of London on the matter. Addressing the Lord Mayor in his office, the A-G and Minister of Justice of Nigeria, Chief Michael Aondoakaa

Further more, unhappy with the general shabby treatment of Nigerians deported from other countries,<sup>1788</sup> the Nigerian Government approved a number of measures to protect its citizens. One such measures was to instruct Nigerian missions abroad to issue travel documents to any Nigerian deportee after ascertaining his or her nationality.<sup>1789</sup> The Government also tightened the much abused process by which the Nigerian passport is acquired by Nigerians and non-Nigerians alike.<sup>1790</sup> Nigeria also signed agreements with those countries often used by Nigerians as illegal transit points in order to seal those routes.<sup>1791</sup>

Since diplomatic protection consists of resort to diplomatic action by a state in respect of any injury to its nationals arising from an internationally wrongful act of another state,<sup>1792</sup> it is submitted that all the classical elements of diplomatic protection were present in the situations enumerated above.

In the Bakassi Peninsula incident for instance, all the recognised diplomatic strategies employed by states for diplomatic protection, both persuasive and coercive, were involved. The tactics employed by Nigeria varied according to the circumstances. When negotiations failed, Nigeria resorted to military occupation of the Bakassi Peninsula in the protection of her nationals. The case was hotly contested by Nigeria when it was instituted by Cameroon at the ICJ. The withdrawal of its troops from the Peninsula in compliance with the judgment of the ICJ, was another diplomatic strategy aimed at protecting the human rights of its nationals. The mediation which produced the “Green Tree Accord,” where conciliation was finally reached, was another diplomatic protection strategy employed by Nigeria.

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(SAN) said that the Federal Government was displeased with the maltreatment of those Nigerian passengers on British Airways flight to Nigeria. See Ashaka “Stop maltreating Nigerians, FG tells Britain.” *Punch* 2002-05-29 11.

<sup>1788</sup> In 2000 thousands of Nigerians were deported from Libya. A 27 year old Nigerian asylum seeker died in a detention camp in Switzerland in May 2001. In 2007 another Nigerian met his death when Spanish immigration officials tried to forcibly deport him to Nigeria. Similar tragic deaths of Nigerian deportees were recorded in such countries as Equatorial Guinea, Austria, Belgium Germany, and some other Western countries. See Ekaette “Deportees as symbol of a failing state.” *Punch* 2008-05-18 64; Amina “Nigerian Envoy’s son arrested in Hong Kong” *Punch* 2007-06- 6 48. See also Akintola “Save Nigerians abroad” *Thisday* 2007-10-10 7.

<sup>1789</sup> See Fafowora “Treatment of Nigerians Abroad” *The Guardian* 2004-12-17 12.

<sup>1790</sup> See Ojior “Aliens with Nigerian passport: A truly sad affair.” *The Nigerian Observer* 1984-09-15 7. This problem is not peculiar to Nigeria however.

<sup>1791</sup> See Fafowora “Treatment of Nigerians abroad.” *The Guardian supra* n 1775 12.

Nigeria's response to the xenophobic attacks on foreigners in South Africa further illustrated a determined effort by Nigeria towards the diplomatic protection of its nationals abroad. The Summit Meeting held between Nigeria and South Africa in Cape Town, the discussions, apologies and peaceful settlement of the problem are indicative of classic diplomatic strategies. The British Airways incident was no exception to this determined effort. The reaction of the Nigerian President in promptly condemning the incident, demanding an apology and dispatching his Attorney General to London, signalled another recourse to diplomatic protection.

## 9 Judicial attitude to diplomatic protection in Nigeria

It appears that the attitude of Nigerian courts towards the issue of diplomatic protection as illustrated by actual cases brought before them can best be described as "sympathetic non interference."<sup>1793</sup> In other words, though the courts sympathise with the plight of the people affected, the courts feel that they are not in a position to interfere or to compel the government to exercise diplomatic protection.<sup>1794</sup> It is intended to examine some of the legal actions instituted against the government in order to deduce the reasons behind this judicial stance.<sup>1795</sup> In this regard, cases involving the Bakassi Peninsula dominate the discussion.

In anticipation of the deadline for the handing over of the Bakassi Peninsula to Cameroon,<sup>1796</sup> and afraid that Nigeria would comply with the order of the ICJ, Nigerians living in the Bakassi Peninsula filed an action at the Federal High Court

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<sup>1792</sup> See ILC's Draft Art on Diplomatic Protection art 1.

<sup>1793</sup> This appears to be the general attitude of the judiciary to diplomatic protection cases in many jurisdictions. For instance although there is a provision for diplomatic protection in the German Constitution, Tiburcio *supra* n 26 59 maintains that: "notwithstanding these legal provisions, German Constitutional law experts denied there was any legal effect to these rules..." This indifferent judicial attitude was also alluded to by the Constitutional Court of SA in *Kaunda's* case *supra* n 688 par 78.

<sup>1794</sup> Soniyi "Bakassi: Court can't stop withdrawal of Nigerian Troops –Judge." *Punch* 2004-09-3.

<sup>1795</sup> Because decisions of High courts of Nigeria are not often reported, reliance will be placed on newspaper reports.

<sup>1796</sup> Nigeria was asked to pull its troops out of the Bakassi Peninsula by the ICJ. However, the Cameroon-Nigeria Mixed Commission was set up on November 15 2002 by the UN to work out the modalities for the withdrawal. The Commission decided that Nigeria should pull its troops out of the Bakassi within 60 days i.e on or before 2004- 08-19. See Onwubiko "Nigeria, Cameroon hold last parley before Bakassi hand-over Aug 19." *The Champion* 2004-08-10.

challenging the anticipated handover.<sup>1797</sup> In an amended suit, they sought an injunction to restrain the Federal Government from withdrawing Nigerian troops from the Bakassi pending the determination of the substantive suit. They also complained of the embarrassment and betrayal engendered by the failure of the Government to stand by them and defend the territory.

The court ruled that it could not stop the President from withdrawing Nigerian troops from the disputed territory.<sup>1798</sup> While sympathizing with the plaintiffs and acknowledging the right of the Bakassi people to be protected by the Federal Government, Justice Binta Nyanko stated that he could not stop the Federal Government from withdrawing the troops from the Peninsula.

The judge said that sections 217 and 218 of the Nigerian Constitution and section 156 of the Nigerian Army Act<sup>1799</sup> conferred unfettered power on the President to deploy military forces, and that he was not in a position to question that power.<sup>1800</sup> Nyanko rejected the plaintiffs' argument that section 6 of the Constitution empowered the court to inquire into the exercise of that power,<sup>1801</sup> and adjourned the substantive suit to a later date.<sup>1802</sup>

Coincidentally, the handover of the territory was subsequently deferred. A new deadline was fixed for August 14, 2006. To beat that deadline again, the Bakassi residents went to court. In an action filed at the Federal High Court at Abuja on August 1, 2006, they sought an interim injunction to restrain the Federal Government

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<sup>1797</sup> See Umana "Ahead of the September 15 handover: Bakassi natives head for Supreme Court." *Punch* 2004-09-12;

<sup>1798</sup> See Soniyi "Bakassi: Court can't stop withdrawal of Nigerian troops – Judge." *Daily Sun*. 2008-05-29 9

<sup>1799</sup> S 217 of the Constitution states *inter alia* that "there shall be an armed forces for the Federation ..." S 218 states that "the powers of the President as Commander -in -Chief of the Armed Forces of the Federation shall include power to determine the operational use of the armed forces in the Federation."

<sup>1800</sup> See *supra* n 1797.

<sup>1801</sup> The 1999 Constitution s 6 confers judicial powers on the courts. Section 6(1) provides *inter alia* that judicial powers vested in the courts shall (a) extend to all inherent powers and sanctions of a court of law and (b) extend to all matters between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person".

<sup>1802</sup> See Eno-Abasi "Bakassi residents ask court to stop handover of Bakassi" *The Guardian* 2006-08-8 12.



from proceeding with the planned handover.<sup>1803</sup> In the substantive suit, they asked the court to determine the legality or otherwise of the agreement ceding the Bakassi Peninsula to Cameroon.<sup>1804</sup> According to them, that agreement was not an enforceable agreement, since it was not enacted into law by the National Assembly as required by law. They also asked the court to restrain the Federal government from expelling them and their kith and kin from their ancestral home under the guise of obeying the 2002 ICJ verdict.<sup>1805</sup>

Needless to say, nothing tangible came out of these suits. However, the question of judicial restraint in cases or matters relating to diplomatic protection brought before the courts in many jurisdictions is a recurring theme. As will be seen in the next chapter, this is also the case in South Africa. The question however is whether this judicial reluctance is motivated by the doctrine of separation of powers enshrined in constitutions, or whether this restraint is caused by the reluctance of the judiciary to interfere in matters of foreign policy. Since it is the executive who makes foreign policy, the question is whether the reluctance of the judiciary to interfere in matters of diplomatic protection is as a result of undue judicial indulgence or deference to the executive. The answer seems to lie in between.<sup>1806</sup>

## 10 Protection of human rights in Nigeria

Although Nigerian courts are reluctant to compel the executive to exercise diplomatic protection, and although diplomatic protection is not *stricto sensu* a human right, the

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<sup>1803</sup> *Ibid.*

<sup>1804</sup> *Ie* the Green Tree Accord of 2006-06-12.

<sup>1805</sup> Thereafter, alleging the poor implementation of the Green Tree Accord signed between Nigeria and the Republic of Cameroon, as well as the faulty resettlement scheme put in place by government, these Nigerian returnees again went to court. They sought a interlocutory injunction against the Nigerian government restraining it from conducting elections into the offices of the President, Vice President, State Governors, Senate, House of Representatives *et cetera*, until land was acquired for them as promised by the President. They also asked the court to restrain the defendants from disbursing the funds meant for their resettlement pending the determination of the substantive suit. Joined in the suit as defendants were the A G of the Federation and five other government officials. In a subsequent interview with the Federal Att.Gen. he insisted that the handover would take place as scheduled. See Owete "Nigeria will quit Bakassi as scheduled, says minister." *The Guardian* 2006-08-8 80. It is common knowledge that the planned handover took place on 2006-08-14 as scheduled.

<sup>1806</sup> For a discussion of the SA situation see ch 6 *infra*.

judiciary in Nigeria has always been in the forefront of protecting, promoting and enforcing respect for human rights of both nationals and non nationals alike.<sup>1807</sup>

Unfortunately, however, for 35 of the 49 years of Nigeria's existence as an independent sovereign state, the country was ruled by different military regimes.<sup>1808</sup> During this period, constitutional governance was kept in abeyance and the military leadership wielded both executive and legislative powers.<sup>1809</sup> Even the judiciary was not spared the ordeal. Its powers were crippled and vitiated by ouster clauses which precluded it from entertaining certain actions that were otherwise justiciable.<sup>1810</sup> Citizen's rights were trampled upon and the violation of human rights reached an alarming crescendo.<sup>1811</sup> Since military rule and human rights are opposed to each other,<sup>1812</sup> the painful experience of Nigerians further confirmed the popular saying that "power tends to corrupt, and absolute power corrupts absolutely".<sup>1813</sup>

Given the above scenario, it can, therefore, safely be said that there was an absence of democracy, the rule of law and respect for human rights in Nigeria for 35 years.<sup>1814</sup> The situation improved remarkably when democracy returned to the country in 1999.<sup>1815</sup> Democracy has provided a fertile ground for human rights to germinate and

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<sup>1807</sup> According to Oguntade JSC in *Ubani v Director SSS supra* n 1665 146 par B-E, even during the military regime, "there can be no doubt that several courts in Nigeria, depending on the judicial personnel who manned them, did a Yeoman's job in the attempt to wrest judicial authority from the military rulers."

<sup>1808</sup> Military rule began in Nigeria in 1966 and democracy was finally restored in 1999.

<sup>1809</sup> See Nwabueze *Military Rule and Constitutionalism in Nigeria* (1992) 65.

<sup>1810</sup> See Ajibola "Human Rights under military rule in Africa: The Nigerian experience." Bello & Ajibola (eds.) *Essays in Honour of Judge Taslim Elias* vol 1 380-1.

<sup>1811</sup> See Nwabueze *supra* n 1811 65. The effect of military rule on the civil society in Nigeria included the erosion of the rule of law, violation of personal liberties, interference with personal property, denial of the community's right to self government, restriction on organised politics and other associated rights, replacement of ordinary courts by special tribunals, enactment of punishment and penalties disproportionate to offences etc. See also Ajibola *supra* n 1813 385.

<sup>1812</sup> See Ajibola *supra* n 1813 380. See also Jinadu "Fundamental human rights, the courts and the government, particularly in military regime in Nigeria." *idem* 485 495.

<sup>1813</sup> This is a famous saying by Lord Acton (1830-1902) an English historian. See the *New Dictionary of Cultural Literacy* (3<sup>rd</sup> ed) (2002) 563. [www.bartleby.com](http://www.bartleby.com).

<sup>1814</sup> During the dark days of military rule in Nigeria, civil society organisations (NGOs) became very vibrant and dynamic in the protection of human rights. They took up the functions of ombudsmen, acted as watchdogs, and took legal actions whenever or wherever the rights of ordinary citizens were violated or were about to be violated. Such civil organizations included the the Civil Liberties Organizations (CLO), Amnesty International, United Action for Democracy (UAD) etc, to name but a few. See e.g Oliomogbe "CLO urges Pope to address Nigeria's burning issues" *The Guardian* 1998-03-20 6; Ameh "CLO alleges extra-judicial killing of 20 detainees" *Punch* 1998-12-02. See also Olofintila, Oliomogbe, Osunde & Djebah "Groups chide police over rally, seek Agbakoba's release" *The Guardian* 1998-03-05 1.

<sup>1815</sup> See Heyns *supra* n 256 1388-89.

blossom.<sup>1816</sup> Although the situation has radically improved, there are still challenges that must be overcome in order to further entrench democratic culture and respect for human rights in the country.<sup>1817</sup>

The instruments adopted by Nigeria for the protection of human rights are hereunder examined. The overall effect of these instruments in bringing about justice to every individual in Nigeria, will determine the extent to which they have gone in the protection of human rights in the country. The first of the instruments to be considered are international instruments. It will be determined which of them have been incorporated into the Nigerian law and whether they have set the required standard expected, particularly with regard to the protection of Nigerians and foreigners alike.

## 11 International instruments for the protection of human rights in Nigeria

Multilateral human rights law developed under the auspices of the UN. It evolved as a result of the monstrous violations of human rights and the immense suffering witnessed during the Second World War.<sup>1818</sup> As a result, the UN was formed, with the aim of promoting respect for human rights and fundamental freedoms as one of its cornerstones.<sup>1819</sup>

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<sup>1816</sup> See, for instance, Okoye "Nigeria's human rights prospects have improved, says Israel parliamentarian." *The Guardian* 2000-05-09 9.

<sup>1817</sup> In 2000 the US Country Report on Human Rights highlighted a series of human rights violations in the country with particular reference to police brutality, detention without trial, invasion of people's privacy, affront to the press, denial of fair trial and the persistent unrest in the Niger Delta. It also noted that the police, army and other security forces continued to commit extra judicial killings and used excessive force to quell civil unrest and ethnic disturbances. The report released by the the American State Department's Human Rights Report for 2004, apart from enumerating these violations, also mentioned harsh judgments delivered by the Sharia courts, life threatening prison conditions, prolonged pre-trial detentions, restrictions on religious rights, massive and pervasive corruption at all levels of government etc. See Obari "US accuses Nigerian security agents of right abuses." *The Guardian* 2000-03-13 80. In its 2008 World Human Rights Report, Amnesty International alleged secret killings of civilians by the police and the army. It also alleged that during the year under review, about 1628 people were arrested, while 785 people were illegally killed in Nigeria. See Oshodi "World Human Rights Report: Amnesty alleges secret killings of civilians by police, army." *Punch* 2008-01-06 1. The government has always denied these allegations. See Amefulu "FG faults Human Rights report on Nigeria." *Punch* 2008-05-06 9.

<sup>1818</sup> See Malan *supra* n 1136 82.

<sup>1819</sup> The concern for human rights is reflected in the UN Charter. Under the auspices of the UN numerous international instruments were concluded and many resolutions and declarations on human rights were adopted. Under the UN Charter, each State party pledges to respect and enforce the observance of human rights and fundamental freedoms of their citizens. Arguments

Nigeria has ratified several international human rights instruments and has incorporated some of them into its legal system.<sup>1820</sup> The main UN human rights instruments ratified by Nigeria include the

- Convention on the rights of the child CRC (1989);<sup>1821</sup>
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. (1984);<sup>1822</sup>
- Convention on the Elimination of all Forms of Discrimination Against Women (1979);<sup>1823</sup>
- Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968);<sup>1824</sup>
- International Covenant on Civil and Political Rights (1966);<sup>1825</sup>
- International Covenant on Economic, Social and Cultural Rights (1966);<sup>1826</sup>
- International Covenant on the Elimination of All Forms of Racial Discrimination (1965);<sup>1827</sup>
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery (1956);<sup>1828</sup>
- Convention on the Political Rights of Women (1952);<sup>1829</sup>
- Protocol Relating to the Status of Refugees (1966);<sup>1830</sup> and

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for the international protection of human rights are therefore based on the concept that every nation has an obligation to respect the human rights of its citizens, and that other nations and the international community have a right to protest if this obligation is breached. In other words, states are obliged to respect human rights of their citizens, incorporate the human rights agreements they signed into their municipal legal system, and implement their international human rights obligations so incorporated. See arts 1(3) 4 & 55 of the Charter.

<sup>1820</sup> Although the ICCPR and the ICESCR were both ratified by Nigeria in 1993, they are yet to be incorporated into Nigerian law. The implication of this is that by virtue of s.12 of the Constitution Nigerian citizens may not be able to invoke the provisions of these treaties for the diplomatic protection of their human rights. See Ladan "Should all categories of human rights be justiciable?" in Law, Human Rights and Administration of Justice in Nigeria Ladan (ed) *Essays in honour of Hon Justice Mohamed Lawal Uwais* (2001) 92. The ACHPR has, however, been domesticated into Nigerian law. This has nevertheless ameliorated the situation because it has enabled Nigerians to invoke it's provisions for the protection of their rights. See [www.unhchr.ch](http://www.unhchr.ch) (accessed December 22 2009)

<sup>1821</sup> Ratified April 1991. Source: [www.unhchr.ch](http://www.unhchr.ch) (as at December 2002).

<sup>1822</sup> Ratified June 2001 *ibid.*

<sup>1823</sup> Ratified June 1985 *ibid.*

<sup>1824</sup> Ratified Dec. 1970 *ibid.*

<sup>1825</sup> Ratified July 1993 *ibid.*

<sup>1826</sup> Ratified July 1993 *ibid.*

<sup>1827</sup> Ratified Oct 1967 *ibid.*

<sup>1828</sup> Ratified June 1961 *ibid.*

<sup>1829</sup> Ratified Nov 1980 *ibid.*

- Convention Relating to the Status of Refugees (1950);<sup>1831</sup>

An important UN Convention not yet ratified by Nigeria is the Convention on the Rights of Migrant Workers and the members of their Families (1990). Others are the:

- Optional Protocol to the International Convention on Civil and Political Rights;
- Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at the abolition of the death penalty;
- Convention on the Nationality of Married Women;
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and
- Convention on the Prevention and Punishment of the Crime of Genocide;

The main OAU human rights treaties ratified by Nigeria include the

- African Charter on Human and People's Rights 1981,<sup>1832</sup> and the
- OAU Convention Governing Specific Aspects of Refugee Problems in Africa 1969;<sup>1833</sup>
- Protocol on Women's Rights in Africa 2005.<sup>1834</sup>

The OAU human rights treaty incorporated into Nigerian municipal law is the ACHPR. Following the coming into force of the treaty in 1981, the Nigerian parliament was the first parliament in Africa to enact it into Nigerian law in 1983 as the African Charter on Human and People's Rights (Ratification and Enforcement Act 1983).<sup>1835</sup>

Treaties dealing with diplomatic protection and diplomacy incorporated into Nigerian law include

- Diplomatic Immunities and Privileges Act (Cap 99) of 1962.

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<sup>1830</sup> Ratified Jan 1988 *ibid.*

<sup>1831</sup> Ratified Oct 1967 *ibid.*

<sup>1832</sup> Ratified Oct 1983. See the cases of *General Sani Abacha v Chief Gani Fawehinmi & Fawehinmi v Abacha supra* n 1657.

<sup>1833</sup> Ratified Oct 1970. [www.unhchr.ch](http://www.unhchr.ch)

<sup>1834</sup> Ratified 16/12/04

<sup>1835</sup> See Cap 10 Laws of the Federation of Nigeria 1990. See also n 1817 *supra* and Heyns *supra* n 256 419.

- The Rome Statute of the International Criminal Court<sup>1836</sup>

The examination that follows, determines the category of rights protected in Nigeria by these instruments and assesses whether these instruments protect the rights of foreigners, whether they are justiciable under Nigerian law and to what extent. The focus of attention is, however, mainly on those rights designated for special investigation in this thesis.<sup>1837</sup>

## 12 Categorisation of human rights under the Nigerian constitution

The Nigerian Constitution expressly outlines certain “fundamental rights” which must be enjoyed by all in Nigeria. Chapter 4 of the 1999 Constitution clearly provides for “fundamental rights”<sup>1838</sup> and the means and processes of safeguarding, protecting, and promoting the enjoyment of those rights.<sup>1839</sup> Akpamgbo SAN, has remarked that:

There is a distinction between human rights and fundamental rights. In fact this distinction has been judicially recognized. It is important to make this point because there is no provision under the 1999 Constitution dealing with human rights properly so-called. What we have are sections dealing with fundamental human rights. This is so notwithstanding that certain basic rights and freedoms described as inalienable to man now form part of Nigeria’s municipal law as received by the African Charter on Human and People’s Rights (Ratification and Enforcement) Act.<sup>1840</sup>

With due respect to the learned SAN, it is submitted that this comment is capable of rekindling and fuelling the much heated debate on the hierarchy of legal norms generally, and the nature of human rights norms in particular.<sup>1841</sup> The difference

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<sup>1836</sup> Ratified on September 27, 2001.

<sup>1837</sup> The rights identified for special attention include the right to life, freedom from torture and discrimination, the right to private property, and the right to due process of law. The scope of protection, the circumstances under which these rights may be denied, derogated from or limited, shall also be critically examined and analysed.

<sup>1838</sup> Not “human rights” or “Bill of Rights”.

<sup>1839</sup> See ch IV of the Nigerian Constitution.

<sup>1840</sup> See Akpamgbo “Democracy, human rights and administration of justice,” in Ladan (ed) *supra* n 1822 13. On the nature of human rights in Nigeria see the dictum of Kayode Eso JSC in *Randome Kuti v Att. Gen. of the Federation* (1985) 2 NWLR 211 230.

<sup>1841</sup> See Meron “On the hierarchy of International Human Rights Norms” *supra* n 131 1-23 where he distinguishes between “fundamental” rights and “mere” human rights.

between “human rights” properly so-called and “fundamental rights” is a question of degree or emphasis. It has been said on several occasions that human rights are universal, equal, indivisible, interdependent and interrelated.<sup>1842</sup> That issue need not be revisited.

With this “equal” and “universal” concept of all human rights in mind, it is noted that the categorisation of human rights in Nigeria discussed here is only for purposes of analysis. It is not an expression of any belief in a hierarchy of human rights norms as such. The first right to be discussed is the right to life. The right to be free from torture and discrimination will then be discussed, followed by the right to own private property and procedural rights in Nigeria.

## 13 Fundamental Rights

### 13.1 *The right to life*

Section 33 of the Nigerian Constitution provides for the right to life. It stipulates that every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria

The right to life is one of the “fundamental” rights designated for examination in this thesis. In relation to Nigeria, the right to life is also a fundamental right under section 33 of the Constitution. Nigerian courts, like courts in other jurisdictions, are very protective of this right. In the case of *Re Oduneye*<sup>1843</sup> which involved the death of a prominent journalist and human rights activist in Nigeria through very violent means, the court gave currency to the sanctity of human life when it said *inter alia* that:

It is a universal concept that all human beings are brothers and assets to one another. The death of one is a loss to the other, whether by natural or felonious means.<sup>1844</sup>

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<sup>1842</sup> See e.g. the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993 *supra* n 214.

<sup>1843</sup> (1987) 4 NWLR 72.

The importance of the right to life was again stressed in the civil case of *Mustapha v Governor Lagos State*,<sup>1845</sup> where the court said *inter alia*:

The right to life is common to all human beings. It is a human right attaching to man as man because of his humanity.<sup>1846</sup>

A further demonstration of the attitude of the Nigerian courts to the right to life can be found in the criminal case of *Bello v Attorney General Oyo State*.<sup>1847</sup> In that case, one Nassiru Bello, who had been convicted and sentenced to death for the offence of armed robbery by the Oyo State High Court of Justice in 1980, appealed against his conviction to the Court of Appeal. However, while his appeal was still pending, he was executed by order of the Oyo State Governor on the recommendation of the Attorney General of Oyo state.

Aggrieved by his execution, the deceased's dependants instituted an action against Oyo state government claiming damages for his death. Both the court of first instance and the Court of Appeal dismissed the claim as disclosing no cause of action.<sup>1848</sup> But the Supreme Court allowed the appeal.<sup>1849</sup> It was held that the Governor of a state could not lawfully order the execution of a convict who had appealed against his conviction, before his appeal had been finally determined. Their Lordships said, *inter alia*,

The premature execution of the deceased by the Oyo state Government, while the deceased's appeal against his conviction was still pending, was not only unconstitutional, but also both illegal and unlawful. By it, the deceased has lost both his right to life and his right to prosecute his appeal. Also, his dependants have been deprived of the benefit of the life of their breadwinner.

Again, in the case of *Ohuka v The State*,<sup>1850</sup> the Supreme Court re-emphasised the sanctity of human life and the right to continued existence pending an appeal and the final determination of a convict's conviction.

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<sup>1844</sup> Per Obaseki JSC at 67.

<sup>1845</sup> (1987) 2 NWLR 539.

<sup>1846</sup> At 585.

<sup>1847</sup> (1986) NSCC vol 17 11; (1986) 5 NWLR 123.

<sup>1848</sup> At 829

<sup>1849</sup> SC 104/1985

<sup>1850</sup> (1988) 1 NWLR 539.



It must, however, be pointed out that the right to life is not an absolute right but a qualified right under the Nigerian Constitution. Derogations and limitations are allowed under certain circumstances.<sup>1851</sup> This qualification can be found under section 33(2) of the Constitution. Thus, the sub - section provides that

A person shall not be regarded as being deprived of his life in contravention of this section if he dies as the result of the use to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary –

- (a) for the defense of any person from unlawful violence or for the defense of property.
- (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (c) For the purpose of suppressing a riot.

Hence, in the case of *Adenji v The State*,<sup>1852</sup> it was held that

the right to life prescribed under section 30(1) of the Nigerian Constitution is clearly a qualified right. It is not unqualified.<sup>1853</sup>

In *Adenji*,<sup>1854</sup> the question was whether the deprivation of life prescribed under section 30(2) of the 1979 Constitution was contrary to the provisions of section 306 of the Criminal Code? The section provides that

It is unlawful to kill any person unless such killing is authorized or justified by law.

It was pointed out that the death penalty prescribed under section 319(1) of the Criminal Code cannot be said to be inconsistent with the Constitution.<sup>1855</sup> It can also not be said that the provision is invalid or unconstitutional.<sup>1856</sup> Thus, if, for instance, an executioner carries out the killing of a condemned criminal, he is simply carrying out a lawful duty. By the same token, the killing of a person in self defence under the

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<sup>1851</sup> See s 33(2).

<sup>1852</sup> (2000) 2 NWLR 114.

<sup>1853</sup> I.e the 1979 Constitution. At 361 par G-H.

<sup>1854</sup> *Supra* n 1854.

<sup>1855</sup> At 125.

circumstances enumerated under section 33(2)(a)-(c) of the Constitution, does not amount to a violation of the right to life.<sup>1857</sup>

Under section 33(2)(a), therefore, if a person is killed in self defense, or in defending any other person against violence, the right to life is not violated. The killing of an assailant in self defense during a brawl, does not also amount to unlawful killing. The right to life is also not violated where the act is committed to preserve the life of another.<sup>1858</sup> This confirms the right to self defence as a fundamental right.<sup>1859</sup>

Under section 33(2) (a) of the Nigerian Constitution, the right to life is also not violated where the deprivation of life occurs in defense of property. This constitutional provision reinforces section 282 of the Criminal Code, which provides that:

A person in peaceable possession of a dwelling house may use such force as he believes to be reasonable, to prevent the forcible breaking in and entry of the house with intent to commit a felony or misdemeanour.

Thus in *R v Ebi*,<sup>1860</sup> it was held that the accused who had killed a person to protect his dwelling house which was under an attack by rioters for two days was not guilty of murder.

Under section 33(2)(b), the right to life is not violated where a person is killed in the course of effecting a lawful arrest or preventing the escape of a person lawfully detained. Thus, if either a peace or police officer is lawfully proceeding to arrest a person, with or without a warrant, for an offence, and the person takes to flight, it is lawful for that officer to use such force as may reasonably be necessary to prevent the escape. Likewise, the right to life is not violated if a person in lawful custody

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<sup>1856</sup> See also *Kalu v The State* (1998) 13 NWLR 531.

<sup>1857</sup> At 125.

<sup>1858</sup> See *R v Rose* (1884) 15 Cox CC 540 where it was held that the accused, a boy of 21 who killed his father to save the life of his mother who was in danger of being killed by him should be acquitted of murder.

<sup>1859</sup> Self defence is said to be the first law of nature. See Hobbes *Leviathan* Pt 1 97.

<sup>1860</sup> (1986) NSCC 17 (1986) 5 NWLR 123.

escapes, and reasonable force which results in his death is used to apprehend him.<sup>1861</sup>

Furthermore, for purposes of suppressing riots, insurrections or mutinies a limitation on the right to life is imposed under section 33(2)(c) of the Nigerian Constitution. This provision brings to mind the vexed issue of police brutality in Nigeria. Over the years, the Nigerian police have been accused of brutality, high-handedness and of using excessive force in the suppression of riots, ethnic violence, and even peaceful demonstrations.<sup>1862</sup>

The security forces often justify their actions by relying on this constitutional provision in defence of their actions.<sup>1863</sup> It is submitted that, instead of employing brutal or excessive force to crack down on peaceful demonstrators, it would better serve the interest of the community, humanity, and the human rights project, if humane strategies are adopted under such circumstances.

Nigeria has not abolished the death penalty. She has also not ratified the second Protocol to the ICCPR, which calls on signatory States to abolish the death penalty.<sup>1864</sup> Although it was said in *Adeniji v The state*<sup>1865</sup> that the imposition or execution of the death sentences in Nigeria is not subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of the courts or any other quarter whatsoever, it would better serve the purpose of human rights if the death sentence is abolished in Nigeria as has been done in many other countries of the world.<sup>1866</sup> Since the right to life is the most sacred of all rights, its violation, particularly its gross violation, is more likely than the violation of other “fundamental” rights to engender or trigger the exercise of diplomatic protection by states on behalf of their nationals. However, since the death penalty is lawful in Nigeria, even a mass

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<sup>1861</sup> The Criminal Code s. 271 goes even further to provide that such a person may be killed if the offence he has committed is punishable by imprisonment for seven years or more. See the case of *R v Aniogo (1943) 9 WACA, 62*.

<sup>1862</sup> Particularly student demonstrations.

<sup>1863</sup> See Ifejeh “State security and human rights.” *Thisday* 2000-08-11 9. See also *Punch* (ed) “Soldiers and rights abuse.” 2007-05-17 16.

<sup>1864</sup> The Second Optional Protocol to the ICCPR was adopted on 1989-12-15, entered into force on 1991-07-11 and has 60 state parties. See 1642 UNTS 414. See also Steiner *et al supra* n 19 1467.

<sup>1865</sup> *Supra* n 1851.

killing, if judicially determined, is not a violation of the right to life and may not trigger diplomatic protection.

### **13.2 Freedom from torture, cruel or inhuman treatment or punishment**

Section 34(1) of the Nigerian Constitution provides that:

Every individual is entitled to respect for the dignity of his person and accordingly –

- (a) no person shall be subjected to torture or to inhuman or degrading treatment

The right to be free from torture, cruel and inhuman treatment or punishment is linked to the right to the dignity of the human person under the Nigerian Constitution. In the case of *Alhaji Abibatu Mogaji v Board of Customs & Excise*,<sup>1867</sup> Adefarasin C.J.<sup>1868</sup> declared that the raid carried out under brutal circumstances by customs officers in a Lagos market using guns, horse whips, and teargas to make arbitrary seizure of goods, thereby causing injuries to the custodians of those goods, was “illegal and amounted to inhuman and degrading treatment.”<sup>1869</sup>

Again in *Peter Niemi v Attorney General of Lagos State and Another*,<sup>1870</sup> the Court of Appeal held *obiter* that a convicted prisoner awaiting execution retains the right to be treated with dignity.<sup>1871</sup> As such, he may not be deprived of food or medical treatment where such is necessary. However, in *Kalu Onuoha v The State*,<sup>1872</sup> it was held that the constitutional provision guaranteeing the right to freedom from torture, inhuman and degrading treatment and the right to life, could not be read so as to render nugatory the express constitutional permission of the death penalty.<sup>1873</sup>

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<sup>1866</sup> See Chenwi *supra* n 1297 200-210.

<sup>1867</sup> (1982) 3 NSLR, 552.

<sup>1868</sup> As he then was.

<sup>1869</sup> At 561-562. See also *Rasak Osayide v Joyce Amadin* (2001) 1 CHR 459 and *Alabo v Boyles* (1984) 3 NCLR 830, where the court held that beating, pushing and submerging a person's head in a pool of water constituted inhuman treatment.

<sup>1870</sup> (1996) 6 NWLR 587.

<sup>1871</sup> At 596.

<sup>1872</sup> (1998) 13 NWLR 531.

<sup>1873</sup> At 556.

In that case, the appellant was convicted of murder by the High Court of Lagos State, and sentenced to death pursuant to the provision of section 319(1) of the Criminal Code. After an unsuccessful appeal to the Court of Appeal, the appellant further appealed to the Supreme Court.<sup>1874</sup> In the Supreme Court, the appellant raised the constitutionality of the death penalty as a mandatory punishment for the offence of murder in Nigeria. The question raised was whether the provisions of section 319(1) of the Criminal Code which prescribes the death penalty in relation to the offence of murder was not contrary to and inconsistent with section 31(1)(a) of the 1979 Constitution and therefore unconstitutional.<sup>1875</sup>

Although section 31(1)(a) prohibited torture, inhuman or degrading treatment, the Supreme Court was of the opinion that the right to life provision<sup>1876</sup> was a relevant provision in determining whether the death penalty was a constitutionally valid and recognised form of punishment in Nigeria.<sup>1877</sup> The Supreme Court used the word “save” as the key to construing the right to life provision. The court noted that although the right to life was fully guaranteed under the Constitution, it was nevertheless subject to the execution of a death sentence of a court of law in respect of a criminal offence of which one was found guilty in Nigeria.<sup>1878</sup>

It is significant to note that although there is no qualification, derogation, or limitation to the right spelt out under section 34(1)(a) of the Constitution,<sup>1879</sup> the crucial words “cruel” and “punishment,” often attached to situations of torture in most, if not in all human rights instruments,<sup>1880</sup> are missing from the Nigerian constitutional provision. It may therefore be asked whether this is because cruelty is not recognized under Nigerian law, or because there is no clear difference between the terms “treatment”

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<sup>1874</sup> At 534.

<sup>1875</sup> *Idem* 575 & 585.

<sup>1876</sup> S 30(1).

<sup>1877</sup> *Idem* 587.

<sup>1878</sup> *Idem* 537 & 587. The court looked at the jurisprudence from other jurisdictions like India, (*Bacan Singh v State of Punjab* (1983), Tanzania (*Mbushuu*) (1994) and South Africa (*Makwanyane*) (1995) on the question of the death penalty in relation to the right to life. These showed that if the right to life provision is qualified, the death penalty was in most of the decisions held to be constitutional; if unqualified, the death penalty was held to be unconstitutional. The court concluded that the right to life under section 30(1) of the 1979 Constitution was clearly a qualified right, and thus the death penalty could not be said to be inconsistent with the Constitution. See 544, 551 & 593.

<sup>1879</sup> le the right to be free from torture, cruel, or inhuman treatment or punishment.

<sup>1880</sup> See the UDHR art 5; the ICCPR art 7; and the ACHR, art 5(2).

and “punishment” under that law?<sup>1881</sup> Perhaps, the draftsmen of the Constitution considered that the two terms convey one and the same meaning and that it would be tautological to provide for “cruel treatment or punishment” in the Constitution which means the same thing.

Be that as it may, the right to be free from torture and its allied vices stands out as a shield against the physical, mental and spiritual dehumanization of the individual.<sup>1882</sup> Its breach is also considered to be a breach of *jus cogens*,<sup>1883</sup> and is condemned by the international community. Often, states will hardly hesitate in taking diplomatic actions in the protection of their nationals tortured or cruelly treated or punished by other states.<sup>1884</sup>

### **13.3 Right to be free from discrimination**

Section 42(1) of the 1999 Constitution provides that

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person -

- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria, or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject, or
- (b) be accorded either expressly by, or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other

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<sup>1881</sup> See Chenwi *supra* n 1235 106 for a discussion of this problem in the constitutions of other countries.

<sup>1882</sup> See Jayawickrama *supra* n 149 298.

<sup>1883</sup> See the case of *Filartiga v Pena Irela supra* n 136 169 where the US Court of Appeals held *inter alia* that “In light of the universal condemnation of torture in numerous international instruments, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world the prohibition is clear and unambiguous and admits of no distinction between treatment of aliens and citizens.” Jayawickrama *supra* n 149 299 maintains that the right to freedom from torture has attained the status of a peremptory norm of International law.”

<sup>1884</sup> The torture and assassination of Archduke Ferdinand in 1914 by the Serbians brought about the First World War. See Rehman *supra* n 28 444.

communities, ethnic groups, places of origin, sex, religions or political opinions.

A point to note, however, is that while sections 33 and 34 of the Constitution speak in all-embracing terms like “every person,” “no one,” or “every individual,” as the case may be, section 42(1) is very specific, and speaks in terms of “a citizen of Nigeria.” The question is whether the provisions of section 42(1) apply only to Nigerians in Nigeria, or whether aliens are also included and protected under this provision? Can it seriously be contended that this provision was deliberate, or that there was an obvious or unavoidable oversight on the part of the drafters of the Constitution in not employing an umbrella phrase like “no one” shall be discriminated against in Nigeria in the construction of that provision.?

It is however submitted that since the Nigerian Constitution was made by Nigerians for Nigerians, the truth remains that the drafters of the Constitution were more concerned with the problem of tribalism, which is endemic in Nigeria, than in solving racial disputes or anomalies. In spite of this lapse however, it is submitted that aliens are also protected from discrimination in Nigeria. Where aliens are affected, reliance can always be placed on the international conventions against discrimination of which Nigeria is a signatory.

Be that as it may, it was held in the case of *Adamu v Attorney General Borno State*<sup>1885</sup> that the right to non-discrimination on the basis of religion was breached where a local authority undertook the cost of providing Islamic religious studies, while leaving parents to bear the cost of providing Christian religious studies. Again in *Mojekwu v Mojekwu*<sup>1886</sup> the Igbo<sup>1887</sup> customary law disentitling a female from sharing in her father’s estate, was held to be discriminatory, unconstitutional and, therefore, could not be enforced.<sup>1888</sup>

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<sup>1885</sup> (1996) 8 NWLR 17.

<sup>1886</sup> (1997) 7 NWLR 403.

<sup>1887</sup> A Nigerian tribe.

<sup>1888</sup> See also *Gladys Ada Ukeje v Lois Chituru Ukeje & Enyinnaya Lazarus Ukeje* [2001] 27 WRN 142.

The right to freedom from discrimination was also the subject for determination in *Muojekwu v Ejikeme*.<sup>1889</sup> It was decided that a rule of custom that requires a rite to make a female child become a male in order to sustain the lineage along male lines and to enable her to inherit her father's estate, sustains discrimination against women, and therefore violates their human dignity.<sup>1890</sup>

Furthermore, it was held in *Alajemba Uke v Albert Iro*<sup>1891</sup> that any law or custom which sought to relegate women to the status of second-class citizens was unconstitutional.<sup>1892</sup> It was further held that a custom which precludes women from being sued or being called upon to give evidence in relation to land subject to customary rights of occupancy was unconstitutional.<sup>1893</sup>

The relationship between the right to be free from discrimination and the exercise of diplomatic protection is close. As already pointed out, discrimination is one of the greatest problems faced by aliens in foreign lands. Where aliens are involved, and where it affects a vast majority of a particular nationality, if such discrimination is government-sponsored, this is likely to trigger the exercise of diplomatic protection by the state of nationality of the affected aliens.<sup>1894</sup>

## 14 Right to own private property in Nigeria

The violation of the right of an alien to property has often triggered the exercise of diplomatic protection by states.<sup>1895</sup> Private property includes both physical objects and certain abstract entities.<sup>1896</sup> The question for determination, however, is whether Nigerian law makes provision for the ownership of private immovable property by nationals and foreigners in Nigeria, and if so, whether the ownership of such private property is respected by the Nigerian Government and constitutionally protected.

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<sup>1889</sup> [2000] 5 NWLR 403.

<sup>1890</sup> At 425.

<sup>1891</sup> [2001] 17 WRN 172.

<sup>1892</sup> At 182.

<sup>1893</sup> *Idem* 185.

<sup>1894</sup> During the Entebbe raid for instance, the Israeli passengers were separated from passengers of other nationalities and confined. This prompted the Israeli Commandos to strike. See "Operation Thunderbolt" *supra* n 1492.

<sup>1895</sup> E.g. the diplomatic protection exercised by Belgium against Spain over the shares in the Barcelona Traction company. See *Barcelona Traction case supra* n 26.



Under the Nigerian Constitution, ownership of private immovable property is dealt with under section 43. Like section 42 of the Constitution, section 43 provides that every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.

It would appear that this provision, like section 42, does not have foreigners in mind. Nevertheless, it is pertinent to point out that this particular provision is in apparent contradiction with the provisions of the Land Use Act, 1978. The Land Use Act vests all land in Nigeria in the Governor of each state, to hold same in trust for all Nigerians. The section provides

Subject to the provisions of this [Act] all lands comprised in the territory of each state in the Federation are hereby vested in the Governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this [Act]

Under this law, no individual can own land in Nigeria. He or she is entitled to a right of occupancy only.<sup>1897</sup> A right of occupancy can either be statutory<sup>1898</sup> or customary.<sup>1899</sup> No alienation of a right of occupancy can be made without the consent of the Governor.<sup>1900</sup> The Governor can revoke a right of occupancy for “overriding public interest.”<sup>1901</sup> Where that happens, compensation must be paid for “unexhausted improvements” on the land.<sup>1902</sup> This is in conformity with section 44 of the Constitution which provides that

No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property

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<sup>1896</sup> Eg shares in companies, debts and intellectual property.

<sup>1897</sup> See s 5 of the Act. In spite of this apparent contradiction, the Land Use Act was entrenched into the Constitution. Section 274 (5) of the 1999 Constitution provides that nothing in the Constitution shall invalidate the Land Use Act, and that its provisions shall continue to apply and have full effect as provision forming part of the Constitution. It provides further that the Land Use Act shall not be altered or repealed except in accordance with the provisions of s 9 of the Constitution S 9 deals with the mode of amending or altering the Constitution itself.

<sup>1898</sup> The Land Use Act s 5(1).

<sup>1899</sup> *Idem* S 6.

<sup>1900</sup> S 22 & 23.

<sup>1901</sup> The Land Use Act s 28(1).

<sup>1902</sup> *Idem* s 29.

shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that among other things –

- (a) requires the prompt payment of compensation thereof, and
- (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

In *A-G v Aideyan*<sup>1903</sup> for instance, the Government of Bendel State of Nigeria<sup>1904</sup> acquired the property of the respondent for public purposes, to wit, office premises. The respondent subsequently sued the state government claiming a declaration that the said acquisition of his property was null and void. He also applied for an injunction to restrain the government from acquiring the property, and claimed special and general damages for the acquisition.<sup>1905</sup>

At the trial, counsel for Bendel State government contended that the court had no jurisdiction to entertain the suit because the respondent's property was acquired under the Public Lands Acquisition Act,<sup>1906</sup> the provision of which ousted the jurisdiction of the court. It was discovered, however, that this law came into force after the acquisition of the property in question.<sup>1907</sup> The trial judge therefore declared the acquisition illegal, null and void and awarded damages against the state government.

Dissatisfied, the state Government appealed to the Court of Appeal, but the court dismissed the appeal with costs.<sup>1908</sup> This decision was upheld by the Supreme Court. It was held that the right to property in Nigeria was entrenched under the Constitution, and that, that right was inviolate. Therefore, such property or any right attendant thereto can only be taken possession of or compulsorily acquired by or under the provisions of a law. Furthermore, such a law must provide for the payment of adequate compensation to the owner. It must give him or her the right of access to

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<sup>1903</sup> (1989) 4 NWLR 646.

<sup>1904</sup> Now Edo State of Nigeria.

<sup>1905</sup> At 648.

<sup>1906</sup> Act 33 of 1976.

<sup>1907</sup> At 650

a High Court for the determination of his or her interest in the property and the amount of compensation due to him or her. It followed, therefore, that any purported acquisition not in accordance with a law containing the above provisions, was no acquisition at all.<sup>1909</sup>

The right against compulsory acquisition of movable property or any interest in an immovable property in Nigeria applies only where there is no law regulating the acquisition.<sup>1910</sup> Where there is such a law, the section will justify the taking of possession of any property compulsorily for purposes of enforcing rights and obligations arising out of contracts, or for purposes of investigation.<sup>1911</sup>

Thus, in *Ikem v Nwogwugwu*,<sup>1912</sup> the appellant who had defaulted on his payments on a series of overdraft facilities granted to him by the respondent Bank, applied for a further overdraft facility, which was secured with his Peugeot 505 Saloon car. He again defaulted on his payments. The Bank then demanded of him to produce collateral for the purpose of giving effect to the bank guarantee. On receiving information that the appellant was about to remove the car from the agreed place of custody, the respondent Bank impounded the car with the help of the police.

Aggrieved by the procedure adopted by the respondents to take possession of the car, the appellant sued the respondents seeking, *inter alia*, an order declaring the seizure, possession and acquisition of the car by the respondents unconstitutional and, therefore, an infringement of his fundamental human rights in terms of section 44(2) of the Constitution.<sup>1913</sup> It was held that the existence of a contract between the appellant and the respondent created rights and obligations between the parties. It then followed naturally that the enjoyment of his interest in the property<sup>1914</sup> could lawfully be tampered with.<sup>1915</sup>

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<sup>1908</sup> Appeal No CA/B/ 81/85.

<sup>1909</sup> At 667.

<sup>1910</sup> See the case of *Ikem v Nwogwugwu* [1999] 13 NWLR 140.

<sup>1911</sup> See the Land Use Act s 29.

<sup>1912</sup> *Supra* n 1907 140.

<sup>1913</sup> At 142.

<sup>1914</sup> At 160.

<sup>1915</sup> *Ibid*

The question whether foreigners can hold land or immovable property in Nigeria, and if so, whether the interest in such private immovable property can be diplomatically protected still lingers. The answer, however, is that as far as foreigners are concerned, by virtue of section 43 of the Constitution, the right to own property in Nigeria is debatable.<sup>1916</sup> Apart from the fact that the provisions of sections 1 and 5 of the Land Use Act apparently contradict the provision of section 43 of the Constitution, the acquisition of land in Nigeria is mainly governed by customary law.<sup>1917</sup>

Under Nigerian customary law, land tenure is usufructory<sup>1918</sup> in nature. Land cannot be owned absolutely, but can only be used.<sup>1919</sup> Therefore, land can never be given away absolutely because alienation of land is forbidden.<sup>1920</sup> Ownership of land is vested in the family, the village and the community, and not in any individual.<sup>1921</sup> No member of the family or community can alienate land without the consent of the family or community.<sup>1922</sup> Any alienation without consent gives rise to forfeiture.<sup>1923</sup>

Under the Land Use Act, ownership of land in the urban areas is vested in the Governor of each State to be held in trust and for the benefit of all Nigerians.<sup>1924</sup> Ownership of land in the rural areas is vested in the local government.<sup>1925</sup> However, the Governor can grant statutory rights of occupancy to any person for any purpose,<sup>1926</sup> while the local government is also empowered to grant customary rights of occupancy to any Nigerian. The combined effect of these customary and statutory laws concerning the ownership of land is to deny any person the right of absolute ownership of land, because the rule is *nemo dat quod non habet*.<sup>1927</sup>

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<sup>1916</sup> See eg Jemide *supra* n 173 .

<sup>1917</sup> Which scope has been widened over the years through contact with the Europeans, the received English law and the Land Use Act 1978. See Okon *supra* n 171 206.

<sup>1918</sup> See Elias *Nigerian Land Law* (1971) 115.

<sup>1919</sup> *Ibid.*

<sup>1920</sup> *Ibid.*

<sup>1921</sup> See the case of *Amodu Tijani v Secretary Southern Nigeria* *supra* n 170 399.

<sup>1922</sup> *Ibid.*

<sup>1923</sup> *Ibid.*

<sup>1924</sup> See the Land Use Act 1978 s 1.

<sup>1925</sup> *Idem* s 2.

<sup>1926</sup> *Idem* s.5.

<sup>1927</sup> Meaning that you cannot give what you have not got.

Leasehold interest or tenancy is however allowed in Nigeria. Thus an alien can acquire a leasehold interest in property in Nigeria.<sup>1928</sup> That interest is protected under section 44 of the Constitution.<sup>1929</sup> The conclusion therefore is that aliens are not discriminated against as far as property rights in the country are concerned, because under the law, nobody can own land absolutely in Nigeria.

## 15 Procedural rights

### 15.1 *The Right to fair trial/fair hearing in Nigeria*

Diplomatic protection can be exercised not only in respect of substantive rights, but also where procedural rights are violated. In *Chattin's Claim*,<sup>1930</sup> for example, it was held that the denial of the right to a fair hearing to an American national by Mexico was enough ground for the exercise of diplomatic protection by the US on his behalf.

As already indicated, procedural rights are those rights which ensure the preservation of substantive rights.<sup>1931</sup> They include the right to a fair hearing/trial, the right to access to courts, *et cetera*.

Section 36 of the Nigerian Constitution declares that

a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.<sup>1932</sup>

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<sup>1928</sup> This can be done by using English Conveyancing format to convey the land. See the case of *Balogun v Oshodi* (1929) 10 NLR 36.

<sup>1929</sup> 'No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that among other things –

(a) requires the prompt payment of compensation therefore ; and

(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

<sup>1930</sup> *Supra* n 32.

<sup>1931</sup> See *supra* n 1306.

<sup>1932</sup> S. 36(1).

The Supreme Court of Nigeria has held, in a plethora of cases,<sup>1933</sup> that the concept of “fair hearing” as used in the Nigerian Constitution encompasses the concept of natural justice in the narrow technical sense of the twin pillars of justice – *audi alteram partem* and *nemo iudex in sua causa* as well as in the broad sense of what is not only right, but is fair to all.<sup>1934</sup> In the case of *Ori-Oge v Attorney General for Ondo State*<sup>1935</sup> for instance, the court gave a succinct interpretation of this Latin phrase when it said that

Natural justice implies two cardinal principles – namely that no person shall be condemned unheard, and that none shall be a judge in his own cause<sup>1936</sup>

This requirement must be complied with in any adjudication between people. The result of non compliance with or breach of the fair hearing/trial requirement in Nigeria is to vitiate such proceedings, with the overall effect of rendering same null and void.<sup>1937</sup>

Thus in *Ika Local Govt Area v Mba*<sup>1938</sup> the plaintiff sued the defendant in the High Court of Akwa Ibom State claiming the sum of N 295,000.00 being the total sum of the three contracts awarded to him by the defendant. The plaintiff applied to the court to set down the matter in the undefended roll. The matter was then adjourned for hearing. On the day of the hearing, the defendant brought an application for an extension of time within which to enter appearance and file a statement of defence. The trial court, however, dismissed the application and entered judgment for the plaintiff.

On appeal, the appellant contended that he was denied the right to a fair hearing by the trial court and that he was excluded from the case by the refusal of the trial court to grant its application for extension of time. The Court of Appeal unanimously allowed

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<sup>1933</sup> See eg *Bill Construction Co. v I & S/s.T. Ltd* (2007) 7 WRN 152; *UBA Plc v Okonkwo* (2004) 5 NWLR 445.; *Josiah v The State* (1985) 1 NWLR 125; *Ika Local Gov. Area v Mba supra*; *Leaders & Co Ltd. v Kusamotu* (2004) 4 NWLR 519; *Jonason Triangle Ltd v C.M.& Partners Ltd, (1999)*, 1 NWLR 555, and *Nigeria-Arab Bank Ltd. v Comex. (1999)* 6 NWLR 648.

<sup>1934</sup> Per Nnaemeka-Agu JSC in *Kotoye v C BN* (1989) 1 NWLR 419 444.

<sup>1935</sup> (1982) 3 NCLR 743.

<sup>1936</sup> At 752.

<sup>1937</sup> *Ika Local Gov. Area v Mba supra* n 197.

<sup>1938</sup> *Ibid.*

the appeal on the basis that by excluding the appellant, the fair hearing provision of the Constitution was breached by the trial court.<sup>1939</sup>

Again in *Josiah v The State*,<sup>1940</sup> the accused was charged along with two others for armed robbery and murder, both capital offences punishable by death. The two others were represented by counsel and were discharged on the basis of a no case submission by their counsel. The accused was not represented. He gave evidence in his defence and was cross examined. The judge had earlier recorded that “the rights of the accused are explained to him.” He was convicted of the charges and sentenced to death by hanging.

On appeal, the Court of Appeal dismissed his appeal. On further appeal to the Supreme Court of Nigeria, it was held that the appellant did not have a fair trial as enjoined by the Nigerian Constitution.<sup>1941</sup> A retrial was, however, ordered in view of the circumstances of the case and in the interest of justice.<sup>1942</sup>

It must be pointed out, however, that the principle of *audi alteram partem* enshrined in the constitutional provision of fair hearing in Nigeria does not confer on a party an absolute right to be heard in all circumstances. It only confers on the party a right to be given the opportunity to be heard. If he or she does not avail him or herself of the opportunity, he or she cannot thereafter complain of a breach of his or her right to fair a hearing.<sup>1943</sup>

The importance of this right to foreigners is underscored by the fact that both the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, and the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families emphasise the need for aliens who are lawfully in other countries to be granted due process of law before they are

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<sup>1939</sup> At 704 par. E-H.

<sup>1940</sup> (1985) 1 NWLR 125.

<sup>1941</sup> At 140.

<sup>1942</sup> Per Oputa JSC “Justice is not a one - way traffic. It is not justice for the appellant alone. Justice is not even a two-way traffic. It is a three way traffic – justice for the appellant, accused of a heinous crime, justice for the victim whose blood is crying to heaven for revenge, and justice for the society at large whose social norms and values had been desecrated by the criminal act”.

<sup>1943</sup> See *Jonanson Triangle Ltd v CM & Partners Ltd supra* and *Leaders & Co. Ltd v Kusamouutu supra* n 1930.

expelled.<sup>1944</sup> A breach of this right may *ipso facto* trigger the exercise of diplomatic protection. Aspects of the right to a fair hearing discussed will include the presumption of innocence, and the right to be tried within a reasonable time.

#### 15.1.1 Presumption of innocence

Section 36(5) of the 1999 Nigerian Constitution guarantees the right to be presumed innocent. The section stipulates that every person who is charged with a crime must be presumed innocent until he or she is proven guilty. It is both the constitutional duty imposed upon the court and the right conferred on the accused by the Constitution to ensure the purity of criminal justice in Nigeria and to ensure that the presumption of innocence of the accused is maintained inviolate.<sup>1945</sup>

Accordingly, even where the breach of this right is not raised by the accused or his or her counsel, it should be taken up by the Court as any proceeding subsequent to the violation of this right and constitutional duty is void.<sup>1946</sup> In *Ohuka v The State (No. 2)*<sup>1947</sup> the appellants along with three others were arraigned before the Court for the offence of murder. The case for the prosecution was that the deceased and all the accused were together at a drinking party where the deceased was last seen alive. The police conducted an investigation and found different parts of the deceased's body in different places under the control of the fourth and fifth accused persons. Counsel for the accused made no case submissions on behalf of the accused persons. The trial judge overruled the no case submissions and called upon the accused to defend themselves. They refused. They were found guilty and sentenced to death.

Dissatisfied, the accused appealed to the Court of Appeal which dismissed their appeal. They, however, succeeded in a further appeal to the Supreme Court where it was held *inter alia* that evidence that an accused person had an opportunity to commit the offence with which he or she is charged will not suffice to ground a ruling that the accused has a case to answer.<sup>1948</sup> Apart from evidence of the opportunity to

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<sup>1944</sup> Art 22.

<sup>1945</sup> See *Okoro v The State* (1988) 5 NWLR 259.

<sup>1946</sup> See *Alaba v The State* (1993) 9 SCNJ 109.

<sup>1947</sup> (1988) 1 NWLR539

<sup>1948</sup> At 545.



commit the offence, there was no other evidence implicating the appellants in the crime in question. It was, therefore, held that the trial judge was wrong to have overruled their no case submission.<sup>1949</sup>

By virtue of the provisions of section 33(5) of the Nigerian Constitution, an accused person is presumed to be innocent until proved guilty.<sup>1950</sup> If such prejudices exist against citizens in their own countries, one can then imagine the ordeal often faced by individuals who are not nationals of the countries where they live, who are charged with criminal offences. It is very likely that if this right is breached with impunity, and is not handled with care, it may attract the exercise of diplomatic protection by a state of nationality on behalf of their affected victims.

#### 15.1.2 *Right to be tried within a reasonable time*

In accordance with the provisions of section 35(1)(c) of the 1999 Constitution, any person who is arrested or detained shall be brought before a court of competent jurisdiction within a reasonable time.<sup>1951</sup> In *Ekang v The State*<sup>1952</sup> it was held that what is “reasonable time”<sup>1953</sup> depends on the circumstances of each particular case.<sup>1954</sup> These include the place or country where the trial takes place and the resources and infrastructure available to the appropriate organ of government in the country.

In *Ekang v The State*<sup>1955</sup> the court stated further that the demand for a speedy trial that has no regard to the peculiar conditions or circumstances in Nigeria would be unrealistic and would be worse than an unreasonable delay in the trial itself.<sup>1956</sup> It

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<sup>1949</sup> At 557.

<sup>1950</sup> Again in *Adegbite v COP* [2006] 13 NWLR 252 it was held that since an accused person is presumed to be innocent under the law, the onus rests with the prosecution to show that the accused person should not be granted bail. See also the cases of *Ifejerika v The State* (1999) 4 NWLR (Pt. 583) 59; *Aroyewun v COP* (2004) 6 NWLR (Pt. 899) 414; *Ugbenyovwe v State* (2004) 12 NWLR 626; *Umana v Attah* (2004) 7 NWLR 63; *Musa v COP* (2004) 9 NWLR 483. *Osakwe v FGN* (2004) 14 NWLR (Pt 893) 305; *Ikhazuagbe v COP* (2004) 7 NWLR 346, and *Odo v COP* (2004) 8 NWLR 46.

<sup>1951</sup> *Adegbite v COP supra* n 1947.

<sup>1952</sup> [2000] 20 WRN 30.

<sup>1953</sup> In relation to the question of whether or not an accused has had a fair trial

<sup>1954</sup> At 45.

<sup>1955</sup> *Supra* n 1954 1

<sup>1956</sup> It is submitted that for the concept of “trial within a reasonable time” to be meaningful, time should start to run from the period the accused is arrested and charged not when he or she is taken to court.

added that it is not enough for an accused to show that there was an unreasonable delay in his or her trial. He or she must go further to show that the unreasonable delay has occasioned a miscarriage of justice.<sup>1957</sup>

Thus, in *Godspower Asakitikpi v The State*,<sup>1958</sup> the court distinguished between delay in bringing the accused to court and the right of the accused to be tried within a reasonable time. In that case, although the accused was arraigned before a High Court and taken to court eighteen times, no plea was filed. It was held that his trial period began to run only after the charge was read and explained to him and only then was his plea filed.<sup>1959</sup> The period prior to the trial was not computed in determining the delay. This was outrageous. As was held in the oft-cited *Chattin's Claim*,<sup>1960</sup> an unreasonable delay in the trial of an accused person can vitiate justice. Just as the US relied on that ground in her suit against Mexico in the exercise of diplomatic protection, so can any state whose national is subjected to an unreasonable delay in his or her trial in another state succeed in its quest for diplomatic protection because justice delayed is justice denied.<sup>1961</sup>

## 16 Enforcement of fundamental human rights in Nigeria

Section 46 of the 1999 Constitution provides for the special jurisdiction of the High Court in the enforcement of fundamental human rights in Nigeria. The section provides that

any person who alleges that any of the provisions of the Chapter dealing with fundamental rights has been, is being or likely to be contravened in any State in relation to him, may apply to any High Court in that State for redress.

It should be noted that, unlike the provision pertaining to immovable property in Nigeria, it is comforting that this provision speaks of “any person.” which is all-embracing and, by implication, includes both nationals and non nationals alike.

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<sup>1957</sup> See also *Effiom v The State* ((1995) 1 NWLR 507.

<sup>1958</sup> (1993) 6 SCNJ 201.

<sup>1959</sup> The same decision was reached in the South African case of *Coetzee v Attorney General Kwazulu-Natal* 1997 (1) SACR 546.

<sup>1960</sup> *Supra* n 32.

Section 46(3) empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court for purposes of this section.<sup>1962</sup>

In the case of *Jack v Unam*,<sup>1963</sup> it was held that both the Federal High Court and the High Court of a State have concurrent jurisdiction in matters of the enforcement of a person's fundamental rights. An application may, therefore, be made either to the judicial division of the Federal High Court in the State, or the High Court of the State in which the breach of the fundamental right occurred, is occurring or is about to occur.<sup>1964</sup> The process of enforcement of fundamental rights is commenced by an application made to the court:

- (a) by an *ex parte* application for leave; and
- (b) upon leave being granted, by notice of motion or originating summons for redress.

No oral evidence is called for. The application is then determined on the affidavits relied upon, as these affidavits constitute the evidence.<sup>1965</sup>

## 17 Treatment of aliens in Nigeria

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<sup>1961</sup> See the case of *R v Sussex Justices ex parte Mc Carthy* [1924] 1 KB 256.

<sup>1962</sup> See Fundamental Rights (Enforcement Procedure) Rules 1979. L N 1 of 1979 which took effect on 1980- 01- 1.

<sup>1963</sup> [2004] 5 NWLR 308.

<sup>1964</sup> See *Bronik Motors Ltd v Wema Bank Ltd. (1983) 1 SCNL 296* and *Tukur v Government of Gongola State (1989) 4 NWLR 517*.

<sup>1965</sup> At 226-227 pars H-B.

Over the years, there have been occasions where aliens have been deported from Nigeria *en mass* and where individuals have also been deported from the country for one reason or the other. Such occasions include the mass expulsion of aliens from Nigeria in 1983 and 1985,<sup>1966</sup> as will be explained below. Other occasions included the deportation from Nigeria in 1988 of one Dr. Patrick Wilmont, a British sociology lecturer at the Ahmadu Bello University Zaria (ABU), the deportation of one Firinne Ni Chreachin, an Irish national, another lecturer at the Bayero University Kano (BUK) in the same year, and the deportation of a British journalist, William Keeping, from Nigeria in 1991.<sup>1967</sup>

Concerning the expulsion of illegal aliens from Nigeria in 1983 and 1985, it can rightly be said that the problem of illegal aliens has been a perennial problem in Nigeria. Most of these illegal aliens come from other West African countries like Ghana, Mali, Chad, Togo, Benin Republic and other West African States. These illegal immigrants enter Nigeria under the cover of the Economic Community of West Africa (ECOWAS) Protocol which permits free movement within the West African sub-region.<sup>1968</sup>

However, this privilege has been grossly abused by immigrants in Nigeria over the years. Most immigrants refuse or neglect to regularize their stay, while others engage in anti- social behaviour like crimes and other social ills, thereby greatly compounding Nigeria's social problems.<sup>1969</sup> In January 1983, the Nigerian government ordered all illegal immigrants to leave the country.<sup>1970</sup> This resulted in a mass exodus of illegal immigrants from Nigeria.<sup>1971</sup>

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<sup>1966</sup> See Ankumah *supra* n 1073 140.

<sup>1967</sup> See See Nakanda "How I was deported, by Keeping" *The Guardian* 1991-07-02 1.

<sup>1968</sup> See ECOWAS Treaty of 1975 art 3(2)(d)(iii). The protocol to the treaty provides that ECOWAS citizens must regularize their stay in the country of their abode within 3 months.

<sup>1969</sup> See 'Illegal Aliens,' *Nigerian Observer* (ed) (1985) 04 26) 3. Most of these illegal immigrants are street beggars. Others are unskilled workers – cooks, drivers, watchmen, gardeners, nannies and house maids, jobs Nigerians can do.

<sup>1970</sup> See Ankumah *supra* n 1073 140.

<sup>1971</sup> Ankumah *ibid* asserts that this was one of the greatest mass expulsion of aliens from a country in the recent past.

Again in 1985, the then military administration in Nigeria issued an order expelling all illegal aliens from the country.<sup>1972</sup> In issuing that order, the ministry of Internal Affairs explained that the number of illegal aliens had reached unacceptable proportions in Nigeria and their anti-social activities had greatly crippled the economic, social and cultural life of Nigeria.<sup>1973</sup>

The Wilmont incident was yet another incident in which the Nigerian authorities expelled a foreigner without due process of law.<sup>1974</sup> Wilmont was accused of espionage, of being a spy for apartheid South Africa and an FBI agent.<sup>1975</sup> Wilmont was a sociology lecturer at ABU, Zaria. He was a British national, but was married to a Nigerian woman. He had lived in Nigeria for upwards of eighteen years, had sought Nigerian citizenship, but was refused.<sup>1976</sup> In March 1988, he was deported from Nigeria and sent back to Britain.

Wilmont, however, denied the allegations levelled against him. He maintained that his deportation was as a result of his publication *Apartheid and the African Liberation* in which he exposed the activities of some highly placed Nigerians and multilateral corporations in Nigeria who were still doing business with apartheid South Africa in spite of the UN ban.<sup>1977</sup> The deportation of Wilmont was condemned by Human Rights activist in Nigeria as “illegal, inhuman and oppressive.”<sup>1978</sup> It was said that Wilmont ought to have been arraigned before a court of law before being deported.<sup>1979</sup> The Nigerian government was therefore requested to offer a public apology to Wilmont’s wife and to revoke the deportation order.<sup>1980</sup>

The deportation of a female expatriate lecturer, Firinne Chreachin, at the Bayero University, Kano, in 1988 was another occasion in which the Nigerian government

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<sup>1972</sup> *Ibid.*

<sup>1973</sup> See “Illegal Aliens” *Nigerian Observer* (ed)1985-04-26.The expulsion of aliens from Nigeria has always been a controversial issue. While some individuals and organizations have condemned it, others have supported it.

<sup>1974</sup> See Musa “Why I was kicked out, by Wilmont.” *The Guardian* 1988-04-3 9.

<sup>1975</sup> *Ibid.*

<sup>1976</sup> *Ibid..*

<sup>1977</sup> *Ibid.*

<sup>1978</sup> See Oyenekan “FMG asked to apologize to Mrs Wilmont.” *The Mail* 1988-04-11 1.

<sup>1979</sup> *Ibid.*

<sup>1980</sup> *Ibid.*

deported a foreign national without due process of law.<sup>1981</sup> Chreachin, an Irish national, formerly married to a Nigerian Professor Adeluga, had been working in the country as a university lecturer for twenty years before her deportation.<sup>1982</sup> She was abducted from her residence at night by immigration officials, driven to Kano airport where she was put on board a London bound aircraft and deported to London. Her deportation was condemned by the local branch of the Academic Staff Union of Nigerian University (ASUU) as “not only provocative, but also a violation of the nation’s legal processes and international agreements.”<sup>1983</sup>

Another reported case of the deportation of a foreigner from Nigeria widely reported in the Press was the deportation of William Keeping, a Lagos based Correspondent of the *Financial Times* of London.<sup>1984</sup> Keeping, who published an article captioned “Concern at the use of Lagos oil windfall,” alleging the misappropriation of the oil revenue by Nigerian officials, was picked up from his office in the evening, escorted by plain-clothed State Security officials to his residence, where he was given ten minutes to pack his bag. He was then taken to the airport, put on board a waiting aircraft and deported.<sup>1985</sup> Keeping admitted that before his deportation, he was warned on a number of occasions by Nigerian officials about his misleading and provocative articles.<sup>1986</sup>

## 18 Conclusion

From the foregoing, it is clear that although there is no specific provision for diplomatic protection in the Nigerian Constitution, the right to diplomatic protection is

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<sup>1981</sup> See Zoro “Another lecturer deported.” *National Concord* 1988-04-29 16.

<sup>1982</sup> *Ibid.*

<sup>1983</sup> *Ibid.* It was earlier reported that Chreachin was deported along with Wilmont, but this proved to be false.

<sup>1984</sup> See Nakanda “How I was deported, by Keeping.” *supra* n 1945.

<sup>1985</sup> *Ibid.*

<sup>1986</sup> Particularly by the minister for finance. Mention should also be made of the interesting case of one Alhaji Shugaba Abdurrahman, the Majority leader in the Borno State House of Assembly who was deported to Chad in 1980 by the orders of the President because he was said to be a security risk. According to a Cabinet Office statement issued in Lagos, the President gave the approval for Shugaba’s deportation following recommendations made to him that Shugaba was not a Nigerian and that he constituted a security risk to the country. See Ajoni, “Govt speaks on deported legislator. Shagari okays order for security.” *The Guardian* 1980-01-30 1. Shugaba contested his deportation in court and after a prolonged battle in court, proved that he was a Nigerian. He was awarded damages against the government. See *Alhaji Shugaba Abdurrahman v Minister of Internal Affairs* (1982) 3 NCLR 915.

implied. Nevertheless the protection of fundamental human rights is clearly spelt out in the Constitution. These fundamental rights protected by the Nigerian Constitution are obviously derived from and inspired by international human rights instruments and conventions.<sup>1987</sup> Although diplomatic protection is not a human right,<sup>1988</sup> from state practice, Nigeria has illustrated that it is prepared to protect its nationals if they are injured abroad in consonance with its new policy. Though the remedy was lacking in the past, and the country's approach to certain situations in recent times can be described as "soft," this has in no way compromised the country's responsibility towards the welfare of its nationals abroad as discerned from the circumstances discussed above

As has been demonstrated above, aliens enjoy certain basic Constitutional rights and freedoms<sup>1989</sup> and are protected under Nigerian law. Nevertheless, occasions have occurred where the Nigerian government has been accused of reacting harshly towards them. It is submitted that in determining the question whether or not Nigeria has complied with its international obligation in its treatment of both nationals and aliens alike, each right discussed here must be assessed independently, based on the provisions of the Constitution.<sup>1990</sup>

In relation to the right to life, the expression used in section 33(1) of the Constitution is "every person", and "no one" shall be deprived... of his life.<sup>1991</sup> It is submitted that the protection conferred by this provision is squarely on the person or *corpus* of the individual concerned, irrespective of his or her nationality or place of origin. To that extent, it can be said that the right to life guaranteed under the Nigerian Constitution, extends to foreigners also.

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<sup>1987</sup> The ICCPR, ICESCR, etc. This is easy to determine because they draw heavily on the language and structure of these international conventions.

<sup>1988</sup> See Dugard *supra* n 57 80.

<sup>1989</sup> As in many other countries, aliens do not enjoy political rights and may not be employed in the diplomatic corp or service.

<sup>1990</sup> This is because according to the principles of statutory interpretation, where a statute or the Constitution intends to exclude, limit, or restrict the enjoyment of any right to anybody, it must do so expressly. It is called the *expressio unius* rule. On the rule governing the interpretation of the Nigerian Constitution, see the case of *Director SSS v Agbakoba supra* n 1675.

<sup>1991</sup> Although the provision does not define a person, there is no doubt that the Constitution grants that right to every person in Nigeria -citizens and non citizens alike.Unless otherwise stated, aliens in Nigeria are persons, i.e entities capable of having rights and performing certain duties.

With regard to the right to freedom from torture under section 34, the Constitution provides that “every individual” is entitled to respect for the dignity of his or her person. Accordingly, “no person” shall be subjected to torture or inhuman or degrading treatment.” Here again, the expression places no limitation whatsoever in respect of the nationality of the beneficiary of this right. It can rightly be said that this provision is all embracing and that the right not to be tortured can be invoked by both Nigerians and foreigners alike.

It is with regard to the right to be free from discrimination under section 42(1) of the Constitution and property rights under section 43 that specific mention is made of Nigerian citizenship. Even then, it is submitted that any foreigner who feels that he or she has been discriminated against because of some private or governmental action, or that his or her property rights have been infringed upon, may bring an action in court to challenge such action.

With respect to the right to a fair hearing, section 36(1) provides that “a person shall be entitled to a fair hearing....” The implication is clear. In connection with the right to presumption of innocence, section 36(5) provides that “every person charged with a criminal offence, shall be presumed innocent ...,” and in connection with the right to be tried within a reasonable time, the same principle applies. Section 36(1) stipulates that “any person” charged with a criminal offence, shall be tried within a reasonable time. The operative words are “any person,” irrespective of nationality.

A question arises as to the relationship between these designated rights and the international human rights instruments. In other words, are the Nigerian human rights norms in compliance with international human rights standard for purposes of diplomatic protection?

The answer is that Nigeria has, to a large extent, complied with international standards. Chapter 4 of the 1999 Constitution shows the clear influence of international human rights conventions. Some of its provisions are modelled on those of the ICCPR, while others are very similar to those of other major international



conventions.<sup>1992</sup> Unfortunately, however, economic, social and cultural (ECOSOC) rights are not justiciable in Nigeria despite the overwhelming need for this. Section 6(6) of the Constitution renders such rights unjusticiable.<sup>1993</sup>

That notwithstanding, the conclusion is that an alien is not left unprotected by the laws of Nigeria. The constitutional provisions satisfy the minimum standard of treatment in international law and are available to all, irrespective of nationality. However, some foreign nationals may not be aware of these rights. That is why article 3 of UNGA resolution 40/144 requires every state to make public its national legislation affecting aliens.

Nevertheless, by virtue of article 10 of that resolution/declaration, any alien shall be free to communicate with the consulate or diplomatic mission of the State of which he or she is a national or in the absence thereof, with the consulate or diplomatic mission of any other state entrusted with the diplomatic protection of the interest of the state of which he or she is a national.

This requirement is aimed at familiarising foreigners with their diplomatic officials. This will enable the missions to intervene on their behalf and assist them whenever necessary.<sup>1994</sup>

It is submitted that this process will further enhance and promote the practice of diplomatic protection in Nigeria. The time is now ripe for Nigeria to enact an Aliens Act or Law and codify the rights which aliens enjoy in Nigeria.

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<sup>1992</sup> Eg the ECHR and the ACHR.

<sup>1993</sup> As already indicated, the African Commission has made it abundantly clear that economic, social and cultural rights are justiciable. See *supra* p 259 The question is whether the non justiciability of these rights in Nigeria is a violation of the African Charter? The answer is that the decisions of the African Commission are based on resolutions declarations and case law, not on treaty law. In so far as resolutions and declarations are not binding on state parties, it is submitted that Nigeria is not in breach of the Charter.

<sup>1994</sup> Art 3(1) (b) of the VCDR provides for the protection of the nationals of the home state against harm or injury. This duty cannot be fulfilled unless the missions are aware of the problems faced by their nationals. According to Sen *supra* n 52 77 the diplomatic agent of his country is the best friend to a person who is resident abroad.

## CHAPTER SIX

### Diplomatic Protection of Human Rights in South Africa: Legal and Constitutional Issues

#### 1 Introduction

This chapter examines diplomatic protection of human rights under South African law. It seeks to determine whether there are legal or constitutional provisions under South African law guaranteeing diplomatic protection of human rights to South Africans abroad, the extent to which such legal or constitutional provisions have been invoked by South African citizens, government responses to such requests and judicial approach or attitude to the requests.

For purposes of exploring its *modus operandi* towards diplomatic protection, the state of human rights in South Africa is determined. The aim is to identify the international and regional human rights instruments binding on South Africa which have been incorporated into South African law aimed at the protection of both foreigners and South African citizens.<sup>1995</sup> The extent to which these instruments have protected the human rights of foreigners in practice, is also assessed.

The application of international law in South African municipal law is the key to determining the issue of diplomatic protection of human rights in the country. Hence, the status of international law in South African law, the method of incorporating international law into South African municipal law, the scope of diplomatic protection of human rights in South Africa, and the instruments from which this protection is derived, will be ascertained. The subject is also discussed from four main perspectives as done in the case of Nigeria; namely, from the constitutional perspective, government policy perspective, state practice and judicial perspectives.<sup>1996</sup>

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<sup>1995</sup> See ch 4 *supra*.

<sup>1996</sup> I.e from the constitutional perspective, government policy on diplomatic protection, state practice, and judicial perspectives.

## 2 The position of international law in South African municipal law

International law plays an important part in South African law.<sup>1997</sup> Not only does it form part of South African law,<sup>1998</sup> but it is also an important interpretative tool for the interpretation of the Constitution and other legislation generally,<sup>1999</sup> as well as an interpretative aid in the interpretation of the Bill of Rights in particular.<sup>2000</sup>

International law did not always play an important role in South African law.<sup>2001</sup> Although the country was a founding member of the League of Nations, she nevertheless became a progenitor of one of the most universally condemned policies of all time, the apartheid policy,<sup>2002</sup> and became a pariah nation, rejected by the international community.<sup>2003</sup> Because of this development, the entire field of public international law became polarized.<sup>2004</sup> In such a climate, Public international law became no more than a subsidiary system of law to be reasoned away.<sup>2005</sup>

With the adoption of the 1993 Constitution (commonly referred to as the Interim Constitution)<sup>2006</sup> South African law entered into a new relationship not only with Public international law, but also with the international community in general.<sup>2007</sup> The

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<sup>1997</sup> See for instance Olivier "The Status of International law in South African law: Section 231 of the 1993 Constitution." (1993 / 1994) 19 *SAYIL* 1; Devine "The relationship between International Law and Municipal Law in the light of the interim South African Constitution 1993." (1995) 44 *ICLQ* 1; Dugard "International Law and the final Constitution." (1995) 11 *SAJHR* 241; & "International Law and the South African Constitution." (1997) *EJIL* 77; Botha "International Law and the South African Interim Constitution." (1994) 9 *SAPLPR* 245, & "The coming of Age of Public International Law in South Africa." (1992/93) 18 *SAYIL* 36; Strydom "International Law and the openness of the South African Constitution." (1995) 20 *SAYIL* 222; & Keightley "Public International law and the Final Constitution." (1996) 12 *SAJHR* 405.

<sup>1998</sup> As Customary International Law under s 232 of the Constitution and as conventional law under s 231 of the Constitution.

<sup>1999</sup> See s 233.

<sup>2000</sup> S 39(1).

<sup>2001</sup> See Botha (1992/93) *supra* n 2000 36.

<sup>2002</sup> *Ibid.*

<sup>2003</sup> See GA Res 3206 XXIX of 1974-09-30 by which SA was rejected at the UN. See Botha *idem* 37.

<sup>2004</sup> Botha *ibid.* According to Olivier, the main points of criticism directed by the international community against apartheid SA were based on the country's non compliance with the norms of International Law. See Olivier *supra* n 2000 1.

<sup>2005</sup> Botha (1992/93) *supra* n 1993 37.

<sup>2006</sup> Act 200 of 1993.

<sup>2007</sup> See Olivier *supra* n 2000 12 & Botha (1992/93) *supra* n 2000 48. According to Olivier, the year 1993 presented a watershed in SA legal history, bringing an end to white minority rule and kick-starting the process of democratic transformation with the adoption of a Constitution providing for

1996 Constitution<sup>2008</sup> further affected the status of international law in South Africa by retaining certain aspects of the interim constitution, and amending others.<sup>2009</sup> In relation to diplomatic protection, the provisions regulating the status of international law under the 1996 Constitution are sections 232,<sup>2010</sup> 231,<sup>2011</sup> 233,<sup>2012</sup> and 39(1) &(2).<sup>2013</sup> These sections constitute the main focus of this discussion.

For the first time in South African constitutional history, the Constitution not only made specific mention of the term “Public international law,” but also provided for the status and role of international law constitutionally.<sup>2014</sup>

As already indicated, international law comprises mainly customary international law rules and conventional law or treaties.<sup>2015</sup> In South Africa, as in many other jurisdictions, different rules apply to the applicability of customary international law and treaties in South African municipal law. In relation to diplomatic protection, the relevance of customary international law in South African law is first examined before the relevance of international agreements or treaties to the subject is considered.<sup>2016</sup>

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a transition to a democracy. See Olivier “International Law in South African Municipal Law: Human Rights, Procedure, Policy and Practice” LLD Thesis UNISA 2002 166.

<sup>2008</sup> I.e the Constitution of the RSA 1996 adopted by the Constitutional Assembly on 8 May 1996 often referred to as the “final” Constitution. See Olivier *supra* n 1993 36; Dugard (1995) *supra* n 1993;& Keightley *supra* n 1993 416.

<sup>2009</sup> While some commentators feel that the 1996 Constitution affected the interim Constitution negatively, others think otherwise. See for instance Keightley *supra* n 2000 405. See also Dugard (1995) *supra* n 2000. It is not intended to make a comparative analysis of the differences and similarities between the interim and the final Constitutions as far as International Law is concerned. Suffice to say that references will be made to relevant provisions where and when necessary.

<sup>2010</sup> I.e the provision defining the status of Customary International Law under SA law.

<sup>2011</sup> The provisions relating to the ratification of international agreements and their incorporation into SA law.

<sup>2012</sup> The provision prescribing that International Law shall be used as an aid in the interpretation of the Constitution and other legislation.

<sup>2013</sup> Provision dealing with the interpretation of the Bill of Rights.

<sup>2014</sup> See Olivier *supra* n 2003 175 *et seq.*

<sup>2015</sup> See art 38 (1)(a) & (b) of the Statute of the ICJ. Other sources include judicial decisions, general principles of law recognized by civilized nations, and writings of renowned publicists.

<sup>2016</sup> It may be of interest to note that SA is one of the few countries in Africa that has constitutionally incorporated both Customary International Law and treaties as part of its municipal law. See Maluwa “The incorporation of international law and its interpretational role in municipal legal systems in Africa: An exploratory survey” *supra* n 1617 45. The other countries are Namibia and Malawi. Maluwa *ibid.* For a brief summary of the inter-relationship between International Law and Municipal Law and the theories commonly known as monism and dualism, see *supra* ch 5. See also Brownlie *Principles of Public International Law* (1990) 32-56.

### 3 The status of customary international law in South African municipal law<sup>2017</sup>

Section 232 of the 1996 Constitution provides that:

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

The basic characteristic of customary law is that it is unwritten.<sup>2018</sup> This unwritten factor of customary law was perhaps the *raison d' etere* behind the controversy that surrounded the applicability of customary international law in South African law prior to 1993.<sup>2019</sup>

Two schools of thought emerged as a result of that controversy. The first school was led by Dugard who was of the view that customary international law was part of South African law and that the courts were obliged to apply it when and where necessary.<sup>2020</sup> The other school was championed by Booysen,<sup>2021</sup> who argued that customary international law was not part of South African law, but only a source of law available to courts in appropriate cases.<sup>2022</sup> Despite the clear provisions of the

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<sup>2017</sup> See eg Olivier (1993/1994) *supra* n 2000 11. Botha (1992/93) *supra* n 2000 41-42, 46-47; Keightley (1996) *supra* n 2000 406-408; Sanders "The applicability of Customary International Law in Municipal Law- South Africa's monist tradition" (1977) *THRHR* 369 & "The applicability of Customary International Law in Municipal Law -South Africa's monist tradition: The Appeal Court has spoken." (1978) *CILSA* 198. See also Devine "What customary international law is part of South African law?" (1987-88) *SAYIL* 19; Scaffer "The interrelationship between Public International Law and the law of South Africa: An Overview." (1983) *ICLQ* 277; & Booysen "Jurisdiction to try abducted persons and the application of international law in South African law." (1990/91) 17 *SAYIL* 133.

<sup>2018</sup> Customary international law comprises usages regarded as legally binding on states by the majority of the international community. The two ingredients necessary for the formation of customary international law are: (a) state practice and (b) *opinio juris*. See the *Asylum* case *supra* n 1491.

<sup>2019</sup> See Botha (1992/93) *supra* n 2000 41. See also Mubangizi *supra* n 282 45. The controversy was further fuelled by SA's persistent objection to the application of customary international law in its territory. See Botha (1992/93) *supra* n 2000 38; Olivier (1993/1994) *supra* n 2000 14; Dugard (1997) *supra* n 1993 248. The courts also refused to apply International Human Rights rules such as the UDHR. See Dugard "The role of International Law in interpreting the Bill of Rights." (1994) 10 *SAJHR* 208 209.

<sup>2020</sup> Dugard (1997) *supra* n 1993 77. O'Shea also belonged to this school See Mubangizi *supra* n 282 45. The following cases supported this proposition *Nduli v Minister of Justice* 1978 (1) SA 89; *Interscience Research and Development Services v Republic Popular DeMocambique* 1980 (2) SA 111 (T); and *Kaffraria Properties v Government of the Republic of Zambia* 1989 (2) SA 709 See also *South Atlantic Islands Development Corporation v Buchan* 1971 (1) SA 234 (C).

<sup>2021</sup> See Booysen *Volkereg en sy verbouding tot die Suid-Afrikaanse reg* (2ed 1980) 433.

<sup>2022</sup> Botha was also of this school of thought. See Mubangizi *supra* n 282 45.

interim Constitution on this subject, the controversy raged on.<sup>2023</sup> The controversy was finally laid to rest by the provisions of section 232 of the 1996 Constitution,<sup>2024</sup>.

Thus, the interpretation of section 232 of the Constitution has given authority to the doctrine that in South Africa, customary international law is “part of the law of the land.”<sup>2025</sup> Maluwa has, however, pointed out that this constitutional provision is virtually unparalleled in Africa at least in so far as the status of customary international law is concerned.<sup>2026</sup> This doctrine means that the courts are bound to apply customary international law whether or not it is raised before them.<sup>2027</sup>

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<sup>2023</sup> The 1993 Constitution s 231(4) provided that the rule of Customary International Law binding on the Republic shall, unless inconsistent with the Constitution or an Act of Parliament form part of the law of South Africa. The bone of contention however was the particular rules of Customary International Law binding on the Republic. See Devine (1987/88) *supra* n 2013. Olivier who was part of the drafting team tried to resolve this controversy when she declared that the aim of section s 231(4) was to make Customary International Law part of the law of the land. See Olivier (1993/1994) *supra* n 1995 11.

<sup>2024</sup> Under this section, the application of customary international law in SA is subject to two qualifications:

(a) it must not be inconsistent with the Constitution, and (b) it must not be inconsistent with an Act of Parliament. Keightley has however pointed out that while the final constitution introduces no major changes to the interim constitution regarding Customary International Law, there are at least two points worth noting about section 232 of the 1996 Constitution. First, in subjecting customary international law to Acts of Parliament in cases of conflict or inconsistencies between the two, the final constitution draws no distinction between Acts passed after the advent of the new constitutional dispensation in South Africa in 1994, and those passed by the previous government. Secondly, the omission of the word “binding” from section 232 of the final Constitution implies that all rules of customary international law form part of South African law regardless of whether such rules were previously accepted as binding on South Africa or not.

<sup>2025</sup> See Olivier *supra* n 2000 11. See also Booysen “The Administrative Law implication of the ‘customary law is part of the South African law’ doctrine.” (1997) 22 *SAYIL* 46 where he opines that the doctrine that Customary International Law is part of the law of SA is not only incorrect in law, but is so sweeping that it has no legal foundation either in theory or in practice. Botha (1992/93) *supra* n 1995 46 on the other hand says that the nominal claim that customary international law is part of the law of SA is subject to so many exceptions that it has become but meaningless.

<sup>2026</sup> Maluwa “International human rights norms and the South African Interim Constitution 1993” (1993/1994) 19 *SAYIL* 14 45.

<sup>2027</sup> Writing with reference to customary law in the SA Constitution, Dugard observed that “section 232 is not a complete statement on the subject of Customary International Law in South Africa. It will be necessary to turn to judicial precedent to decide which rules of Customary International Law are to be applied and how they are to be proved. Since International Law is not foreign law, courts may take judicial notice of it as if it were part of our common law. In practice, this means that courts turn to the judicial decisions of international tribunals and domestic courts both South African and foreign and to International Law treaties for guidance as to whether or not a particular rule has been accepted as a rule of Customary International Law on the grounds that it meets the twin applications of *usus* and *opinio juris*.” See Dugard *supra* n 1 36.

With regard to the standard of proof, it was held in *S v Petane*<sup>2028</sup> that for South African courts to consider the incorporation of a customary international law norm, the customary international law norm must be widely accepted. Nevertheless, the entire *corpus* of customary international law has now been accepted as part of the law of the land in South Africa.<sup>2029</sup>

Since section 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament, the implication is that diplomatic protection is also part of the law of South Africa, because diplomatic protection operates at the customary international law level.<sup>2030</sup> In the absence of any proof of inconsistency, diplomatic protection must be regarded as part of the law of South Africa. As a result, it is not imperative to incorporate it specifically into South African law.

#### **4 Incorporation of international agreements into South African municipal law**

The starting point in determining how international agreements are dealt with under South African law and practice under the new democratic dispensation is section 231 of the 1996 Constitution.<sup>2031</sup> Section 231(1) - (3) lays down the procedures governing domestic negotiation, approval and conclusion of international agreements.<sup>2032</sup> In

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<sup>2028</sup> 1988 (3) SA 51 (CC).

<sup>2029</sup> The doctrine is also in vogue in the UK, the US, and other countries of the world. In the US, see the case of *The Paquete Habana* 175 US 677 1900. For England and Canada, see the discussion of Slyz "International Law and national courts" 1995/96 *Journal of International Law and Politics* 65 88ff.

<sup>2030</sup> See s 232. See also *Kaunda's case supra n* 688 par 23.

<sup>2031</sup> See Devine "Some problems relating to treaties in the interim South African Constitution and some suggestions for the definitive constitution." (1995) 20 *SAYIL* 1; Scholtz "A few thoughts on section 231 of the South African Constitution Act 108 of 1996" (2004) 29 *SAYIL* 202; Schneeberger, "A labyrinth of tautology: The meaning of the term international agreement and its significance for South African law and treaty making practice" (2001) 26 *SAYIL* 1; Olivier "Informal International Agreements under the 1996 Constitution" (1997) 22 *SAYIL* 63; Scholtz and Ferreira; "The interpretation of section 231 of the South African Constitution: A lost ball in the high weeds" (2008) *XLI CILSA* 324; Michie "The provisional application of treaties in South African law and practice" (2005) 30 *SAYIL* 1 & Scholtz & Olivier "Exploring the doctrine of self-execution as enforcement mechanism of international obligations." (2002) *SAYIL* 99.

<sup>2032</sup> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

relation to diplomatic protection, section 231(4) applies. It deals with the incorporation of international agreements into South African Law. Section 231(4) provides that:

Any international agreement becomes law in the Republic when it is enacted into law by the national legislation, but a self executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>2033</sup>

Section 231(4) of the 1996 Constitution therefore requires a treaty to be incorporated into South African law before it can be applied by the courts. Once this is done, the international agreement can be invoked before national courts and applied like any other domestic source of law. In relation to diplomatic protection and human rights, the consequence of non compliance is particularly relevant because no diplomatic or human rights treaties to which the Republic is a party can be invoked by the individual unless same is incorporated into SA municipal law.<sup>2034</sup>

However, while this section provides on one hand that an international agreement becomes law in the Republic only when it is enacted into law by national legislation, it also contains a *proviso* that

a self executing provision of an international agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament

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(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification of (or) accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.”

<sup>2033</sup> Under the interim constitution, the function of negotiating and signing of treaties was reserved for the executive specially the President. This was in line with the pre -1994 position. Parliament was not involved. See Dugard *supra* n 1 53; See also Keightley *supra* n 1995 409 who is of the view that s 231(4) of the 1996 Constitution represents a complete reversal of the interim Constitutional position by providing that a treaty will only become law in SA when enacted into law by national legislation. According to him, the intention behind s 231(4) is presumably to require treaties to be incorporated into SA domestic law through the medium of Acts of Parliament. That is to say, to reintroduce the position as it existed prior to the interim constitution.

<sup>2034</sup> Malan *supra* n 1136 82 however maintains that human rights treaties need not be incorporated into domestic law before individuals can acquire rights under such treaties because such treaties are in the nature of *stipulations alteri* (agreements for the benefit of third parties) and have a self executing character.



This *proviso* creates a scenario whereby some international agreements ratified by South Africa become law of the land only when they are enacted into law by national legislation, while others are automatically incorporated.<sup>2035</sup> The intention of the drafters in including this *proviso* is unclear, but many commentators seem to agree that the section is bound to create problems.<sup>2036</sup> The provision of self executing treaties in the Constitution, therefore, deserves a brief consideration since this scenario is likely to occur with regard to treaties having an impact on diplomatic protection.

## 5 Judicial interpretation of section 231(4) – the self execution provisions of the South African Constitution

The self-executing provision of section 231(4) of the 1996 Constitution which has given rise to serious debates within academic and judicial circles fell for determination by the Transvaal Provincial Division of the High Court of South Africa.<sup>2037</sup>

In the *Preller* case, the appellants challenged the constitutional validity of the extradition agreement signed between the RSA and the USA on 16 September 1999. The appellants contended that their arrest and detention in terms of the

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<sup>2035</sup> Agreements which can be automatically incorporated into SA law are international agreements of a technical, administrative, or executive nature under section 231(3) of the Constitution.

<sup>2036</sup> Dugard *supra* n 1 62 agrees that the section can create problems and therefore warns that no general guidelines can be given in this regard and that each case in which it is claimed that a treaty is self executing will have to be decided on its own merit by the courts, with due regard to the nature of the treaty, the precision of the language and the existing SA law on the subject. Olivier *supra* n 2005 284 *et seq* like Dugard, agrees that the self executing nature of an international agreement should be determined through a combination of factors. Such factors should also include the language and subject-matter of the treaty. She believes that the domestic law of a State party to an international agreement should only be relevant in so far as it permits self execution. In other words, should certain treaty provisions be capable of direct application, such direct application can only be effected in the legal systems of State parties permitting the concept of direct application. She submits that the concept of self execution will become increasingly more relevant as treaty regimes develop *ibid*.

<sup>2037</sup> The court had the opportunity on two separate occasions to address the various uncertainties concerning the transformation of international agreements into SA law in terms of self executing agreements. The two cases were the *Quagliani* case (*Quagliani v President of the RSA*) 959/04 TPD (unreported) and *Van Rooyen Brown* case (*Van Rooyen /Brown v President of the RSA*) 2824/06 TPD (unreported) decided by Justice Preller on 6/3/08. (Hereinafter referred to as the *Preller* judgment) and the *Goodwin* case (*Goodwin v Director-General Department of Justice and Constitutional Development* 2124/08 TPD. (Unreported), decided on 23/6/08 by Acting Justice Ebersohn. (Hereinafter referred to as the *Ebersohn* judgment).

agreement were unlawful as a result of the alleged invalidity of the agreement.<sup>2038</sup>  
The main allegation was that the agreement was invalid, because it was signed by  
the Minister of Justice and not by the President.<sup>2039</sup>

From the outset, the court stressed the consequences of invalidating the agreement  
which might be disastrous, taking into consideration the fact that the agreement had  
been in operation for several years and that a number of persons had been  
extradited in terms of it.<sup>2040</sup> The court confirmed that it was not a step to be taken  
lightly, but nevertheless one that must be taken if circumstances demanded.<sup>2041</sup>

The court then referred to section 231(1) of the 1996 Constitution which states that  
the negotiating and signing of all international agreements is the responsibility of the  
National Executive. Section 83(a) which determines that the President is the Head of  
State and Head of the National Executive. Section 85(1) and (2) which provide that  
the executive authority is vested in the President of the Republic and that such  
authority must be exercised together with other members of the Cabinet. Section  
84(2) which lists a number of responsibilities that the President may perform of his  
own accord – but not including the negotiation and signing of international  
agreements. The court also cited section 2(1) of the Extradition Act which provides  
that the President may enter into extradition agreements with foreign states subject  
to the provisions of the Act. The court came to the conclusion that

International agreements are therefore the responsibility of the Cabinet as a  
whole. As far as the provisions of section 2(1) of the Extradition Act 67 of  
1962 that the President may enter into agreements with foreign states may  
purport to reserve the power and responsibility of the President to the  
exclusion of the Cabinet, it would be in conflict with the Constitution and would  
be void.<sup>2042</sup>

The court accepted that the term “self executing provision” in section 231(4) of the  
Constitution was taken from US law and has a technical meaning that is foreign to

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<sup>2038</sup> At 2.

<sup>2039</sup> See Scholtz & Ferreira *supra* n 2033 326.

<sup>2040</sup> At 5 *linea* 17.

<sup>2041</sup> *Linea* 19.

<sup>2042</sup> At 10.

the SA legal system.<sup>2043</sup> According to the court, it would be impossible to give effect to the intention of the writers of the Constitution by merely attaching their ordinary meaning to those words.<sup>2044</sup> The court however pointed out that because the words are part and parcel of section 231(4) of the Constitution, it would have to give some meaning to them.<sup>2045</sup> Finally, the court made a declaration that the extradition agreement signed on 16 September 1999 between the RSA and the USA was not binding since it was not incorporated into SA law as a result of failure to comply with the provisions of section 231(4) of the Constitution.<sup>2046</sup>

The *Ebersohn* judgment dealt with the same extradition agreement, but more background facts were supplied to the extradition agreement in dispute than in the *Preller* judgment.<sup>2047</sup> According to the court in *Ebersohn* case, the current extradition agreement between the RSA and the USA was preceded by an extradition agreement between the two countries that was concluded on 18 December 1947. During 1998, representatives of the two countries negotiated a new agreement that was intended to replace the 1947 agreement. The new agreement was signed on 16 September 1999 by the Minister of Justice and Constitutional Development on behalf of South Africa in Washington, with the written approval of the President, as contained in the Presidential Minute.

After the agreement had been approved by both Houses of Parliament, the Minister for Foreign Affairs signed the Instrument of Ratification on March 28 2001 so as to bring it into force between the two countries. On May 29 2001, pursuant to section

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<sup>2043</sup> At 13 *linea* 6 *et seq.*

<sup>2044</sup> *Ibid.*.

<sup>2045</sup> *Ibid.* The court then referred to the contention by the respondent that the term “self-executing” should be understood in accordance with the wording of the Afrikaans text of section 231(4) to mean “*direk uitvoerbaar*” and that the drafters of the Constitution contemplated a “quick and simple coming into operation” of treaties that does not require enactment into law by national legislation. The court rejected the submission that in view of the above argument and in view of the provision in article 24 of the Extradition agreement, the Extradition agreement should be regarded as having become law in the Republic. The court based its finding on the fact that before the instrument of ratification can be exchanged, the treaty must have been approved by parliament in terms of section 231 of the Constitution. In its discussion of section 231(4) of the Constitution, the court also referred to the contention by one of the applicants that the words “self executing provision” in section 231(4) is indicative of the fact that the drafters of the Constitution intended that only a provision of an agreement, but not the entire agreement may be “self executing”.

<sup>2046</sup> At 2.

<sup>2047</sup> Par. 6 *et seq.*

2(3) of the Extradition Act, the Minister of Justice and Constitutional Development published the required notice in the Government Gazette<sup>2048</sup> together with the text of the approved agreement.

After his arrest in the US, in terms of the new extradition agreement, and pending his extradition to South Africa, the applicant requested the court in Los Angeles to order his immediate release as a result of the alleged invalidity of the agreement between the two countries.<sup>2049</sup> The magistrate dismissed the application finding that the agreement was binding on the US. He therefore made an order that any constitutional matters relating to SA in the matter, should be raised in a South African court. Against this background, the current application was lodged.

The applicant then brought an application asking the court firstly, to set aside the decision of the respondent requesting the relevant authorities in the US to arrest him. Secondly, declaring the conduct of the respondent unlawful and inconsistent with the Constitution in making the request to the US authorities and thirdly, prohibiting the respondent from taking any further action in terms of the agreement, pending the final determination of the issues in the *Quagliani* and *Van Rooyen Brown* cases.<sup>2050</sup>

The applicant based his argument, *inter alia*, on the ground that the extradition agreement in question was invalid, because it had not been signed by the President personally and that the respondent acted without any power conferred on him by law in making the request for his arrest.<sup>2051</sup> The court pointed out that the basis for the attack on the validity of the extradition agreement in both the *Preller* and the *Ebersohn* judgments was the fact that the Minister of Justice and not the President signed the agreement in Washington.<sup>2052</sup>

The court referred to section 2 of the Extradition Act in terms of which the President may enter into extradition agreements with foreign states subject to the provisions of

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<sup>2048</sup> See G G 22430 dated 2001-06-29 53.

<sup>2049</sup> Par 16.

<sup>2050</sup> *Supra* par 1.

<sup>2051</sup> Par 13.

<sup>2052</sup> Par 15.

the Act.<sup>2053</sup> The court also referred to section 84(1) of the Constitution in terms of which the President has the power entrusted in him by the Constitution and legislation,<sup>2054</sup> and section 85 that vests the executive authority of the Republic in the President and requires that his executive authority be exercised together with other members of the Cabinet.<sup>2055</sup>

In view of the aforementioned, the Court found that the decision of the President to authorize the Minister of Justice and Constitutional Development to sign the newly negotiated extradition agreement conformed with the requirements of section 101.<sup>2056</sup> In this regard the court agreed with the *Preller* judgment that

Section 2 of the Extradition Act could never have intended that the President himself had to perform each and every act that had brought about the finalization of the treaty. All that he had to do is to act as the Head of the Executive as required of him by the Constitution'.<sup>2057</sup>

Concerning the transformation of the extradition agreement into South African law in terms of section 231(4) of the Constitution, the court did not agree with the decision in *Preller* judgment, but found that it had been incorporated into South African law.<sup>2058</sup>

The *Preller* judgment answered the question regarding the effect where an international agreement is ratified but not transformed into national legislation as prescribed by section 231(4) of the 1996 Constitution. In relation to diplomatic

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<sup>2053</sup> Par 12.

<sup>2054</sup> Including those necessary to perform the functions of Head of State and Head of the National Executive par 21.

<sup>2055</sup> Par 22. In addition to the above, the court referred to articles 11 and 13 of the Vienna Convention in terms of which states are bound in international law by the Law of Treaties once there has, *inter alia*, been an exchange of instruments constituting a treaty. The court also cited section 101 of the Constitution that provides for a decision by the President to be in writing and countersigned by another member of the Cabinet if that decision concerns a function assigned to that particular member. Section 231(1) of the Constitution which determines that the negotiating and signing of all international agreements is the responsibility of the National Executive, was also referred to. Both sections 232 and 233 that provide that customary international law is part of South African law unless inconsistent with the Constitution or an Act of Parliament, and that a court when interpreting legislation, must give preference to an interpretation that is consistent with international law, were also referred to.

<sup>2056</sup> *Ibid*

<sup>2057</sup> Par 36.

<sup>2058</sup> Par 31. The court pointed out that should its findings be wrong, South Africa is still bound by the extradition agreement of 1947, and any extradition can and must then proceed in terms thereof.

protection, it must be emphasized that an international agreement may be in force and may create international obligations for South Africa, but if it is not incorporated in terms of section 231(4) of the Constitution it will not have any domestic application. Thus, an international agreement dealing with diplomatic protection, which has not been incorporated into South African municipal law, will not serve as a basis for the application of individual rights and obligations.<sup>2059</sup>

A comparative analysis of the *Preller* and the *Ebersohn* judgments nevertheless reveals that although the issues for determination in the two judgments were the same,<sup>2060</sup> ironically, the two courts arrived at different decisions. Be that as it may, the disparity in the two judgments underscores the scepticism expressed in academic and judicial circles concerning the interpretation of the self executing provision of section 231(4) of the 1996 Constitution.<sup>2061</sup> That uncertainty still persists. One can only hope that the Constitutional Court will intervene in order to bring greater clarity to this very important constitutional and interpretational issue.<sup>2062</sup>

One thing is clear, however. Section 231(4) of the South African Constitution has made it possible for the incorporation of international agreements which favour diplomatic protection into SA law. International agreements incorporated into South African law for purposes of diplomatic protection include the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.<sup>2063</sup>

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<sup>2059</sup> See Scholtz *supra* n 2033 213. Eg the VCDR.

<sup>2060</sup> I.e the validity of the same extradition agreement, between the same parties – RSA and the USA, signed on the same date.

<sup>2061</sup> Scholtz & Ferreira *supra* n 2033 338 are of the view that in the *Preller* judgment, the court employed the outdated approach of the so-called “intention of the drafters” of the Constitution approach instead of a teleological or purposive interpretation approved by the Constitutional Court in *S v Makwanyane supra* n 1203.

<sup>2062</sup> *Ibid.* One of criticisms leveled against the provisions of section 231(4) of the Constitution is that it is difficult to see how that section can remedy past anomalies related to the incorporation of treaties into SA municipal law. For instance, it is difficult to see how this provision will remedy the ugly situation whereby government departments delay to submit treaties to parliament because of their desire to ensure that existing SA law accords with new treaty obligations, as was the case in the past.

<sup>2063</sup> See the Diplomatic Immunities and Privileges Act 37 of 2001 which incorporated the VCDR 1961 and its VCCR 1963 counterpart. See <http://www.library.up.ac.za/law/index.htm> See also [www.it.up.ac.za/documentation/governance/disclaimer/](http://www.it.up.ac.za/documentation/governance/disclaimer/). (accessed 2010-04-17)

## 6 The interpretational role of international law in South Africa

Another important role of international law in South African law is that it serves as an interpretational aid for the courts when interpreting legislation. Section 233 of the Constitution in particular extends the interpretational role of international law to all legislation. The section provides that

When interpreting any legislation every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The inclusion of this provision in the Constitution is important in that it amplifies the importance of international law in the South African legal system. However, its inclusion has given rise to speculation as to whether the drafters of the Constitution intended the courts to test all legislation against the tenets of international law, or whether the courts are mandated to test only those legislation with international flavour or *nexus* against the tenets of international law.<sup>2064</sup>

Taken literally, the provision appears wide enough to empower all courts in South Africa<sup>2065</sup> to test all legislation coming before them against the tenets of international law. Botha is, however, of the opinion that such an interpretation would not be in line with common sense.<sup>2066</sup> Rather, common sense dictates that only legislation with an international flavour or *nexus* should be so tested.<sup>2067</sup>

To achieve this goal, however, the courts must first determine the international law position governing the subject-matter of any legislation before testing such legislation against the tenets of international law.<sup>2068</sup> It may be concluded that since reference in this provision is made to “Public” international law in the broad sense of the term in interpreting the Constitution or any other legislation for that matter, South African

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<sup>2064</sup> See Botha “Treaty making in South Africa: A reassessment.” (2000) 25 *SAYIL* 91 94.

<sup>2065</sup> I.e from the lowest courts in the land to the highest.

<sup>2066</sup> See Botha (2000) *supra* n. 2067 93.

<sup>2067</sup> *Ibid.*

<sup>2068</sup> See the case of *Azanian Peoples Organisation [AZAPO] v The President of South Africa* 1996 (4) SA 671 (CC). Although the case did not involve the incorporation of a treaty, it does serve as an example of legislation with an international *nexus* where the courts were required to apply the provisions of section 233.

courts are required to have regard to international law contained in custom, treaties, general principles of law, the writings of publicists, and the decisions of international and municipal courts.<sup>2069</sup>

Section 233 is very significant in relation to diplomatic protection. Since this section enjoins all courts to prefer an interpretation of any legislation which accords with international law over an interpretation which does not, then South African courts are enjoined to interpret any legislation as favouring the applicability of diplomatic protection.

Section 233 of the Constitution compliments and strengthens the provisions of section 232, which makes customary international law part of the law of the land and section 231(4) which serves as a vehicle through which international agreements are incorporated into South Africa municipal law.

Apart from section 233 of the Constitution, the role of international law in the interpretative process under South African legal system is contained in section 39 of the Constitution. This is the section dealing with the interpretation of the Bill of Rights, and will be considered later in this chapter.

In conclusion, therefore, it can be said that diplomatic protection as embodied in international law is not only constitutionally and legally favoured under South African law, it is also entrenched in the national consciousness of the people as will be seen below where decided cases on diplomatic protection are considered.<sup>2070</sup>

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<sup>2069</sup> See Maluwa(1993/1994) *supra* n 2028 35.

<sup>2070</sup> Botha says that by embracing Public International Law as an equal component in the fabric of SA law, not only will the SA legal system have some hope of legitimacy in the eyes of the population as a whole, but that Public International Law will also come of age as an international monitor - a system of checks and balances – healing the rifts between the peoples of the country in an interim phase, smothering the workings of a new and democratic SA and ultimately ensuring its continued international legitimacy. See Botha *supra* n 1995 43.



## 7 Diplomatic protection and South African law

### 7.1 Constitutional provisions

Although diplomatic protection is not specifically provided for under the South African Constitution,<sup>2071</sup> by virtue of sections 232 and 233 of the Constitution<sup>2072</sup> international law pertaining to diplomatic protection is deemed to form part of South African law.<sup>2073</sup> However, in discussing the issue of diplomatic protection under South African law, Erasmus and Davidson<sup>2074</sup> argue that South African citizens are entitled to diplomatic protection under South African Constitution.<sup>2075</sup>

According to Erasmus and Davidson, the relevant constitutional provisions are to be found in sections 3,<sup>2076</sup> 7,<sup>2077</sup> 20,<sup>2078</sup> and 33 of the SA Constitution.<sup>2079</sup> In the landmark case of *Kaunda v The President of the RSA*,<sup>2080</sup> the Constitutional Court accepted that the provisions of sections 3 and 20 of the Constitution, read together with section 7(1)<sup>2081</sup> and (2),<sup>2082</sup> are applicable to issues of diplomatic protection under South African law.<sup>2083</sup>

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<sup>2071</sup> See for instance Erasmus & Davidson *supra* n 293 113; Pete and Plessis “South African nationals abroad and their right to diplomatic protection –Lessons from the mercenaries case” *supra* n 358 439; Olivier “Diplomatic Protection –Right or privilege” *supra* n 358 238; Dugard (2005) *supra* n 25 75 & Crawford *supra* n 10 19.

<sup>2072</sup> S 232 stipulates that Customary International Law is law in the Republic, while s 233 plays an interpretative role in respect of the interpretation of legislation concerning International Law.

<sup>2073</sup> See for instance Erasmus & Davidson *supra* n 293 113; Pete and Plessis *supra* n 358 439; Olivier *supra* n 358 238; Dugard *supra* n 25 79 & Crawford *supra* n 10 19

<sup>2074</sup> Erasmus & Davidson *supra* n 293 113.

<sup>2075</sup> *Idem* 125.

<sup>2076</sup> (Citizenship).

<sup>2077</sup> Obligation imposed on the SA Government by the Bill of Rights.

<sup>2078</sup> The Bill of Rights provision on citizenship.

<sup>2079</sup> See 125. Erasmus & Davidson are of the view that s 33 of the Constitution also applies. S 33 deals with rules and procedures governing administrative acts of government.

<sup>2080</sup> *Supra* n 688 par 59. Chaskalson CJ however took exception to the wide interpretation given to s 3 of the Constitution by Erasmus & Davidson (i.e the benefits and privileges of citizens guaranteed by s 3).

<sup>2081</sup> Which prescribes that the Bill of Rights is the cornerstone of democracy in SA.

<sup>2082</sup> Which prescribes that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>2083</sup> See particularly the judgment of Ngcobo J par 188. The court did not however agree with Erasmus & Davidson that S A citizens have a Constitutional right to diplomatic protection. See the judgment of Chakalson J par 59. See also Olivier (2005) *supra* n 358 238.

In their thought-provoking article, Erasmus and Davidson maintain that the concept of diplomatic protection under customary international law should be revisited<sup>2084</sup> because under that concept the individual has no right to diplomatic protection. Only the state of nationality can exercise this right.

According to the traditional legal fiction, injury to the individual constitutes an injury to the state. Thus, the State is merely protecting its own right in taking up the case of the individual concerned.<sup>2085</sup> A corollary of this view is that a state has an absolute discretion whether to extend diplomatic protection to its nationals who have suffered harm or injury abroad or not.<sup>2086</sup> Since the State has no duty at international law to provide diplomatic protection,<sup>2087</sup> the end result is that it is the individual who suffers.<sup>2088</sup>

Erasmus and Davidson then attack this traditional customary approach to diplomatic protection.<sup>2089</sup> They maintain that with the emergence of a human rights regime, the position of the individual in international law is changing.<sup>2090</sup> Therefore, a need arises to revisit the meaning of diplomatic protection in international law in so far as the protection of basic human rights are concerned.<sup>2091</sup>

Furthermore, the changing international world order characterized by globalization makes a change in approach to diplomatic protection inevitable.<sup>2092</sup> Henceforth, there is a need for diplomatic protection to be used more often for the protection of basic human rights than for the protection of property rights of nationals expropriated by foreign governments.<sup>2093</sup> When and where gross violations of basic human rights occur,<sup>2094</sup> the state should be duty-bound to exercise diplomatic protection.<sup>2095</sup> Such

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<sup>2084</sup> *Supra* n 293 113.

<sup>2085</sup> *Barcelona Traction case supra* n 26 44. See also *Mavromatis Palestine Concession case supra* n 36 12.

<sup>2086</sup> See the *Barcelona Traction case supra* n 26. This traditional approach to diplomatic protection of the individual also applies to corporate entities in International Law.

<sup>2087</sup> *Barcelona Traction case supra* n 26.

<sup>2088</sup> Erasmus & Davidson *supra* n 293 115.

<sup>2089</sup> *Ibid* 120.

<sup>2090</sup> *Idem* 117.

<sup>2091</sup> *Idem* 117 & 119.

<sup>2092</sup> *Idem* 120.

<sup>2093</sup> *Idem* 121.

<sup>2094</sup> *Ibid*.

an approach, they argue, will enhance the basic objective of diplomatic protection because, when gross violations of human rights occur, it is the individual and not the state *per se* who suffers.<sup>2096</sup> They submit that a state that fails to provide the minimum protection to its nationals runs the risk of retrogression.<sup>2097</sup>

Turning to South African law, the authors maintain that South Africans are entitled to diplomatic protection under the 1996 Constitution.<sup>2098</sup> Sections 3 and 20 in particular which provide that all South Africans are equally entitled to the rights, privileges and benefits of citizenship, and that no citizen may be deprived of citizenship, are the relevant constitutional provisions guaranteeing this right.<sup>2099</sup> Citizenship should therefore logically include the right or an entitlement to diplomatic protection. They maintain that

Without this dimension, it [diplomatic protection] will lose an essential part of its meaning and effect.<sup>2100</sup>

## 8 Decided cases on diplomatic protection under South African law

A plethora of cases have come before the courts on the subject of diplomatic protection in South Africa<sup>2101</sup> In *Kaunda's* case<sup>2102</sup> for instance, it was held that section 3 and 20 of the Constitution are relevant for purposes of diplomatic protection.<sup>2103</sup> That case discussed all aspects of diplomatic protection of human rights under South African law – government policy, state practice, judicial attitude,

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<sup>2095</sup> *Ibid.* This suggestion was first made to the ILC by Garcia Amador in 1957 and reiterated by Dugard in 2000. It was however rejected by the ILC for lack of state practice. It represents the *lex ferenda*.

<sup>2096</sup> At 123.

<sup>2097</sup> *Idem* 122.

<sup>2098</sup> *Idem* 125.

<sup>2099</sup> “What are the rights and privileges of citizenship? What is the effect of putting the right to citizenship in the Bill of Rights and in the founding provisions of this supreme and justiciable Constitution?” They query.

<sup>2100</sup> In conclusion, Erasmus & Davidson *supra* n 293 129 call for the harmonization of International and Municipal Law in SA so as to enhance the diplomatic protection of SA citizens.

<sup>2101</sup> See e.g. *Kaunda v President RSA* 2005 (4) SA 235 (CC), *Roothman v President RSA* 2005 (3) All SA 600 (T), *Thatcher v Minister of Justice and Constitutional Development* 2005 (1) SA 375 (C), *Van Zyl v Government of the RSA* 2005 (4) All SA 96 (T) & *Von Abo v Government of RSA* 2009 (2) SA 526 (T).

<sup>2102</sup> *Supra* n 688.

<sup>2103</sup> See the judgment of Chaskalson CJ par 59.

the concept of extraterritoriality, its discretionary nature, human rights constraints, *et cetera*. This subject is therefore discussed *in extenso* below.

In *Kaunda's* case, the applicants were South African nationals who were arrested at Harare airport on 7 March 2004 and detained in Zimbabwe Chikurubi prison along with another group of 15 men arrested in Malabo, the capital of Equatorial Guinea for allegedly being mercenaries bent on overthrowing the government of Equatorial Guinea. They brought an application in which they sought to compel the government of South Africa to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea.<sup>2104</sup> The applicants initially approached the High Court in Pretoria which dismissed their application.<sup>2105</sup> The applicants then approached the Constitutional Court for leave to appeal directly to it.<sup>2106</sup> The Constitutional Court unanimously found that the application for leave to appeal should be granted.<sup>2107</sup>

The constitutional issues raised in the appeal were whether the State was bound by the Constitution of South Africa to take steps to protect the applicants in relation to the complaints they had concerning their conditions of detention in Zimbabwe and the prosecution they were facing there. It also raised the issue of the possibility of their being extradited to Equatorial Guinea to face charges which could, if they were convicted, result in their being sentenced to death. The matter raised complex constitutional issues of law which were of great importance not only to the applicants, but to the wider society.<sup>2108</sup>

The applicants asked for a *mandamus* to compel the government to take action at a diplomatic level to ensure that the rights they claimed to have under the South African Constitution were respected by the two foreign governments of Zimbabwe and Equatorial Guinea.<sup>2109</sup> They demanded that the government should seek assurances from the foreign governments concerning their prosecutions or

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<sup>2104</sup> *Idem* 237.

<sup>2105</sup> *Idem* par 3.

<sup>2106</sup> *Idem* par 5.

<sup>2107</sup> *Ibid.*

<sup>2108</sup> *Ibid.*

<sup>2109</sup> *Idem* par 4.

contemplated prosecutions, in those countries.<sup>2110</sup> The applicants asserted that they had rights under the South African Constitution entitling them to make such demands, that the government had failed to comply with their demands and that, in failing to do so, it had breached their constitutional rights.<sup>2111</sup>

The applicants further maintained that their rights to dignity, life, freedom and security of the person, including the right not to be treated or punished in a cruel, inhuman or degrading way, and their right to a fair trial entrenched under sections 10, 11, 12 and 35 of the Constitution were being violated in Zimbabwe, and were likely to be infringed if they were extradited to Equatorial Guinea.<sup>2112</sup> They contended that since section 7(2) of the Constitution requires the state to “respect, protect, promote and fulfil the rights in the Bill of Rights,” the State was obliged to protect these rights on their behalf. The only way it could do so under the circumstances, it was argued, was to provide them diplomatic protection.<sup>2113</sup>

It therefore became necessary to consider whether the applicants had a right to diplomatic protection by the State according to South African law and whether they could require the State to come to their assistance in Zimbabwe and Equatorial Guinea if they were extradited to that country.

In the majority judgment read by Chaskalson CJ,<sup>2114</sup> the court referred to section 232 of the Constitution which recognizes customary international law as part of South African law, before proceeding to examine the term “diplomatic protection.”<sup>2115</sup> Diplomatic protection was defined as “action taken by a state against another state in respect of injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter state.”<sup>2116</sup>

Diplomatic protection includes consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retortion, severance of diplomatic relations and

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<sup>2110</sup> *Ibid.*

<sup>2111</sup> *Idem* par 31.

<sup>2112</sup> *Ibid.*

<sup>2113</sup> *Idem* par 32.

<sup>2114</sup> As he then was.

<sup>2115</sup> *Idem* par 25.

<sup>2116</sup> *Idem* par 26.

economic pressure.<sup>2117</sup> The court pointed out that, traditionally, international law acknowledges that States have the right to protect their nationals beyond their borders, but are under no obligation to do so.<sup>2118</sup>

The court referred to the case of *Barcelona Traction Light and Power Company Limited*<sup>2119</sup> where the ICJ stated that diplomatic protection is a discretionary power of the State and that political and other considerations may influence its exercise.<sup>2120</sup> The court then referred to a suggestion by the Special Rapporteur to the ILC on Diplomatic Protection, that in cases of grave breaches of the norms of *jus cogens*, a state owes a legal duty to its injured nationals to exercise diplomatic protection on their behalf.<sup>2121</sup>

Within this context, the court referred to the two constitutional interpretative clauses, namely sections 233<sup>2122</sup> and 39 (1) (b).<sup>2123</sup> The court was unable to identify any international instrument providing for the right to diplomatic protection and therefore was reluctant to interpret the Constitution in consonance with international law.<sup>2124</sup> It was of the opinion that the right to diplomatic protection is a highly unusual right “which one would expect to be spelt out expressly rather than being left to implication.”<sup>2125</sup> It concluded however that diplomatic protection is not recognized as a human right by international law and remains the prerogative of a state to exercise at will.<sup>2126</sup>

The court considered whether diplomatic protection is recognized as a right under South African Municipal Law. Relying on section 7(2) of the Constitution<sup>2127</sup> the applicants had contended that the same should protect them from the violation or possible violation of their constitutional rights in Zimbabwe and Equatorial Guinea

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<sup>2117</sup> *Idem* par 27.

<sup>2118</sup> Par 23 The court relied on *Barcelona Traction* case *supra* n 26.

<sup>2119</sup> *Supra* n 26 relied upon by counsel for the State.

<sup>2120</sup> Par 44. See also *Geck supra* n 10 1047.

<sup>2121</sup> Par 30.

<sup>2122</sup> For the interpretation of legislation generally.

<sup>2123</sup> For the interpretation of the Bill of Rights.

<sup>2124</sup> Par 26.

<sup>2125</sup> Par 15.

<sup>2126</sup> Par 32.

<sup>2127</sup> Which demands that the state should respect, protect, promote and fulfil the rights in the Bill of Rights.

respectively.<sup>2128</sup> According to them, it is the responsibility of the State to stand up for its citizens when their constitutional rights are abused by another state by giving an extraterritorial effect to the Constitution.

The Chief Justice then turned to the issue of whether or not the South African Constitution can be construed as having extraterritorial effect. He concluded that it could not.

For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure that laws and conduct of a foreign state and its officials meet not only the requirement of the foreign States' law, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty.<sup>2129</sup>

The court emphasized the importance of territoriality by pointing out that the rights protected by the Bill of Rights safeguard foreigners present within South African territory, but have no application beyond South Africa's borders. From the international law perspective, national legislation is ordinarily limited to the territory of the particular state. Although there are circumstances where legislation may apply to nationals outside the state, it creates the possibility of conflict with the laws of the foreign state and on the sovereign equality of states.<sup>2130</sup>

The question whether South African citizens can require the SA government to take action to protect them against the conduct of a foreign country was a different issue which depended, in the first instance, on whether the Constitution could be construed as having extra-territorial effect.<sup>2131</sup> In respect of the request to be assisted outside the State, the CJ pointed out that, it must be borne in mind, firstly, that, the Constitution of South Africa provides the framework for the government of South Africa.<sup>2132</sup> In that respect, the Constitution is territorially bound and has no application beyond its borders.<sup>2133</sup> Secondly, the rights in the Bill of Rights upon which reliance is placed by the applicants, are rights that vest in everyone while they

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<sup>2128</sup> Such as the rights to life, security of the person, to a fair trial and not to be tortured.

<sup>2129</sup> Par 44.

<sup>2130</sup> Par 36-40.

<sup>2131</sup> Pars 32 98.

<sup>2132</sup> See par 36 of the judgment.

are in South Africa – nationals and foreigners alike. Clearly, they lose the benefit of that protection when they move beyond the borders of South Africa.<sup>2134</sup>

Chaskalson was of the opinion that the State has a positive obligation to comply with the constitutional provisions requiring it to “respect, protect, and promote and fulfil the rights in the Bill of Rights.”<sup>2135</sup> He continued that that did not mean however, that the rights which nationals have under the Constitution attach to them when they are outside of South Africa,<sup>2136</sup> or that the State has an obligation under section 7(2) to “respect, protect, promote and fulfil” the rights in the Bill of Rights beyond its borders.<sup>2137</sup>

Chaskalson then turned to examine the rights, privileges and benefits of citizenship as guaranteed under section 3 of the South African Constitution and concluded that although South African citizens do not possess an enforceable right to diplomatic protection, they are nevertheless entitled to request the SA government for protection under international law against wrongful acts of a foreign State.<sup>2138</sup> Since, they are not in a position to invoke international law themselves, they are obliged to seek protection through the State of which they are nationals.<sup>2139</sup> He further said that the State is entitled but not obliged under international law to take such action. It invariably acts only if requested by the national to do so.<sup>2140</sup> Nevertheless, the entitlement to request diplomatic protection has certain consequences.<sup>2141</sup> First, government must have a corresponding obligation to consider the request and deal with it in a manner consistent with the Constitution. Furthermore, there may even be a duty in extreme cases for the government to act on its own initiative.<sup>2142</sup>

According to the Chief Justice, the South African Constitution contemplated that the government would act positively to protect its citizens against human rights

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<sup>2133</sup> *Ibid.*

<sup>2134</sup> *Ibid.*

<sup>2135</sup> Par 32.

<sup>2136</sup> At 12 par 32.

<sup>2137</sup> See par 32.

<sup>2138</sup> Par 60.

<sup>2139</sup> Par 61.

<sup>2140</sup> At 44 par 61.

<sup>2141</sup> Par 67.

<sup>2142</sup> At 49 par 67.



abuses.<sup>2143</sup> There might be a duty on government consistent with its obligations under international law to take action to protect one of its citizens against a gross abuse of international human rights norms.<sup>2144</sup> A request to government for assistance in such circumstances, where the evidence was clear, would be difficult and in extreme cases impossible to refuse.<sup>2145</sup> It was unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and the court would order the government to take appropriate action if necessary.<sup>2146</sup>

The applicants placed considerable reliance on the case of *Mohamed v President of the RSA*<sup>2147</sup> to prove that they were entitled to diplomatic protection. The court had to distinguish *Mohamed's* case from the instant case.<sup>2148</sup> In *Mohamed's* case,<sup>2149</sup> Mohamed was on trial on charges of murder and conspiracy to attack a US facility in a US court, flowing from the 1998 bombing of the US embassy in Dar es Salaam.

Mohamed was a Tanzanian national. He fled to South Africa under a false passport, an assumed name and visitor's visa that he had obtained in Dar es Salaam after the bombing.<sup>2150</sup> On arrival in South Africa, he applied for asylum under his assumed name.<sup>2151</sup> He was given a temporary residence status which was to be reviewed periodically pending the decision on his application for asylum.<sup>2152</sup>

After the Federal Bureau of Investigation (FBI) detected Mohamed's presence in South Africa, the Chief Immigration Officer of the Department of Home Affairs (DHA) notified the Directorate of Aliens Control (DAC) of the DHA, and requested that Mohamed be declared a prohibited person and to ensure that he was not to be allowed to leave the country.<sup>2153</sup> When Mohamed called at the refugee receiving

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<sup>2143</sup> Par 66.

<sup>2144</sup> Pars 67& 69.

<sup>2145</sup> Par 69.

<sup>2146</sup> *Ibid.*

<sup>2147</sup> 2001 (7) BCLR 685 (CC) *supra* n 1204.

<sup>2148</sup> Par 46.

<sup>2149</sup> *Supra* n 1204.

<sup>2150</sup> Par 8.

<sup>2151</sup> Par 9.

<sup>2152</sup> *Ibid.*

<sup>2153</sup> *Idem* par 12.

office in Cape Town on 5 October 1999 for the extension of his temporary residence permit, he was arrested.<sup>2154</sup>

Due to inconsistent statements by officials of the DHA, there was conflicting evidence before the court regarding whether or not Mohamed was informed of his right to protection against self-incrimination, about his right to remain silent and his right to legal representation.<sup>2155</sup> Mohamed was handed over to the FBI and after interrogation, confessed to the embassy bombing in Dar es Salaam. Mohamed left South Africa for the US in the custody of a number of FBI agents on 6 October 1999.<sup>2156</sup>

The court said that *Mohamed's* case dealt with an entirely different situation from the instant case.<sup>2157</sup> In *Mohamed's* case, certain state functionaries had colluded with the FBI to secure the removal of Mohamed from South Africa to the USA and, in so doing, had acted illegally and in breach of Mohammed's rights under the Constitution.<sup>2158</sup> The Court pointed out that Mohamed's rights were violated while he was still in South Africa whereas by contrast, the applicants had left South Africa and placed themselves in danger of their own free will and not as a result of any unlawful conduct of government.<sup>2159</sup>

The court denied that *Mohamed's* case was authority for the submission made by the applicants. In conclusion, therefore, the court found that the claims made by the applicants were misconceived and they were dismissed *pro tanto*.<sup>2160</sup>

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<sup>2154</sup> *Idem* par 15.

<sup>2155</sup> *Idem* par 9.

<sup>2156</sup> *Idem* par 26.

<sup>2157</sup> *Idem* par 47.

<sup>2158</sup> *Ibid.*

<sup>2159</sup> *Idem* par 49.

<sup>2160</sup> Ngcobo J. in a separate judgment agreed substantially with the majority judgment but differed in the approach to the treatment of S.3(2). O'Regan J in a separate judgment also agreed with the majority's analysis of s. 3 of the Constitution, but disagreed in relation to the question whether under the Constitution the State bore any obligation towards the applicants to take steps to protect them. Sachs J, also in a separate concurring judgment maintained that the government had a clear and unambiguous duty to do whatever was reasonable within its power to prevent South Africans living abroad from being subjected to torture.

The majority decision in *Kaunda's* case has been criticised.<sup>2161</sup> Olivier is of the view that the court failed to discuss in depth the applicability of customary international law to the case before coming to the conclusion that it did not apply to the situation.<sup>2162</sup> Consequently, in light of the court's inability to identify any applicable international law provision of which Zimbabwe could be in breach if the applicants were extradited to Equatorial Guinea, she finds it strange for the court to have said that although there was a real possibility that they might be extradited, this did not mean that they would in fact be extradited.<sup>2163</sup>

Olivier then wonders why the court, having established that the death penalty does not violate international law, went on to say that

If the allegation by the applicants that they will not get a fair trial in Equatorial Guinea proves to be correct, and they are convicted and sentenced to death, there would have been a grave violation of international law.<sup>2164</sup>

Does an unfair trial resulting in the death penalty constitute a breach of international law whereas the death penalty *per se* does not?

She queries. She regards the majority judgment as “fuzzy” and the political undertones as very clear from the international law perspective.<sup>2165</sup> She maintains that:

Courts do not wish to become involved in executive functions not even in pointing out the constitutional and international law parameters for government action. The approach adopted by the court is formalistic and recalls the narrow positivist approach of South African courts under apartheid where the judiciary was reluctant to question legislation and policy and shied away from a value-oriented approach which may challenge government.<sup>2166</sup>

Pete and du Plessis are of the view that the majority decision does little more than underline that a South African citizen is entitled to write a letter or in some other

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<sup>2161</sup> See Olivier *supra* n 358 238 - 240 & Pete & du Plessis *supra* n 358 471

<sup>2162</sup> Olivier *supra* n 358 *ibid*.

<sup>2163</sup> *Idem* 244 See *Kaunda's* case *supra* n 688 par 104-05 .

<sup>2164</sup> Olivier *supra* n 358 241.

<sup>2165</sup> *Idem* 246.

<sup>2166</sup> *Ibid*

manner ask his or her government for assistance, and that such a “right” is meaningless within the context of diplomatic protection.<sup>2167</sup> Besides, they continued, the court’s approach to the issue under consideration showed undue deference to the executive in the realm of foreign relations.<sup>2168</sup> It showed that judges are reluctant to look critically and astutely at decisions to grant or to refuse diplomatic protection. As a result of this hands-off approach, the executive is often given the opportunity to make sensitive decisions which may tarnish relations with foreign states.<sup>2169</sup>

On the question of extraterritoriality of the South African Constitution, Pete and du Plessis opine that the approach adopted by the Constitutional Court is tantamount to allowing the South African government to apply a double standard in respect of the human rights of South African nationals, depending on whether they find themselves inside or outside the country.<sup>2170</sup> Accordingly they support the minority judgment of the Constitutional Court which suggests that there may be a duty on the government to do what it reasonably can within the confines of international law to protect the rights of nationals as they are guaranteed in the South African Constitution even when such nationals are abroad.<sup>2171</sup>

*Thatcher v Minister of Justice and Constitutional Development*<sup>2172</sup> was another case in which the court was called upon to deal with a matter of diplomatic protection. In that case, the government of Equatorial Guinea, in March 2004, requested the South African government in writing, to render assistance to it by allowing it to question the applicant, Sir Mark Thatcher, a prominent British businessman, resident in Cape Town, on a number of matters relating to an alleged *coup*.<sup>2173</sup> The alleged *coup* was an attempt to overthrow the government of Equatorial Guinea, in which some South African nationals were implicated. The South African government complied with the request. The applicant therefore brought this urgent application for a review of that decision, urging the court to set it aside and to declare same unconstitutional.<sup>2174</sup>

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<sup>2167</sup> *Supra* n 358 471.

<sup>2168</sup> At 472.

<sup>2169</sup> At 441.

<sup>2170</sup> At 463.

<sup>2171</sup> At 472. Olivier *supra* n 358 246 also prefers the minority judgment.

<sup>2172</sup> 2005 (1) SA 373 (C) ; ILDC 172 (ZA 2004) 24 Nov 2004. The case was an offshoot of *Kaunda’s* case *supra* n 688.

<sup>2173</sup> Par 4.

<sup>2174</sup> Par 6.

The trend of events was that the authorised representative of the second respondent,<sup>2175</sup> having satisfied himself in terms of section 7(2) of the International Cooperation in Criminal Matters Act (ICCMA) of 1996<sup>2176</sup> that the request complied with the jurisdictional requirements set forth in that section asked the first respondent<sup>2177</sup> to approve the request in terms of sections 7(4) and 7(5) of the Co-operation Act. This approval was conveyed to the third respondent<sup>2178</sup> who thereupon requested the fourth respondent<sup>2179</sup> to deal with the matter.<sup>2180</sup>

After satisfying herself that the documentation provided for her contained approval by the first respondent of a request for assistance by Equatorial Guinea in terms of the Co-operation Act, the fourth respondent issued a *subpoena* in terms of section 8(2) of the Act requiring the applicant to attend court for the purpose of responding to certain questions annexed to the *subpoena*.<sup>2181</sup>

The applicant contended that the decision to comply with the request of the government of Equatorial Guinea to question him was reached irrationally, unreasonably, arbitrarily, capriciously, unlawfully, and unconstitutionally in law.<sup>2182</sup> In the alternative the applicant sought an order declaring section 8(1) of the Co-operation Act unconstitutional.

The applicant averred that no assistance should be given to Equatorial Guinea in the conduct of the case against South Africans already arrested in Equatorial Guinea as they could not be expected to obtain a fair trial there.<sup>2183</sup> The applicant suggested that the purpose of the interrogation was to elicit evidence which could be used to bolster the case against him by the South African prosecuting authorities, and

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<sup>2175</sup> The Director-General in the Department of Justice and Constitutional Development.

<sup>2176</sup> The Co-Operation Act 75 of 1996.

<sup>2177</sup> The Minister for Justice and Constitutional Development.

<sup>2178</sup> The Chief Magistrate of the Magistrate court for the District of Wynberg who issued both the warrant for the applicant's arrest and the search warrant.

<sup>2179</sup> An additional magistrate attached to the Court.

<sup>2180</sup> See *Thacher's case supra* n 2168 par 5

<sup>2181</sup> *Idem* par 64.

<sup>2182</sup> *Idem* par 83.

<sup>2183</sup> *Iddem* par 9.

possibly to facilitate his extradition to Equatorial Guinea, where, it was alleged, his trial would not be in accordance with the requirements of international law.<sup>2184</sup>

The applicant submitted that the first respondent had failed to apply her mind in considering the documentation and making her decision in that her decision was irrational. He argued that compelling him to comply with the terms of the *subpoena* prior to the conclusion of his criminal trial in South Africa would enable the prosecuting authorities to gain a comprehensive insight into any defence he might wish to raise.<sup>2185</sup> Furthermore, he said that, this would violate his right to silence and the right of protection against self-incrimination entrenched in sections 35(1)(a) and (c) and sections 35(3)(h) and (j) of the 1996 Constitution. By not taking these considerations into account when making her decision, he contended, the first respondent had acted unconstitutionally.<sup>2186</sup>

Finally, the applicant submitted that the respective decisions of the first and second respondents fell foul of the provisions of the Promotion of Administrative Justice Act<sup>2187</sup> in that such decisions constituted arbitrary, capricious, and unreasonable administrative action which should be set aside.<sup>2188</sup>

It was held, *inter alia*, that in considering the conduct of the respondents in making decisions in terms of the Co-operative Act, the court had to take into account the fact that procedure was not purely a legal exercise, but involved an interaction between the domestic law of South Africa and its foreign or international relations with Equatorial Guinea.<sup>2189</sup>

The court considered the conduct of the third respondent and found that the third respondent took no reviewable decision requiring consideration for purposes of the present application and that no case for any relief had been made against him.<sup>2190</sup>

As to the second respondent, having satisfied himself as to the requirements of

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<sup>2184</sup> *Idem* par 10.

<sup>2185</sup> Par 11.

<sup>2186</sup> Par 12.

<sup>2187</sup> 3 of 2000 (PAJA).

<sup>2188</sup> Par 14.

<sup>2189</sup> Par 52.

<sup>2190</sup> Par 54.

section 7(2) of the Co-operative Act, he had arranged for the request and supporting documents to be made available to the first respondent in terms of section 7(4) of the Co-operative Act.

From the moment the request and supporting documents were made available to the first respondent, the second respondent became *functus officio*, and it is clear that no basis existed to review or set aside the decision made by the second respondent. It could not be said that in carrying out his statutory functions in terms of the Co-operative Act, he acted irrationally, unreasonably, arbitrarily, capriciously, unlawfully, or unconstitutionally in any respect.<sup>2191</sup>

The court also found that the fourth respondent acted in terms of the power conferred on her by section 8(1) of the Co-operative Act.<sup>2192</sup> She was not required to consider the applicant's constitutional right before issuing the *subpoena*.<sup>2193</sup> The correct time to consider these rights was when the applicant appeared before her in terms of the *subpoena*.<sup>2194</sup> Hence no case had been made out against the fourth respondent.<sup>2195</sup>

As to the conduct of the first respondent, the court noted that section 7(4) of the Co-operative Act, in terms of which he was required to decide whether to approve a request for assistance, did not lay down any requirement to be complied with prior to the granting of approval.<sup>2196</sup> Considering whether the applicant's constitutional rights had been infringed, the court concluded that the weight of authority was against permitting the applicant to exercise his right to silence and right against self-incrimination at that stage of the proceedings.<sup>2197</sup>

In addition, Justice Van Zyl found the applicant's reliance on the decision of the Constitutional Court in *Mohamed's case*<sup>2198</sup> not only misplaced, but also premature

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<sup>2191</sup> Par 63.

<sup>2192</sup> Par 67

<sup>2193</sup> *Ibid.*

<sup>2194</sup> Par 71.

<sup>2195</sup> *Ibid.*

<sup>2196</sup> Par 74.

<sup>2197</sup> Par 83-94.

<sup>2198</sup> *Supra* n 1204.

and unjustified.<sup>2199</sup> However, it was held that since no case had been made out against any of the respondents for the relief sought, the application must be dismissed.<sup>2200</sup>

It is submitted that *Thatcher's* case can not be regarded as a typical case of diplomatic protection *stricto sensu*. First and foremost, the applicant was a British national and not a South African citizen. Secondly, the South Africans on trial in Equatorial Guinea<sup>2201</sup> were not applicants before the South African court, nor did the applicant hold any brief on their behalf.<sup>2202</sup>

Beukes has, however, pointed out that since the PAJA was in issue in this case, one would have expected an examination of the PAJA and its prescripts by the court.<sup>2203</sup> However, such an examination was not forthcoming despite the fact that the PAJA gives effect to the constitutional imperative concerning constitutional administrative duties of government officials. This criticism notwithstanding, the dismissal of the application for review was commendable according to Beukes.<sup>2204</sup>

In *Roothman v President of RSA*,<sup>2205</sup> the court refused to grant the applicant's relief for *mandamus* to compel the government of South Africa to take steps to ensure that the government of the Democratic Republic of the Congo (DRC) complied with a court order to wit: payment of the debt owed to him. Although diplomatic protection was not specifically mentioned in the writ, it was nevertheless obvious that a strong suggestion of the exertion of diplomatic pressure was indicated.<sup>2206</sup>

The facts of the case were that the applicant, a South African national, entered into a contract with the government of the DRC, whereby he was given the power to locate and seize illegal cobalt exported from the DRC, sell same on behalf of the

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<sup>2199</sup> Par 96. The applicant had relied on *Mohamed's* case *supra* n 1204 to show that if extradited, he might face the death penalty in Equatorial Guinea.

<sup>2200</sup> Par 109.

<sup>2201</sup> Du Toit & 7 others.

<sup>2202</sup> At par 102.

<sup>2203</sup> See Beukes "South Africa and International co-operation in criminal prosecutions – *Thatcher v Minister of Justice and Constitutional Development*" (2005) 30 SA YIL 253 263.

<sup>2204</sup> *Ibid.*

<sup>2205</sup> 2005 (3) All SA 600 (T).

<sup>2206</sup> At 696 par 6.



government, and receive 30% of the net proceeds.<sup>2207</sup> The applicant subsequently brought an action against the government of the DRC for breach of contract and obtained judgment in his favour.<sup>2208</sup> Attempts to enforce the judgment were unsuccessful. As a result of the difficulties encountered in enforcing the judgment debt, the plaintiff/applicant brought the current application.<sup>2209</sup>

The applicant made the following arguments in support of his application. It advocated that the State has a special duty to assist litigants to enforce their rights, including civil claims against debtors.<sup>2210</sup> It based this argument upon the tenets of the rule of law which it maintained was justiciable.<sup>2211</sup> A further argument was that the relief sought was consistent with the guarantee of the right of access to the courts under section 34 of the Constitution.<sup>2212</sup> Finally it was argued that the fact that the judgment debtor was a sovereign state meant that the state had a special duty to assist the applicant, since the ordinary remedy of contempt of court proceedings was not available to the applicant in the light of the provisions of the Foreign States Immunities Act.<sup>2213</sup>

It was, however, held that the applicant could in the present court only obtain relief in respect of assets of the respondent State that were situated in South Africa. The court could not see any recourse for the applicant where it was not shown that any such assets existed in the country. While section 34 of the Constitution guarantees the right of access to courts in the sense that everyone has the right of access to the courts in order to resolve any dispute, this did not mean that the section was of any assistance to the applicant.<sup>2214</sup> The duty placed on the State in that regard relates to the creation of an enabling environment for litigation.<sup>2215</sup>

Although the application did not set out precisely what assistance was required from the first five respondents it seemed that the exertion of diplomatic pressure was

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<sup>2207</sup> At 603 par (d).

<sup>2208</sup> *Idem* 602 par (h).

<sup>2209</sup> *Idem* 603.

<sup>2210</sup> *Idem* 603 par (a).

<sup>2211</sup> *Idem*.

<sup>2212</sup> *Idem* 606 par (c).

<sup>2213</sup> 87 of 1981. *Idem* 606 par (d).

<sup>2214</sup> *Idem* 608.

<sup>2215</sup> *Ibid*.

indicated.<sup>2216</sup> The court pointed out that where a plaintiff is confronted with a difficult defendant who flouts an order of court with impunity, there could be no basis for invoking the assistance of the State to exert extra-judicial pressure on the defendant in order to achieve compliance with the order.<sup>2217</sup>

The court could not find that a citizen had a right to demand the exercise of diplomacy inside the Republic when he was engaged in civil litigation with a foreign power in a commercial matter and had been unable to obtain satisfaction of the judgement.<sup>2218</sup> The court distinguished this case from that relied upon by the applicant<sup>2219</sup> because in this case the state was in no way responsible for the applicant's predicament. The application was therefore dismissed.<sup>2220</sup>

The decision in *Roothman's* case must have influenced the decision in *Van Zyl v Government of the RSA*,<sup>2221</sup> where the court also refused to extend diplomatic protection to a South African national against the Kingdom of Lesotho in respect of acts performed in its territory, against a company incorporated in Lesotho.<sup>2222</sup>

In that case, the government of Lesotho had expropriated property belonging to the applicants without paying them compensation.<sup>2223</sup> Maintaining that the Lesotho government had violated the international minimum Standard in its treatment of the applicants, allegedly with the knowledge of and consent of the first respondent,<sup>2224</sup> the applicants demanded diplomatic protection from the respondents. The respondents, however, advised the applicants that their request for diplomatic protection could not be acceded to.<sup>2225</sup> The present application was therefore for the review and setting aside of the respondent's decision.<sup>2226</sup>

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<sup>2216</sup> *Idem* 608 par (e).

<sup>2217</sup> *Idem* par (f).

<sup>2218</sup> *Idem* par (g).

<sup>2219</sup> I.e. *Kaunda's* case *supra* n 688.

<sup>2220</sup> At 610.

<sup>2221</sup> 2005 (4) All SA 96 (T) ; 171 (ZA 2005) 20 July 2005 *supra* n 556.

<sup>2222</sup> Pars 88 90-93.

<sup>2223</sup> See 101 par (b).

<sup>2224</sup> The Government of RSA. At 108 par 22.

<sup>2225</sup> *Idem* 104 par 14.

<sup>2226</sup> *Idem* 101 par (b).

A preliminary application was made for the striking out of certain portions of the applicant's replying and supplementary replying affidavits,<sup>2227</sup> but the court ruled that the striking out application required a ventilation of the issues on the merits. It therefore had to be heard together with the main application.<sup>2228</sup>

On the merits, the applicants based their right to diplomatic protection on the obligation imposed by the Constitution on the respondents to remedy the violation of the applicant's property rights by the Lesotho government.<sup>2229</sup> They also argued that their right to citizenship entailed a duty on their government to intervene on their behalf when their constitutional rights were violated by another government.<sup>2230</sup>

The court first considered the concept of diplomatic protection. It followed the definition offered by the Permanent Court of International Justice.<sup>2231</sup> In terms of that definition, a State is entitled to protect its subjects when injured by acts of another state which are in conflict with international law.<sup>2232</sup>

The principles of international law are such that private individuals or companies are not subjects of international law and cannot benefit there from where specific status is not conferred on them by treaties or agreements between states.<sup>2233</sup> Where a private individual or company contracts with a state, as in the case of the applicants and the Lesotho government, then the remedies for breach of contract flow from the contract and are determined by the proper law of the contract.<sup>2234</sup> A breach by the contracting State does not incur international responsibility.<sup>2235</sup> The applicants were ruled not to be subjects of international law and could not have international law applied in their claim against the Lesotho government.

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<sup>2227</sup> *Idem* 102.

<sup>2228</sup> *Idem* 103.

<sup>2229</sup> *Idem* 107 par 22.

<sup>2230</sup> *Idem* 108 par 23.

<sup>2231</sup> *Mavromatis Palestine Concession case supra* n 36.

<sup>2232</sup> At 106.

<sup>2233</sup> At 110 par 27.

<sup>2234</sup> *Idem* par 28.

<sup>2235</sup> *Ibid.*

In conferring diplomatic immunity, the State of nationality has a discretion whether or not it will act upon the infraction of its international law rights.<sup>2236</sup> However, international law places no duty on the State to protect its nationals abroad.<sup>2237</sup> The application for review raised the question about whether the respondent's decision was reviewable, and, if so, on what basis and to what extent.<sup>2238</sup>

An examination of foreign law led the court to conclude that the respondent's decision could be reviewed on a very limited basis pertaining to foreign policy and public relations.<sup>2239</sup> Foreign policy and foreign relations considerations are essentially the function of the executive and not the judiciary.<sup>2240</sup> The basis of respondent's refusal of the applicants request was that the applicants did not have an enforceable right to effective diplomatic protection. A request for diplomatic protection was received and was properly considered. The court rejected the submission that the decision was objectively irrational and, therefore, not related to the purpose for which the power was granted.

As the applicants had also contended that an international delict and violation of international minimum standards had occurred, the court had to consider whether the requirement for an international delictual claim existed.<sup>2241</sup> The requirements are nationality and exhaustion of local remedies before the prosecution of a claim before an international tribunal can succeed.<sup>2242</sup> The evidence before the court established that the fourth to ninth applicants were not nationals of the Republic of South Africa even though the first three applicants who were South African nationals held some of the shares in those companies.<sup>2243</sup> The first three applicants were therefore not entitled to diplomatic protection as shareholders in the companies .<sup>2244</sup> The court

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<sup>2236</sup> *Idem* 112 par 32.

<sup>2237</sup> *Ibid.*

<sup>2238</sup> *Idem* 117 par 45.

<sup>2239</sup> *Idem* 122 par 56. In arriving at this conclusion, the court considered both English and Canadian decisions. The English decisions considered included *Council of Civil Service v Minister of the Civil Service* [1985] 3 AC 374; *R v Home Secretary ex parte Bentley* [1993] 4 All ER 442, while the only Canadian case considered was *Operation Dismantle Inc. v The Queen* [1983] 18 DLR 481.

<sup>2240</sup> *Idem* 123 par 56(a).

<sup>2241</sup> *Idem* 145 par 105.

<sup>2242</sup> *Idem* 140 par 93.

<sup>2243</sup> *Ibid* par 95.

<sup>2244</sup> *Idem* 141.

went on to find that the applicants had not exhausted all local remedies in Lesotho before approaching the courts.

In conclusion, the court found that the elements of international delict claimed by the applicants which would have vested the right in the Republic of South Africa to act against the Kingdom of Lesotho were not satisfied<sup>2245</sup> and, consequently, dismissed the application with costs.<sup>2246</sup>

In a hypothetical case, Schmulow has illustrated that although the company was incorporated in Lesotho, the international law position on the protection of shareholders offered sufficient interest to the Republic of South Africa to have intervened on behalf of the South African nationals-shareholders involved.<sup>2247</sup> He concedes that, although international law permits expropriation of foreign owned property,<sup>2248</sup> however, for expropriation to be legal in practice, it must be accompanied by adequate, prompt and effective compensation.<sup>2249</sup> Since no compensation was paid in this case, the action of the Kingdom of Lesotho “would appear to constitute a breach of international law and would consequently be *prima facie* illegal.”<sup>2250</sup>

Schmulow therefore argued that the corporate veil ought to have been pierced to show that foreign shareholders have been injured by the very state in which their company was registered – after the injuring state had insisted upon incorporation taking place within its borders.<sup>2251</sup> He argued further that there was a genuine link between the mining companies and the Republic of South Africa that should have warranted the intervention of the South African government.<sup>2252</sup> Since the South African government had refused to assist, it ought to have been compelled to do so by the court in terms of the Constitution.<sup>2253</sup>

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<sup>2245</sup> Par 105.

<sup>2246</sup> Par 126.

<sup>2247</sup> See Schmulow “Diplomatic intervention in the event of expropriation of a company without compensation.” (1996) 21 *SAYIL* 73 81.

<sup>2248</sup> *Idem* 75.

<sup>2249</sup> *Idem* 76.

<sup>2250</sup> *Idem* 78.

<sup>2251</sup> *Idem* 82.

<sup>2252</sup> *Idem* 92.

<sup>2253</sup> *Ibid.*

In *Von Abo v Government of the Republic of South Africa*,<sup>2254</sup> however, it was held by the Gauteng North High Court in Pretoria that the plaintiff had the right to diplomatic protection from the South African government in respect of the violation of his rights by the government of Zimbabwe.<sup>2255</sup> In that case, the plaintiff was the sole owner of farming interests in Zimbabwe which he had incorporated under the laws of Zimbabwe for purposes of farming. Over a period of fifty years, the plaintiff's holdings in farmland in Zimbabwe had expanded considerably.

The plaintiff initially financed the farming activities by applying his own resources drawn from South African reserves. In time however, he funded the farming interests using the finances available to him in Zimbabwe. He set about re-investing profit and capital gains in his Zimbabwean interests. In this way he became a beneficial owner of a considerable farming empire.<sup>2256</sup>

From 1997 onwards, the government of Zimbabwe violated the plaintiff's rights by destroying his property interests in a number of farms in Zimbabwe, or contributed to their destruction.<sup>2257</sup> This destruction of property rights was achieved as part of an overall scheme and/or policy of the Zimbabwean government to expropriate land owned by white farmers.<sup>2258</sup> No compensation was however paid. Aggrieved that his farming operation had been ruined and that the government of Zimbabwe had not paid compensation for the expropriation or damage he had suffered, the plaintiff brought proceedings against the Zimbabwean government in that country to protect his interests in the properties. His efforts however proved futile.<sup>2259</sup>

The plaintiff then struggled for more than six years to convince the South African government to act against Zimbabwe's expropriation of his farmland, but his pleas fell on deaf ears.<sup>2260</sup> Having exhausted all local remedies available to him in Zimbabwe, and dissatisfied with the response of the government in what he termed

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<sup>2254</sup> 2009 (2) SA 526 (T) *supra* n 801 .

<sup>2255</sup> Par 161.

<sup>2256</sup> Par 6.

<sup>2257</sup> Par 8.

<sup>2258</sup> *Ibid.*

<sup>2259</sup> *Idem* par 10.

<sup>2260</sup> *Idem* par 91.

its failure to “take diplomatic steps....to protect or fulfil [his] rights” without “meaningful explanation for the failure and/or refusal,” he decided to put it on terms, and threatened legal action.<sup>2261</sup>

No response was forthcoming from the government. In January 2007, Mr. Von Abo approached the High Court in Pretoria. He sought an order declaring amongst other prayers that the failure of the government to consider and decide his application for diplomatic protection in respect of the violation of his rights by the government of Zimbabwe was inconsistent with the Constitution and invalid.<sup>2262</sup>

The government and other defendants opposed the application and the reliefs sought.<sup>2263</sup> The defendants contended that the entities on whose behalf the applicant had approached the court for diplomatic protection were Zimbabwean entities and Zimbabwe was a sovereign State. They added that how Zimbabwe treated its citizens, corporations and trusts was a matter for Zimbabwean law, with the result that the court in that case had no jurisdiction to adjudicate on the matter.<sup>2264</sup> They further contended that that notwithstanding, they had seriously considered the request for diplomatic protection and had taken reasonable steps to provide the protection sought.<sup>2265</sup> They further averred that the government of South Africa had made several diplomatic representations on Mr. Von Abo’s plight to the government of Zimbabwe without success, but had no means to coerce that government to heed the representations.<sup>2266</sup>

The High court found that the requirements necessary for a state to assert a claim for diplomatic protection on behalf of its citizens were present.<sup>2267</sup> According to the court, those requirements are that the claimant must be a national of the country from which diplomatic protection is sought, that there must be a violation of the

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<sup>2261</sup> *Idem* par 17.

<sup>2262</sup> *Idem* par 18 & 19.

<sup>2263</sup> See *idem* pars 1, 40, 43 & 91.

<sup>2264</sup> *Idem* par 55.

<sup>2265</sup> *Idem* par 49.

<sup>2266</sup> *Idem* par 51.

<sup>2267</sup> *Idem* par 65.

international minimum standard, and that the claimant must have exhausted all available internal remedies.<sup>2268</sup>

The court also found that the plaintiff had demonstrated that his rightful property in Zimbabwe was unlawfully expropriated under international law,<sup>2269</sup> and that he was not compensated.<sup>2270</sup> The court was of the view that the action of the Zimbabwean government constituted expropriation without the payment of compensation, which did not comply with the international minimum standard of treatment of aliens or even of nationals.<sup>2271</sup>

Given the almost absolute disregard the government of Zimbabwe showed for orders of its own court, especially regarding the expropriation, the court was of the opinion that there were no more local remedies available to him.<sup>2272</sup> If for six or more years, the South African government did absolutely nothing to bring about relief for the applicant, there was no doubt that the government had been dealing with the matter in bad faith.<sup>2273</sup> According to the court

They exhibited neither the will nor the ability to do anything constructive to bring their Northern neighbour to book .... They paid no regard or any consequence to the plight of valuable citizens such as the applicant/plaintiff.<sup>2274</sup>

In the circumstances therefore, it was difficult to resist the conclusion that the respondents (government)

were simply stringing the plaintiff along and never had any serious intention to afford him proper protection.<sup>2275</sup>

The court therefore ruled that the plaintiff/applicant qualified for diplomatic protection,<sup>2276</sup> and ordered the government to take all necessary steps within 60

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<sup>2268</sup> *Idem* par 68.

<sup>2269</sup> *Idem* par 79.

<sup>2270</sup> *Idem* par 81.

<sup>2271</sup> *Idem* par 81.

<sup>2272</sup> *Idem* par 86.

<sup>2273</sup> *Idem* par 143.

<sup>2274</sup> *Idem* par 143.

<sup>2275</sup> *Idem* par 112.

<sup>2276</sup> *Idem* par 154.



days to remedy the violation of the plaintiff/ applicant's rights and to report back to the court regarding the steps so taken.<sup>2277</sup>

The applicant, however, appealed to the Constitutional Court<sup>2278</sup> for a confirmation of the order of the Gauteng High Court in terms of section 172(2)(a) of the Constitution<sup>2279</sup> and Rule 16 of the Constitutional Court.<sup>2280</sup> He cited the President of the Republic as the only respondent<sup>2281</sup> and only sought for the confirmation of paragraph 1 of the order of the Gauteng High Court.<sup>2282</sup> In the Constitutional Court Moseneke DCJ, after a comprehensive review of the case before the Gauteng High Court, came to the merits of the case before the Constitutional Court.<sup>2283</sup>

He said that the applicant's conviction that the order of the High Court was susceptible to confirmation appeared to have been emboldened by the stance of the High Court.<sup>2284</sup> He added that the respondent did not agree with this characterisation and on that basis had opposed the confirmation, since the order in issue did not relate to his conduct as President as envisaged in section 172(2)(a) of the Constitution.<sup>2285</sup>

According to Moseneke DCJ, at the hearing, the main issue argued before the Constitutional Court was whether the order of the High Court that the conduct of the President was inconsistent with the Constitution and invalid, was subject to confirmation by that court in terms of section 172(2)(a) of the Constitution, while the

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<sup>2277</sup> *Idem* par 161. According to Prinsloo J, par 90 "This may involve effective diplomatic pressure on the Zimbabwean government to restore the properties to the applicant and his companies and to pay compensation for losses and damages."

<sup>2278</sup> See *Von Abo v Government of the Republic of South Africa* 2009 (4) SA 526 (T).

<sup>2279</sup> S 172(2)(a) states that "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional validity has no force unless it is confirmed by the Constitutional Court."

<sup>2280</sup> Which directs that a copy of the order sought to be confirmed shall be filed at the Constitutional Court within 15 days.

<sup>2281</sup> At p 2.

<sup>2282</sup> *Ibid.* See also par 161(1) of the Order of the High Court which stated *inter alia* "It is declared that the failure of the respondents to rationally, appropriately and in good faith consider, decide and deal with the applicant's application for diplomatic protection in terms of the violation of his rights by the Government of Zimbabwe is inconsistent with the Constitution, 1996 and invalid."

<sup>2283</sup> At 8.

<sup>2284</sup> In its judgment, par 155 the High Court had said *obiter* that its order should be referred to the Constitutional Court for confirmation. "The certification process as described by s 172(2)(a) of the Constitution, will be attended to in the normal course..."

sole question of substance for determination was whether the failure of the President to provide diplomatic protection constituted “conduct” for purposes of section 172(2)(a) of the Constitution.<sup>2286</sup>

While the applicant argued that failure by the President to provide diplomatic protection amounted to “conduct,” within the meaning of section 172(2)(a) of the Constitution, the respondent argued otherwise. The respondent then urged the court to dismiss the application for confirmation because failure to provide proper diplomatic protection does not amount to “conduct” of the President as envisaged in section 172(2)(a) of the Constitution.<sup>2287</sup>

The Constitutional Court maintained that it had original, concurrent and inherent jurisdiction to enquire into the conduct of the President under the Constitution<sup>2288</sup> and that the jurisdiction to enquire into the conduct of the President is contained in sections 172(2)(a), 167(5) and 167(4) of the Constitution.<sup>2289</sup> While section 172(2)(a) deals with the “conduct” of the President, section 167(4)(e) deals with “failure to fulfil a constitutional obligation.” The two terms must be distinguished.<sup>2290</sup>

The question was therefore whether the alleged failure of the President to deal with the applicant’s request for diplomatic protection against the violation of his property rights by the Zimbabwean government can properly be characterized as relating to conduct of the President. To answer this question, the court described briefly the nature of the executive authority envisaged by the Constitution<sup>2291</sup> and came to the conclusion that it cannot.

It seems to me therefore that it is impermissible to hold that when the conduct of the government as represented by the national executive, or of one or more members of the Cabinet, is impugned on the ground that it is inconsistent with the Constitution and thus invalid, that dispute relates to the conduct of the President and therefore that the ensuing order of constitutional invalidity must

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<sup>2285</sup> At 8-9.

<sup>2286</sup> *Idem* 12-13.

<sup>2287</sup> *Idem* 15.

<sup>2288</sup> *Ibid.*

<sup>2289</sup> *Ibid.*

<sup>2290</sup> *Idem* par 34.

<sup>2291</sup> *Idem* par 39.

be confirmed by this Court on the ground that it relates to the conduct of the President. If that were so, it would mean that in theory every order against the government or a member of the Cabinet must be confirmed before it has any force or effect.<sup>2292</sup>

Furthermore, the court pointed out that since the order of the High Court did not single out the offending conduct on the part of the President in particular nor did the order refer to him specifically and whereas there were five respondents in the court below, it would be unfair to confirm the order against just one respondent.<sup>2293</sup>

In conclusion Moseneke DCJ said, *inter alia*,

In the light of the above, I find that the applicant has approached this court erroneously. The portion of the order of the High court that declares the conduct of the respondent to be invalid does not concern the conduct of the President within the meaning of section 172(2)(a) of the Constitution despite the fact that he was cited as a party in the proceedings.<sup>2294</sup>

The application for confirmation of the judgment of the High Court was, therefore, dismissed but without costs.<sup>2295</sup>

## 9 Judicial attitude to diplomatic protection in South Africa

It is necessary to take a good look at the judicial attitude to diplomatic protection in South Africa as can be gleaned from the above decided cases. Of the many cases that came before the courts, only one of the cases; namely, *Von Abo v The Government of RSA* succeeded.<sup>2296</sup> On appeal, however, the case suffered some

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<sup>2292</sup> *Idem* at 24 par 42. Moseneke DCJ said that that would defeat the scheme of ch 5 of the Constitution and blur the careful jurisdictional lines between the Constitutional Court and other courts, leading to an unwarranted increase of confirmation proceedings in the Constitutional Court.

<sup>2293</sup> *Idem* par 48.

<sup>2294</sup> *Idem* 49. The judge pointed out the import of his conclusion was that the application for confirmation was misconceived because it did not concern the conduct of the President. In the circumstances, the order of the High Court needed no confirmation by the Constitutional Court.

<sup>2295</sup> *Idem* par 54.

<sup>2296</sup> *Supra* n 801 See also the case of *Campbell (Pty) Ltd v The Republic of Zimbabwe supra* n 1302 where the applicants obtained judgment in their favour at the SADC tribunal against the expropriation of their farm land in Zimbabwe, and were able to enforce the judgment in a South

setback.<sup>2297</sup> From the above decided cases, it appears that diplomatic protection has been invoked in South Africa in matters pertaining to debt collection,<sup>2298</sup> arrest and detention,<sup>2299</sup> extradition<sup>2300</sup> and expropriation of property,<sup>2301</sup> but with very limited success.

It would appear therefore that South African courts place the responsibility for providing diplomatic protection squarely on the shoulders of the executive branch of government and are reluctant to descend into that arena.<sup>2302</sup> In *Kaunda's* case<sup>2303</sup> it was said that:

A court cannot tell government how to make diplomatic intervention for the protection of its nationals,<sup>2304</sup> and that

A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy, which is essentially the function of the executive<sup>2305</sup>

The obvious conclusion is that South African courts, like courts in other states are reluctant to order diplomatic protection against the executive arm of government.<sup>2306</sup> The interesting aspect of this judicial attitude is that while the courts are always willing to entertain cases on diplomatic protection,<sup>2307</sup> they are very reluctant to grant them.<sup>2308</sup>

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African court See Ainsley Brown "White Zimbabwean farmers to get justice in SA" *Commercial Law International* 2010-04-13, [www.commerciallawinternational.com/?](http://www.commerciallawinternational.com/?) (accessed 2010-11-08). .  
<sup>2297</sup> *Supra* n 2274.  
<sup>2298</sup> *Roothman v President of RSA supra* n 2201  
<sup>2299</sup> *Kaunda v President of RSA supra* n 688 *Thatcher v Minister of Justice supra* n 2168 & *Mohamed v President of RSA supra* n 1290.  
<sup>2300</sup> *Ibid.*  
<sup>2301</sup> *Van Zyl v Government of RSA supra* n 556 & *Von Abo v Government of RSA supra* n 801.  
<sup>2302</sup> See *Olivier supra* n 358 252. See also *Pete & Plessis supra* n 358 441.  
<sup>2303</sup> This is the *locus classicus* or the leading case on diplomatic protection in South African law.  
<sup>2304</sup> Par 73.  
<sup>2305</sup> This statement re iterated the legal position laid down by the ICJ in the *Barcelona Traction* case *supra* n 26.  
<sup>2306</sup> See e.g. *Abbassi v Secretary of State for foreign and Commonwealth Affairs* (2002) EWCA civ 1598 in which proceedings were brought against the British government to compel it to protect British nationals accused of involvement in the Afghan war who were taken prisoners and incarcerated in Guantanamo Bay, but the action did not succeed.  
<sup>2307</sup> As shown e.g. in *Kaunda's* case *supra* n 688.  
<sup>2308</sup> According to Chaskalson CJ in par 78 of the *Kaunda* judgment however, "This does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection." It appears that the courts always places the onus on the applicant to prove that he or she is entitled to diplomatic protection.

This has led to severe criticism of judicial attitude towards diplomatic protection in South Africa. Commenting on the judicial attitude in *Kaunda's* case, Olivier wonders why the court had to grapple with questions such as the nature of diplomatic intervention and the territorial restrictions on the Bill of Rights which resulted in a complicated and very confusing line of argument delivered by Chaskalson CJ.<sup>2309</sup> This led to the conclusion that the Bill of Rights protects only those within the borders of South Africa and that it is up to the executive to decide whether and how to entertain requests on behalf of citizens abroad whose human rights have been or are being abused by a foreign state.

The point of departure should rather have been whether international human rights had been violated.<sup>2310</sup> If so, an obligation could have arisen for the executive to act in a manner which would have been likely to affect the situation positively.<sup>2311</sup> Besides, according to Olivier, the irony of the situation was that while the court held that the executive must deal with requests for diplomatic protection in terms of the Constitution, it nevertheless gave the executive a wide discretion on how to act, a discretion with which the courts would not lightly interfere.<sup>2312</sup>

She asks: "Why are courts so wary of setting the constitutional parameters for diplomatic protection?"<sup>2313</sup> Olivier's conclusion is that

The decision is neither in line with South African Constitution, concomitant to the protection of human rights, nor with the letter and spirit of the international human rights law.<sup>2314</sup>

Tladi has however pointed out that this view is:

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<sup>2309</sup> See Olivier *supra* n 358 252.

<sup>2310</sup> *Ibid.*

<sup>2311</sup> *Ibid.* She is of the opinion that arguing from the perspective of the territoriality of the Bill of Rights brought the court against the wall of sovereignty and territorial integrity and made it impossible for the State to become involved in the plight of its nationals in other states.

<sup>2312</sup> *Ibid.* The Court said in par 81 that "...government has a broad discretion in such matters which must be respected by the courts...".

<sup>2313</sup> *Ibid.* According to her, diplomacy is regarded as a mysterious enclave of executive action, discretionary in nature and not to be tested against the Constitution, and in which a court should not "meddle."

<sup>2314</sup> At 176.

fundamentally problematic and constitutes a threat not only to the integrity of international law, but also to the very values it purports to speak on behalf of.<sup>2315</sup>

The question he poses is whether a national does (or should have) a right to diplomatic protection against the wrongful conduct of foreign states and whether the state has (or should have) a corresponding duty to diplomatically protect the national.<sup>2316</sup>

Tladi is of the view that diplomatic protection and human rights should be kept separate and apart and that diplomatic protection should not be employed for the protection of human rights.<sup>2317</sup> According to him,

The argument in support of the individual's right to diplomatic protection postulates that a national's right to diplomatic protection should be seen as a tool for the protection and enforcement of international human rights law.<sup>2318</sup>

The danger posed by this argument and the reasons underlying it are double-edged. Firstly, it is based on the new concept of international law – which places human rights at the centre, and secondly, “it paints a picture of international law without a process, effective or otherwise, for the protection of human rights.”

While agreeing that there may well be a place for diplomatic protection as a tool for international human rights, he believes that

over reliance on diplomatic protection may serve to undermine the very system that serves to promote the right of individuals to claim their own rights.<sup>2319</sup>

His main objection to the use of diplomatic protection for the protection of human rights is based on the ironic premise that:

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<sup>2315</sup> Tladi “South African Lawyers, values and new vision.” (2008) 33 *SAYIL* 167. Ngcobo J had expressed the same view in *Kaunda's case supra* n 688 par 181. Tladi specifically refers to “the views expressed by Justice Ngcobo and Olivier “to be “fundamentally problematic...”.

<sup>2316</sup> At 175.

<sup>2317</sup> *Ibid.*

<sup>2318</sup> *Idem* at 177.

<sup>2319</sup> *Idem* at p 182.

having achieved the objective of recognising individual's right to act and to enforce his or her own rights under international law independent of the State, human rights supporters now demand of the State the continued enforcement of rights on behalf of individuals.<sup>2320</sup>

He, however, agrees with Olivier that the court in *Kaunda's* case, should have considered the matter mainly from the human rights point of view rather than from the diplomatic protection angle.<sup>2321</sup> Tladi nevertheless criticises the decision in *Von Abo v The President of the RSA*<sup>2322</sup> as being "fundamental wrong in law" because it is:

illustrative of the appeal to human rights, embodied in the calls for the individual's right to diplomatic protection

This appeal is in turn, based on the current system of international law.<sup>2323</sup>

Tladi's view is thus not only in complete contrast with that of Olivier,<sup>2324</sup> but also with that of Dugard, who, as the Special Rapporteur on Diplomatic Protection to the ILC, sought to convince the ILC to impose some duty on states to exercise diplomatic protection on behalf of their nationals whose fundamental human rights are violated abroad.<sup>2325</sup> In as much as he disagrees with the current system or the "new vision" of international law, his view can best be described as academic or idealistic if not down to earth conservative.<sup>2326</sup> Needless to say, one wonders if Tladi would not seek the protection of his government if any of his fundamental rights were violated in a foreign land.<sup>2327</sup>

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<sup>2320</sup> *Ibid.*

<sup>2321</sup> *Idem* at 184.

<sup>2322</sup> *Supra* n 801.

<sup>2323</sup> According to her at 178 "I do not believe that the current system of international law is fair and just."

<sup>2324</sup> Whom she describes as a "proponent of the right to diplomatic protection." *Idem* 176.

<sup>2325</sup> Alluding to this, Tladi says at 167 that the ILC "resisted the overtures of the Special Rapporteur for a national's right to diplomatic protection."

<sup>2326</sup> See *supra* n 2315.

<sup>2327</sup> Tladi has something in common with Kelson *supra* n 431 in that just as Kelson believed in a pure theory of law generally, Tladi believes in a pure theory of international law. See Kelson *General Theory of Law and State* (1945) 175-177 & Kelson "The pure theory of Law" (1934) 50 LQR 474. See Tladi *supra* n 2315 169 & 177 respectively.

Pete and du Plessis, like Olivier, have decried the undue deference granted to the executive by the courts within the realm of foreign relations.<sup>2328</sup> As a result of this deference, the judiciary has surrendered to the executive the power to make sensitive decisions on issues concerning diplomatic protection which may affect relations with foreign states.<sup>2329</sup>

Pete and du Plessis maintain that judges should be more astute and take bolder decisions in matters relating to diplomatic protection instead of viewing them as an executive prerogative. According to them, this deferential attitude, which they term “the Court’s low-level rationality”, has watered down diplomatic protection to the point of rendering it meaningless.<sup>2330</sup>

As justified as these criticisms may be, it is important to note that the courts’ reluctance to compel the executive to grant diplomatic protection is not peculiar to South Africa.<sup>2331</sup> In *Kaunda’s* case,<sup>2332</sup> for instance, the court reflected on the expert opinion of the ILC Special Rapporteur on Diplomatic Protection on the subject, which showed that claims by individuals against their governments for diplomatic protection were often dismissed in many jurisdictions. This was manifested in the attitude of British, Dutch, Spanish, Austrian, Belgian and French courts.<sup>2333</sup> According to the court:

Even in those countries where the Constitution recognizes that the State has an obligation to afford such protection....there is some doubt as to whether that obligation is justiciable under municipal law.<sup>2334</sup>

Since the exercise of all public power is subject to constitutional control, such exercise of discretion by government is justiciable. Thus,

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<sup>2328</sup> *Supra* n 358 441.

<sup>2329</sup> *Ibid.*

<sup>2330</sup> *Idem* 442.

<sup>2331</sup> See *Abassi v Secretary for Foreign and Commonwealth Affairs and Secretary of State for Home Department*. Judgment of (2002) 11 06 [2002] EWCA Civ 1598 and *Rudolf Hess* case ILR vol 90 387.

<sup>2332</sup> *Supra* n 688.

<sup>2333</sup> *Idem* par 71.

<sup>2334</sup> *Idem* par 72.



if government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly.<sup>2335</sup>

It is likely that the doctrine of diplomatic protection will further be deliberated upon and the scope judicially expanded in the near future under South African law.

## 10 Extraterritoriality

The issue of the extraterritorial application of the constitution for purposes of diplomatic protection in South Africa must begin with the consideration of the case of *Mohamed v President of the RSA*.<sup>2336</sup> In that case, the Constitutional Court held that the deportation of Mohamed, a Tanzanian national to the US to stand trial by the SA authorities with the collusion of US officials, was a violation of the SA Constitution since SA had failed to obtain a prior undertaking that if convicted, the death sentence would not be imposed on him.<sup>2337</sup>

The decision in *Mohamed's case*<sup>2338</sup> was generally considered to be an extraterritorial application of the SA Constitution.<sup>2339</sup> However, in a thoughtful analysis of that case, du Plessis<sup>2340</sup> has pointed out that the case did not really constitute an extraterritorial application of the Constitution, as the harm to Mohamed in the US was caused by the action of public officials in SA.<sup>2341</sup> According to him, the 'extraterritorial' application of the Constitution is thus an application of the Bill of Rights, triggered by effects abroad, which would be the end-result of acts of public officials which began in South Africa.<sup>2342</sup>

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<sup>2335</sup> *Ibid.* See pars 77-80 That was the basis of the decision in *Von Abo's case supra* 801.

<sup>2336</sup> *Mohamed's case supra* n 1204.

<sup>2337</sup> This is said to have violated Mohammed's constitutional rights to human dignity, to life and not to be punished in a cruel, inhuman or degrading manner.

<sup>2338</sup> *Supra* n 1290.

<sup>2339</sup> See Dugard *supra* n 1 79.

<sup>2340</sup> Du Plessis *The extraterritorial Application of the South African Constitution* (2003) 20 SAYIL 797.

<sup>2341</sup> Dugard *supra* n 1 79.

<sup>2342</sup> *Idem* 130.

## 11 South African government policy on diplomatic protection

Apart from the criticisms levelled against the judicial attitude to diplomatic protection in South Africa, the other aspect of diplomatic protection which has been criticised is government policy on the subject. The South African Government policy on diplomatic protection was disclosed in the case of *Kaunda v President of the RSA*<sup>2343</sup> and can be paraphrased as follows:

As their government, we have to ensure that all South African citizens, whatever offence they have carried out or are charged with, must receive a fair trial, they must have access to their lawyers, they must be tried within the framework of the Vienna Convention, they must be held in prison within the framework of the Vienna Convention and international law and we will always, it is our constitutional duty to ensure that this is getting out within the framework of the Geneva Convention and that it is a fair trial.<sup>2344</sup>

This policy statement by the Department of Foreign Affairs indicated that SA nationals abroad who face criminal charges abroad would obtain a fair trial within the framework of international human rights law. The policy was referred to by the court as being in line with government's constitutional duty under section 3(2) of the Constitution.<sup>2345</sup>

Based on this policy statement, the court found that

there may be a duty on government consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.<sup>2346</sup>

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<sup>2343</sup> *Supra* n 688.

<sup>2344</sup> This policy is based on the statement made by the South African Deputy Minister for Foreign Affairs Mr Aziz Pahad in a media briefing. See *Kaunda's case supra* n 688 par 68.

<sup>2345</sup> At 68.

<sup>2346</sup> *Idem* par 69. The rest of the judgment indicates that the court did not hold the present set of facts to comply with the requirement for government action set out by this quotation, namely a material infringement of human rights. It is also not clear in the light of the court's earlier conclusion that

The court accepted that given the government's stated foreign policy, there was no reason to believe that this would not be done.<sup>2347</sup> In this respect, according to the Chief Justice, the government was in the best position to decide on what action to take:

The situation that presently exists calls for skilled diplomacy the outcome of which could be harmed by any order that this court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow. If the situation on the ground changes, the government may have to adapt its approach to address the developments that take place. In the circumstances, it must be left to government, aware of its responsibilities, to decide what can best be done.<sup>2348</sup>

The rationale was that

The timing of representations if they are to be made, the language in which they should be couched and sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal.<sup>2349</sup>

It was however conceded that all public power was subject to constitutional control. Government had a wide discretion in matters of diplomatic protection and the court may not tell government what form such protection should take. Where government has dealt with a request in bad faith or irrationally, the court may review the decision.<sup>2350</sup>

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there was no obligation on a state to render diplomatic protection under International Law whether a separate duty is established in cases of gross violations of human rights.

<sup>2347</sup> *Idem* par 127.

<sup>2348</sup> This was confirmed by Ngcobo J who said at par 189 that "foreign relations is a matter which is within the domain of the executive" and that states "are better judges of whether to intervene and if so the timing and the manner of such intervention." See also the judgment of O'Regan J to the same effect at par 245.

<sup>2349</sup> *Idem* par 77. "The best way to secure relief for the nationals in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges and which could be harmed by court proceedings and the attendant publicity."

<sup>2350</sup> *Idem* par 80.

Although government argued that it was doing what it was entitled to do in law and in foreign policy to assist the applicants and although there was nothing to show that government had provided any assistance to them, the court did not investigate the matter further. Nevertheless, the court was prepared to look into the obligations of government to the applicants in the event of there being a possibility of being denied a fair hearing, or should they be sentenced to death.<sup>2351</sup>

The wisdom behind the Government's policy only to intervene once the death penalty has been imposed has been questioned.<sup>2352</sup> It has been said that a disappointing feature of the *Kaunda* judgment is the manner in which the Constitutional Court extended the hope of some form of diplomatic protection to South African citizens abroad, only to dash this hope by allowing the authorities an almost complete discretion to decide on the form, if any, that this "protection" would take.<sup>2353</sup>

It has also been said that the court's decision may mean that government policy will be allowed to trump the right of South African nationals when they are most desperately in need of the protection of their state.<sup>2354</sup> The effect may lead to an evisceration of the corresponding right held by the citizen.<sup>2355</sup>

It has also been asserted that the court in *Kaunda*, particularly in its majority judgment, showed undue deference to the executive.<sup>2356</sup> According to the Court:

This however is a terrain in which the courts must exercise discretion, and recognize that government is better placed than they are to deal with such matters.<sup>2357</sup>

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<sup>2351</sup> *Idem* par 99.

<sup>2352</sup> Pete & Plessis *supra* n 358 469. See also Olivier *supra* n 358 245.

<sup>2353</sup> Pete & Plessis *Idem* 468.

<sup>2354</sup> *Ibid.*

<sup>2355</sup> *Idem* 448. The Court had said *inter alia* "...The entitlement to request diplomatic protection which is part of the constitutional guarantee given by s 3 has certain consequences. If ... citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution...".

<sup>2356</sup> *Idem* 468.

<sup>2357</sup> *Idem* par 67.

The risk of adopting an overly deferential approach when confronted with sensitive foreign policy issues is that the promises in the South African Constitution may all too easily be sacrificed on the alter of government's chosen foreign policy.<sup>2358</sup> The danger which lies in such deference is not only in the obvious difficulty of proof, but also in the hurdle that an applicant who intends to challenge government foreign policy will have to scale in order to succeed.<sup>2359</sup>

Furthermore, it has been said that even if it is clear that the government's chosen policy does not reflect a whole-hearted and convincing commitment to, or understanding of, an applicant's human rights predicament, the danger is that the court may be tempted to genuflect to the face of a bold assertion by government that it has given constitutional consideration to the request of the applicant, even if that is not the case.<sup>2360</sup>

This criticism was borne out in *Van Zyl v Government of RSA*<sup>2361</sup> where the applicant's application to the Transvaal Provincial High Court for a review of government's policy decision to refuse him diplomatic protection in respect of his property rights expropriated by the government of Lesotho was dismissed.

Although the court came to the conclusion that government's refusal of diplomatic protection to the applicant was reviewable on a very limited basis, it based its decision on a submission that government policy was based on solid legal advice and not on the whims and caprice of government.<sup>2362</sup>

According to the court:

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<sup>2358</sup> *Ibid.*

<sup>2359</sup> *Ibid.* It is difficult to imagine how a litigant would successfully show that a policy decision not to afford a South African citizen diplomatic protection should be reviewed on the basis that it was taken in bad faith.

<sup>2360</sup> *Idem* 469. Another government policy criticized by the court itself at par 112 was the SA's government policy not to comment on the justice system in foreign countries. At the trial, it was alleged that the judicial system in Equatorial Guinea was so poor and unreliable that if the applicants were extradited to that country they would be charged, convicted & sentenced to death without due process of law. O'Regan J was quick to point out in par 267 that it is not satisfactory for government merely to say that it was not its policy to comment on the criminal justice system of other countries.

<sup>2361</sup> *Supra* n 688.

<sup>2362</sup> The legal advice was obtained from both the Department of Foreign Affairs and the Department of Justice. See par 15.

On the basis of the advice received, the respondent in a letter stated that: regrettably the South African Government is unable to accede to your request.<sup>2363</sup>

The court said further that:

This inability cannot be attributed to the view that it was legally impossible to accede to the applicant's request, but the position taken was as a result of a policy decision. That decision was taken within the ambit of exercising the relevant discretion.<sup>2364</sup>

Yet the court dismissed the applicant's petition without inquiring into the basis upon which the respondent's exercise of discretion was based. The court held that the respondents were correctly advised.<sup>2365</sup>

Thus having regard to the applicable policy considerations, which were of such a nature that the respondents rationally determined that they could not accede to the applicant's request for diplomatic protection as of right, therefore, none of the grounds on which the applicants seek to have the decision of the respondents set aside can be sustained.<sup>2366</sup>

The application was then dismissed.<sup>2367</sup>

In *Von Abo v The Government of the RSA*,<sup>2368</sup> the issue of government policy on diplomatic protection was again considered. Because of the lackadaisical manner in which the policy decision was reached by the respondents, the applicant was able to convince the court that the policy decision whereby the respondents arrived at the decision not to grant diplomatic protection to him, was borne out of bad faith.<sup>2369</sup>

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<sup>2363</sup> *Idem* 104 par 14. See also 109 par 25.

<sup>2364</sup> *Idem* 126 par 62.

<sup>2365</sup> *Idem* par 70.

<sup>2366</sup> *Idem* par 71.

<sup>2367</sup> *Idem* par 126.

<sup>2368</sup> *Supra* 801.

<sup>2369</sup> *Idem*. Per Prinsloo J in par 143.

Based on a series of communications, persuasions, suggestions, and insinuations over a period of six years, the court came to the inevitable conclusion that the respondents had not exercised their discretion properly.<sup>2370</sup>

I regret to say that it is difficult to resist the conclusion that the respondents were simply stringing the applicant along and never had any serious intention to afford him proper protection. Their feeble effort, if any, amounted to little more than quiet acquiescence in the conduct of their Zimbabwean counterparts and their 'war veteran' thugs.<sup>2371</sup>

In the course of the judgment, the court said *inter alia*

The applicant therefore had a right to apply for diplomatic protection and the respondents, at a minimum, were under a Constitutional duty at the very least to properly (that is rationally) apply their minds to the request for diplomatic protection....In my view, and for all the reasons mentioned, the government in the present instance failed to respond appropriately and dealt with the matter in bad faith and irrationally<sup>2372</sup>

Hence, in terms of government policy on diplomatic protection and from the decision reached by the courts in the *Van Zyl* case,<sup>2373</sup> it is impossible to disagree with Olivier, Pete and Plessis<sup>2374</sup> that the courts have given too much deference to the executive to deal with requests for diplomatic protection. It is also easy to see the difficulty that a litigant faces in order to successfully prove that a policy decision not to afford him or her diplomatic protection in South Africa was taken in bad faith.<sup>2375</sup> This makes the *dictum* that executive decisions on diplomatic protection in South Africa are reviewable by the courts, virtually meaningless.<sup>2376</sup>

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<sup>2370</sup> *Idem* par 112.

<sup>2371</sup> *Ibid.*

<sup>2372</sup> *Idem* par 143.

<sup>2373</sup> *Supra* n 688.

<sup>2374</sup> *Supra* n 358.

<sup>2375</sup> It appears that *Von Abo* was an exception to this general rule.

<sup>2376</sup> See *Kaunda's case supra* n 688 par 80.

## 12 Protection of human rights in South Africa

Before 1994, South Africa had a poor human rights record.<sup>2377</sup> This was as a result of the apartheid policy adopted and practised by the government in power. The apartheid policy was a policy of segregation and racial discrimination designed to bring about physical segregation between races by creating different residential areas and the use of separate public utilities for different races.<sup>2378</sup>

The enforcement of this policy was achieved through the enactment of draconian laws. This brought about untold hardship particularly to the black people who were forcibly removed from their homesteads and relocated elsewhere.<sup>2379</sup> This, in turn, brought about endless litigation, which, needless to say, always went against the victims.<sup>2380</sup> Apartheid constituted a grave violation of the human rights of those affected and elicited international condemnation through the UN.<sup>2381</sup>

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<sup>2377</sup> See e.g. Olivier "South Africa and international human rights procedure, policy and practice." (parts 1 and 2) (2003) *TSAR* 547; Botha & Olivier "Ten years of international law in the South African Courts: Reviewing the past and assessing the future" (2004) 29 *SAYIL* 42. Dugard "The role of international law in interpreting the Bill of Rights" (1994) 10 *SAJHR* 208; Lourens "The South African Bill of Rights – public, private, or both a viewpoint on its sphere of application" (1994) XXVII *CILSA*; Maluwa "International Human Rights norms and South African Interim Constitution 1993" *supra* n 2005 14; Botha "South African Judicial decisions: International law in the Constitutional Court." (1995) 20 *SAYIL* 222; Klug "Striking down death: *S v Makwanyane & Another* SAJHR 61; Zlotnick "The death penalty and public opinion *S v Makwanyane & Another*" SAJHR 70; Mubangizi *supra* n 282; Waal *et al The Bill of Rights Handbook* (2000); Church *et al supra* n 159.

<sup>2378</sup> See Mubangizi *supra* n. 282 36.

<sup>2379</sup> See Robertson *supra* n 1257 120. See also Mubangizi *supra* n 282 36.

Apart from forceful relocation of people who were mainly blacks, apartheid laws banned communism through the Suppression of Communist Act 44 of 1950. Hence anybody who opposed the regime, or identified with the Communist Party of South Africa was branded a communist, banned from participation in any political activity, and restricted to a particular area. Apartheid laws also prohibited mixed marriages through the Prohibition of Mixed Marriages Act 55 of 1949, prohibited adultery, attempted adultery or related immoral acts between whites and people of other races, through the Immorality Amendment Act 21 of 1950 as amended by Act 23 of 1957, created a national register in which every person was registered by the Population Registration Act 30 of 1950, removed "coloured" people from the common voters' register by the Separate Representation of Voters Act 46 of 1951 but never registered the blacks to vote. Apartheid laws also banned illegal squatting through the Prevention of Illegal Squatting Act 52 of 1951 to name but a few such laws. Other obnoxious apartheid laws which greatly affected and violated human rights in South Africa before 1994 included the Black Authorities Act 68 of 1951; Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 Black Labour (Settlement of Disputes) Act 48 of 1953; Bantu Education Act 47 of 1953; Reservation of Separate Amenities Act, 49 of 1953, Blacks (Prohibition of Interdicts) Act 64 of 1956; Extension of University Education Act 45 of 1959 and the Terrorism Act 83 of 1967.

<sup>2380</sup> Robertson *supra* n 1195 120; Mubangizi *supra* n 282 38.

<sup>2381</sup> Robertson *idem* 29.



Since the judiciary was reluctant to question legislation and policy which could challenge government, the courts adopted a narrow, positivist approach<sup>2382</sup> and were very reluctant, unwilling, or powerless to enforce ordinary human rights norms,<sup>2383</sup> let alone accept international human rights standards as binding on them.<sup>2384</sup> Today, however, the situation is quite different. With the coming into force of the 1993 Constitution, followed by the 1996 Constitution the human rights situation in South Africa has radically improved. The 1996 Constitution is the supreme law of the land.<sup>2385</sup> It has provisions and institutions which are, amongst other things, democratic and able to uphold human rights.<sup>2386</sup>

### 13 Human rights provisions under the South African Constitution

Chapter 2 of the South African Constitution makes provision for a Bill of Rights.<sup>2387</sup> The importance of the Bill of Rights under the South African Constitution cannot be underestimated. Not only does it direct the State on the use of its prerogative powers,<sup>2388</sup> but also imposes obligations on both the State and the citizenry alike.<sup>2389</sup>

Section 7(1) of the Constitution provides that

This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom

Section 7(2) provides that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights”, while section 7(3) provides that “the rights in the Bill of

<sup>2382</sup> See Olivier *supra* n 358 246.

<sup>2383</sup> Robertson *supra* n 1195 120; Mubangizi *supra* n 282 38. See eg the case of *R v Pitje* 1961 (2) SA 587 (A); *R v Sisulu & Others* 1953 (3) SA 276 (A) *Sobukwe & Another v Minister of Justice* 1972 (1) SA 693 (A); *Omar & Others v Minister of Law and Order* 1987 (3) SA 839 (A); *S v Van Niekerk* 1972 (3) SA 711 (A).

<sup>2384</sup> This can be illustrated with reference to a number of cases. In *S v Adams S v Werner* 1981 (1) SA 187 (A) for instance, the Appellate Division of the Supreme Court refused to invoke the provisions of the Charter of the UN in the settlement of judicial disputes. In *S v Petane* 1988 (3) SA 51 (C) the court questioned the binding effect of the UN resolution as a source of Customary International Law. In *Nduli v Minister of Justice* 1978 (1) SA 893 (A) however, while holding that International Law was part of SA municipal or common law, the court stated that International Law can only become part of South African law if it is incorporated by an Act of Parliament. See “The role of International Law in interpreting the Bill of Rights” (1994) 10 *SAJHR* 208 209.

<sup>2385</sup> By virtue of s 2.

<sup>2386</sup> By virtue of s 108.

<sup>2387</sup> Ss 7-39.

<sup>2388</sup> S 8(1) See Mubangizi *supra* n 282 42.

<sup>2389</sup> See s 7(2).

Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

## 14 The Bill of Rights under the South African Constitution

The South African Bill of Rights has been described as “one of the most progressive in the world.”<sup>2390</sup> As pointed out above, section 7(1) of the Constitution provides that the Bill of Rights is “the cornerstone of democracy in South Africa” and section 7(2) requires the State to “respect, protect, promote and fulfil the rights in the Bill of Rights.” According to section 8(1), the Bill of Rights applies to all laws, and binds the legislature, the executive, the judiciary, and all organs of State. Section 35(1) makes it obligatory for the courts to “have regard to Public international law” and gives them a discretion to “have regard to comparative foreign case law” when interpreting the Bill of Rights. Section 39 of the Constitution requires courts to consider international law, when interpreting the Bill of Rights.<sup>2391</sup> Section 39(1) provides that:

When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

It is interesting to note that section 39 of the Constitution extends the interpretational role of international law even further, since it requires not only courts, but other tribunals and fora to consider international law as an interpretational tool when interpreting the Bill of Rights.

In interpreting the provisions of section 39 of the Constitution in relation to diplomatic protection, the court must assume two responsibilities: Firstly, it must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and secondly it must consider international law. In performing

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<sup>2390</sup> Mubangizi *supra* n 282 71.

<sup>2391</sup> The Bill of Rights consists of 32 sections made up of all categories of rights ranging from the right to life, freedom and security of the person, freedom from slavery, servitude and forced labour; freedom of expression *etcetera* to the interpretation of the Bill of Rights. Attention will however be

their interpretation function,<sup>2392</sup> the courts may also consider foreign law.<sup>2393</sup> That is to say, decisions by foreign national courts or foreign national legislation.<sup>2394</sup> As far as the second category of legal sources is concerned, the courts are obliged to promote the spirit, purport and objects of the Bill of Rights.<sup>2395</sup> The aim of this provision is to harmonize existing legal principles with the Bill of Rights as far as legislation is concerned.<sup>2396</sup> There is also the general obligation to harmonize such legislation with international law.<sup>2397</sup>

Since customary international law is part of the law of South Africa by virtue of section 232 of the Constitution and diplomatic protection is customary law, by virtue of section 233 of the Constitution,<sup>2398</sup> the courts are expected to approach their interpretative function with a view of arriving at an interpretation which favours the overall interest of all South Africans. The favourable interpretation is that the constitutional provision pertaining to international law must be considered as including diplomatic protection when interpreting the Bill of Rights. Any contrary interpretation would be absurd and contrary to the spirit and letter of section 39(1) of the Constitution.

With regard to international agreements, section 231(4) of the Constitution is the vehicle through which international agreements are incorporated into South African municipal law. For purposes of diplomatic protection, both the VCDR and the VCCR have already been incorporated into South African municipal law.<sup>2399</sup> It is submitted that in combination with customary international law, the scope of diplomatic protection in South African law is considerably enhanced by this incorporation. In conclusion, therefore, it can be said that the aim of section 39 of the 1996 Constitution is to use international law as a tool in promoting the values that underlie SA society - an open and democratic society based on human dignity, equality and

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focused here on the right to life, freedom from torture, cruel, inhuman or degrading treatment, and the right to be free from discrimination, which are discussed as fundamental rights in this thesis.

<sup>2392</sup> I.e the Bill of Rights.

<sup>2393</sup> S 39(1) (c).

<sup>2394</sup> See Church *et al supra* n 159 194.

<sup>2395</sup> S 39(2).

<sup>2396</sup> Church *et al supra* n 159 195.

<sup>2397</sup> S 233.

<sup>2398</sup> S 232.

<sup>2399</sup> See the Diplomatic Immunities and Privileges Act 37 of 2001.

freedom in order to guarantee diplomatic protection of human rights and fundamental freedoms of SA citizens.<sup>2400</sup>

## 15 International human rights instruments and South African law

Before 1993, South Africa was not a party to any human rights instrument apart from those dealing with the suppression of slavery.<sup>2401</sup> Subsequently, South Africa has signed, ratified, or acceded to a number of international human rights instruments.<sup>2402</sup> The main UN human rights instruments ratified by South Africa include:<sup>2403</sup>

- The Convention on the Right of the Child 1989.<sup>2404</sup>
- Amendment to article 43(2) of the Convention on the Right of the Child 1995.<sup>2405</sup>
- Protocol 1 and II to the Geneva Convention of 1949 relating to the Protection of Victims of International and Non-International Armed Conflicts 1977<sup>2406</sup>
- The Convention on the Elimination of All Forms of Discrimination Against Women 1979.<sup>2407</sup>
- The Convention relating to the Status of Refugees 1967.<sup>2408</sup>
- Convention on the Elimination of all Forms of Racial Discrimination 1966.<sup>2409</sup>
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.<sup>2410</sup>
- The International Convention on Civil and Political Rights, 1966.<sup>2411</sup>

<sup>2400</sup> Loures maintains that the crux of the term “values in a democratic society” is that the electorate should have a final say in how they are to be governed. This being the case and because the source of moral value lies in a self determined being, therefore, when the electorate demand [diplomatic] intervention, such intervention will follow because this is the will of the people. See Lourens “The South African Bill of Rights – public, private or both: a viewpoint on its sphere of application.” *supra* n 2383 354.

<sup>2401</sup> See Dugard *supra* n 1 336. As SA was not a party to other human rights instruments, they could not be used as judicial guide for the purposes of statutory interpretation.

<sup>2402</sup> Initial Human Rights Treaties signed but not ratified by SA include (i) Convention on the Political Rights of Women (1953) signed (1993); (ii) Convention on the Nationality of Married Women (1957) signed 1993; International Covenant on Economic Social and Cultural Rights (ICESCR) (1966) signed on 3 October 1994 but not yet ratified.

<sup>2403</sup> Source: See [www.unhchr.ch](http://www.unhchr.ch) (as at 2009-12-22).

<sup>2404</sup> Ratified June 1995. (See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2405</sup> Accepted August 1997. (See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2406</sup> Acceded to November 1995. (See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2407</sup> Ratified December 1995. (See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2408</sup> Acceded to January 1995. (See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2409</sup> Ratified December 1998. (See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2410</sup> Ratified December 1998. (See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2411</sup> Ratified December 1998. (See [www.unhchr.ch](http://www.unhchr.ch)).

- The Optional Protocol to the International Convention on Civil and Political Rights 1966,<sup>2412</sup> and the
- Second Optional Protocol to the International Convention on Civil and Political Rights, aiming at the Abolition of the Death Penalty 1989.<sup>2413</sup>

One of the main UN Conventions on human rights not yet ratified by South Africa is the Convention on the Rights of Migrant Workers and members of their Families (1990) and the ICESCR.

The main OAU human rights treaties ratified by South Africa include:

- The African Charter on Human and People's Rights 1981<sup>2414</sup>
- The Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights 1998.<sup>2415</sup>
- The OAU Convention Governing Specific Aspects of Refugee Problems in Africa 1969<sup>2416</sup>
- Protocol on the Rights of Women<sup>2417</sup>
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Treaties specifically dealing with diplomatic protection that are incorporated into South African municipal law include:

- The Vienna Convention on Diplomatic Relations (1961). Incorporated as Diplomatic Immunities and Privileges Act 2001 and the Vienna Convention on Consular Relations (1963).
- The Rome Statute of the ICC. Incorporated as the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

It is discouraging to note that not many of the treaties signed, ratified or acceded to by South Africa have been incorporated into South African municipal law. It is hoped that Parliament will hasten this process through the legislative process provided by

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<sup>2412</sup> Acceded to August 2002.(See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2413</sup> Acceded to August 2002.(See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2414</sup> Adhered to July 1996. (See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2415</sup> Ratified July 2002.(See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2416</sup> Acceded to December 1995.(See [www.unhchr.ch](http://www.unhchr.ch)).

<sup>2417</sup> Ratified 17/12/04.

section 231(4) in order to harmonise international law and domestic law.<sup>2418</sup> At the moment however, such treaties can only be applied through the interpretative provisions of the Constitution or in so far as they can be regarded as self executing. Many treaty provisions however coincide with provisions of the Constitution and can be enforced as such.

At this juncture, the status of international law *vis-a vis* diplomatic protection under South African law has been determined as well as the place of human rights enshrined in the 1996 Constitution. It is pertinent therefore to examine those “fundamental rights” relating to the protection of both South African citizens and foreigners alike in South Africa. These rights are contained in the Bill of Rights.<sup>2419</sup> The focus however, will be on those rights designated for special study in this thesis.<sup>2420</sup> In the process, the scope, limitations, derogations, or prohibition clauses contained in the Bill of Rights if any, will also be discussed. Finally the enforcement procedure for the Bill of Rights and the question whether the Bill of Rights applies to South African nationals and foreigners alike will be examined. The first of these fundamental rights to be discussed is the right to life

## 16 Fundamental rights

### 16.1 *The right to life*

Section 11 of the SA Constitution guarantees the right to life. The section provides simply that “everyone has the right to life.” As has already been stressed, this right is the most fundamental of all rights because without life no one can enjoy any other

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<sup>2418</sup> See Keightley *supra* n.1995 412. Perhaps certain provisions of these treaties may already have formed part of SA law through the Constitutional Bill of Rights.

<sup>2419</sup> In *Kaunda's case supra* n 688 par 36, the Constitutional Court said that the Bill of Rights protects both South Africans and foreigners alike. See also *Mohamed v The President of RSA supra* n 1204 and *Patel v Minister of Home Affairs* 2000 (2) SA 343.

<sup>2420</sup> These include the right to life, the right not to be tortured and the right not to be discriminated against. Others are the right to own property in South Africa and the right to a fair hearing, which is discussed under procedural rights. The two aspects of the right to a fair hearing that are examined include the right to presumption of innocence, and the right to be tried within a reasonable time. It will be recalled that these rights were designated for examination in this thesis. In the process, the scope, limitations, derogations, or prohibition clauses contained in the Bill of Rights if any, will also be discussed. Finally the enforcement procedure for the Bill of Rights and the question whether the Bill of Rights applies to SA nationals and foreigners alike will be examined.

right. In *S v Makwanyane & Others*,<sup>2421</sup> the importance of this right was stressed by the Constitutional Court as “the most important of all human rights and the source of all personal rights.”<sup>2422</sup>

In that case, the issue before the court was whether section 277(1)(a) of the Criminal Procedure Act which prescribes the death penalty was consistent with the Constitution. The facts were that the two accused were convicted on four counts of murder and one count of robbery with aggravating circumstances and sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. The Constitutional Court was required to decide the constitutionality of Section 277(1)(a) of the Criminal Procedure Act. It also had to decide whether the death penalty was cruel, inhuman, and degrading within the meaning of section 11(2) of the 1993 Constitution.

It was held that the carrying out of the death penalty destroyed life and that life was protected without reservation under section 9 of the Constitution, annihilated human dignity protected under section 10, and that elements of arbitrariness were present in its enforcement.<sup>2423</sup> It was further held that, taking these factors into consideration, public opinion prevailing in South Africa, and by section 11(2) of the Constitution, capital punishment or the death penalty was a cruel, inhuman and degrading punishment, which must be abolished.

In *Mohamed v The President of South Africa*,<sup>2424</sup> the issue of the right to life again had to be determined. The Constitutional Court held that South Africa could not expose a person to the risk of execution whether by deportation or extradition regardless of consent.<sup>2425</sup> The court therefore declared the handing over of Mohamed, arrested by the immigration authorities in connection with the bombing of the US embassy in Tanzania to the FBI to be unlawful.<sup>2426</sup> The Court said that an undertaking should first have been obtained from the USA that Mohamed would not be executed should he be found guilty of the charges against him in the US courts.

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<sup>2421</sup> *Supra* n 1203.

<sup>2422</sup> Par 144 BCLR.

<sup>2423</sup> *Idem* par 153.

<sup>2424</sup> *Supra* n 1204.

<sup>2425</sup> Par 36.

Consequently, the court directed the Registrar of the court to draw the attention of the American trial court to the judgment as a matter of urgency.<sup>2427</sup>

## **16.2 Right to be free from torture, cruel, inhuman and degrading treatment or punishment**

Section 12(1)(d) of the 1996 Constitution provides that

“everyone has the right not to be tortured in any way”.

Section 12(1)(e) provides that

everyone has the right not to be treated or punished in a cruel, inhuman or degrading way.

The right of freedom from torture, cruel, inhuman and degrading treatment is predicated upon the right to freedom and security of the person.<sup>2428</sup> In *Makwayane’s* case, the court held that the right to dignity is one of the factors to be taken into consideration in determining whether any punishment is cruel, inhuman or degrading.<sup>2429</sup> The right not to be tortured, or treated or punished in a cruel, inhuman or degrading manner under section 12(1) of the Constitution must therefore be read along with section 35(2)(e), which provides for the right to conditions of detention which are consistent with human dignity.<sup>2430</sup>

In *S v Williams*,<sup>2431</sup> the Constitutional Court held that corporal punishment of juvenile offenders in terms of section 294 of the Criminal Procedure Act was a violation of the

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<sup>2426</sup> *Ibid.*

<sup>2427</sup> For the extraterritorial implications of this case, see *Extraterritoriality*(10) *supra* p 358. See also the cases of Mariette Bosch and Micheal Molefe, both SA nationals who were sentenced to death in Botswana for murder. Although there was request for diplomatic protection, she unsuccessfully petitioned the African Commission against her death sentence. See *Interrights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003) She was hanged on March 31 2003. See also <http://www.capitalpunishmentuk.org/bosh.html> For Molefe’s case see <http://www.news24.com/SouthAfrica/Politics/SA-man-gets-death-penalty-20080307> (Accessed 2010/08/26).

<sup>2428</sup> See s 12 of the Constitution captioned “Freedom and security of the person.”

<sup>2429</sup> *Makwanyane supra* n 1203 par 144.

<sup>2430</sup> It should be noted that in *De Lange v Smuts* NO 1998 (3) SA 785 (CC); 1998 (7) BCLR 779, the Constitutional Court categorized the right under s. 12(1) into two aspects – the substantive and the procedural aspects.

<sup>2431</sup> 1995 (3) SA 632; 1995 7 BCLR 861 (CC).



right to freedom from torture, cruel, inhuman and degrading treatment.<sup>2432</sup> That case was referred to the Constitutional Court by the Full Bench of the Cape Provincial Division of the Supreme Court.<sup>2433</sup> It was a consolidation of five different cases in which six juveniles were convicted by different magistrates and sentenced to receive a “moderate correction” of a number of strokes with a light cane.<sup>2434</sup>

The issue was whether the sentence of juvenile whipping pursuant to the provisions of section 294 of the Criminal Procedure Act was consistent with the provisions of the 1993 Constitution.<sup>2435</sup> It was held that the section should be interpreted in accordance with the values which underlie an open and democratic society based on dignity, freedom and equality.<sup>2436</sup> It was further held that in determining whether punishment is cruel, inhuman or degrading within the meaning of the Constitution, it must be assessed in light of the values which underlie the Constitution.<sup>2437</sup> The court accordingly found that the provisions of section 294 of the Criminal Procedure Act violated the provisions of sections 10 and 11(2) of the 1996 Constitution, and therefore declared it invalid and of no force and effect.<sup>2438</sup>

### **16.3 Right to be free from discrimination**

Section 9(3) and (4) of the 1996 Constitution provides against discrimination. Section 9(3) provides that

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

Section 9(4) provides that:

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<sup>2432</sup> Par 45.

<sup>2433</sup> As it then was.

<sup>2434</sup> At 633.

<sup>2435</sup> The case was decided under s 9 the 1993 Constitution which is equivalent to s 10 of the 1996 Constitution. Section 35(1) of the 1996 Constitution provides that the rights entrenched in it, including section 10, must be respected. Section 10 provides that “everyone has inherent dignity and the right to have their dignity respected and protected.”

<sup>2436</sup> Par 35.

<sup>2437</sup> *Idem* par 37.

<sup>2438</sup> *Idem* par 96. See also the cases of *Mariette Bosch & Molefe supra* n 2429.

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

It has been held that discrimination means “treating people differently in a way that impairs their fundamental dignity.”<sup>2439</sup> Discrimination is prohibited in South Africa on both vertical and horizontal levels.<sup>2440</sup>

A number of discrimination cases have come before the South African courts.<sup>2441</sup> The courts have, however, held that the non-discrimination clause under section 9(3) of the 1996 Constitution does not prohibit discrimination as such.<sup>2442</sup> Rather, the section prohibits unfair discrimination. Thus section 9(5) prescribes that

Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The onus is placed on the applicant who alleges discrimination to establish objectively that there has been differentiation on one of the grounds listed under section 9(3).<sup>2443</sup> Thus in *President of the Republic of South Africa v Hugo*,<sup>2444</sup> the Constitutional Court held that although a Presidential Act which granted remission of sentence to all mothers in prison who had children under the age of twelve years was discriminatory, it did not violate the provisions of section 9(3) of the Constitution, and was therefore fair. But in *Matukan v Laerskool Potgietersrus*<sup>2445</sup> it was held that the administration of a deceased estate along racial lines amounted to unfair discrimination on the bases of race, colour, and ethnic origin.<sup>2446</sup>

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<sup>2439</sup> See the case of *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) where the Constitutional Court defined discrimination as a particular type of differentiation and held that there are two types of discrimination - discrimination based on one of the grounds listed under section 9(3), and discrimination based on “analogous grounds”. In *Harksen v Lane* 1999 (1) SA (CC) “analogous ground” was defined as one which is “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.”

<sup>2440</sup> See Mubangizi *supra* n 282 75-81. S 9(3) binds the government on the vertical level while section 9(4) binds private individuals on the horizontal level See also Waal *et al supra* n 2373 41.

<sup>2441</sup> See *supra* n 2441 *infra*.

<sup>2442</sup> E.g *President of the Republic of SA v Hugo* 1997 (4) SA 1 (CC)

<sup>2443</sup> See the seventeen grounds of discrimination enumerated under s 9(3).

<sup>2444</sup> 1997 (4) SA 1 (CC) *supra* n 2441.

<sup>2445</sup> 1996 (3) SA 223 (T).

<sup>2446</sup> See also the cases of *Mfolo v Minister of Education* 1992 (3) SA 181 (BGD) where the Bophuthatswana Supreme Court decided that the suspension of four pregnant students in a

It is submitted that section 9(3) of the 1996 Constitution is intrinsically linked to section 9(1) of the Constitution – the equal protection clause because discrimination is the very antithesis of equality. The section provides that:

everyone is equal before the law and has the right to equal protection and benefit of the law.

This section seeks to ensure equal treatment of all persons by courts of law. It is submitted that in a society such as South Africa, which is unavoidably stratified along racial lines, freedom from discrimination assumes an added importance, particularly to a foreigner, and everything should be done to curb this vice.<sup>2447</sup>

## 17 Right to own private property

Section 25 of the 1996 Constitution deals comprehensively with property rights. The section provides, *inter alia*, that

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application –
  - (a) for a public purpose or in the public interest; and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided

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teachers college was discriminatory. However, in *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC) the Labour Appeal Court overturned the decision of the Labour Court to the effect that the plaintiff, whose permanent appointment was reduced to a fixed contract of five months on grounds of her pregnancy was discriminatory. In *Hoffman v South African Airways* 2001 (1) SA 1 (CC) the court warned against the danger of “allowing stereotyping and prejudice to creep in under the guise of commercial interests.” *Prince v President of the Cape Law Society* 2000 (3) SA 845 (SCA) dealt with discrimination based on religious grounds. It was held that the refusal of the Cape Law Society to register the Rastafarian appellant on grounds of his two previous convictions for possession of dagga, was not a violation of his freedom of religion, while the case of *National Coalition for Gay and Lesbian Equality v Minister for Justice* 1999 (1) SA 6 (CC) dealt with “sexual orientation” discrimination.

<sup>2447</sup> In order to ameliorate past injustices caused by apartheid, an Affirmative Action Clause was introduced into the 1996 Constitution. Section 9(2) of the Constitution stipulates that in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken. As a result, the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 was enacted. See generally Heyns (ed), Westhiizen & Mayimele-Hashatse *Discrimination and the Law in South Africa* (1994).

or approved by the court.<sup>2448</sup>

- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
  - (a) the current use of the property;
  - (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and
  - (e) the purpose of the expropriation.
- (4) For the purpose of this section –
  - (a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
  - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after the 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water, and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact the legislation referred to in subsection 6.

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<sup>2448</sup> It is not indicated whether the compensation payable should be “prompt, effective or adequate”

### **17.1 The meaning of property under the South African Constitution**

Section 25 of the 1996 Constitution provides that no one may be arbitrarily deprived of property and that property cannot be expropriated without compensation. Although in popular parlance the term “property” is used strictly to denote land or real or physical property,<sup>2449</sup> section 25(4) (b) of the Constitution stipulates that property is not limited to land. It therefore means that the term “property” means more than the ownership of corporeal things, and encompasses a plethora of other rights such as the right to salaries, shares in companies, claims to payment from a pension fund, intellectual property such as ideas, inventions, trade marks and other contractual rights.<sup>2450</sup>

### **17.2 Distinction between deprivation and expropriation of property under the 1996 Constitution**

Sections 25(1) and 25(2) of the 1996 Constitution distinguish between “deprivation” and “expropriation” of property. Section 25(1) deals with the issue of deprivation of property, while section 25(2) deals with expropriation of property. Although none of these terms is defined under the Constitution, it has been said that “deprivation” involves an exercise of the state’s regulatory powers over property, and is therefore permissible,<sup>2451</sup> provided it is not arbitrary and is carried out in terms of a law of general application.<sup>2452</sup>

Thus, when a person is “deprived” of property in South Africa, such an individual has no right to compensation.<sup>2453</sup> Whereas, expropriation means compulsory

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as understood in the traditional Western sense.

<sup>2449</sup> Ordinarily, the concept of property connotes a bundle of rights vested in the owner both under the English and Roman-Dutch legal tradition. The owner of any property has the right to use the thing, to exclude others from it, to receive income from it, to alienate it or transfer it to others etc. See Waal *et al supra* n 2373 382-384.

<sup>2450</sup> *Idem* 382-386.

<sup>2451</sup> *Idem* 387-388.

<sup>2452</sup> *Ibid.* See Moster “The distinction between deprivation and expropriation and the future of the ‘doctrine’ of constructive expropriation in South Africa.” (2003) 19 *SAJHR* 567 and Murvey “Property rights in the new Constitution: An analytical framework for constitutional review.” (1993) XXVI *CILSA* 211.

<sup>2453</sup> Waal *et al supra* n 2373 387.

acquisition,<sup>2454</sup> and occurs where the state takes away property and either keeps it for itself, or transfers it to someone else, but imposes restriction on its use.<sup>2455</sup> Under these circumstances the state is bound to pay compensation.<sup>2456</sup> There is a paucity of South African case law on the subject. Suffice it to say that the interpretation given to those terms under South African law is based on the interpretation given to them by courts in Zimbabwe and other jurisdictions.<sup>2457</sup>

Another term worthy of definition or interpretation under section 25 of the 1996 Constitution is the term “law of general application.” Section 25(1) requires that any deprivation of property must be done in terms of a law of “general application,” while section 25(2) provides that any expropriation shall also be carried out in terms of a law of “general application.” This term is not defined in the Constitution, but the phrase is also used in section 36 of the Constitution. Under section 36(1), it has been held to mean that any limitation of rights is permissible only (i) where it is authorized by law and (ii) where that law had general application.<sup>2458</sup>

In view of section 36, it would appear that section 25, imposes a duty on the government not to deprive individuals of their property unless it is done under a law which applies to everyone. Such a law should not be discriminatory or arbitrary in any way.<sup>2459</sup>

A law depriving an individual of his or her property may be arbitrary either in substance or in procedure.<sup>2460</sup> Such a law may be substantially arbitrary if it is unconstitutional,<sup>2461</sup> and may be procedurally arbitrary if it does not follow rules of

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<sup>2454</sup> See *Harksen v Lane* NO 1998 (1) SA 300 (CC).

<sup>2455</sup> *Waal et al supra* n 2377 388.

<sup>2456</sup> *Ibid.*

<sup>2457</sup> See the cases of *Chairman of the Public Service Commission v Zimbabwe Teachers Association* 1996 (9) BCLR 1189 (ZS), *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 (PC) and *Hewlett v Minister of Finance* 1982 (1) SA 502 (ZSC).

<sup>2458</sup> See *Waal et al supra* n 2377 389.

<sup>2459</sup> “Arbitrary” means irrational or illegitimate. A deprivation is arbitrary if it follows unfair procedure, if it is irrational, or if it is for no good reason. That is to say, it should not be “capricious or proceed merely from the will, and not based on reason or principle.” See *Waal et al supra* n 2377 390.

<sup>2460</sup> *Ibid.*

<sup>2461</sup> If such a law is not allowed under the Constitution. Eg section 25(1) stipulates that “no law shall permit arbitrary deprivation of property.”

procedure.<sup>2462</sup> The requirement is that such a deprivation must be in accordance with due process of law.<sup>2463</sup>

### **17.3 Constraints on the expropriation of property under South African law**

Section 25(2) of the 1996 Constitution imposes two constraints on government in the process of expropriating property. It provides that any expropriation is permitted: (i) Only for public purpose, or public interest; and (ii) that it must be subject to the payment of compensation. The term “public purpose” can be understood in contrast to “private” purpose.<sup>2464</sup> Section 25(4), however, provides that the term “public interest” must be interpreted to include “the nation’s commitment to land reform” as well as “reforms to bring about equitable access to all South Africa’s natural resources.”

In connection with the payment of compensation, section 25(2)(b) provides that the amount, timing, and manner of compensation on expropriation, can be agreed upon between the expropriating authority and the person concerned. However, the amount of compensation to be paid may be determined by a court of competent jurisdiction, where, in accordance with the compensation formula set out in section 25(3) of the constitution. No agreement is reached between the state and the person whose property is being expropriated.<sup>2465</sup>

Section 25(5) requires the state to implement measures aimed at achieving land redistribution. Section 25(6) provides for the securing of land tenure which has been made insecure as a result of past racially discriminatory laws or practices. That section, when read in conjunction with section 25(9) of the Constitution, makes it mandatory for legislation to be enacted to address past inequalities in land

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<sup>2462</sup> *Waal et al supra* n 2381 390. They maintain that “the best source of guidance on the interpretation of the substantive element of the arbitrariness requirement in s. 25 (1) is the Constitutional Court’s treatment of s 9 (1)” This is because s 9(1) confers a right to equal treatment and equal benefit of the law. According to the Court, where the State differentiates between individuals or groups of individuals, it must do so in a manner which is both rational and not arbitrary. See *Harksen’s case supra* n 2438.

<sup>2463</sup> *Waal et al supra* n 2377 389.

<sup>2464</sup> A public purpose may include the establishment of projects such as roads, hospitals or bridges which are for the benefit of all.

distribution and land reform.<sup>2466</sup> Section 25(7) grants the right to restitution of property to persons and communities who were dispossessed of property as a result of the 1913 racially discriminatory legislation, while section 25(8) contains a *proviso* that any departure from section 25 must accord with the provisions of section 36(1) of the Constitution.

It is submitted that the issue of property rights is very sensitive and potentially volatile in South Africa<sup>2467</sup> and should be handled with care.<sup>2468</sup> In interpreting section 25 of the Constitution, the courts must not only take the requirements of sections 36(1) and 9(1) of the Constitution into consideration, but must also consider section 39(1).<sup>2469</sup> It should also be guided by the principles of natural justice, equity, and good conscience. Although neither the ICCPR nor the ICESCR provides for the protection of property rights, the underlying reason for the weak protection of property rights on the international level and in South Africa in particular, is because of the new International Economic Order expressed in numerous resolutions of the General Assembly.<sup>2470</sup> These resolutions emphasise the sovereignty of states over their natural resources.

In principle however, there is no basis for the thesis that international human right does not extend to the protection of property rights. The better view is that it is for states to protect the property rights of their nationals abroad where and when the need arises.<sup>2471</sup>

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<sup>2465</sup> The compensation formula requires that compensation for expropriated property should be “just, and equitable” in its amount, timing, and in the manner of payment.

<sup>2466</sup> See the Restitution of Land Rights Act 22 of 1994 enacted in compliance with s 25(6) of the Constitution.

<sup>2467</sup> See Robertson *supra* n 1195 122.

<sup>2468</sup> Otherwise it will assume the same dimension as seen in Zimbabwe. It has been said however that the inclusion of a constitutional right to property in both the 1993 and the 1996 Constitutions was a subject of great controversy. See Waal *et al supra* n 2377 380.

<sup>2469</sup> Which provides that “when interpreting the Bill of Rights, a court, tribunal, or forum – must promote the values that underlie an open and democratic society based on human dignity, equality and freedom ...”.

<sup>2470</sup> E.g General Assembly Charter of Economic Rights and Duties of States (1974) GA Res 3281 (XXIX) 1974 29 UN GAOR Supp (No 31) 52 and General Assembly Resolution on Permanent Sovereignty over Natural Resources (1962).GA Res 1803 (XVII) 1962 17 UN GAOR Supp (No 17).

<sup>2471</sup> See *Van Zyl v Government of RSA supra* n 556 117.



## 18 Procedural rights

### 18.1 *Right to fair trial/fair hearing*

Section 35(3) of the 1996 Constitution guarantees the right to a fair trial. The section stipulates, *inter alia*, that

“Every accused person has a right to a fair trial...”

As already indicated, the two aspects of the right to fair trial to be examined in this chapter are (a) The right to be tried within a reasonable time, and (b) the right to presumption of innocence. The right to be tried within a reasonable time is guaranteed under section 35(3)(d) of the Constitution, while the right to presumption of innocence is protected under section 35(3)(h).

### 18.2 *The right to be tried within a reasonable time*

Section 35(3) of the South African Constitution stipulates that

Every accused person has a right to a fair trial, which includes the right-  
(d) to have their trial begin and conclude without unreasonable delay.

What constitutes an unreasonable delay depends on the circumstances of each case.<sup>2472</sup> However, in *Coetzee v Attorney General KwaZulu-Natal*<sup>2473</sup> the court identified a number of factors which must be considered when determining whether the delay was reasonable or not.<sup>2474</sup> These factors include (i) The nature of the case, the time lag between the commission of the crime, the apprehension of the accused person and the commencement of his trial; (ii) the reasons for the delay; and (iii) the prejudice which the accused is likely to suffer as the result of the delay.<sup>2475</sup> With

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<sup>2472</sup> See *Coetzee v Attorney General KwaZulu-Natal supra* n 1956. See also *Elang v The State supra* n 1949 30.

<sup>2473</sup> 1997 (1) SACR 546 (D) *supra* n 1956.

<sup>2474</sup> In *Sanderson v Attorney General KwaZulu-Natal* 1998 (2) SA 38 (CC) it was held that a trial can only be vitiated as a result of unreasonable delay where it is established that the accused has probably suffered irreparable prejudice as a result of the delay. See par 39.

<sup>2475</sup> These factors were approved in the case of *Feedmill Development v Attorney General, KwaZulu-Natal* 1998 (2) SACR 539 (N).

these factors in mind, a court should ask whether the burden borne by the accused as a result of the delay is unreasonable.<sup>2476</sup>

The right to be tried within a reasonable time seeks to protect three interests of the accused person. These are the security of the accused person, his or her liberty, and a fair trial.<sup>2477</sup> Regard must therefore be had to these factors in determining “reasonable time” in the trial of an accused person.<sup>2478</sup> Some questions therefore arise for determination. These are: (1) whether foreigners are also protected by this provision?; (2) Whether any remedy is available to an accused person whose trial has been unreasonably delayed in South Africa? and (3) in terms of diplomatic protection, whether there are any responsibility upon the State for violating this right in relation to a foreigner.

The second question was discussed in *Sanderson’s case*.<sup>2479</sup> The court stated, *inter alia*,

Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of ‘appropriate’ remedies less radical than barring the prosecution. These would include a *mandamus* requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused.<sup>2480</sup>

The first question was discussed generally in *Kaunda’s case*<sup>2481</sup> where the Constitutional Court stated that the rights in the Bill of Rights protect both nationals and non-nationals alike.<sup>2482</sup> The third question must be answered within the context of judicial precedent set in international law. In *Chattin’s Claim*,<sup>2483</sup> for instance, it was held that the delay that occurred during the trial of Chattin in Mexico was

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<sup>2476</sup> *Coetzee v Attorney General KwaZulu-Natal supra* n 2467 par 36.

<sup>2477</sup> See the case of *Sanderson v Attorney General KwaZulu-Natal supra* n 2469.

<sup>2478</sup> *Idem* par 39.

<sup>2479</sup> *Supra* n 2469

<sup>2480</sup> *Idem* par 42.

<sup>2481</sup> I.e whether foreigners also enjoy this right. See *Kaunda’s case supra* n 688 par 36.

<sup>2482</sup> *Ibid.* See also *Patel v Minister of Home Affairs* 2000 (2) SA 343. and *Mohamed’s case supra* n 1204.

<sup>2483</sup> *Supra* n 29.

unreasonable and that it amounted to a denial of justice under the circumstances.<sup>2484</sup>  
The US therefore succeeded in its action for diplomatic protection against Mexico.

### **18.3 Right to be presumed innocent**

Another important aspect of the right to fair hearing under the 1996 Constitution is the right to be presumed innocent until proven guilty in any criminal trial. Section 35(3)(h) of the Constitution provides that an accused has the right:

to be presumed innocent, to remain silent, and not to testify during the proceeding.

Presumption of innocence is thus an established principle of South African law which places the burden of proof squarely on the prosecution to prove its case against an accused person beyond all reasonable doubt before he or she is convicted.<sup>2485</sup>

The importance of the right to presumption of innocence cannot be overemphasized. It protects the fundamental liberty of any person accused of committing a crime.<sup>2486</sup> Since a person charged with a criminal offence faces personal as well as social consequences of a grave nature, and is liable to lose his or her liberty, and be subjected to social, psychological and economic deprivation, approbation, and even ostracism, this right becomes crucial. As was stated in *R v Oakes*,<sup>2487</sup>

the presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.<sup>2488</sup>

The rule on presumption of innocence has been invoked in several cases in South Africa to rebut the constitutionality of statutory presumptions. In *Scagell v Attorney General Western Cape*<sup>2489</sup> for instance, the offending provision was section 6(3) of

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<sup>2484</sup> See the judgment of the US-Mexico Joint Commission in *Chattin's Claim supra* n 32.

<sup>2485</sup> See *S v Zuma supra* n 1344 40. Under SA law, presumptions are categorised into factual or evidential presumptions. See the case of *Scagell v Attorney-General Western Cape* 1996 (2) 579 and reverse-onus presumption. See the case of *S v Zuma supra* n 1344. On irrebuttable presumptions, see the case of *S v Coetzee supra* n 2467.

<sup>2486</sup> *R v Oakes supra* n 1351.

<sup>2487</sup> *Ibid.*

<sup>2488</sup> *Idem* 212-213 quoted with approval in *Zuma's Case supra* n 1344.

<sup>2489</sup> *Supra* n 2480.

the Gambling Act.<sup>2490</sup> The section provided that the presence of certain gambling items, including playing cards and dice, on any premises, would constitute a *prima facie* evidence that the person in charge of the premises permitted gambling on the premises. The Court held that the effect of the section was extraordinarily sweeping and, therefore, invalidated that section of the Act.<sup>2491</sup>

Again in *S v Zuma*,<sup>2492</sup> the Court invalidated a provision in the Criminal Procedure Act which placed a legal burden on an accused to show that a confession reduced to writing before a Magistrate was not freely and voluntarily made.<sup>2493</sup> In *Zuma's* case, the accused were convicted on two counts of murder and one count of robbery. At their trial, they entered a plea of not guilty. Two of the accused had made statements before a magistrate which counsel for the State tendered as admissible confessions. Admissibility was contested by Counsel for the accused, and a trial within a trial ensued.<sup>2494</sup>

At the outset of the trial, the defence Counsel raised the issue of the constitutionality of section 217(1)(b) of the Criminal Procedure Act and Counsel for the prosecution consented to having the point in issue determined by the trial judge.<sup>2495</sup> The trial within a trial proceeded. The accused testified that they had made their statements under duress due to threats of further assault on them by the police.<sup>2496</sup> The policemen concerned denied this, but two women called as witnesses by the defence, said they had seen the police assaulting the accused. At the end of their testimony, the Court concluded that the statements had been freely and voluntarily made and that the accused had failed to discharge the *onus* upon them under *provisio* (b) on a balance of probabilities.

In his judgment, the trial judge said *inter alia*:

Had we been convinced that s 217(1)(b) of the Criminal Procedure Act was still valid and constitutional, we would therefore have had little hesitation in

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<sup>2490</sup> 51 of 1965.

<sup>2491</sup> *Idem* 382.

<sup>2492</sup> *Supra* n 1344.

<sup>2493</sup> *Idem* par 44.

<sup>2494</sup> *Idem* par 7.

<sup>2495</sup> In terms of s 101 of the Constitution.

<sup>2496</sup> *Idem* par 7.

accepting that the accused had not discharged the onus placed upon them by that section. The constitutionality of s 217(1)(b) of the Criminal Procedure Act is therefore crucial to the decision of this case.<sup>2497</sup>

The judge, however, refrained from ruling on the constitutionality of section 217(1)(b) of the Criminal Procedure Act and referred the matter to the Constitutional Court.<sup>2498</sup> After weighing all the relevant considerations, the Constitutional Court held that a proper balance could be struck by invalidating the admission of the confession in reliance upon the provision of section 217(1)(b) of the Criminal Procedure Act. The provision was therefore invalidated.<sup>2499</sup>

In *S v Mbatha*<sup>2500</sup> the Constitutional Court dealt with the provisions of sections 40(1), 32(1)(a) and 32(1)(e) of the Arms and Ammunition Act<sup>2501</sup> which provided that persons found in the vicinity of unlicensed firearms were presumed to be possessors of those weapons, unless they established the contrary. The Court held that the right to presumption of innocence was breached and therefore invalidated the presumption. This was because the presumption was so broadly formulated that there was no logical or rational connection between the presumed fact and the proven fact.<sup>2502</sup>

*S v Julies*,<sup>2503</sup> was also referred to the Constitutional Court by the Cape Provincial Division.<sup>2504</sup> It concerned the constitutionality of section 21(a)(iii) of the Drug and Drug Trafficking Act.<sup>2505</sup> In that case, the accused was convicted of dealing in three methaqualone tablets,<sup>2506</sup> an undesirable dependence producing substance, in contravention of the provisions of the Act. For the conviction, the trial judge relied on the above mentioned statutory provisions which read, *inter alia*,

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<sup>2497</sup> *Idem* par 20.

<sup>2498</sup> *Idem* par 8-9.

<sup>2499</sup> *Idem* par 44.

<sup>2500</sup> 1996 (2) SA 464 (CC).

<sup>2501</sup> 75 of 1969.

<sup>2502</sup> See also the case of *S v Coeteeze supra* n 2479 where the Constitutional Court also invalidated s 332(5) of the Criminal Procedure Act because it was inconsistent with the right to presumption of innocence.

<sup>2503</sup> 1996 (7) BCLR 899 (CC).

<sup>2504</sup> As it then was.

<sup>2505</sup> 140 of 1992.

<sup>2506</sup> More commonly known as mandrax.

If in the prosecution of any person for an offence referred to (a) in section 13(f), it is proved that

(iii) [the person] was found in possession of any undesirable dependence-producing substance, it shall be presumed, until the contrary is proved, that the accused dealt with such a substance...

It was held that the provisions of section 21(1)(a)(iii) of the Drug and Drug Trafficking Act were inconsistent with the Constitution and were therefore declared invalid.<sup>2507</sup>

In *Osman v Attorney General Transvaal*,<sup>2508</sup> however, the appellant had been charged in the Magistrate's Court with the contravention of section 36 of the General Law Amendment Act<sup>2509</sup> which provides that any person who is found in possession of any goods in regard to which there is a reasonable suspicion that they have been stolen, and is unable to give a satisfactory account of such possession, shall be guilty of an offence.<sup>2510</sup>

At the commencement of the trial, the defence counsel objected to the charge, contending that section 36 was in conflict with sections 25(2)(c) and 25(2)(d) of the 1993 Constitution.<sup>2511</sup> The appellants therefore requested a stay of proceedings to enable them to pursue their challenge of the provisions in the High Court. The court ruled against them. They were however granted leave to appeal to the Constitutional Court.<sup>2512</sup> The Constitutional Court held that section 36 of the General Law Amendment Act did not violate any of the rights protected by section 25(2)(c) and 25(3)(d) of the 1993 Constitution<sup>2513</sup> and dismissed the appeal.<sup>2514</sup>

Again, in *Zuma's case*,<sup>2515</sup> the Durban High Court issued a letter of request to the Attorney-General of Mauritius to transmit to the National Director of Public

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<sup>2507</sup> *Idem* 900.

<sup>2508</sup> 1998 (4) SA 1224 (CC).

<sup>2509</sup> 62 of 1955.

<sup>2510</sup> *Idem* par 2.

<sup>2511</sup> *Idem* par 3.

<sup>2512</sup> *Idem* par 5.

<sup>2513</sup> Now s 35(h) of the 1996 Constitution. See also the cases of *S v Gwaadiso* 1996 (1) SA 292 & *S v Mello* 1998 (3) SA 712.

<sup>2514</sup> *Idem* par 27.

Prosecution (NDPP) some 14 original documents together with statements of authenticity in terms of s 2(2) of the International Co-operation in Criminal Matters Act<sup>2516</sup> The applicants unsuccessfully challenged the lawfulness of the High Court's decision in the Supreme Court of Appeal (SCA). They subsequently approached the Constitutional Court for leave to appeal against the judgment of the SCA.<sup>2517</sup>

Although criminal proceedings had been instituted against the applicants, these had subsequently been struck from the roll.<sup>2518</sup> Apart from arguing that the application was brought under the wrong section of the Act,<sup>2519</sup> Zuma, in the second case, alleged that his right to a fair trial under section 35(3)(h) of the Constitution had been infringed in that his right to personal dignity and presumption of innocence had been compromised.<sup>2520</sup>

It was held, *inter alia*, that regarding Zuma's right to dignity, this right did not necessarily extend to the right not to be named as a suspect once there was a reasonable suspicion that a crime had been committed. The truth was that Zuma was suspected of corruption, but that did not necessarily signify his guilt. Therefore, his right to be presumed innocent under section 35(3)(h) remained untrammelled.<sup>2521</sup>

From these decided cases, it is clear that SA courts are willing to accord to people who are wrongly presumed to be guilty the benefit of the doubt. The Constitutional Court has struck down several constitutional and statutory provisions which would otherwise have incriminated many accused persons. In relation to aliens, however, the question is whether they are truly covered by this right?

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<sup>2515</sup> See *Thint Holding (South Africa) (PTY) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* 2009 (1) SA 141 (CC).

<sup>2516</sup> 75 of 1996.

<sup>2517</sup> S 2(2) of the Act provided for the issue of a letter of request for purposes of a criminal investigation, while s 2(1) provided for its issue during criminal proceedings.

<sup>2518</sup> At 141.

<sup>2519</sup> The applicants argued that s 2(1) should have been used. See par 5.

<sup>2520</sup> *Idem* par 26.

<sup>2521</sup> *Idem* par 50-53.

Relying on *Kaunda's* case,<sup>2522</sup> it can be said that the general position is that the law protects everybody in SA, be they nationals or foreigners. In that case, it was said that the Bill of Rights enshrines the rights of all people “in our country”.

The rights in the Bill of Rights ....are rights that vest in every one. Foreigners are entitled to require the South African State to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa.<sup>2523</sup>

In *Lawyers for Human Rights v Minister of Home Affairs*<sup>2524</sup> the Department of the Interior contended that the phrase “in our country” means that the persons have to be formally admitted into South Africa before they are considered to be bearers of the rights enshrined in the South African Bill of Rights and that foreigners who are at the South African Airports or in South African harbours without permission are excluded.<sup>2525</sup> The court however held that when a right is formulated in such a way that “everyone” is its beneficiary, everyone who is physically inside the country whether at sea or in airports, are bearers of these rights.<sup>2526</sup> The court did not however express itself on the position of people who enter South Africa illegally by road at border posts.<sup>2527</sup>

It is submitted that respect for the right to presumption of innocence should not be restricted to the courts in SA only, but that ordinary individual in the society should be informed of this right. Incidents in SA over the years have rebutted the impression that the right to presumption of innocence is respected by the ordinary man in South Africa. The xenophobic attacks on foreigners in SA are good examples. One of the reasons advanced for the attacks on foreigners is that foreigners are criminals.<sup>2528</sup> If the right to presumption of innocence was taken seriously or respected, it would be in the interest of justice if foreigners who are accused of committing crimes are handed over to the police and made to face the full weight of the law. They should

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<sup>2522</sup> *Supra* n 688 and *Patel's case supra* n 2414.

<sup>2523</sup> Par 36. See the case of *Mohammed v The President of the RSA supra* n 1204.

<sup>2524</sup> 2004 7 BCLR 775 (CC).

<sup>2525</sup> Par 8.

<sup>2526</sup> *Idem* par 26.

<sup>2527</sup> *Idem* par 27.

<sup>2528</sup> See ch 5 *supra*.



not be killed or maimed without being tried in a court of law. In other words, the law should be allowed to take its normal course.

## 19 Limitation on rights under the South African Bill of Rights

The rights enshrined in the Bill of Rights under the 1996 Constitution are limited by section 36 thereof. The section provides that

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom taking into account all relevant factors, including

- (a) the nature of the right
- (b) the importance of the purpose of the limitation
- (c) the nature and extent of the limitation
- (d) the relation between the limitation and purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The inferences to be drawn from the provision of section 36 of the 1996 Constitution with regard to the Bill of Rights are that any limitation must be in the form of a law, and that the law must be a law of general application.<sup>2529</sup> Such a limitation must also be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>2530</sup> In relation to diplomatic protection, section 36 precludes any law to be enacted to limit the right of the State to exercise diplomatic protection, except such a law is justified by those circumstances enumerated in section 36(1) of the Constitution.

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<sup>2529</sup> See Mubangizi, *supra* n 282 59. See also the case of *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).

<sup>2530</sup> It has been urged by many commentators that in analyzing whether the provisions of the Bill of Rights have been complied with, the two-stage process suggested in the Canadian case of *R v Oakes* *supra* n 1351 should be used by the courts. I.e first, whether there has been an infringement, and second, whether the infringement is reasonable and justifiable.

## 20 Enforcement of rights under the 1996 Constitution

Section 38 of the Constitution provides the grounds and the *modus* whereby the provisions of the Bill of Rights may be invoked and enforced in South Africa. The section states that:

Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who can not act in their own name;
- (c) anyone acting as a member of or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.’

The operative word in this provision is “anyone.” The question is whether it includes foreigners? It is submitted that it does. Otherwise the Constitution would have said so expressly. Hence, anybody, whether a citizen or a foreigner, who alleges that his or her right has been infringed or threatened in SA can approach a court of competent jurisdiction and file his or her complaint. As already pointed out, in *Lawyers for Human Rights v Minister of Home Affairs*,<sup>2531</sup> the court held that when a right is formulated in such a way that “everyone” or “anyone” is its beneficiary, everyone who is physically inside the country is a bearer of these rights.<sup>2532</sup> It is submitted that this provision is clear and unambiguous.

## 21 Treatment of aliens in South Africa

The question regarding the protection of foreign nationals in international law is one of those issues in which different approaches have been adopted by both the West

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<sup>2531</sup> *Supra* n 2519.

<sup>2532</sup> *Idem* par 26.

and third-world nations in their international relations.<sup>2533</sup> Generally, under international law, aliens are expected to be treated decently in accordance with a civilized standard of behaviour.<sup>2534</sup> The acceptable standard of treatment of aliens is either the national standard<sup>2535</sup> or the international minimum standard.<sup>2536</sup>

In South Africa however, it would appear that while the courts have correctly recognized that non-citizens may enjoy some constitutional rights, they have retained an unhelpful rights/privileges distinction with respect to the protection of those rights, particularly in immigration matters.<sup>2537</sup>

Dugard has however referred to the General Assembly Declaration on the Rights of Individuals who are not Nationals of the Country in which they Live,<sup>2538</sup> which recognises that human rights expounded in the UDHR and other international instruments should also accrue to individuals who are not nationals of South Africa.<sup>2539</sup>

These rights include non-discrimination on the ground of race, the prohibition of torture, cruelty, inhuman or degrading treatment or punishment, and the right to a fair trial.<sup>2540</sup> In respect of discrimination, as already indicated, discrimination is one of the social problems that individuals who live outside their countries of nationality face or contend with.<sup>2541</sup> Despite legislative efforts to rid South Africa of discriminatory practices, particularly discrimination on the grounds of race, gender, sex, ethnic or

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<sup>2533</sup> See Edukere "The legal status of immigrants" *The Guardian* 1986-04-28 7. See also Klaaren "So far not so good: An Analysis of Immigration decisions under the interim Constitution" *SAJHR* 605; See also Pretorius "Protecting the rights of Aliens in South Africa: International and Constitutional law issues" (1996) 21 *SAYIL* 130 134. and the following cases: *Ulde, Manjar Ali Shail Yusuf v The Minister of Home Affairs* Case No. 5353/2006; *Jeebhai v Minister of Home Affairs* (139/2008 [2009] ZASCA35 (2009) 03 31; *Patel v Minister of Home Affairs supra* n 2414; *Lawyers for Human Rights v President supra* n 2519.

<sup>2534</sup> See ch 2 *supra*.

<sup>2535</sup> Favoured by third-world countries. The standard advocated by these third-world countries is that foreigners should be treated in the same way as the ordinary citizens of the country where they reside.

<sup>2536</sup> Favoured by the West who argue that there exists "an international minimum standard" for the protection of foreign nationals that must be upheld irrespective of how the state treats its own nationals.

<sup>2537</sup> See Klaaren *supra* n 1204 606.

<sup>2538</sup> Res 144(XL).

<sup>2539</sup> Dugard *supra* n 25 78.

<sup>2540</sup> See Res 40/144 arts 5, 6 & 7.

<sup>2541</sup> See e.g *supra* n 28 at p 6.

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language, some discrimination is still evident both in statutory provisions and in the courts.<sup>2542</sup>

Although discrimination is still prevalent in SA society, the attitude of the courts towards this vice appears to be changing.<sup>2543</sup> For instance, in the past, it was believed that the doctrine of *audi alterem partem* was not applicable in deportation cases and that no reason ought to be given for a refusal to extend either a temporary or permanent residence permit to an alien.<sup>2544</sup>

Thus, in *Lewis v Minister of Internal Affairs*,<sup>2545</sup> the applicant was a lecturer in History at the University of Bophuthatswana and resided in Mmabatho. He was appointed to the position in August 1987 for a period commencing on 1<sup>st</sup> August 1987 and terminating on 31 December 1990. He applied for and obtained the necessary temporary residence and work permits as required by the Aliens and Travellers Control Act.<sup>2546</sup> On 31 January 1990, he was handed a warrant for his deportation. On 5 February 1990, the applicant brought an urgent application before the High Court of Bophuthatswana asking the court to set aside the warrant for his deportation since he was not given any hearing. It was held that the *audi alterem partem* rule is excluded in respect of deportation orders made in terms of the South African Act<sup>2547</sup>

In the second case post dating the 1993 Constitution, and decided in favour of the government, *Xu v Minister van Binnelandse*<sup>2548</sup> the court dismissed two applications in terms of section 24(c) for written reasons for a refusal to grant one temporary residence permit and extend another in terms of the Aliens Control Act.<sup>2549</sup>

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<sup>2542</sup> See Pretorius *supra* n 2528 134.

<sup>2543</sup> This point was emphasized by the UN Commissioner for Human Rights on Human Rights day on 2009-12-10. in SA.

<sup>2544</sup> *Ibid.*

<sup>2545</sup> Decided before 1993.1991 (3) SA 628 (BG).

<sup>2546</sup> I.e Aliens Act 1 of 1937.

<sup>2547</sup> *Ibid.*

<sup>2548</sup> 1995 (1) SA 185 (T); 1995 (1) BCLR 62 (T).

<sup>2549</sup> 96 of 1991.

In the third case, *Naidenov v Minister of Home Affairs*,<sup>2550</sup> the court dismissed an application made in terms of both sections 23 and 24 of the Immigration Act by an alien accused of having committed a serious crime abroad. He sought to extend his temporary residence in SA in order to apply for political asylum. In the fourth case, *Paekh v Minister of Home Affairs*,<sup>2551</sup> the court also dismissed an alien's application for written reasons in relation to a decision not to grant him permanent residence.

Decided cases in this area from the late 1990's to the present however reveal some shift in judicial attitude towards aliens in South Africa.<sup>2552</sup> This shift began in *Foulds v Minister of Home Affairs*.<sup>2553</sup> The case concerned an application for permanent residence that was refused without any reasons being given. Basing its decision on common law rather than on constitutional grounds, the court set aside the refusal and ordered the Home Affairs to give the applicant an opportunity to respond to information adversely affecting him.<sup>2554</sup>

The court in *Foulds v Minister of Home Affairs*<sup>2555</sup> held that the applicant had a reasonable and legitimate expectation that the Immigration Board would properly and fairly consider his application for a permanent residence permit and give him an opportunity to deal with certain information adverse to him which the Board had obtained. As the Board had failed to disclose this information and there were no special circumstances justifying the non disclosure, its decision to refuse to authorize the issue of a permanent residence permit to him had been fatally flawed and had to be set aside.<sup>2556</sup>

Again, in *Yuen v Minister of Home Affairs*<sup>2557</sup> the applicant relied on the respondents' failure to apply the maxim *audi alterem partem* before he was deported. At the instance of the respondents and as all the relevant information was before the court, the court dealt with the application for review on the papers before it. It was held that

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<sup>2550</sup> 1995 (7) BCLR, 891 (T).

<sup>2551</sup> 1996 (2) SA 710 (DCLD).

<sup>2552</sup> The cases are discussed *infra*.

<sup>2553</sup> 1996 (4) SA 137 (W).

<sup>2554</sup> At 149.

<sup>2555</sup> *Supra* n 2548.

<sup>2556</sup> *Idem* at 149H.

<sup>2557</sup> 1998 (1) SA 958 (C).

the right to a fair hearing also implied the right to be informed of the facts and information which might be detrimental to the interest of a private individual. It was not necessary that the information be given in the exact form in which it was received but essential facts were supposed to be divulged to the interested person to enable him or her to reply. The application for review therefore succeeded and the respondent's decision to withdraw the applicant's certificate of permanent residence and deport him was set aside.<sup>2558</sup>

In *Jeebhai v Minister of Home Affairs*<sup>2559</sup> the Court of Appeal declared the arrest, detention and subsequent removal from South Africa of one Khalid Rashid, a Pakistani national to be unlawful and granted a counter-application by the respondents declaring the appellants to have been in contempt of court.

In that case, the first appellant, Mr. Jeebhai, was a businessman from Lenasia. Rashid was arrested in Escourt at the home of Jeebhai's brother, Mr Mohamed Ali. As Rashid was unable to brief attorneys or depose to an affidavit, Jeebhai the first appellant instituted proceedings on his behalf. Mr. Zehir Omar, the defence attorney in that case, his professional assistant, Ms Yasmine Naidoo and Jeebhai were found guilty of having been in contempt of court. Jeebhai was cautioned and discharged but Omar and Naidoo were each sentenced to a fine of R2000 or six months' imprisonment suspended for a period of three years on condition that they were not convicted of contempt of court during the period of suspension.<sup>2560</sup>

The facts were that on the evening of 31 October 2005, at about 22h00, a senior immigration officer and several members of the South African Police Service descended on Mohamed Ali's home in Fordeville, Escourt in the Province of KwaZulu Natal. The police were armed and clad in protective bulletproof vests. The police first gained entry to the house and, having established that it was safe to enter, the senior immigration officer entered. They found Mohamed Ali and Rashid, the Pakistani national, on the premises. The senior immigration officer asked them

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<sup>2558</sup> See the following cases: *Ulde, Manjar Ali Shail Yusuf v The Minister of Home Affairs* Case No. 5353/2006; *Jeebhai v Minister of Home Affairs* 2008 ZASCA 160 Rashid's case *supra* n 1316; *Patel v Minister of Home Affairs* *supra* n 2477; *Lawyers for Human Rights v President RSA* *supra* n 2519.

<sup>2559</sup> *Supra* n 1316.

for their identification papers. Rashid was unable to produce any permit authorizing his stay in South Africa. The immigration officer arrested both as illegal foreigners and accompanied them to the police station where they were detained.

On 2 November 2005, a Chief Immigration Officer interviewed Rashid who admitted that he was an illegal alien and to fraudulently obtaining documents purporting to authorize his presence in the country. Rashid was handed a Notice of Deportation as contemplated under regulation 28(2) of the Immigration Regulations.<sup>2561</sup>

On 6 November 2005 Rashid was handed over to five Pakistani law enforcement officials at Waterkloof Military Air Base in Pretoria from whence he was flown to Islamabad Airport in Pakistan and held in custody. His removal from South Africa was effected secretly, without his relatives or friends having been apprised of the situation.<sup>2562</sup> In the meantime Mohamed Ali was transferred to Lindela Repatriation Centre, a facility that the Department of Home Affairs uses to detain illegal immigrants pending their deportation. It appears that he contacted his family from Lindela.<sup>2563</sup>

The first appellant then instructed his attorneys to commence legal proceedings in the Pretoria High Court for his and Rashid's release. The case had a chequered history. It was struck off the roll on many occasions, relisted on many occasions and postponed indefinitely on many occasions<sup>2564</sup> By 12 June 2006, more than seven months after his arrest, the first appellant had still not been able to establish what

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<sup>2560</sup> Hence their interest in the case as second and third appellants respectively.

<sup>2561</sup> The notice stated that as the person was an illegal alien he was notified that he was to be deported to his country of origin – in his case Pakistan. The reason given for the deportation was that he was an illegal alien.

<sup>2562</sup> At par 6.

<sup>2563</sup> At par 6.

<sup>2564</sup> The application was set down for hearing on 2005-11-15. On that day, the application was postponed.(par 7). On 2006-02-14 the matter came before Legardi J.who postponed the application indefinitely.The matter was reenrolled for hearing before Poswa J on 2006-05-10, who granted an urgent application against the respondents to furnish particulars of the deportation of Rashid. (par 10). The matter was relisted before Legodi J as an urgent application, who on 2006-06-19 struck it out for want of urgency (par 12).Another application was filed before Southwood J on 2006-06-22 who also struck out the matter from the roll. The matter wasreenrolled and ordered to be heard by the Full Court.The Full Court heard argument on 2006-08-05 and delivered its judgment striking out the case on 2007-02-16 for failure to comply with the Rules of Court. The case went on appeal on 2008-11-4 and was again struck off the roll again at the Court of Appeal (par 15). The matter was reenrolled at the Court of Appeal on 2009-02-16. Judgment was delivered on 2009-03-31. See *Jeebhai v Minister of Home Affairs* 2009 (4) SA 662 (SCA).

happened to Rashid.<sup>2565</sup> He launched another urgent application in which he sought among other orders, a declaration that the arrest, detention and “removal” of Rashid from South Africa were unlawful, inconsistent with the Constitution and constituted an “enforced disappearance” as envisaged in Article 7(2)(i) of the Rome Statute of the International Criminal Court.<sup>2566</sup>

In their answering affidavit, filed in response to the application, the respondents applied for the appellants to be committed for contempt of court. On 19 June 2006 Legodi J struck the matter off the roll for want of urgency and ordered the matter to be heard by a full court. The matter was duly enrolled before the full court which directed that the matters be consolidated and heard together.<sup>2567</sup> The appellants filed a consolidated record comprising twelve volumes, in compliance with the Court’s directions. The Court heard arguments on 25 August 2006 and delivered its judgment on 16 February 2007. The full court decided against the appellants on all the issues raised on appeal but failed to address the argument that the said deportation was effected without a deportation warrant.<sup>2568</sup>

On appeal to the Supreme Court of Appeal, the judgment of the Full Court was set aside and the arrest, detention and deportation of Rashid was declared unlawful.<sup>2569</sup>

Also, in *Patel v Minister of Home Affairs*,<sup>2570</sup> on the issue of a fair hearing in immigration/deportation matters, it was held that aliens had the same rights under the Constitution that citizens have, unless the contrary emerges from the Constitution.<sup>2571</sup> Accordingly, the second applicant was entitled to the rights set out in sections 9, 10, 12, 21 and in particular, section 33 of the Constitution which required the administrative action taken against him to be lawful, reasonable and administratively fair. He was entitled to the right to be heard in respect of the issue of

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<sup>2565</sup> *Ibid.*

<sup>2566</sup> *Ibid.*

<sup>2567</sup> *Idem* par 14.

<sup>2568</sup> *Idem* par 19.

<sup>2569</sup> *Idem* 350.

<sup>2570</sup> *Supra* n 2414

<sup>2571</sup> See also *Kaunda’s supra* n 688 and *Mohamed’s case supra* n 1204.



section 45 of the warrant and an application he had made for permanent residence.<sup>2572</sup>

In *Patel*, the second applicant, an alien married to a South African citizen<sup>2573</sup> had been detained in terms of a deportation warrant issued under section 45 of the Aliens Control Act.<sup>2574</sup> He had not been given a hearing prior to the issue of the warrant.<sup>2575</sup> In opposing his application for his release from detention and preventing his deportation, the respondents averred, *inter alia*, that the second applicant as an alien was not entitled to the protection of section 33 of the Constitution.

It was however held that the respondent's decisions in respect of the issue of the warrant and the decision on the second applicant's application for permanent residence had not been taken after due consideration of the applicant's constitutional right to live together with his wife as spouses and of the first applicant's right to freedom of movement.<sup>2576</sup> The court found that the respondents had not taken into account, or weighed in the balance, the rights of the applicants' children in terms of section 28(1) (b) of the Constitution to family and parental care.<sup>2577</sup>

These recent decisions must be viewed against the backdrop of article 13 of the ICCPR which stipulates that

An alien lawfully in the territory of a state party to the present Covenant may be expelled only in pursuance of a decision reached in accordance with law and shall except where compelling reasons of national security otherwise require, be allowed to submit his reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or a person, or persons especially designated by the competent authority.

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<sup>2572</sup> At 3491 – 350 C/D.

<sup>2573</sup> The first applicant.

<sup>2574</sup> 96 of 1991.

<sup>2575</sup> *Idem* 343.

<sup>2576</sup> *Idem* 349.

<sup>2577</sup> *Idem* 350D.

Finally, the discussion of the treatment of aliens in South Africa would be incomplete without mention being made of *Mohamed's* case,<sup>2578</sup> where the court held that the South African security agents had no right to extradite Mohamed to the US without obtaining an undertaking from the US that Mohamed would not be sentenced to death if found guilty of the offence charged and would not be executed if sentenced to death.<sup>2579</sup>

If *Mohamed's* case is compared to *Kaunda's* case, it would appear that the SA Constitution protects the rights of foreigners better than those of South African nationals. However, as already indicated, the *rationale* behind the decision in *Mohamed* and the distinction between the two cases were supplied by the Constitutional Court in *Kaunda*.<sup>2580</sup> It appears that the pendulum is swinging from mere indifference of the law towards the plight of aliens in the past, to active protection in the present. It is hoped that this trend will continue and that aliens will be given greater opportunities for a fair hearing in any decision that adversely affect them, particularly in decisions to expel or deport them. In this way their rights under the Constitution will be further guaranteed.<sup>2581</sup>

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<sup>2578</sup> *Supra* n 1204.

<sup>2579</sup> See *idem* par 47.

<sup>2580</sup> *Ibid.*

<sup>2581</sup> As far back as 1999, the South African Human Rights Commission (SAHRC) had compiled a report entitled "*Illegal? Report on the Arrest and Detention of Persons in Terms of the Alien Control Act*". This report emerged from the Commission's view that "[g]lowing] hatred and ignorance about the rights and realities of refugees and migrants has become an increasing serious blight in SA's human rights record." The methodology of the report was to give voice to persons who had directly experienced human rights violations in the hands of state officials. While the focus of the report was on the arrest process, a number of conclusions and recommendations related to the conduct of the private security officials in the Lindela camp. The report reveals that the arrest process for immigration purposes is almost entirely arbitrary and capricious. Other findings related to detention conditions. A significant number of persons with apparently valid cases of asylum, did not have their cases investigated or decided. Some persons reported detention in police cells and at Lindela for periods longer than allowed by law, as well as detention alongside criminal suspects. There were widespread reported incidents of bribery and extortion during detention, in addition to incidents of assault. Common complaints about the detention conditions specifically at Lindela included lack of adequate nutrition, inadequate medical care, and interrupted sleep as well as being subjected to degrading treatment or intimidation. See Klaaren "SAHRC Report on the treatment of persons arrested and detained under the Aliens Control Act." *Supra* n 1204 131.

## 22 Conclusion

In the celebrated case of *Kaunda v The President of the RSA*<sup>2582</sup> it was held that the SA Constitution does not guarantee a right to diplomatic protection<sup>2583</sup> although section 3 of the Constitution provides that all citizens are equally entitled to the rights, privileges and benefits of citizenship. The court held that the key to the enjoyment of the rights, privileges and benefits of citizenship is nationality.<sup>2584</sup> That notwithstanding however, it was held that a South African national is entitled to request his or her government for diplomatic protection against the wrongful acts of foreign states.<sup>2585</sup>

If a South African is not entitled to diplomatic protection under the Constitution, the question is whether the government's role is merely to receive such requests, without making serious or determined efforts towards granting them?<sup>2586</sup> It is submitted that the obligation imposed on government by section 3 of the Constitution is not merely to receive requests for diplomatic protection from SA citizens, but to consider such requests in good faith and in a manner consistent with the Constitution.<sup>2587</sup> In other words, the citizen is entitled to have his or her request considered and determined appropriately.<sup>2588</sup> Although a decision as to whether and how protection should be granted falls within the executive discretion,<sup>2589</sup> it is comforting to know that a court could, when the government refuses to consider a legitimate request, or deals with the matter in bad faith or irrationally, order the government to deal with the matter appropriately.<sup>2590</sup>

It is submitted that the problem with the use of diplomatic protection for the protection of human rights lies in the discretionary nature of that right. The discretion

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<sup>2582</sup> *Supra* n 688.

<sup>2583</sup> O'Regan J was however prepared to compel the government to afford diplomatic protection to the applicants when she said in par 269 "In my view the appropriate relief would therefore be that a declaratory order be made by this court with regard to the obligations of government...".

<sup>2584</sup> Which is an incident of citizenship. *Idem* par 61.

<sup>2585</sup> *Idem* par 62 – 63.

<sup>2586</sup> In other words does the SA Constitution make adequate provision for the diplomatic protection of SA citizens abroad?

<sup>2587</sup> *Idem* par 67 191 238.

<sup>2588</sup> See the *dictum* of Chaskalson J par 63.

<sup>2589</sup> *Idem* par 76.

<sup>2590</sup> *Idem* par 80.

is exercised not only by the executive, but also by the courts.<sup>2591</sup> First and foremost, in international law, the state is vested with the discretion to determine whether protection should be granted or not and, if so, what sort of protection should be afforded. This was held in the *Barcelona Traction* case, where it was said that

The state must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted and when it will cease. It remains in this respect a discretionary power<sup>2592</sup>

Under the Constitution, it also appears that the same principle applies. According to Chaskalson J in *Kaunda's* case,

This is a terrain in which courts must exercise discretion, and recognize that government is better placed than they are to deal with such matters.<sup>2593</sup>

This discretionary factor, it is submitted, makes judicial supervision or review of the exercise of diplomatic protection difficult.

Although it was said in *Van Zyl's* case that

The executive in invoking the form of diplomatic protection and any intervention, is required to make an informed choice invariably exercising a discretion based on “the application of intelligence and tact to the conduct of relations”<sup>2594</sup>

Yet it may not be possible to obtain the requisite intelligence and tact at all times. The question is, what happens if such intelligence is not available, is not reliable, or where there is lack of tact in the conduct of negotiations?

It is submitted that this double exercise of discretion, both by the courts and by the executive, often jeopardises the cases of citizens who otherwise would have been entitled to diplomatic protection.<sup>2595</sup> One is therefore forced to agree with Chaskalson J when he said that diplomatic protection is a right which should be spelt out

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<sup>2591</sup> *Idem* par 67.

<sup>2592</sup> *Supra* n 26.

<sup>2593</sup> *Ibid.*

<sup>2594</sup> *Supra* n 556 106.

<sup>2595</sup> See the cases cited above.

expressly “rather than being left to implication” in the Constitution.<sup>2596</sup> However, if diplomatic protection is expressly spelt out in the Constitution, it should provide the necessary safeguards or checks and balances, to ameliorate the discretionary factors that impede or hinder the unfettered exercise of this right.<sup>2597</sup> This will in turn enable citizens to invoke the right to diplomatic protection with increased confidence and certainty.

As for the question whether the Bill of Rights has an extraterritorial effect or not, it was held in *Kaunda’s* case that the Constitution of SA which incorporates the Bill of Rights, has no extraterritorial effect as far as diplomatic protection is concerned.<sup>2598</sup> The court had to deal with the argument that the duty entrenched in section 7(2) to “respect, protect, promote and fulfil” the rights in the Bill of Rights extends beyond the borders of the State.<sup>2599</sup> It was also held that any extraterritorial application of the Bill of Rights is limited by the international law principle that the sovereignty of other states may not be impeded.<sup>2600</sup>

There could however be exceptions.<sup>2601</sup> The court further explained that there is a difference between an extraterritorial infringement of a constitutional right by institutions and persons bound by sections 7(1) and 7(2) of the Constitution, and a duty on the South African government to take action in a foreign State that may interfere directly or indirectly with the sovereignty of the affected state. The court left open the possibility that the former instances might be justiciable in South African courts.<sup>2602</sup> As far as foreigners are concerned, it was also held in *Kaunda’s* case that their human rights are protected under the South African Constitution as long as they are within South African territory.<sup>2603</sup>

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<sup>2596</sup> *Idem* par 15.

<sup>2597</sup> The 1996 Constitution s 7.

<sup>2598</sup> It will be recalled that in that case the court dismissed the application for *mandamus* to compel the SA government to take action at a diplomatic level to ensure that the two foreign governments involved ie Zimbabwe and Equatorial Guinea respect the rights of South African citizens under the South African Constitution..

<sup>2599</sup> *Idem* par 32.

<sup>2600</sup> *Idem* pars 36 41 229.

<sup>2601</sup> Where for instance there is a gross violation of the norms of *jus cogens*. *Idem* par 44.

<sup>2602</sup> *Idem* par 45. It was not necessary to deal conclusively with the question since the *Kaunda* case only involved the question whether South African law imposes a duty on the State to make representations in terms of the government’s right in international law to approach other states on behalf of South African citizens.

<sup>2603</sup> *Idem* par 36.

## CHAPTER SEVEN

### Conclusions

#### 1 Introduction

This closing chapter intends to summarise what has been said about the diplomatic protection of human rights in Nigeria and South Africa and to undertake a comparative analysis of the mode of practice adopted by the respective states. The purpose is to compare, contrast, and critically examine the constitutional provisions, state practice, and judicial attitude to the subject in both countries to determine the extent to which the two countries have gone in the application of diplomatic protection for the protection of human rights of their nationals.<sup>2604</sup> Conclusions will be drawn and suggestions will be proffered with regard to the ways of improving the institution of diplomatic protection in both countries.

To determine areas of similarity and difference in their approach to the subject however, the experiences of the two states, the strategies adopted by them in the use of diplomatic protection for the protection of the human rights of their nationals abroad, and the overall effect of adopting such strategies will not only be analysed, but will also be compared and contrasted. The extent to which their mode of practice has affected the institution of diplomatic protection generally and the state of human rights within the two states particularly will also be examined.

#### 2 Diplomatic protection in Nigeria and South Africa: A comparative analysis

Although there is no specific constitutional provision for diplomatic protection under either the constitutions of Nigeria or SA, a critical analysis of certain constitutional provisions of the two countries has revealed that diplomatic protection is contemplated. Under the Nigerian Constitution, the applicable sections are sections

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<sup>2604</sup> As portrayed in the chapters *supra*.

14,<sup>2605</sup> 17,<sup>2606</sup> 26 and 41<sup>2607</sup> whereas sections 3, 7, 20 and 33 of the South African Constitution are relevant. Section 14 of the Nigerian Constitution guarantees the right to safety of all Nigerians, section 17 guarantees equal opportunity, section 26 deals with citizenship, while section 41 provides for freedom of movement in and out of the country to all Nigerians. Under the South African Constitution however, section 3 deals with citizenship, section 7 provides for a Bill of Rights to protect all citizens, section 20 provides that no citizen may be deprived of his or her citizenship, while section 33 provides for the right to fair administrative action to all South Africans.

The omission of specific constitutional provisions for diplomatic protection in the two Constitutions is unfortunate, as a growing number of states now have constitutional provisions that recognise the right of individuals to diplomatic protection for injuries sustained abroad.<sup>2608</sup> This reflects a growing recognition within the international community of the desirability or need to protect human rights across the globe. The conclusion is that this growing trend within the international community of providing diplomatic protection to their nationals abroad is constitutionally lacking in these two countries.<sup>2609</sup>

The effect of this omission in the two Constitutions is that the average Nigerian or South African lawyer may be confounded when searching for the relevant constitutional provisions in a suit for diplomatic protection brought against the government.<sup>2610</sup> Consequently, the citizen may not obtain the benefit of this remedy. That notwithstanding however, it is settled that one of the most important mechanisms that can be used to protect and promote human rights is diplomatic protection.<sup>2611</sup>

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<sup>2605</sup> Which provides that “The security and welfare of the people shall be the primary purpose of government.”

<sup>2606</sup> Which provides that every citizen shall have equality of rights, obligations and opportunities before the law.

<sup>2607</sup> Which deals with citizenship.

<sup>2608</sup> See *supra* n 1604.

<sup>2609</sup> See the judgment of O’Regan J in *Kaunda’s case supra* n 688 par 221.

<sup>2610</sup> Text writers do not address this aspect of the law in Nigeria.

<sup>2611</sup> As was held in *Kaunda’s case*. It was also said that the right to diplomatic protection should be “spelt out expressly rather than being left to implication.”

The question for analysis, therefore, is the extent to which the governments of Nigeria and SA have gone, or are prepared to go, in order to protect their nationals who are injured abroad in spite of this constitutional *lacuna*. As indicated above, in contrast to Nigeria, issues concerning diplomatic protection regularly come before South African courts.<sup>2612</sup> Such matters range from requests for government assistance in the collection of a debt,<sup>2613</sup> to avoid criminal prosecution,<sup>2614</sup> to recover expropriated property, to be paid compensation,<sup>2615</sup> to fulfil contractual obligation,<sup>2616</sup> or to avoid criminal interrogation,<sup>2617</sup> to name but a few of such situations

Diplomatic protection is said to be within the exclusive portfolio of the executive arm of government who decides whether “protection will be granted, to what extent it is granted, and when it will cease.”<sup>2618</sup> To determine the extent to which the Nigerian and South African governments are prepared to act in order to protect their nationals abroad, this thesis has examined state practice and government policy on diplomatic protection of the two countries. The Nigerian practice was first analysed, followed by South African practice. The concept of extraterritoriality was also examined. That concept will again be briefly reviewed here followed by the “clean hands” doctrine<sup>2619</sup> because these two concepts often influence government decisions in relation to the practice of diplomatic protection.

## 2.1 Extraterritoriality

The concept of extraterritoriality has already been defined.<sup>2620</sup> It implies the invocation of a state’s constitutional provisions for the protection of its national who is injured abroad. This concept will first be reviewed in relation to South Africa followed by that of Nigeria.

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<sup>2612</sup> See the cases cited in ch 6 *supra*.

<sup>2613</sup> See *Roothman’s case supra* n 2201.

<sup>2614</sup> *Kaunda’s case supra* n 686.

<sup>2615</sup> *Von Abo v Government of RSA supra* n 801. See also *Van Zyl’s case supra* n 556.

<sup>2616</sup> *Roothman’s case supra* n 2201.

<sup>2617</sup> *Thatcher’s case supra* n 2168.

<sup>2618</sup> Because of the foreign policy implications. See *Barcelona Traction case supra* n 26 178.

<sup>2619</sup> See ch 1. This is the concept whereby a state’s decision to exercise diplomatic protection on behalf of its injured national will depend on whether or not the said injury was incurred as a result of an initial offence committed by its national.



## 2.2 The South African experience

In the South African jurisprudence as already indicated, the decision in *Mohammed's case*<sup>2621</sup> was generally considered to be an extraterritorial application of the SA Constitution.<sup>2622</sup> However, du Plessis has pointed out that the case did not really constitute an extraterritorial application of the Constitution.<sup>2623</sup> The pronouncement of the Constitutional Court on the same subject matter in *Kaunda's case*<sup>2624</sup> however dispelled all lingering doubts that had existed on the extraterritoriality of the SA constitution as far as diplomatic protection is concerned.

In that case,<sup>2625</sup> the Constitutional Court asserted that jurisdictional competence of the government of South Africa is primarily territorial. According to the Court,

The Constitution provides the framework for the governance of South Africa. In that respect, it is territorially bound, and has no application beyond our borders.<sup>2626</sup>

Consequently, although rights in the Bill of Rights vest in everyone as long as they are in SA, the individual loses the benefit of that protection when he or she moves beyond its borders.<sup>2627</sup>

This principle was followed in *Rootman's case*,<sup>2628</sup> where the court refused to issue a *mandamus* against the government of the DRC to comply with a South African court order to fulfil its contractual obligation. It was also followed in *Van Zyl's case*<sup>2629</sup> where the court refused to grant a request for diplomatic protection against the Kingdom of Lesotho for an alleged violation of the property rights of South African nationals in that Kingdom. However, in *Thatchers' case*,<sup>2630</sup> and *Von Abo's case* it

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<sup>2620</sup> See ch 5 *supra*.

<sup>2621</sup> *Supra* n 1204.

<sup>2622</sup> See Dugard *supra* n. 1 79.

<sup>2623</sup> Du Plessis "The extraterritorial Application of the South African Constitution" (2003) 20 *SAYIL* 797.

<sup>2624</sup> *Supra* n 688.

<sup>2625</sup> I.e. *Kaunda's case supra* n 688.

<sup>2626</sup> *Idem* 36.

<sup>2627</sup> *Ibid.*

<sup>2628</sup> *Supra* n 2201.

<sup>2629</sup> *Van Zyl v Government of the RSA supra* n 556.

<sup>2630</sup> *Supra* n 2168.

would appear that the element of extraterritoriality was not in issue. Thus the court ruled in *Thatcher's* case that the decision of the Respondents to comply with a request by the Government of Equatorial Guinea to question the applicant in connection with an alleged *coup* plot to overthrow the government of that country in which he was involved, was not reached irrationally, unreasonably, arbitrarily or unconstitutionally. Again in *Von Abo's* case<sup>2631</sup>, the court granted a request by the applicant to compel the government of South Africa to accord diplomatic protection to him against the government of Zimbabwe, because the SA government failed to treat the applicant's request for diplomatic protection in accordance with the Constitution.

Erasmus and Davidson have, however, argued that the Vatelian customary international law concept of diplomatic protection which gives to the state an exclusive right of diplomatic protection because injury to the individual is said to be an injury to the state of nationality, should be abandoned in South Africa. They argue that the concept should be revisited, re-examined and further developed in light of changing needs and insights.<sup>2632</sup> They have also suggested that in addition to its more traditional usage in areas such as the protection against the confiscation of property of foreign nationals abroad, diplomatic protection should be recognised and used as an obligatory means of enhancing respect for human rights in SA.<sup>2633</sup>

Accordingly, basic human rights<sup>2634</sup> "should be considered part of the international minimum standard of treatment ... the denial of which should trigger the exercise of diplomatic protection."<sup>2635</sup> This machinery should be put in motion particularly when gross violations of human rights occur, because "a state that fails to protect its nationals under such conditions runs the risk of retrogradation and failing to provide the minimum protection required."<sup>2636</sup> The suggestion implies the extraterritorial application of the constitution for the protection of nationals.

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<sup>2631</sup> *Supra* n 801.

<sup>2632</sup> See Erasmus & Davidson *supra* n 293 135. The changing needs and insights include such phenomena as globalisation.

<sup>2633</sup> *Idem* 119.

<sup>2634</sup> Such as non-discrimination, fair trial provisions, access to justice and respect for a person's physical integrity and dignity, and one may add the right to life.

<sup>2635</sup> Erasmus *supra* n 293 122.

<sup>2636</sup> *Ibid* 122. This theme was echoed over and over in *Kaunda's* case *supra* n 686. The premise is that "the ultimate purpose of the State [or government] is related to the protection of individual

As commendable as this suggestion is however, it is submitted that Erasmus and Davidson's views on the traditional customary international law concept and use of diplomatic protection should be qualified. Although diplomatic protection has traditionally been employed by states mostly to protect property rights,<sup>2637</sup> such protection has not been restricted to property rights only but has been extended to rights such as the right to life,<sup>2638</sup> the right against discrimination,<sup>2639</sup> and even to the protection of procedural rights.<sup>2640</sup>

It is also submitted that the problem is not with the extension of the scope or ambit of diplomatic protection to cover the protection of human rights as such, but in dispensing with the discretionary nature of diplomatic protection as a legal remedy in international law.<sup>2641</sup> By dispensing with this discretion, citizens will be assured that their state of nationality will exercise diplomatic protection on their behalf as an obligation if they are injured abroad.<sup>2642</sup>

There is therefore a compelling argument for the proposition that states have not only a right but also an obligation to protect their nationals abroad against egregious violation of their human rights.<sup>2643</sup> The growing trend within the international community of providing diplomatic protection to nationals abroad, is not an irrelevant consideration in determining whether this duty should exist.<sup>2644</sup>

In his first report to the UNILC in 2000, the Special Rapporteur to the ILC on diplomatic protection concluded that:

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rights, to maintain a legal order conducive to the promotion of the rule of law, and to allow for conditions that will further human dignity." See *Kaunda's case supra* n 688 par 218.

<sup>2637</sup> See the cases of *Barcelona Traction, supra* n 26; *Mavrommantis Palestine Concession Case supra* n 36 & *Panevezys-Sadutiskiis Case supra* n 81.

<sup>2638</sup> For e.g the Entebe raid was to save the lives of those Israelis hijacked in the Air France incident.

<sup>2639</sup> *Chattins Claim supra* n 32.

<sup>2640</sup> It would appear that Dugard shares the same view. Dugard *supra* n 25 79 -80.

<sup>2641</sup> See ch 6 395.

<sup>2642</sup> Dugard the Special Rapporteur on Diplomatic Protection for the ILC submitted a proposal during 2000 on the *de legere ferenda* aspect of diplomatic protection, but the proposal was not accepted. The proposal was to the effect that the state of nationality of the injured person has a legal duty to exercise diplomatic protection on his or her behalf. See Dugard *supra* n 25 79. See also Erasmus & Davidson *supra* n 293 122.

<sup>2643</sup> *Kaunda v The President RSA supra* n 688.

<sup>2644</sup> See the judgment of O'Regan J in *Kaunda's case supra* n 688 par 221.

Today there is general agreement that norms of *jus cogens* reflect the most fundamental values of international community and are therefore to require deserving international protection. It is not unreasonable therefore to require a state to react by way of diplomatic protection to measures taken by a state against its nationals which constitute the grave breach of a norm of *jus cogens*... If a state party to a human rights Convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the Convention and provide adequate means of redress, there is no reason why a state of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.<sup>2645</sup>

### **2.3 The Nigerian experience**

Nigeria applies a flexible and pragmatic approach to the issue of diplomatic protection. Her deployment of troops in the Bakassi Peninsula to protect Nigerians living there illustrates extraterritorial exercise of diplomatic protection. Her willingness to withdraw the troops from the Peninsula when ordered by the ICJ to do so, also illustrates this flexibility.

Nigeria's response to the xenophobic attacks of foreigners in SA also demonstrates Nigeria's willingness to act extraterritorially when the exigencies of the occasion demand. The visit of the Nigerian President to SA at that time was proof of Nigeria's genuine concern over the welfare of its nationals abroad and her willingness to invoke her constitutional mandate to protect them.<sup>2646</sup>

The newly introduced "citizen diplomacy" has added a new impetus to the practice of diplomatic protection in Nigeria. It has given the Nigerian government additional "licence" to act extraterritorially when the need arises. Since this new approach is

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<sup>2645</sup> See the First Report of the Special Rapporteur to the UNILC on diplomatic protection in 2000. ILC 52<sup>nd</sup> Session 2000: A/C 4/506 and Addendum. See also *supra* p 41. However as already mentioned, this recommendation was not accepted by the ILC.

<sup>2646</sup> Even the British Airways incident of 2008 shows that Nigeria is prepared to act extraterritorially to protect its citizens abroad.

geared towards the protection of Nigeria's image and integrity abroad,<sup>2647</sup> the policy will definitely change Nigeria's approach to diplomatic protection of her citizens in the foreseeable future.

It is submitted that there are common denominators in the approach of the two states to diplomatic protection. These are their flexibility, consistency and commitment to issues. Just as the Nigerian President visited SA during the xenophobic attacks on foreigners in 2008, it will be recalled that the SA President made diplomatic visits to Zimbabwe and Equatorial Guinea in connection with the *Kaunda* incident even though the court had rejected the application of the mercenaries.<sup>2648</sup> The difference in their approach appears to lie in their method or style of approach. While SA prefers quiet diplomacy,<sup>2649</sup> Nigeria's approach appears to be more confrontational.<sup>2650</sup>

### 3 The doctrine of 'clean hands'

The question of clean hands is related to the issue of extraterritoriality in the exercise of diplomatic protection in that the clean hands doctrine is usually considered by governments when deciding whether or not to exercise diplomatic protection.<sup>2651</sup> The doctrine of clean hands implies that the state of the alien's nationality may decline to espouse the claim of its injured national if the wrongful act of the state complained of resulted from the initial wrongful conduct of the alien.<sup>2652</sup>

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<sup>2647</sup> See "A 'new' foreign policy thrust?" *The Guardian* (ed) 2007- 09- 20 16.

<sup>2648</sup> It must be mentioned that the SA mercenaries along with their British counterpart who were involved in the alleged attempted coup to overthrow the government of Equatorial Guinea were pardoned and released from prison in November 2009 as a result of the quiet diplomacy of the SA government.

<sup>2649</sup> This approach was also adopted by SA in an attempt to resolve the Zimbabwe crises.

<sup>2650</sup> In the Bakassi incident for instance, the deployment of Nigerian troops in the territory and the stalling of negotiations aimed at resolving the protracted border issue with Cameroon illustrate this confrontational tendency. Although no harsh words were exchanged during President Yar'dua's visit to SA, the mere personal visit of the Nigerian President to SA spoke volumes in terms of diplomacy and diplomatic protection. The dispatch of the Federal A-G and Minister of Justice to UK during the British Airline incident, is also illustrative of this approach.

<sup>2651</sup> See Shapovalov *supra* n 296.

<sup>2652</sup> *Idem* 831.

The doctrine of “clean hands” is not new in international law.<sup>2653</sup> It is closely related to notions of equity and good faith and found expression in the works of eighteenth-century writers particularly that of Richard Francis who stated that “He that had commiteth Iniquity shall not have equity.”<sup>2654</sup>

The clean hands doctrine is commonly understood as requiring that a party claiming an equitable relief, or asserting an equitable defense should itself have acted in accordance with equitable principles.<sup>2655</sup> In other words, the doctrine emphasizes the equitable maxim that “he who comes to equity, must do equity” and that “he who comes to equity must come with clean hands.”<sup>2656</sup> The doctrine prohibits anyone from benefiting from his or her own wrongful conduct.

Some commentators are of the view that the doctrine of “clean hands” should be the guiding principle for any state that exercises diplomatic protection.<sup>2657</sup> They believe that a state should not exercise diplomatic protection on behalf of a national whose hands are soiled.<sup>2658</sup> Thus, diplomatic protection should only be exercised on behalf of a national with clean hands. Other commentators, however, differ.<sup>2659</sup>

The clean hands doctrine has been a subject of considerable legal debate in the international legal community,<sup>2660</sup> and has been vigorously debated at the UNILC with a view of incorporating it into the ILC’s Draft Articles on Diplomatic Protection as a condition for admissibility of diplomatic protection.<sup>2661</sup> This, however, did not occur.

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<sup>2653</sup> *Idem* 834.

<sup>2654</sup> Francis *Maxims of Equity* (1727) 5.

<sup>2655</sup> See Garner *Blacks Law Dictionary supra* n 12 which defines clean hands as “the principle that a party may not seek equitable relief or assert an equitable defence if that party has violated an equitable principle such as good faith.”

<sup>2656</sup> Shapovalov *supra* n 296 831.

<sup>2657</sup> *Ibid.*

<sup>2658</sup> *Ibid.*

<sup>2659</sup> *Idem* 841.

<sup>2660</sup> *Idem* 830.

<sup>2661</sup> See the *Provisional Summary Record of the 2793<sup>rd</sup> Meeting* UN Int’l L Comm’n 56<sup>th</sup> Sess., 3-27 UN Doc. A/CN.4/ SR. 2793 ( 2004) 05 14) (hereinafter referred to as *ILC Meeting*) noting arguments of the members of the ILC regarding the application of the clean hands doctrine to the field of diplomatic protection. See also the *ILC Meeting 2792* UN Int’l. L. Comm’n 56<sup>th</sup> Sess., 17-18, U.N. Doc. A/CN.4/SR. 2792 (May 28, (2004) 05 28); and the *ILC Meeting 2819* U.N.Int’l. L. Comm’n, 56<sup>th</sup> Sess.10 13, U.N. Doc. A/CN.4/SR.2819 (2004) 07 27). The greatest exponent of this doctrine at the ILC has been Peller, while the greatest opponent has been Dugard. See Shapovalov *supra* n 296 852.

This said, Borchard cited several cases and incidents in which states refrained from interfering or exercising diplomatic protection on behalf of their nationals, because their nationals had “unclean hands”.<sup>2662</sup> The clean hands doctrine is thus one factor that a state may take into consideration when deciding whether to exercise diplomatic protection or not. More specifically, it is an excuse usually employed by a state to avoid exercising diplomatic protection when contemplating doing so.<sup>2663</sup> It will now be examined whether or not Nigerian and SA practice incorporate this doctrine.

### 3.1 *The doctrine of ‘clean hands’ in Nigeria*

It would appear that the Nigerian government is ready and willing to protect any citizen injured abroad no matter what crime he or she has committed. According to Maduekwe, the Nigerian Foreign Affairs minister,

Any nation worth its salt should take the security, plight and lives of its nationals seriously every where in the world. Any maltreatment or act of injustice meted on our [Nigerian] nationals shall henceforth be met with retaliatory actions. This shall be done by ensuring that the course of justice is followed, and that the rights of Nigerians are respected. In other words, “enlightened self interest” shall henceforth be the operative principle of Nigeria’s foreign policy.<sup>2664</sup>

It can therefore be said that the doctrine of clean hands does not apply to diplomatic protection in Nigeria, because it is excluded from operation by the declared government policy on the subject.

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<sup>2662</sup> See Borchard *supra* n 1 713 where he cites numerous instances in which individuals forfeited diplomatic protection on account of their wrongful conducts. He argues that “those cases in which foreign offices or international commissions have refused or at least limited the protection ordinarily extended to injured nationals “ were “because the acts of the claimant himself have made such protection unjustifiable either in whole or in part.”

<sup>2663</sup> Shapovalov *supra* n 296 851.

<sup>2664</sup> See *supra* n 1710. The question is whether states should be encouraged to take retaliatory measures against other states in exercise of diplomatic protection? Although reciprocity continues to form an integral part of relations between states, it is submitted that the circumstances of the situation should determine the reaction to be taken by government. See however, the commentary to art. 1 of the Draft Articles on Diplomatic Protection *supra* n 1. where it is

### 3.2 *The doctrine of “clean hands” in South Africa*

In SA, the Constitutional Court said in *Kaunda’s* case<sup>2665</sup> that although the applicants were on a frolic of their own when they got into trouble in Zimbabwe, they were still covered by the declared government policy on diplomatic protection.<sup>2666</sup> As already indicated, the avowed government policy is to ensure that all South African citizens receive a fair trial whatever offence they have committed or are charged with, in accordance with the framework of the Vienna Convention.

In that case, all the judges agreed that the applicants should be protected no matter how grave their alleged offences, in accordance with the Constitution and the declared government policy.<sup>2667</sup> However, while O’Regan J was willing to compel the SA government to make immediate representations on behalf of the applicants to the foreign governments involved, the majority judgment delivered by Chaskalson J adopted a more conservative approach by deciding to reserve to the executive branch the right to exercise its discretion in this direction.<sup>2668</sup>

It can therefore be said that another striking similarity in the practice of diplomatic protection of human rights by Nigeria and South Africa is their rejection of the doctrine of clean hands in the exercise of diplomatic protection. Other areas of similarity include judicial approach to the subject by the two states, lack of specific constitutional provision in the two Constitutions, and similarity in the declared government policies. The main difference, as already indicated, lies in their style of approach.

A comparative analysis of the constitutional provisions specifically related to the protection of human rights in the two states now follows

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emphasized that the definition of diplomatic protection under draft art.1 speaks of “peaceful means” of conflict resolution.

<sup>2665</sup> *Supra* n 688 in apparent reference to the doctrine of “clean hands.”

<sup>2666</sup> At par 50.

<sup>2667</sup> See the judgments of Ngcobo J O’ Regan J & Sachs J respectively.

<sup>2668</sup> “The situation that presently exists calls for skilled diplomacy the outcome of which could be harmed by any order that this court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow. If the situation on the ground changes, the government may have to adapt its approach to address the developments



## 4 The protection of human rights in Nigeria and South Africa: A comparative analysis

There are striking similarities and differences in the constitutional provisions of Nigeria and SA in the area of protection of human rights. Although both countries have constitutional provisions for the protection of human rights, they differ in the language, designation, method of interpretation and enforcement and in the limitations or restrictions placed on these human rights.

While Nigeria has “Fundamental Rights” provisions under Chapter 4 of its Constitution,<sup>2669</sup> SA has a Bill of Rights under chapter two of its Constitution.<sup>2670</sup> A comparative analysis of the constitutional provisions specifically related to the protection of human rights in the two states reveals considerable differences and similarities in the interpretation, limitation, enforcement and justiciability of these rights under the two constitutions. It is interesting to note that there is considerable disparity in the mode of protection and enforcement of these fundamental rights in Nigeria and South Africa. The main focus will be on those fundamental rights designated for special attention in this thesis.

## 5 Fundamental rights

### 5.1 *The right to life*

Considering the right to life, the obvious difference between Nigeria and SA is that although the right to life is held dear in both countries, South Africa has abolished the death penalty whereas Nigeria has not.<sup>2671</sup> South Africa abolished the death penalty in 1995 in the leading case of *S v Makwanyane*.<sup>2672</sup> In the Nigerian case of *Kalu v*

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that take place. In the circumstances, it must be left to government, aware of its responsibilities to decide what can best be done.” Per Chakalson J par 127.

<sup>2669</sup> In the case of *Olufumilayo Ransome-Kuti v The Attorney General of the Federation* (1985) 2 NSCC 879 892 the nature of a “fundamental right” was said to be “a right that stands above the ordinary laws of the land and which in fact is antecedent to the political society itself ... a primary condition to a civilized existence.”

<sup>2670</sup> The Bill of Rights is the cornerstone of democracy in S A See s 7 of the Constitution.

<sup>2671</sup> See *S v Makwanyane supra* n 1203 in which the death penalty was abolished in SA.

<sup>2672</sup> *Ibid.*

*The State*,<sup>2673</sup> Iguh J pointed out that one of the fundamental bases upon which the South African Constitutional Court pronounced the death penalty unconstitutional is “on account of the vital fact that the right to life in the relevant constitution was unqualified.”<sup>2674</sup> As already said, it is hoped that Nigeria will reconsider its stand on this matter in the near future.<sup>2675</sup>

## **5.2 Freedom from torture, cruel, inhuman or degrading treatment or punishment**

The right to be free from torture, cruel, or inhuman treatment or punishment is also not provided for in the same language or with the same spirit in Nigeria as contained in the SA Constitution or in other International Human Rights Instruments. Under the Nigerian Constitution, for instance, it appears that the right has been watered down considerably.<sup>2676</sup>

Whereas the UDHR, for example, stipulates that “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment,”<sup>2677</sup> and the ICCPR provides in the same vein that “No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment,”<sup>2678</sup> the Nigerian Constitution only provides that

“no person shall be subjected to torture or to inhuman or degrading treatment”<sup>2679</sup>

The words “cruel” and “punishment” have been omitted. The reason why these key words have been omitted from the constitutional provision is not obvious. Nevertheless, the omission of those words in the Nigerian Constitution gives cause for concern. It would appear, however, that the drafters of the Nigerian Constitution believed that no treatment or punishment may be cruel or inhuman at the same time or that the words used are tautologous. As Chenwi has queried,<sup>2680</sup> can’t we have

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<sup>2673</sup> (1988) 13 NWLR 531 *supra* n 1854.

<sup>2674</sup> At 590.

<sup>2675</sup> See p 278. *supra* 1850.

<sup>2676</sup> See s 34(1)(a) of the Constitution.

<sup>2677</sup> Art 5.

<sup>2678</sup> Art 7.

<sup>2679</sup> S 34(1)(a).

<sup>2680</sup> See Chenwi *supra* n 1235 106.

“punishment” which is “cruel” at the same time?<sup>2681</sup> In contradistinction to the Nigerian Constitution however, the SA Constitution provides that

Everyone has the right to freedom and security of the person which includes the right -

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.<sup>2682</sup>

It is submitted that this provision is closer to the letter and spirit of the International instruments on the subject than the Nigerian provision.

### **5.3 Right to be free from discrimination**

It would appear that the right to be free from discrimination in Nigeria is mainly geared towards prohibiting discrimination in governmental circles only,<sup>2683</sup> whereas that rule is aimed at prohibiting discrimination in official as well as private life under the SA Constitution.<sup>2684</sup> To this end, the SA Constitution differentiates between “direct” and “indirect” discrimination as well as “fair” and “unfair” discrimination<sup>2685</sup> - distinctions that do not appear in the Nigerian Constitution.<sup>2686</sup>

That notwithstanding, however, in relation to diplomatic protection, as Pretorius has pointed out:

despite efforts to rid South Africa of discriminatory practices and legislation, particularly discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief,

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<sup>2681</sup> Incidentally, under the Matrimonial Causes Act in Nigeria, cruelty is still a ground for divorce. This omission is not apparent under the SA Constitution. See s. 12(1) (d) and (e) of the SA Constitution.

<sup>2682</sup> S 12(1).

<sup>2683</sup> This observation is based upon the wording of s 42(1) of the Constitution. See *supra* p 280.

<sup>2684</sup> See s 9 (3). These grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

<sup>2685</sup> See s 9.

<sup>2686</sup> However, s 14 (3) of the Nigerian Constitution provides that “ the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria.” A Federal Character Commission is also set up under s 153 of the Constitution.

culture, or language, some discrimination is still evident in statutory provisions and case law involving aliens.<sup>2687</sup>

As earlier indicated, discrimination has a tribal rather than a racial connotation in the Nigerian society.<sup>2688</sup> It also affects mostly women and the physically challenged,<sup>2689</sup> whereas in SA discrimination is not only racially motivated, but also tribally engendered and has all the nuances of the grounds enumerated under section 9(3) and (4) of the Constitution.<sup>2690</sup> Whether tribally or racially motivated however, it is trite that discrimination is an important and lethal factor that can trigger the exercise of diplomatic protection by states.<sup>2691</sup>

## 6 Property rights

With regard to property rights, the Nigerian Constitution makes provision for acquisition and ownership of property anywhere in Nigeria, whereas the South African Constitution concentrates mainly on preventing “deprivation” of property and prohibiting “expropriation” without compensation.<sup>2692</sup> However, as already pointed out, the apparent disparity between the provisions of the Nigerian Constitution on the ownership of property and the Land Use Act renders the right to own property under the Nigerian Constitution nugatory.<sup>2693</sup>

The concept of property under the South African Constitution is wider than that its Nigerian counterpart. Under the South African Constitution, the concept of property has been enlarged to include things other than land.<sup>2694</sup> That, notwithstanding, the

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<sup>2687</sup> See Pretorius “Discrimination against aliens – international law, the courts and the Constitution.” *supra* n 2532 261 262. See also the following cases cited in support of this position. *Nyamakazi v President of Bophuthatswana* 1994 (1) BCLR 92 (B).; *Xu v Minister van Binnelandse Sake* 1995 (1) SA 185; and *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T).

<sup>2688</sup> See *supra* p 280. Prohibition is based upon ethnic group, place of origin, sex, religion or political opinion.

<sup>2689</sup> See Soniyi, “ECOWAS parliamentarians call for anti-discrimination laws.” *The Punch* 2009-10-21 73 where it was reported that female parliamentarians at the ECOWAS parliament in Abuja, Nigeria have called for laws that will reduce discrimination against women. See also Badejo: “Avoid discrimination against physically challenged, employers urged.” *Punch Ibid* 31.

<sup>2690</sup> See *supra* n 2679.

<sup>2691</sup> See *Chattin’s Claim supra* n 32.

<sup>2692</sup> See s 25(1) & (2) of the Constitution. See also *Moster supra* n 2451 567& *Murvey supra* n 2451 211.

<sup>2693</sup> See *supra* p 282 & 285.

<sup>2694</sup> See s 25(4)(b).

Constitution tries to maintain the *status quo* although an attempt is made to ameliorate past discriminatory practices with regard to property holding in the country.

The question, however, is whether foreigners are allowed to own private property in South Africa and if so, whether the *status quo* is likely to continue. The answer is that foreigners are allowed to own private property in South Africa, but this trend is likely to be reversed.<sup>2695</sup> Foreigners may no longer be able to own private property in SA in the near future and will instead be allowed only to lease land if the planned legislation is implemented.<sup>2696</sup>

Gwanya, the Director General for the department of Land Affairs in SA, indicated a policy to this extent in Cape Town in 2008.<sup>2697</sup> He said that a policy which will regulate ownership of land by non South Africans was being developed. Gwanya intimated that the department had engaged the services of experts to compile a report which recommended that the ownership of land by foreigners should be regulated.<sup>2698</sup>

The Director-General however said that it was unlikely that the envisaged legislation will negatively affect foreigners currently owning land in SA. According to him,

It is hoped that the legislation will not be retrospective and therefore the current land owners may not be affected.

It must be borne in mind that the deprivation or expropriation of alien property by receiving states without the payment of compensation has often been a compelling reason for the exercise of diplomatic protection.<sup>2699</sup> It is therefore hoped that the governments of these two states will refrain from expropriating or confiscating alien

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<sup>2695</sup> See Roos: "SA land not for foreign buyers" 2008-09-04 [www.fin24.com](http://www.fin24.com). See also "Will South Africa impose a property ownership ban on foreigners?" [http://www.shelteroffshore.com/indx.php/property/more/south\\_africa\\_property/](http://www.shelteroffshore.com/indx.php/property/more/south_africa_property/) (Accessed 2008/11/11).

<sup>2696</sup> According to a report, stronger foreign currencies (forex) enable foreigners to buy more land including land that is strategically situated in SA such as coastal and agricultural land.

<sup>2697</sup> See *supra* n 2694.

<sup>2698</sup> The report recommended a moratorium on the sale of state land to foreigners. It further recommended that land be leased to foreigners as opposed to full ownership. *Ibid.*

<sup>2699</sup> See e.g the *Barcelona Traction* case *supra* n 26; *Mavramantis Palestine Concession* case *supra* n 36.

property in their territories without the payment of compensation. This will avoid the painful task of defending diplomatic protection actions preferred against them by the affected states, particularly by the West, which are most often very eager to protect their investments and nationals abroad.<sup>2700</sup>

## 7 Procedural rights

Although procedural rights are provided for in both the Nigerian and SA constitutions, it would appear that while the right to a fair hearing in Nigeria specifically extends to both civil and criminal proceedings,<sup>2701</sup> emphasis is placed on the protection of this right mostly in criminal trials under the SA Constitution.<sup>2702</sup> Even though the rules of natural justice apply in all judicial and administrative proceedings in South Africa, this constitutional emphasis on criminal trials tilts the onus of proof in favour of the accused person. To that extent, the ambit of this right in the two states differs.

Another important difference between the procedural rights provisions in the Nigerian and SA Constitutions is seen in the right to be presumed innocent until proven guilty. While the right to the presumption of innocence in Nigeria is not linked with the right to remain silent, under the SA Constitution this right is connected with the right to remain silent and the right to refuse to testify at the trial.<sup>2703</sup>

With regard to the right to be tried within a reasonable time, the approach adopted by the two countries is similar.<sup>2704</sup> In Nigeria, section 35(3) of the 1999 Constitution provides that detained persons have to be informed within 24 hours of their crime.

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<sup>2700</sup> As rightly observed by Okowa, "There is here a presumption that nationals [are] indispensable elements of a state's territorial attributes and wrong done to the nationals, invariably affects the rights of the state." See Okowa "Issues of admissibility and the law on International Responsibility" in Malcom Evans (ed) *International Law* (2003) 472 477.

<sup>2701</sup> Section 36(1) of the Constitution provides *inter alia* that "in the determination of his civil rights and obligations, ... a person shall be entitled to a fair hearing within a reasonable time ..." S 36(4) goes further to provide that "Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to a fair hearing in public" whereas the right to fair trial only appears under s 35 of the SA Constitution which deals with "Arrested, detained and accused persons."

<sup>2702</sup> See s 35 (3) of the Constitution which provides *inter alia* that "Every accused person has a right to a fair trial which includes the right ... "

<sup>2703</sup> S 35(3)(h) of the SA Constitution stipulates that "every accused person has a right to a fair trial which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings."

<sup>2704</sup> See s 35(5) of the Nigerian and s 35 (1) (d) of the South African Constitutions respectively.

Such persons shall be brought before a court of law within 24 hours.<sup>2705</sup> Further, the accused has to be tried within two months from the date of arrest or detention in the case of a person not entitled to bail, or within three months in the case of a person entitled to bail.<sup>2706</sup>

The situation in SA is similar.<sup>2707</sup> The Constitution provides that everyone arrested for allegedly committing a crime must be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest, or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours. However, in practice, this provision is often honoured in the breach rather than in compliance.<sup>2708</sup>

The constraints militating against the enjoyment of this right are the same in Nigeria,<sup>2709</sup> as in SA.<sup>2710</sup> The identified constraints include: (i) The nature of the case; (ii) the time lag between the commission of the crime, the apprehension of the accused person and the commencement of his or her trial; and (iii) the infrastructure or resources in place for a quick trial.<sup>2711</sup>

With these factors in mind, a court should ask whether or not the burden borne by the accused as a result of the delay is reasonable. To make the enjoyment of this right effective in the two jurisdictions, it is imperative that a procedure be worked out so as to ensure that the trial will proceed “without undue delay” both in the first instance and on appeal, because justice delayed is justice denied.

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<sup>2705</sup> If the court is within 40 kilometers of the place of detention, or 48 hours if more than 40 kilometers.

<sup>2706</sup> See the Nigerian Constitution s 35(5).

<sup>2707</sup> See s 35(1) (d) of the Constitution.

<sup>2708</sup> Accused persons are often denied this right by not being brought promptly to court after their arrest with the usual excuse that investigations are yet to be concluded.

<sup>2709</sup> See the cases of *Ekang v The State*[2001] 20 WRN 30 *supra* n 1949 and *Asakitikpi v The State supra* n 1955.

<sup>2710</sup> See the case of *Coetzee v Attorney General KwaZulu-Natal supra* n 1956.

<sup>2711</sup> See the case of *Feedmill Development v Attorney General KwaZulu -Natal supra* n 2470 where these factors were judicially approved.

## 8 Interpretation of human rights provisions in the Nigerian and South African constitutions

In interpreting the Fundamental Rights provision of the Nigerian Constitution in relation to diplomatic protection, no special rules of interpretation are prescribed.<sup>2712</sup> The ordinary rules of statutory interpretation are applied and the liberal approach to interpretation applies.<sup>2713</sup> This was the decision of the Supreme Court of Nigeria in the case of *Director SSS v Agbakoba*,<sup>2714</sup> where the Court said, *inter alia*,

The purposive construction which is incumbent on this court to put on the fundamental rights provisions of our Constitution ...is that whenever possible and in response of the demands of justice, the courts lean to the broader interpretation unless there is something in the rest of the Constitution as to defeat the obvious ends the Constitution was designed to serve.<sup>2715</sup>

This method of interpretation is relevant in relation to diplomatic protection. It means that the words of the Constitution relating to fundamental rights under the Nigerian Constitution should be read not as mere legislative provisions, but to infer diplomatic protection where necessary, because, the words were meant

as revelations of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.<sup>2716</sup>

In other words, the Constitution must be interpreted liberally to include the sanctity of human rights, and specifically to include the use of diplomatic protection for the protection of human rights.

Under the South African Constitution, the interpretation of the Bill of Rights goes way beyond a liberal interpretation. Certain factors, including international law, and certain “democratic values” must be taken into consideration. Foreign law may also be considered. Section 39(1) of the constitution therefore provides that

When interpreting the Bill of Rights, a court, tribunal or forum:

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<sup>2712</sup> *Director SSS v Agbakoba supra* n 1691.

<sup>2713</sup> A liberal method of statutory interpretation is an interpretation whereby.....

<sup>2714</sup> *Ibid.*

<sup>2715</sup> Per Onu JSC 336-337 par E-B.

<sup>2716</sup> Per Ogundare JSC in *Director SSS v Agbakoba supra* n 1691 357.



- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

Section 39(2) goes further to provide that

When interpreting any legislation, and when developing the common law every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Section 39(1) requires a court to interpret the Bill of Rights in a way that promotes the values that underlie an open and democratic society based on human dignity, equality and freedom.

As can be seen from the constitutional provisions and judicial *dicta* in relation to the protection of human rights in the two jurisdictions, it appears that the mandate is to interpret the Constitution not only liberally to protect human rights, but in such a way as to infer diplomatic protection. In SA, the mandate even goes beyond mere liberal interpretation of the Constitution to include the incorporation of democratic values based on human dignity, equality and freedom. The courts are also enjoined to consider international law, and foreign law in the process.

## **9 Limitation of rights**

Human rights are not considered absolute in Nigeria or in SA. Accordingly, these rights are limited under the Constitutions of both countries. However, the methods adopted for the limitations of human rights under the two Constitutions differ. While the Nigerian Constitution grants fundamental rights and immediately limits them under the same constitutional provision, the South African Constitution has one limitation clause in the form of section 36. This clause can be applied for the limitation of any right in the Bill of Rights under the SA Constitution. In relation to diplomatic protection, an illustration of the different approaches adopted by the two states in the limitation of rights under their different Constitutions will suffice.

### **9.1 Limitation of fundamental rights under the Nigerian constitution**

The Nigerian approach is to grant a fundamental right with one hand, and to limit it immediately with the other, irrespective of the right involved. For instance, section 35 (1) of the Nigerian Constitution provides for the right to life. The section provides that,

Every person has a right to life and no one shall be deprived intentionally of his life.

However, the same sub-section goes on to provide that the right to life is not violated,

in execution of the sentence of a court in respect of a criminal offence of which he or she has been found guilty in Nigeria.

Section 33(2) of the Constitution goes further to enumerate specific instances in which limitation is placed on the right to life. It stipulates that,

A person shall not be regarded as being deprived of his life in contravention of this section if he dies as the result of the use to such extent and such circumstances as are permitted by law, of such force as is reasonably necessary –

- (b) for the defense of any person from unlawful violence or for the defense of property.
- (c) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (d) For the purpose of suppressing a riot.

Similarly, under section 34(1) of the Nigerian Constitution, “every individual is entitled to respect for the dignity of his person” and accordingly –

- (a) no person shall be subjected to torture, or to inhuman or degrading treatment;
- (b) no person shall be held in slavery or servitude; and
- (c) no person shall be required to perform forced or compulsory labour.

However, section 34(2) immediately limits this right by providing that

For the purposes of subsection (1) (c) of this section “forced or compulsory labour” does not include –

(a) any labour required in consequence of the sentence or order of a court.

All other fundamental rights are limited in this manner under the Nigerian Constitution.

Furthermore, section 45 of the Constitution spells out other factors to be taken into consideration by the courts in determining whether a limitation of fundamental rights is justified in Nigeria. These factors include, *inter alia*,

- (a) public defence, public safety, public order, public morality or public health;  
or
- (b) for the purpose of protecting the rights of other persons

Since human life is said to be sacrosanct, the obvious question is whether the limitation of this right in the Nigerian Constitution is justified.

This brings the issue of the death penalty in Nigeria again into focus. In her seminal book,<sup>2717</sup> Chenwi has made a convincing argument for the abolition of the death penalty on the basis of the international human rights law obligations of states. She argues that states should abolish the death penalty, because it violates the right to life.<sup>2718</sup> Besides, the method of execution often adds a dimension of cruelty which dehumanises all who are involved in the process.<sup>2719</sup>

Although there is no consensus that the abolition of the death penalty is a human right, suffice to say that the current trend is towards abolition.<sup>2720</sup> Sooner or later, the issue will arise in Nigeria and the country will have to consider its position on the issue of capital punishment. Limitation of human rights under the South African Constitution will now be considered.

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<sup>2717</sup> Chenwi *supra* n 1235 15-20.

<sup>2718</sup> *Idem* 58.

<sup>2719</sup> *Ibid.*

<sup>2720</sup> Chenwi *supra* n 1235 34-42 & 98 has documented the countries that have embraced abolition over the last ten years. As compared to previous 20 years, the number has doubled.

## 9.2 *Limitation of rights under the South African Constitution*

The difference between the Nigerian and the South African situation *vis-à-vis* the limitation of rights is that, under the SA Constitution, one umbrella provision is applied in limiting rights stipulated in the Bill of Rights, whereas, in Nigeria, the limitation clause comes immediately after each stipulated right.<sup>2721</sup> Apart from the right to life which is not limited under the SA Constitution, section 36 applies to all other rights enumerated under the Bill of rights. Thus, one must refer to section 36 of the SA Constitution in limiting any right.

The problem with this method of Constitutional limitation is that it is neither clear nor straight-forward. The limitation clause is shrouded in legalism and technicality and may lead to misinterpretation and, consequently, to a denial of a particular right sought, thereby engendering a denial of justice in the process.<sup>2722</sup>

In relation to diplomatic protection, the problem is that in determining whether any legislation limiting this right is valid under the South African Constitution, the court has an obligation to check the limitation complained of against the ten limiting factors enumerated under section 36. The court then has to balance the right sought to be enforced, against the interests of a “democratic society,” to determine whether the limiting legislation in question has passed the required test.<sup>2723</sup>

In the process, the right may be erroneously denied resulting in a possible miscarriage of justice. One thing is certain, however, it cannot be denied that under the Nigerian Constitution, every clause limiting a fundamental right is clear and unambiguous and the courts can easily apply it without much hesitation. This is not the case in respect of South Africa.<sup>2724</sup>

Nevertheless, in respect of the limitation clauses in both Constitutions, the message is loud and clear. Any state desiring or intending to exercise diplomatic protection on

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<sup>2721</sup> See the SA Constitution s 36.

<sup>2722</sup> See Woolman “Out of order? Out of Balance? The limitation clause of the final Constitution.” (1997) 13 SAJHR 102.

<sup>2723</sup> *Idem* 113.

behalf of its national against either of the two states must ensure that the violated right is not vitiated by any limitation clause in the Constitution of the state involved.

## 10 Procedure for enforcement of human rights in Nigeria and South Africa

Another important way in which the protection of human rights under the Nigerian Constitution differs from its South African counterpart is that special procedures are required for the enforcement of fundamental rights under the Nigerian Constitution whereas no special procedures are required under the South African Constitution. These procedures will now be discussed.

### 10.1 Enforcement procedure for fundamental rights in Nigeria

Section 46 of the Nigerian Constitution grants the High Court special jurisdiction in the enforcement of fundamental rights in Nigeria. The section provides that any person who alleges that any of the provisions of the chapter dealing with fundamental rights has been, is being, or is likely to be contravened in any State in relation to him or her, may apply to any High Court in that State for redress.

However section 46(3) empowers the Chief Justice of Nigeria to make special rules with regard to the practice and procedure of a High Court for purposes of enforcement of these fundamental rights.<sup>2725</sup> The shortcoming in this provision is that emphasis is placed on the “form” rather than on the “substance”, of enforcement.<sup>2726</sup> Consequently, a fundamental right may be denied because the right forms or procedures were not adopted, thereby leading to a denial of justice.

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<sup>2724</sup> Olivier is of the view that the limitation test under s 36 of the SA Constitution is a proportionality test which may give a better result than a simple blanket limitation test adopted by Nigeria.

<sup>2725</sup> See L.N No. 1 of 1979 Fundamental Rights (Enforcement Procedure) Rules 1979, which took effect from 1980-01-01.

<sup>2726</sup> Many cases have been dismissed by the courts because the prescribed formats were not followed by litigants. See e.g the cases of *Jack v the University of Agriculture Makurdi* (2004) 5 NWLR 208; *University of Ilorin v Oluwadare* (2006) 14 NWLR 751; *Edwin Ikem v Innocent Nwogwugwu* (1999) 13 NWLR 140; & *Egbe v Honourable Justice Belgore* (2004) 8 NWLR 336 to name but a few.

## 10.2 Enforcement procedure in South Africa

Unlike Nigeria, there is no special set of rules for the enforcement of rights in the Bill of Rights under the South African Constitution. What section 38 of the Constitution,<sup>2727</sup> requires is simply that

Anyone ....has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed, or threatened, and the court may grant appropriate relief including a declaration of rights.

In relation to diplomatic protection, the effect is a guarantee that once a right in the Bill of Rights is infringed and there is an application for relief, the courts can intervene without any formalities in conformity with the general notion that *ubi jus ibi remedium*. This was evident not only in the *Kaunda* case,<sup>2728</sup> but in all the cases on diplomatic protection discussed above.<sup>2729</sup> The overall effect is to reduce incidents of diplomatic protection in South Africa, because aggrieved persons have easy access to the courts to challenge the violation of their rights since no legal hindrance is imposed.

## 11 Justiciability of ECOSOC rights

There is yet another difference in the mode of protecting human rights in Nigeria and SA. In Nigeria, only civil and political rights are justiciable. Economic, social and cultural rights are not.<sup>2730</sup> In South Africa, all rights - civil, political, as well as economic, social and cultural are justiciable.<sup>2731</sup>

Given the fact that the human rights incorporated into the Constitutions of the two countries were incorporated from the same source,<sup>2732</sup> it is ironic that South Africa should allow economic, social and cultural rights to be justiciable while Nigeria does

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<sup>2727</sup> Which deals with the enforcement of rights.

<sup>2728</sup> *Supra* 688.

<sup>2729</sup> ee ch 6 *supra* in particular.

<sup>2730</sup> See Ladan "Should all category of human rights be justiciable?" in Ladan (ed) *supra* n 1819 66.

<sup>2731</sup> *Idem* 80. See also Davis "Adjudicating the socio-economic rights in the South African Constitution: Towards 'defference lite'?" (2006) 22 *SAJHR* 301.

<sup>2732</sup> Their sources are the UDHR, ICCPR, ICESCR and the ACHPR.

not. A further irony is the fact that South Africa has not ratified the ICESCR. Several implications flow from this dichotomy:

First and foremost, it shows how far the diplomacy of human rights in both countries has been marked by sharp inconsistencies and contradictions.<sup>2733</sup> Secondly, this trend has the potential of granting more rights and freedoms to South Africans than to Nigerians. It has been said that failure by Nigeria to make ECOSOC rights justiciable is not only

evidence of insensitivity to the plight and conditions of the poor, homeless, sick, illiterate, hungry and marginalised citizens of Nigeria, but also evidence of deliberate ignorance of the internationally recognised interdependence principles of all human rights.<sup>2734</sup>

It also shows a reluctance to follow the precedent set in other African states.<sup>2735</sup> In relation to diplomatic protection, a protecting State must ensure that the right that has allegedly been violated is justiciable in the receiving State. If not, the protecting State may be constrained in its attempt to exercise diplomatic protection. This is because, a cardinal requirement for the exercise of diplomatic protection is the exhaustion of local remedies.<sup>2736</sup> A claim can only be brought to the international arena if local remedies have been exhausted.<sup>2737</sup> If the violated right is an economic, social or cultural right in Nigeria, for instance, the chances are that diplomatic protection may not be available since those rights are not justiciable in Nigeria.

If, however, the violation occurred in SA, then the situation would be different. Since the violation of economic, social and cultural rights are justiciable in SA, the victim of the breach can go to court to seek redress. It is only where there is a denial of justice that diplomatic protection by the state of nationality of the injured alien is possible.

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<sup>2733</sup> Stemmet "Walking the tight rope: The diplomacy of human rights." (2002) *Acta Academia* 63.

<sup>2734</sup> See Ladan *supra* n 1819 306.

<sup>2735</sup> *Ibid.* See pp 259 & ...for comments on this.

<sup>2736</sup> See the ILC's Draft Articles on Diplomatic Protection art 14.

<sup>2737</sup> See e.g the *Tinoco Concession case* (1924) 1 U.N.R.A.A; 18 A.J.I.L.(1924). P.147. *The North American Dredging Company Claim (United States v Mexico)* (1926) 4 U.N.R.A.A, 26-30; and *The Mexican Railway Union Claim (Great Britain v Mexico)* (1930) 5 U.N.R.A.A. 155. See also Sen *supra* n 52 390.

Nevertheless, although South Africa constitutionally has more justiciable rights as compared to Nigeria, the two countries still have a long way to go in entrenching human rights cultures.

## 12 Other areas of comparison

### 12.1 *Basic structural similarities in the Nigerian and South African constitutions*

It is submitted that this comparative analysis would be incomplete without mention being made of the basic similarities in the constitutional structures of Nigeria and SA. This is important, because the constitutional structures of both countries have played significant roles in facilitating and motivating the machinery of both states in the provision of diplomatic protection of human rights. These basic constitutional structures constitute the strong or enduring pillars upon which the Nigerian and SA constitutions are premised.

### 12.2 *Dynamic pillars of the Nigerian and South African Constitutions*

The Nigerian and SA Constitutions have several common basic values which facilitate and enhance the diplomatic protection of human rights. By far the most important of these values are - constitutional supremacy,<sup>2738</sup> democracy,<sup>2739</sup> the rule of law,<sup>2740</sup> separation of powers,<sup>2741</sup> accountability,<sup>2742</sup> and devolution of powers.<sup>2743</sup> These basic values or features will now be discussed.

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<sup>2738</sup> S 1 of the Nigerian Constitution and s 2 of the South African Constitution.

<sup>2739</sup> S 14(1) of the Nigerian Constitution; s 1 of the South African Constitution.

<sup>2740</sup> S.1(3) of the Nigerian Constitution; s.1(c) of the South African Constitution.

<sup>2741</sup> See Part II ss 4-7 of the Nigerian Constitution. Under the S A Constitution, this power is implied. See the case of *South African Association of Personal Injury Lawyers v Heath* 2000 (1) BCLR 77 (CC) See de Waal *et al supra* n 2373 96.

<sup>2742</sup> S 14 of the Nigerian Constitution; s.1(d) of the SA Constitution.

<sup>2743</sup> Both the Nigerian and S A Constitutions stipulate that at the expiration of the terms of office of the President and members of the National/ State/Provincial legislatures, elections shall be conducted to fill these offices. See ss 76(1) & (2), 116, and 132 of the Nigerian Constitution and ss 46 & 86 of the SA Constitution respectively.



### 12.3 Constitutional supremacy

Constitutional supremacy means that the Constitution is supreme and binds all branches of government.<sup>2744</sup> Therefore it has priority over any other rules made by the legislature, the executive or the judiciary.<sup>2745</sup> Since the power to exercise diplomatic protection and protect human rights in Nigeria and SA is derived from the Constitution,<sup>2746</sup> any law or conduct from any branch of government that obstructs or hinders this process either substantially or otherwise, is null and void.<sup>2747</sup>

### 12.4 Democracy

Democracy means freedom of choice.<sup>2748</sup> It means a government based on the will of the people.<sup>2749</sup> Section 14(1) of the Nigerian Constitution, for instance, provides that “the Federal Republic of Nigeria shall be a State based on democracy and social justice”. Accordingly, section 14(2)(a) of the same Constitution stipulates that “sovereignty belongs to the people of Nigeria from whom government derives its powers and authority.”

Likewise, section 1 of the Constitution of the RSA provides that “The Republic of South Africa is one, sovereign, democratic state.” The Constitution does not only provide for the ‘formulation of the will of the people,’ it also requires government to “respond” to the will of the people.<sup>2750</sup>

Furthermore, references to democracy in the SA Constitution are followed by references to the values of openness, responsiveness and accountability.<sup>2751</sup> There

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<sup>2744</sup> S 1 of the Nigerian Constitution provides that “This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.” Similarly s 2 of the South African Constitution provides that “This Constitution shall be the supreme law of the Republic. Law or conduct inconsistent with it shall be invalid and the obligations imposed by it must be fulfilled.”

<sup>2745</sup> This is in contradistinction to Parliamentary supremacy whereby Parliament is supreme.

<sup>2746</sup> As discussed above.

<sup>2747</sup> See for instance s. 1(3) of the Nigerian constitution, and s 2 of the South African Constitution.

<sup>2748</sup> This is the basic idea behind the concept of democracy according to contemporary political usage of the term. See the *Large Print English Dictionary supra* n 7 88.

<sup>2749</sup> Abraham Lincoln defined democracy as the government of the people, by the people and for the people.

<sup>2750</sup> See the Preamble.

<sup>2751</sup> See eg the SA Constitution ss 33, 215(1), 216(1) & 217(1).

are similar references to these values in the Nigerian Constitution.<sup>2752</sup>

In the context of diplomatic protection and protection of human rights, this means that it is the will of the people that must prevail in all circumstances with regard to the applicability of this right. The collective will expressed in the Constitution should not be deterred, compromised or limited under any circumstances.

### **12.5 The rule of law**

Another basic similarity between the Nigerian and South African constitutions is the provision for the rule of law. The rule of law means that governmental power should be subject to and constrained by the Constitution.<sup>2753</sup> This implies that it is the law and not arbitrary power that should prevail in the land,<sup>2754</sup> that everybody is equal before the law,<sup>2755</sup> and that the ordinary laws of the land should be based on or traceable to the Constitution itself.<sup>2756</sup>

In relation to diplomatic protection and protection of human rights, the rule of law means that everybody in Nigeria and SA is equally entitled to these rights since the Constitution has prescribed them. No government should, therefore, deny them.

### **12.6 Separation of powers**

Separation of powers is another basic constitutional value in the Nigerian and South Africa Constitutions that enhances diplomatic protection of human rights.<sup>2757</sup> As already indicated, governmental powers are legislative,<sup>2758</sup> executive<sup>2759</sup> and judicial

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<sup>2752</sup> *Idem* s 1(d).

<sup>2753</sup> See the Nigerian Constitution s 14 (1).

<sup>2754</sup> This means that no person can be punished unless there is a breach of the law.

<sup>2755</sup> This implies that everybody should be subject to the same law and to the jurisdiction of the ordinary courts of the land.

<sup>2756</sup> This term was popularized by Dicey in the 20<sup>th</sup> century although the idea had been a central theme in Western political philosophy for centuries. See Dicey *Introduction to the study of the law of the Constitution* (1885) 10 (ed) (1959) xcvi-cl.

<sup>2757</sup> The French philosopher Montesquieu (1689-1755) is usually credited with the first formulation of the modern doctrine of separation of powers in his work *L'Esprit des Lois* (1748).

<sup>2758</sup> See the Nigerian Constitution s 4 & the SA Constitution s 42.

<sup>2759</sup> The Nigerian Constitution s 5 & the SA Constitution s 83.

in nature.<sup>2760</sup> The gist of this constitutional principle is that these three governmental powers should be independent of each other so that no single person or agency can control or usurp the functions of the other.<sup>2761</sup> The main objective of this constitutional principle is to safeguard the freedom and liberty of the ordinary citizen and prevent tyranny.<sup>2762</sup> Since diplomatic protection of human rights is generally seen as a prerogative of the executive branch of government, no other branch of government should interfere, usurp, interrupt, or frustrate its dispensation or implementation.<sup>2763</sup>

Related to the concept of separation of powers in both the Nigerian and the South African constitutions is the concept of checks and balances. The doctrine of separation of powers does not advocate a water-tight compartmentalisation of powers.<sup>2764</sup> In its operation over the centuries, it has been complimented with the principles of checks and balances, co-operation and co-ordination.<sup>2765</sup>

The checks prevent one power from overreaching its bounds, while balances reconcile the powers to one another.<sup>2766</sup> Co-operation and co-ordination ensure that government activities are not hampered by unnecessary conflicts resulting from separation of powers, but that the interest of the people is taken into consideration by government.<sup>2767</sup>

An illustration of the principles of checks and balances in relation to the practice of diplomatic protection of human rights is that if the executive branch fails to discharge its responsibility to provide the right, the courts have the power of judicial review and

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<sup>2760</sup> The Nigerian Constitution s 6 & the SA Constitution s 165.

<sup>2761</sup> *Idem* 13.

<sup>2762</sup> *Ibid.*

<sup>2763</sup> See the dicta of Chaskalson CJ in *Kaunda's case supra* n 628 par 19.

<sup>2764</sup> See de Waal *et al supra* n 2373 95.

<sup>2765</sup> *Ibid.*

<sup>2766</sup> *Ibid.*

<sup>2767</sup> South Africa practices a co-operative form of federalism, whereas Nigeria practices a competitive form. In a co-operative form of federalism, different spheres of government share the same responsibilities, whereas in a competitive form of federalism governmental powers are divided between the federal or central government and the regions. See de Waal *et al supra* n 2381 119.

can compel the executive branch to comply.<sup>2768</sup> This principle is applicable both in Nigeria<sup>2769</sup> and in SA.<sup>2770</sup>

## **12.7 Devolution of power**

Devolution of powers has to do with the way in which power changes hands across the political spectrum.<sup>2771</sup> This is another constitutional value common to the two countries that favours diplomatic protection of human rights. Under the Nigerian and South African Constitutions, it is stipulated that at the expiration of the tenure of office of the President and members of the National and State/Provincial legislatures, free and fair elections will be conducted by an independent body to fill those vacancies.<sup>2772</sup>

The implication is that if one government is not sensitive to the needs and aspirations of the people, and does not discharge its responsibilities in relation to diplomatic protection of human rights, the next government might. These fundamental constitutional values provide a healthy and conducive environment for the diplomatic protection of human rights under both Constitutions.

## **13 General appraisal of the Nigerian and South African Constitutions**

### **(a) South Africa**

It has been said that the South African Constitution is one of the most progressive constitutions in the world.<sup>2773</sup> This is true to the extent that it is one of the more recent constitutions to emerge in this age of globalisation. It has thus embodied

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<sup>2768</sup> Furthermore, the courts may declare any unauthorised exercise of power either by the executive or the legislature invalid.

<sup>2769</sup> See the *Revenue Allocation Case. Attorney General of Bendel State v The Attorney General of the Federation & 22 Others* (1981) 10 SC 1.

<sup>2770</sup> See the cases of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 374 (CC) & *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191.

<sup>2771</sup> Garner (ed) *Black's Law Dictionary supra* n 12 484 defines devolution as "the act or instance of transferring one's rights, duties or powers to another."

<sup>2772</sup> See n 2742 *supra*.

<sup>2773</sup> See Mubangizi *supra* n 282 71.

modern constitutional concepts and structures.<sup>2774</sup> First and foremost, it is human rights oriented.<sup>2775</sup> The idea of incorporating human rights norms into the SA Constitution was to ameliorate past and present prejudices and injustices.<sup>2776</sup> Secondly, the South African Constitution is international in outlook.<sup>2777</sup>

This international outlook is reflected in the constitutional injunction that in interpreting the Constitution, the Bill of Rights, and other statutes, or in developing the common law, the courts should refer to international law.<sup>2778</sup> Other commendable features of the 1996 Constitution of South Africa is the justiciability of all rights under the Constitution, whether they are civil, political, economic, social or cultural rights.

### **(b) Nigeria**

The Preamble to the 1999 Constitution states that the Constitution was made by the people.<sup>2779</sup> It is submitted that although Nigerians were consulted and given a free hand and opportunity to make contributions and input by way of public debates and hearings before the enactment of that Constitution, the general consensus was to retain the provisions of the 1979 Constitution with very little amendments.<sup>2780</sup> Unfortunately, the 1979 Constitution had no provisions on international law *stricto sensu*.<sup>2781</sup> Perhaps the 1999 Constitution could have had the same international outlook as that of South Africa if the conditions that prevailed in South Africa had existed in Nigeria at that time and the people thought it necessary to internationalise the Constitution.<sup>2782</sup>

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<sup>2774</sup> *Ibid.*

<sup>2775</sup> *Ibid.*

<sup>2776</sup> *Idem* 45.

<sup>2777</sup> *Ibid.*

<sup>2778</sup> See the SA Constitution ss 39(1), 39(2) & s. 233.

<sup>2779</sup> By proclaiming “*We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved to provide for a Constitution for the purpose of promoting the good government and welfare of all persons...Do hereby make, enact, and give to ourselves the following constitution.*”

<sup>2780</sup> See Flanz *Constitutions of the Countries of the World* (1999) vol xiv Nigeria: vi.

<sup>2781</sup> “Nowhere in the 1979 Constitution was there a clear cut formulation on the relationship between International Law and Nigerian Law.” Oyeboode *supra* n 1658 283.

<sup>2782</sup> During the Constitutional process leading to democracy in SA, the urge was to find a “common law” acceptable to all the parties concerned. That “common law” was international law. See Olivier *supra* n 1995 who has documented the negotiating process. See also Botha *supra* n 1995 who says that by embracing Public international law as an equal component in the fabric of SA law, not only has the SA legal system had some hope of legitimacy in the eyes of the population as a whole, but that Public international law has also come of age as an international monitor - a system of checks and balances – healing the rifts between the peoples of the country,

## 14 Peculiar human rights problems in Nigeria

There are a few current endemic human rights problems in Nigeria. These include issues associated with the Niger Delta and the Sharia law.

### 14.1 *The Niger Delta problem*

The Niger Delta problem has, however, been diffused. While it lasted, it was an albatross around the neck of the Nigerian nation as far as its human rights record is concerned.<sup>2783</sup> Since the bulk of Nigeria's oil reserves are derived from the Niger Delta Region, it is shocking that the environmental, ecological and health effects of oil exploitation on the indigenes of the oil producing areas of the Niger Delta Region of Nigeria was ignored by successive governments and the existing revenue allocation formula in the country.

Water pollution had caused mass unemployment of local fishermen. Land degradation and oil spillage undermined local farmers, resulting in widespread poverty and frustration in the area.<sup>2784</sup> The people of the Niger Delta therefore complained bitterly of the deprivation and degradation of their environment and neglect by both the Federal Government of Nigeria and the oil companies operating in the area. They felt that they were entitled to some compensation by way of social amenities and job creation for this deprivation and degradation of their environment.<sup>2785</sup>

Since help was not forthcoming, they demanded total control of the resources in the Niger Delta. They felt that the 13% derivation formula in the Constitution was not

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smoothing the workings of a new and democratic SA and ultimately ensuring its continued international legitimacy.

<sup>2783</sup> See *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*. Comm. No 155/96 (2001) African Commission for Human Rights. See also Smith *Text and Materials on International Human Rights* (2007) 289.

<sup>2784</sup> *Ibid.*

<sup>2785</sup> *Idem* 290.

enough. To enforce their demands, they resorted to armed struggle, hostage taking, terrorism and ransom demands.<sup>2786</sup>

Although the Presidential Committee on the Review of the 1999 Constitution, appreciated the injustice in the revenue formula, they failed to make a specific recommendation other than that it should be “increased substantially beyond the 13% minimum.”<sup>2787</sup>

Nigeria’s main source of public revenue is oil, and this has been so since the 1970’s. Paradoxically, this oil comes mostly from the Niger Delta Region.<sup>2788</sup> It is submitted that there is no sound reason why those who come from the area where the wealth of the nation is derived, should be the most poverty-stricken.

Abductions and terror were unleashed in the area and the Niger Delta became an occupied territory. It is submitted however that a military solution was not the right option to the Niger Delta problem due to the sustained loss of lives and property that had resulted in the use of force.

Although many efforts had been made in the past to solve this intractable problem, no success was achieved. Nevertheless, a diplomatic solution remained the better option. With the increased use of diplomacy and in the fullness of time, a diplomatic break-through was achieved.<sup>2789</sup>

## **14.2 The Sharia law question in Nigeria**

A vexing human rights problem in Nigeria is the impact of the Sharia law on human rights, especially those of women. It is rather ironic and sad that although Nigeria is a secular state,<sup>2790</sup> the Federal Government of Nigeria has connived at and permitted

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<sup>2786</sup> Things fell apart and anarchy was let loose upon the land.

<sup>2787</sup> This opened up another controversy as to what is “substantial”. See the Report of the Presidential Committee on the Review of the 1999 Constitution vol 1 (Main Report) (2001) 02 ) 44.

<sup>2788</sup> *Supra* n 2782 289.

<sup>2789</sup> Adopting diplomatic tactics as suggested above, President Yar’Adua declared a 60-day amnesty period (6 August 2009 – 4 October 2009) for militants in the Niger Delta to surrender their arms and be pardoned. At the end of the 60 days, many militants complied. A lot of arms and ammunitions were also surrendered.

<sup>2790</sup> See the Nigerian Constitution s 10 which prohibits the adoption of any state religion.

the practice of the Sharia legal system in the Northern states of the country with all the attendant abuses.

This has severely dented the human rights image of the country internationally. A good example of this was the conviction and condemnation to death by stoning of one Safiyat Hunsein Tungar, a single mother, for alleged adultery in 2002. Since adultery is not a crime in Nigeria, and section 36 of the Constitution clearly stipulates that

a person shall not be convicted of any criminal offence unless the offence is defined, and the penalty prescribed for in a written law,

The conviction of Safiyat attracted international outrage. The credibility of the Nigerian legal system generally and the Sharia legal system in particular was questioned.

Although the sentence of death in that case was reversed on appeal,<sup>2791</sup> the nation's human rights image was severely tarnished. It is hoped that such an incident will not be repeated.

## **15 Diplomatic protection and human rights: The final question**

The final question is whether diplomatic protection is still available as a legal remedy in international law or whether it has been eclipsed by the advent of human rights law. As pointed out earlier, it was thought that the advent of a human rights regime in international law would render diplomatic protection superfluous.<sup>2792</sup>

According to Tiburcio,

Notwithstanding that much has been studied and written on both subjects of diplomatic protection and human rights, there have been great controversies as regards the exact limits of each regards to the other. Doctrine has been mostly unclear and controversial referring to this aspect, for it has been said that the modern doctrine of human rights has taken the place of diplomatic

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<sup>2791</sup> See Adeyemi & Meya "Court saves Safiyat from death by stoning." *The Guardian* 2002-03-26 1.



protection, and thus diplomatic protection does not exist any more. Conversely, it has been said that diplomatic protection will always exist, because of its specific nature.<sup>2793</sup>

The growth of international human rights law had led some to argue that diplomatic protection would lose its *raison d'etre* and that it would cease to exist, and be replaced by human rights law.<sup>2794</sup> That expectation has, however, not materialised.<sup>2795</sup> The reason is that neither the international nor the regional human rights instruments have adequately protected human rights or offered effective remedies to human rights violations.

Although individuals today enjoy more international remedies for the protection of their rights than ever before, only a few individuals in a few states have obtained satisfactory remedies or redress from the current international and regional human rights conventions to date. Besides, some regions of the world such as Asia are not yet subject to any human rights convention.<sup>2796</sup>

The fate of individuals who are living in countries in which they are not nationals is even worse.<sup>2797</sup> Although international human rights instruments extend protection to “all individuals,” there is only one multilateral convention that seeks to provide the alien with remedies for the protection of his or her rights outside the field of foreign investment.<sup>2798</sup> As submitted by Dugard

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<sup>2792</sup> See *supra* ch 2.

<sup>2793</sup> See Tiburcio *supra* n 26 66.

<sup>2794</sup> See Dugard *supra* n 25 76. See also Geck *supra* n 10 1045.

<sup>2795</sup> The argument advanced for the demise of diplomatic protection was that it is no longer necessary to accord privileged treatment to aliens judged by the international minimum standard, as this standard has been replaced by the human rights standard (which accords to nationals and aliens alike the same standard of treatment under the UDHR.) It was also argued that the individual is now a true subject of International Law with legal standing to enforce his or her human rights at the international level. As a consequence, the right of a state to claim on behalf of its nationals should be restricted to cases where there are no other method of settlement agreed upon by the alien and the injuring State. In such a case, the claimant State acts as an agent of the individual and not in its own right. See Dugard *supra* n 57 76.

<sup>2796</sup> Dugard First Report to The ILC on Diplomatic Protection *supra* n 9.

<sup>2797</sup> Dugard *supra* n 25 77.

<sup>2798</sup> That is the Convention on the Protection of the Human Rights of all Migrant Workers and Members of their Families (1990). See ch 4 *supra*. Dugard *supra* n 25 77 has pointed out that although the Declaration on the Human Rights of those who are not Nationals of the Countries in which they Live (res 40/144) has granted rights to aliens, no machinery has been put in place to enforce them.

As long as the state remains the dominant actor in international relations, the espousal of claims by states for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights.<sup>2799</sup>

and that

until the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection. As an important instrument in the protection of human rights, it should be strengthened and encouraged.<sup>2800</sup>

Crawford agrees with this submission and says that diplomatic protection “undoubtedly continues to be practised”, even though some of the assumptions on which it was based have changed.<sup>2801</sup> He explains that the initial question facing the ILC was how diplomatic protection should be reconciled with human rights in light of developments in international law.<sup>2802</sup>

According to Crawford,

the international law of human rights is primarily based on multilateral treaties and involves the rights of individuals at international level.<sup>2803</sup> Many of these rights overlap with claims that can be brought by way of diplomatic protection if the injured individual is a national of the claimant state. Furthermore, individuals can have rights under international law whether or not these are classified under the rubric of human rights.<sup>2804</sup>

Another relevant development is the multitude of bilateral and multilateral investment protection agreements which give individual investors the right to have direct recourse to international arbitral tribunals.<sup>2805</sup> If individual investors can invoke these

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<sup>2799</sup> First Report to the ILC on Diplomatic Protection *supra* n 9.

<sup>2800</sup> Dugard *supra* n 25 78.

<sup>2801</sup> See Crawford *supra* n 10 22.

<sup>2802</sup> *Idem* 23.

<sup>2803</sup> *Ibid.*

<sup>2804</sup> *Ibid.* In *La Grand* case *supra* n 33 the ICJ held that a detainee’s right to be informed without delay under art 36(1) of the VCCR is an individual right though one that could be invoked by the State of nationality. The Court saw no reason to categorise it as a human right.

<sup>2805</sup> In most cases without any need to exhaust local remedies.

rights without any need to rely on the state of nationality to espouse their claim, does it remain useful to view them as substantive rights of the State at all?<sup>2806</sup>

According to Crawford, because of these controversial factors, some view the definition of diplomatic protection as “a mechanism or a procedure for invoking the international responsibility of the host state” as an outdated fiction and the *Marvommatis* principle as no more useful.<sup>2807</sup> That notwithstanding, Dugard proposed to the ILC that the principle of diplomatic protection should be codified in its traditional form, although “he made no attempt to justify the traditional view as based on a consistent or coherent doctrine.”<sup>2808</sup> Thus diplomatic protection still provides a potent remedy for the protection of millions of aliens who have no access to remedies before international bodies.<sup>2809</sup>

If this is the case, a related, important question is whether diplomatic protection should remain a discretion or whether it should be made an obligation. As was said from the outset, despite the changing legal, socio- economic and political world order and the inadequacy of the *status quo* whereby diplomatic protection is not obligatory on states irrespective of the human rights norm violated, it is submitted that the right to diplomatic protection will always remain a discretion of the state concerned. The reasons for this were clearly stated by the ICJ in the *Barcelona Traction* case.<sup>2810</sup>

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<sup>2806</sup> Crawford *ibid*.

<sup>2807</sup> E.g Dugard says that “the right of a state to assert its own right when it acts on behalf of its national is an outdated fiction which should be discarded – except perhaps in cases in which the real *national* interest of the State is affected.” See First Report to the ILC on Diplomatic Protection *supra* n 9. Dugard identified two flaws in the *Marvommantis* principle (which states that by taking up the case of its national, the State is in essence enforcing its own right). Dugard states first of all that, just because a legal fiction is involved in the concept, is not a good ground for dismissing diplomatic protection as a legal remedy in international law. Secondly, according to Dugard, it is an exaggeration to say that international protection of human rights has developed to the point of rendering diplomatic protection obsolete. See Dugard *supra* n 9 pars 18, 22-32.

<sup>2808</sup> On that basis the ILC went on to address the standard range of issues associated with diplomatic protection, including the content and scope of the rule of exhaustion of local remedies; nationality of claims, statelessness and dual nationality. It did not deal with the claims process or with certain grounds of admissibility often linked to diplomatic protection such as the clean hands doctrine, and the notion of contributory fault. Special diplomatic activities described in the VCDR and the VCCR were also not part of the topic . See Crawford *supra* n 10 24..Erasmus & Davidson *supra* n 293 on the other hand have however argued that the traditional approach to diplomatic protection should be discarded.

<sup>2809</sup> *Idem* 79.

<sup>2810</sup> *Supra* n 26 44. See ch 2 *supra* for a further analysis of that case.

Should it therefore be exercised by Nigeria and South Africa as an obligation? <sup>2811</sup>

The answer is that *Barcelona Traction* is still good law. Thus any state will have to weigh the “political and other factors” mentioned in *Barcelona Traction* before embarking on diplomatic protection irrespective of whether diplomatic protection is made an obligation or not. If conditions are not favourable for the exercise, diplomatic protection cannot be exercised. In the final analysis, it remains a discretion.

## **16 Lessons for Nigeria and the Republic of South Africa**

The main theme that has emerged from the analysis is that although Nigeria and SA have made tremendous diplomatic efforts to protect human rights, there is still room for improvement. Their approach to this problem is similar. They differ only in terms of procedures, details and terminology adopted for this purpose.

What lesson can Nigeria and South Africa learn from each other in connection with the practice of diplomatic protection of human rights? The lesson is clearly that diplomatic protection of human rights is a journey. That journey has begun. According to a Chinese proverb, “the journey of a thousand miles begins with one step.” Thus, no matter how difficult the terrain, or how dark or slippery the tunnel may be, there is a glimmer of hope ahead. Slow and steady steps will definitely win the race.

Suggestions and recommendations now follow.

## **17 Suggestions and recommendations**

It is therefore suggested that:-

- Since diplomatic protection normally begins with diplomatic missions abroad, diplomatic missions of both Nigeria and South Africa should be reorganised in order to prepare them for the onerous task of protecting their nationals abroad. There have been frequent complaints by Nigerians and South Africans in foreign countries, who, needing assistance from their embassies and High

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<sup>2811</sup> Some are of the view that diplomatic protection should be made an obligation for states. See

Commissions, are denied such assistance for one reason or another. In some cases, the staff of such embassies are rude and unsympathetic to the very people they are supposed to protect. This problem of insensitivity to the plight of their fellow men and women abroad, must be eliminated. To redress this problem, specific guidelines should be issued by the sending states to diplomatic missions abroad on ways of protecting their nationals more effectively. Any breach of such guidelines should attract disciplinary action. It is submitted that unless these missions are overhauled and reorganised, this task will not be successfully accomplished.

- Since the embassies and High Commissions were set up in part to protect nationals abroad and to do everything humanly possible within their policy framework to solve their problems, the embassy personnel should be made to carry out their responsibility effectively. It is, however, discouraging to note that while some embassy personnel have lived up to expectations, the vast majority of them seem to be afraid even to openly and officially identify with their nationals in their respective countries of accreditation. As a result of this, many Nigerians and South Africans do not even bother to approach their embassies when they encounter problems abroad.<sup>2812</sup>
- The time has certainly come for this fundamental problem to be fully addressed and decisively resolved. In the first place, Nigerians and South Africans should be encouraged to report to their embassies and High Commissions as soon as they arrive in a foreign country, particularly if they are visiting that country for the first time. Some basic information about the country, such as the laws, foreign exchange regulations, and dangerous neighbourhoods, should be made known to them. Although some administrative problems may be posed to missions if every national should reports to them, obviously not everyone will do so. Such a move will at least create an awareness to visiting nationals that this service exists. This policy decision should be taken and enforced by the respective Ministries of Foreign Affairs. Nigerian and South African embassy officials who

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<sup>2812</sup> Dugard *supra* n 25 80 & *supra* n 1 290. See also Erasmus & Davidson *supra* 293 123.  
This is a general problem facing both Nigerians and South Africans living abroad.

are unable or unwilling to render such services to their nationals should be relieved of their duties.<sup>2813</sup>

- On the issue of effectiveness of diplomatic personnel, the appointment of politicians as diplomats should stop. This is because, there is no *rationale* in appointing or rewarding party members who have no knowledge or idea of diplomacy, with ambassadorial posting, as they will only become embarrassments to the sending states.
- In view of the provisions of article 10 of resolution 40/144, a hotline should be set up in all Nigerian and South African embassies/High Commissions abroad. This will enable their nationals who need immediate assistance to call the embassies directly and urgently and to lay their complaints or grievances.
- Embassy personnel should be properly trained, educated and drilled on the need and necessity of assisting their nationals. To solve this problem, it is suggested that Foreign Service training institutions of both countries should make training in human rights mandatory. Besides, embassies should be adequately funded.<sup>2814</sup>
- A special contingency-fund to be designated ‘diplomatic casualty fund’ should be set up to help those nationals who are genuinely in need in foreign countries.
- With regard to the solution of the Niger Delta problem in Nigeria, it has been suggested that only a Sovereign National Conference can solve the problem. Although a Sovereign National Conference may bring Nigerians together, it is submitted that it may not provide the answer to this problem. Rather, it is likely to aggravate it. This is because, if convened, every delegate to the conference will go armed with his or her community demands. In the final analysis, petty jealousy, envy, the desire to cheat, create confusion, or gain advantage over others will set in and the conference will fail for lack of consensus.<sup>2815</sup>
- To accelerate the diplomatic promotion of human rights in Nigeria and SA, a human rights culture aimed at cultivating tolerance towards foreigners must be

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<sup>2813</sup> It is said that many of these embassies are hampered by lack of funds. Consequently, they may be unable to discharge their responsibility unless they are adequately funded. See “Pruning our foreign missions” *Daily Champion* (ed) 2005-10-30 10. In view of new foreign policy objective of the present Nigerian administration, a time has come, for a contingency fund to be created and specifically allocated to Nigerian embassies for the purpose of rendering emergency help to Nigerians who are facing financial difficulties abroad.

<sup>2814</sup> Due to the prevailing global economic down turn.

<sup>2815</sup> The Niger Delta problem in Nigeria has been diffused by the granting of unconditional amnesty to the militants in the Niger Delta. About twenty thousand militants surrendered their weapons in exchange for a monthly stipend of N65,000 which is equivalent to \$430 See also *supra* n 369.

cultivated in both countries. Towards that end, human rights education should be introduced into school curricula at all levels – primary, secondary and tertiary in both countries. The masses should also be educated on human rights issues. The Nigerian-South African Bi-National Commission should champion this crusade. The Commission should be encouraged to play a more proactive role based on human rights obligations to ensure the protection of their nationals in each others' territory.

- A call is hereby made for an intensified awareness campaign to be launched to raise the awareness of the citizens of the two countries to the use of the protection mechanism available under the African Charter and the ICCPR for conflict resolution. This will enhance the prospects of protecting their human rights. Citizens should be educated on when and how to approach regional and other international human rights protecting bodies for appropriate reliefs
- .The popularisation of the knowledge of rights issues and the institutionalisation of training on rights and development along the lines initiated by the University of Pretoria should be encouraged and emulated by other institutions and organizations. All such institutions should however make determined efforts to focus more on the rights of foreigners
- In order to curb xenophobic tendencies in South Africa, it is suggested that the government of South Africa should send out a strong and clear message to the people that xenophobia is against the law and the international obligations of South Africa and shall not be tolerated under any circumstance.
- Furthermore, there should be a co-ordinated approach between various government departments to address xenophobia and its manifestation. Migrant and refugee policies should be clear, coherent, implementable and should reflect South Africa's constitutional and international obligations.
- South Africa should take steps to sign and ratify the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, and other relevant treaties. This should signal South Africa's commitment to abide by international standards in her treatment of resident non-nationals.
- Factors that encourage the manifestation of xenophobia such as poverty, unemployment, crime, corruption in the immigration and police services and

ignorance about the role and significance of non nationals in SA should be stressed

- A nation-wide public awareness and information campaign on racism and xenophobia and their effects, should be organised. Public service officials should undergo training not only on racism and xenophobia, but on the theory and practice of immigration and refugee policies. Above all, South Africans should be urged to practice and cultivate the spirit of *ubuntu*, hospitality and solidarity in their relations with others in their midst.
- Very few human rights treaties have been incorporated into Nigerian/South African municipal law. Besides, no record of international treaties incorporated into the municipal laws of these two countries is kept. It is suggested that Nigeria and South Africa should not only domesticate more international treaties into their legal systems, but a record should be kept of all treaties incorporated into their legal systems. This will enhance the prospects of diplomatic protection of human rights in the two countries as their citizens will know and take advantage of international treaties incorporated into the legal system for their benefit.<sup>2816</sup>
- It is also recommended that the two states should constitutionally make provision for diplomatic protection by amending their respective constitutions towards that end, and earnestly resolve, to make human rights the corner-stone of their nascent democracies.
- In order to encourage friendly relations among African states and nip the perennial African refugee problem and xenophobic attacks in the bud, it is suggested that diplomatic channels for conflict resolution - in particular, the inter-state complaint mechanism under the ICCPR and the ACHPR should be explored and adopted by African states to settle inter- and intra-state disputes.
- Finally, the ILC must convene an international Convention for the adoption of the Draft Articles on diplomatic protection as a treaty. All participating states should also be urged to ratify the treaty. When this is done, diplomatic protection will

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<sup>2816</sup> Determined efforts were made to know the treaties incorporated into Nigerian/South African law. With regard to South Africa, letters were directed to the Office of the Chief Law Officer, Department of International Relations and Cooperation dated 2010-01-12 and to the Director-General, Ministry of Justice and Constitutional Deveoplment dated 2010-01-21 asking for information concerning incorporated treaties in SA law. No concrete information was received from these sources. However, Mrs Marie Theron of the University of Pretoria law library, in an independent enquiry, confirmed that there is no official record of incorporated treaties in South



rise from the status of customary international law to the status of conventional law. It will then be characterised by certainty and predictability and will earn the respect of the international community.

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Africa. With regard to Nigeria, Nigerian embassy sources were exploited with no answer to the enquiry. The Official Nigerian government website was also searched in vain.

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