

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.¹⁶⁰⁵ 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

¹⁶⁰⁵ 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.¹⁶⁰⁶

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,¹⁶⁰⁷ and dualism.¹⁶⁰⁸ These two doctrines are also the two principal theories involved in the application of international law in municipal legal system.¹⁶⁰⁹

Advocates of monism view all law¹⁶¹⁰ 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.¹⁶¹¹ In their view, the science of law is a unified field of knowledge.¹⁶¹² 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.¹⁶¹³ The two systems emanate from one and the same source.¹⁶¹⁴ In this scheme of things, international law and municipal law are therefore related parts of the same legal structure.¹⁶¹⁵

Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Vietnam and Yugoslavia. See Dugard *supra* n 25 81.

¹⁶⁰⁶ 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.

¹⁶⁰⁷ 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.

¹⁶⁰⁸ According to dualism, international law and municipal law represent two entirely distinct legal systems of law. Shearer *supra* n 117 64.

¹⁶⁰⁹ See Green *International Law* (1982) 8. See also Shearer *supra* n 117 67.

¹⁶¹⁰ I.e International law & municipal law.

¹⁶¹¹ See Green *supra* n 1611 8.

¹⁶¹² *Ibid.* See also Dugard *supra* n 1 47 and Shearer *supra* n 117 67.

¹⁶¹³ Shearer *Ibid.*

¹⁶¹⁴ *Ibid.*

¹⁶¹⁵ 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.¹⁶¹⁶ 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.¹⁶¹⁷ 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.¹⁶¹⁸ 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.¹⁶¹⁹

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.¹⁶²⁰ 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.¹⁶²¹ International law cannot impinge upon state law unless the latter allows its constitutional machinery to be used for that purpose.¹⁶²² 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,¹⁶²³ unless such rules undergo a transformation by the process of “specific adoption” by, or “specific incorporation” into municipal law.¹⁶²⁴ The specific method of incorporation is often spelt out in a country’s constitution.¹⁶²⁵ Simply put, to the

¹⁶¹⁶ Kelson, Vendross & Scelle were the original exponents of this view. See Shearer *supra* n 117 67. See also Dugard *supra* n 1 47.

¹⁶¹⁷ Shearer *ibid.*

¹⁶¹⁸ *Idem.*

¹⁶¹⁹ Maluwa *supra* n 1617 49.

¹⁶²⁰ ie whether it is a domestic court or an international tribunal.

¹⁶²¹ Maluwa *supra* n 1617 49.

¹⁶²² Shearer *supra* n 112 66.

¹⁶²³ *Ibid.*

¹⁶²⁴ The chief exponents of dualism were Anzilotti & Triepel. See Dugard *supra* n 1 47.

¹⁶²⁵ 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.¹⁶²⁶

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.¹⁶²⁷ 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.¹⁶²⁸ 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.¹⁶²⁹ 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.¹⁶³⁰

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.¹⁶³¹ A distinction must however be made between the incorporation of a treaty and customary international law into municipal law¹⁶³² because different rules often apply.¹⁶³³ 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.¹⁶³⁴

¹⁶²⁶ Maluwa *supra* n 1617 49.

¹⁶²⁷ *Idem* 48.

¹⁶²⁸ The fundamental principle in almost all legal systems is that the internal application of treaties is governed by domestic Constitutional Law.

¹⁶²⁹ 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.

¹⁶³⁰ Maluwa *ibid*.

¹⁶³¹ 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.

¹⁶³² See Shearer *supra* n 117 68. See also Green *supra* n 1611 10.

¹⁶³³ See the *Advisory Opinion in the Nationality Decrees Issued in Tunis and Morocco*(1923) *PCIJ Rep Series B No 4* 42.

¹⁶³⁴ *Ibid*.

A state that becomes a party to a treaty, does so as a matter of free choice.¹⁶³⁵ 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,”¹⁶³⁶ 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.¹⁶³⁷ 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.¹⁶³⁸

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.¹⁶³⁹ If the matter is brought in a national arena, municipal law will govern.¹⁶⁴⁰ However, if it is brought in an international arena, then international law will prevail.¹⁶⁴¹ 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

¹⁶³⁵ 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.

¹⁶³⁶ See eg the S A Constitution 1996 ss 231, 232, 233 & s 39(1).

¹⁶³⁷ E.g South Africa. See *supra* n 1633. See Green *supra* n 1608 8.

¹⁶³⁸ 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?

¹⁶³⁹ Green *supra* n 1608 8.

¹⁶⁴⁰ *Ibid.*

¹⁶⁴¹ 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.¹⁶⁴² 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.¹⁶⁴³ 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.¹⁶⁴⁴ 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 land¹⁶⁴⁵ has never been consistently and universally accepted by English courts.¹⁶⁴⁶

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.¹⁶⁴⁷ The opposing approach holds to the doctrine of transformation whereby rules of international law are not to be considered part of

¹⁶⁴² Maluwa *supra* n 1617 50.

¹⁶⁴³ *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.

¹⁶⁴⁴ 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.

¹⁶⁴⁵ 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.”

¹⁶⁴⁶ See the case of *Trendtex Corporation v Central Bank of Nigeria supra* n 561 529 & Maluwa *supra* n 1617 51.

¹⁶⁴⁷ *Ibid.*

English law unless they have been specifically transformed by an Act of Parliament and adopted by decisions of judges and long established custom.¹⁶⁴⁸

A long line of cases stretching back two and a half centuries,¹⁶⁴⁹ to more recent decisions¹⁶⁵⁰ reveal that courts have vacillated between the two doctrines. In the *Trendtex* case¹⁶⁵¹ 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* case¹⁶⁵² decided three years earlier, Denning MR made a complete *volte face* in *Trendtex*, accepting the doctrine of incorporation as the more correct approach.¹⁶⁵³ 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.¹⁶⁵⁴

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.¹⁶⁵⁵

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.¹⁶⁵⁶ This is in

¹⁶⁴⁸ *Idem.*

¹⁶⁴⁹ See for instance the case of *Buvot v Barbuit* (1737) Cas t Talb 281.

¹⁶⁵⁰ See the case of *Trendtex Corporation v Central Bank of Nigeria supra* n 561 529.

¹⁶⁵¹ *Ibid.*

¹⁶⁵² *R v Immigration Officer ex parte Thakrar* (1974) 2 WLR 593.

¹⁶⁵³ 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.

¹⁶⁵⁴ See the case of *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR 124.

¹⁶⁵⁵ 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.

¹⁶⁵⁶ 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.¹⁶⁵⁷ 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*¹⁶⁵⁸ 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.¹⁶⁵⁹

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.¹⁶⁶⁰ 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.¹⁶⁶¹

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

¹⁶⁵⁷ 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.

¹⁶⁵⁸ *Supra* n 1656. The same provision was enshrined in the 1979 Constitution.

¹⁶⁵⁹ See the African Charter on Human and People's Rights (Ratification and Enforcement Act 1983) Cap 10 Laws of the Federation of Nigeria 1990.

¹⁶⁶⁰ State Security (Detention of Persons) Decree No 2 of 1984 as amended.

¹⁶⁶¹ 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.¹⁶⁶² 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.¹⁶⁶³ In other words, by its incorporation, the ACHPR had become part of Nigerian law.

Again in *Ubani v Director SSS*,¹⁶⁶⁴ 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.¹⁶⁶⁵ He also sought a declaration that his continuous detention was a violation of his freedom of movement under the 1979 Constitution¹⁶⁶⁶ and the African Charter on Human and Peoples' Rights.¹⁶⁶⁷

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

¹⁶⁶² 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.

¹⁶⁶³ *Abacha v Fawehinmi supra* n 1657 248.

¹⁶⁶⁴ (1999) 11 NWLR 129.

¹⁶⁶⁵ At 131.

¹⁶⁶⁶ 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."

¹⁶⁶⁷ Article 7(1).

upheld the objection and dismissed the application. Aggrieved by the dismissal, the appellant appealed to the Court of Appeal.¹⁶⁶⁸

Citing *Fawehinmi's* case¹⁶⁶⁹ 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.¹⁶⁷⁰ 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.¹⁶⁷¹

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.¹⁶⁷²

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 pp746-747.¹⁶⁷³

The *rationale* for the decision was that:

No government will be allowed to contract out by local legislation its international obligations¹⁶⁷⁴

Also in *Attorney General of the Federation v Godwin Ajai*,¹⁶⁷⁵ the respondent's passport was seized by an officer of the State Security Service (SSS) at the Murtala

¹⁶⁶⁸ CA/1/260/96.

¹⁶⁶⁹ At 147 pars A-C.

¹⁶⁷⁰ *Ibid.*

¹⁶⁷¹ *Ibid.*

¹⁶⁷² Per Oguntade JSC at 147-149

¹⁶⁷³ *Ibid.*

¹⁶⁷⁴ *Ibid.*

¹⁶⁷⁵ [2000] 12 NWLR 509.

Mohamed Airport in Lagos while waiting for a flight to Edinburgh in Scotland to attend the 8th 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 Constitution¹⁶⁷⁶ 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.¹⁶⁷⁷

Leave of court was granted to him to enforce his fundamental rights.¹⁶⁷⁸ He filed his motion on notice and the application was set down for hearing on the 26th of June 1995. On that day, the case was further adjourned to the 3rd July 1995, but neither appellant nor his counsel was present in court.¹⁶⁷⁹

The case was adjourned for judgment. On the adjourned date, counsel for the appellant appeared and sought to enter appellant's defence.¹⁶⁸⁰ The court, however, refused and delivered its judgement, granting the reliefs sought by the respondent.¹⁶⁸¹ Dissatisfied with the judgment, the appellant appealed to the Court of Appeal.¹⁶⁸² The appeal was dismissed and the judgment of the High court was upheld, while the cross appeal was allowed.¹⁶⁸³

¹⁶⁷⁶ Section 41 of the 1999 Constitution.

¹⁶⁷⁷ At 513.

¹⁶⁷⁸ *Ibid.*

¹⁶⁷⁹ *Idid.*

¹⁶⁸⁰ *Idem* 525.

¹⁶⁸¹ *Idem* 537 par B-C except the amount of damages claimed by the respondent.

¹⁶⁸² CA/L/3/96. The respondent also cross appealed on the *quantum* of damages awarded to him by the court. See 514 & 523 *idem*.

¹⁶⁸³ *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.¹⁶⁸⁴ It can, however, be argued that sections 2,¹⁶⁸⁵ 14(1),¹⁶⁸⁶ 14(1)(b),¹⁶⁸⁷ 25,¹⁶⁸⁸ and 41¹⁶⁸⁹ of the Constitution may apply¹⁶⁹⁰ given the modern context where international commerce, communication, and globalization prevail.¹⁶⁹¹ 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

¹⁶⁸⁴ Unlike the Constitutions of those countries mentioned in *supra* n 1604.

¹⁶⁸⁵ S 2 identifies Nigeria as an indivisible and indissoluble sovereign state.

¹⁶⁸⁶ 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.’

¹⁶⁸⁷ The section provides that “the security and welfare of the people, shall be the primary purpose of government.”

¹⁶⁸⁸ This section deals with citizenship. It bestows the right to citizenship on all Nigerians.

¹⁶⁸⁹ 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.

¹⁶⁹⁰ See Erasmus & Davidson *supra* n 293 who have made submissions along these lines concerning Diplomatic Protection under the South African Constitution.

¹⁶⁹¹ See Erasmus & Davidson *supra* n 293 125.

of *Director SSS v Agbakoba*¹⁶⁹²

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.¹⁶⁹³

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.¹⁶⁹⁴

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.¹⁶⁹⁵

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,¹⁶⁹⁶

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.¹⁶⁹⁷

¹⁶⁹² [1999] 3 NWLR 314. See also the case of *Attorney-General of the Federation v Ajayi supra* n 1677.

¹⁶⁹³ 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.

¹⁶⁹⁴ *Ibid.*

¹⁶⁹⁵ 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.

¹⁶⁹⁶ *Supra* n 1694

¹⁶⁹⁷ 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,¹⁶⁹⁸ it would therefore appear that section 19 of the Nigerian Constitution has some bearing on the subject of diplomatic protection.¹⁶⁹⁹ 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.¹⁷⁰⁰ This policy was later abandoned in response to the changing international environment and the country's domestic conditions.¹⁷⁰¹ 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

¹⁶⁹⁸ 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.

¹⁶⁹⁹ 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.

¹⁷⁰⁰ 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.

¹⁷⁰¹ 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 Oyeboode *supra* n 1659 283.

strategies have not been people-oriented.¹⁷⁰² 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.¹⁷⁰³ This indifference on the part of the Nigerian government, nevertheless, aroused adverse publicity, disenchantment and outrage against the government of the day.¹⁷⁰⁴ The adverse publicity and condemnation prompted Nigeria to adopt a new foreign policy objective called "citizen diplomacy," which is said to be "people oriented."¹⁷⁰⁵ It is geared towards "protecting" the image and integrity of Nigeria. "Citizen diplomacy" is said to be based on reciprocity.¹⁷⁰⁶ By that doctrine, individual Nigerians are the main focus of any foreign policy endeavour.¹⁷⁰⁷

According to this new foreign policy objective, every Nigerian abroad is assured of protection,¹⁷⁰⁸ and any country that portrays Nigeria and Nigerians in a bad or negative light, will face negative consequences.¹⁷⁰⁹ The reason for this is that:

¹⁷⁰² 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.

¹⁷⁰³ See for instance Giwa "Guinea detains 51 Nigerians – for drug trafficking" *Thisday* 2001-08-02 1.

¹⁷⁰⁴ 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.

¹⁷⁰⁵ See "FG Begins "Citizenship Diplomacy" *Thisday* (ed) 2007-28-8 5. See also "Nigeria to Adopt 'Citizenship Diplomacy'" *Thisday* (ed) 2007-12-9 3.

¹⁷⁰⁶ 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.

¹⁷⁰⁷ *Ibid.*

¹⁷⁰⁸ *Ibid.*

¹⁷⁰⁹ 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.¹⁷¹⁰

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.¹⁷¹¹

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.¹⁷¹² 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.¹⁷¹³ In the formation of customary international law, state practice is the “material element,” while the sense of legal obligation is the “psychological element.”¹⁷¹⁴ With regard to Nigerian practice, the

¹⁷¹⁰ *Ibid.*

¹⁷¹¹ 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.

¹⁷¹² 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.

¹⁷¹³ See Shearer *supra* n 117 33. See also Murty *supra* n 829 252.

¹⁷¹⁴ 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 2002,¹⁷¹⁵ her response to the xenophobic attacks on foreign nationals in South Africa in 2008,¹⁷¹⁶ and the British Airways incident of March of the same year,¹⁷¹⁷ 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.¹⁷¹⁸ 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.¹⁷¹⁹ 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.¹⁷²⁰ A state that exercises its jurisdiction beyond its territorial boundaries or limits, interferes with the exclusive territorial jurisdiction of another state.¹⁷²¹ 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

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.

¹⁷¹⁵ The case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening Judgment, ICJ Reports, (2002) supra* n 1643.

¹⁷¹⁶ 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 "Curtailling 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

¹⁷¹⁷ 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.

¹⁷¹⁸ See Coomans & Kamminga *Extraterritorial Application of Human Rights Treaties* (2007) 42.

¹⁷¹⁹ *Ibid.*

¹⁷²⁰ See Dugard *supra* n 1 133.

¹⁷²¹ See the case of *SS Lotus* (1927) PCIJ Series A No 10 (France v Turkey).

provisions to protect him or her.¹⁷²² 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.¹⁷²³ 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.¹⁷²⁴ 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,¹⁷²⁵ 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.¹⁷²⁶

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

¹⁷²² 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.

¹⁷²³ See Booyen "Extra-territorial application of Constitutional Rights in respect of Aliens" (1989-1990) 13 *SAYIL* 184.

¹⁷²⁴ 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.

¹⁷²⁵ 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.

¹⁷²⁶ 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,¹⁷²⁷ 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.¹⁷²⁸ 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.¹⁷²⁹

Diplomatic steps were, however, followed to resolve the conflict peacefully.¹⁷³⁰ 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.¹⁷³¹

Cameroon formally approached the OAU to intervene in the conflict, but the OAU could not resolve the matter.¹⁷³² 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.¹⁷³³ 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 1994.¹⁷³⁴ The government of the Republic of Cameroon

¹⁷²⁷ 1998 figure. See *The World Almanac and book of facts* (2003) *supra* n 284 824.

¹⁷²⁸ About 12 Nigerian soldiers were killed in that incident. See Nigeria's counter-claim at par 310 of the judgment.

¹⁷²⁹ *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.

¹⁷³⁰ See Aimufua "Diplomacy and the battle for Bakassi Peninsula" *The Vanguard* 1995-08-21 26.

¹⁷³¹ *Ibid.*

¹⁷³² *Ibid.*

¹⁷³³ *Ibid.*

¹⁷³⁴ 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.¹⁷³⁵ Nigeria filed its counterclaim in 1999 following the ICJ's refusal to uphold her preliminary objection on the question of jurisdiction.¹⁷³⁶ 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.¹⁷³⁷

Delivering its judgment on the 10th of October 2002, the ICJ ruled that sovereignty over the Bakassi was vested in the Cameroon.¹⁷³⁸ 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.¹⁷³⁹ The court

group is not confined to the use of a single instrument or strategy. Coercion is another diplomatic instrument.

¹⁷³⁵ 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."

¹⁷³⁶ At 313.

¹⁷³⁷ 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

¹⁷³⁸ At 455.

¹⁷³⁹ *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.¹⁷⁴⁰

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.¹⁷⁴¹ Others philosophically called for the acceptance of the judgment in good faith.¹⁷⁴² However, public opinion was generally against the judgment.¹⁷⁴³ The Nigerian government rejected the judgment on the grounds that it was based on political considerations.¹⁷⁴⁴ 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.¹⁷⁴⁵

The hardship of the judgment was felt mainly by Nigerians who had been living on the Peninsula for centuries.¹⁷⁴⁶ One can imagine the physical, social, political, economic and psychological effects that the judgment must have had on them, being

upon by Nigeria. It however ruled that in the absence of acquiescence by Cameroon, these effectivities could not prevail over Cameroon's conventional titles.

¹⁷⁴⁰ *Idem* 456 .

¹⁷⁴¹ See "Nigeria and the ICJ verdict" *The Comet* (ed) 2002-10-21 17

¹⁷⁴² 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.

¹⁷⁴³ 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.

¹⁷⁴⁴ 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.

¹⁷⁴⁵ 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.

¹⁷⁴⁶ 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.¹⁷⁴⁷ They felt that they should be diplomatically protected by Nigeria, and demanded the Nigerian government to exercise diplomatic protection on their behalf.¹⁷⁴⁸ They also vowed to resist the handover of the Bakassi Peninsula by Nigeria to Cameroon if their expectation of diplomatic protection was not met.¹⁷⁴⁹

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.¹⁷⁵⁰ These displaced Nigerians lobbied the National Assembly, which adopted several resolutions, asking the Federal Government not to hand over the Bakassi Peninsula.¹⁷⁵¹ Besides, the Nigerian government itself, using delaying tactics and reticence, vacillated, and put off the handover date several times.¹⁷⁵²

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 Accord¹⁷⁵³ in 2006, brokered by Kofi

¹⁷⁴⁷ 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.

¹⁷⁴⁸ *Ibid.*

¹⁷⁴⁹ 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.

¹⁷⁵⁰ 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.

¹⁷⁵¹ 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.

¹⁷⁵² 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.

¹⁷⁵³ 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.¹⁷⁵⁴ 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.¹⁷⁵⁵

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.¹⁷⁵⁶ 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.¹⁷⁵⁷

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

resolution of the deadlock over the implementation of the ICJ judgment. The accord was reached on 12 June, 2006.

¹⁷⁵⁴ 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.

¹⁷⁵⁵ See the text of the special broadcast of President Obasanjo to the nation in the *Daily Champion* of 2006-06-15 1.

¹⁷⁵⁶ 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.

¹⁷⁵⁷ 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.¹⁷⁵⁸

It has however been argued that Nigeria had no option in the circumstances.¹⁷⁵⁹ 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.¹⁷⁶⁰ 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.¹⁷⁶¹ 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.¹⁷⁶²

¹⁷⁵⁸ 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.

¹⁷⁵⁹ 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.

¹⁷⁶⁰ *Ibid.*

¹⁷⁶¹ *Ibid.*

¹⁷⁶² 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 2008.¹⁷⁶³ The incident is said to have started in Johannesburg¹⁷⁶⁴ but spread across the entire length and breadth of South Africa.¹⁷⁶⁵

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.¹⁷⁶⁶

News of the xenophobic attacks surprised, shocked and angered many Nigerians.¹⁷⁶⁷ It generated explosive reactions in the Nigerian news media.¹⁷⁶⁸ Initial reports indicated that many Nigerians had been killed while many more were wounded.¹⁷⁶⁹ 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.¹⁷⁷⁰ In all, about sixty two foreigners were killed in the violence, and thousands more were injured or displaced.¹⁷⁷¹

¹⁷⁶³ 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.

¹⁷⁶⁴ See See Bathembu "All quiet in Alexandra" *The Citizen* 2008-06-13 7.

¹⁷⁶⁵ 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.

¹⁷⁶⁶ Osagie "Attacks on foreigners spread in South Africa" *Punch* 2008-5-22 53

¹⁷⁶⁷ *Ibid.*

¹⁷⁶⁸ See *supra* n 1762.

¹⁷⁶⁹ *Ibid.*

¹⁷⁷⁰ *Ibid* See also Bathembu "All quiet in Alexandra" *The Citizen* 2008-06-13 7.

¹⁷⁷¹ 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.¹⁷⁷² 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.¹⁷⁷³ 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.¹⁷⁷⁴

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.¹⁷⁷⁵

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.¹⁷⁷⁶

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.”

¹⁷⁷² 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.

¹⁷⁷³ *Ibid.*

¹⁷⁷⁴ *Ibid.*

¹⁷⁷⁵ Okafor “FG to evacuate Nigerians in South Africa if .”. *Punch* 2008-05-29 8.

¹⁷⁷⁶ 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.¹⁷⁷⁷

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.¹⁷⁷⁸

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.¹⁷⁷⁹ That, however did not happen. Although no Nigerian was killed in the attacks as previously reported,¹⁷⁸⁰ 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.¹⁷⁸¹ 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.¹⁷⁸²

¹⁷⁷⁷ 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.

¹⁷⁷⁸ See Zana “South Africa to Nigeria: we’re sorry for attacks.” *The Nation* 2008-06-6 1.

¹⁷⁷⁹ *Ibid.*

¹⁷⁸⁰ Many however lost their properties. See *supra* n 1770.

¹⁷⁸¹ See Barrett, “South Africa’s Madness: Who is to blame?” *Daily Sun*. 2008-05-29 9.

¹⁷⁸² 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 Lagos¹⁷⁸³ off the aircraft, after they had complained about the arrest and inhuman treatment of a Nigerian deportee on board the plane.¹⁷⁸⁴

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.¹⁷⁸⁵

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.¹⁷⁸⁶ Some regard this incident as clearly demonstrating the Nigerian Government's genuine sympathy and regard for the feelings of its nationals.¹⁷⁸⁷

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.

¹⁷⁸³ Flight BA 0075.

¹⁷⁸⁴ See *supra* n 1704

¹⁷⁸⁵ 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.

¹⁷⁸⁶ *Ibid.*

¹⁷⁸⁷ 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,¹⁷⁸⁸ 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.¹⁷⁸⁹ The Government also tightened the much abused process by which the Nigerian passport is acquired by Nigerians and non-Nigerians alike.¹⁷⁹⁰ Nigeria also signed agreements with those countries often used by Nigerians as illegal transit points in order to seal those routes.¹⁷⁹¹

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,¹⁷⁹² 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.

(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.

¹⁷⁸⁸ 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.

¹⁷⁸⁹ See Fafowora “Treatment of Nigerians Abroad” *The Guardian* 2004-12-17 12.

¹⁷⁹⁰ 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.

¹⁷⁹¹ 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."¹⁷⁹³ 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.¹⁷⁹⁴ It is intended to examine some of the legal actions instituted against the government in order to deduce the reasons behind this judicial stance.¹⁷⁹⁵ 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,¹⁷⁹⁶ 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

¹⁷⁹² See ILC's Draft Art on Diplomatic Protection art 1.

¹⁷⁹³ 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.

¹⁷⁹⁴ Soniyi "Bakassi: Court can't stop withdrawal of Nigerian Troops –Judge." *Punch* 2004-09-3.

¹⁷⁹⁵ Because decisions of High courts of Nigeria are not often reported, reliance will be placed on newspaper reports.

¹⁷⁹⁶ 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.¹⁷⁹⁷ 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.¹⁷⁹⁸ 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 Act¹⁷⁹⁹ conferred unfettered power on the President to deploy military forces, and that he was not in a position to question that power.¹⁸⁰⁰ Nyako rejected the plaintiffs' argument that section 6 of the Constitution empowered the court to inquire into the exercise of that power,¹⁸⁰¹ and adjourned the substantive suit to a later date.¹⁸⁰²

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

¹⁷⁹⁷ See Umana "Ahead of the September 15 handover: Bakassi natives head for Supreme Court." *Punch* 2004-09-12;

¹⁷⁹⁸ See Soniyi "Bakassi: Court can't stop withdrawal of Nigerian troops – Judge." *Daily Sun*. 2008-05-29 9

¹⁷⁹⁹ 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."

¹⁸⁰⁰ See *supra* n 1797.

¹⁸⁰¹ 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".

¹⁸⁰² See Eno-Abasi "Bakassi residents ask court to stop handover of Bakassi" *The Guardian* 2006-08-8 12.

from proceeding with the planned handover.¹⁸⁰³ In the substantive suit, they asked the court to determine the legality or otherwise of the agreement ceding the Bakassi Peninsula to Cameroon.¹⁸⁰⁴ 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.¹⁸⁰⁵

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.¹⁸⁰⁶

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

¹⁸⁰³ *Ibid.*

¹⁸⁰⁴ *Ie* the Green Tree Accord of 2006-06-12.

¹⁸⁰⁵ 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.

¹⁸⁰⁶ 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.¹⁸⁰⁷

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.¹⁸⁰⁸ During this period, constitutional governance was kept in abeyance and the military leadership wielded both executive and legislative powers.¹⁸⁰⁹ 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.¹⁸¹⁰ Citizen's rights were trampled upon and the violation of human rights reached an alarming crescendo.¹⁸¹¹ Since military rule and human rights are opposed to each other,¹⁸¹² the painful experience of Nigerians further confirmed the popular saying that "power tends to corrupt, and absolute power corrupts absolutely".¹⁸¹³

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.¹⁸¹⁴ The situation improved remarkably when democracy returned to the country in 1999.¹⁸¹⁵ Democracy has provided a fertile ground for human rights to germinate and

¹⁸⁰⁷ 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."

¹⁸⁰⁸ Military rule began in Nigeria in 1966 and democracy was finally restored in 1999.

¹⁸⁰⁹ See Nwabueze *Military Rule and Constitutionalism in Nigeria* (1992) 65.

¹⁸¹⁰ 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.

¹⁸¹¹ 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.

¹⁸¹² 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.

¹⁸¹³ This is a famous saying by Lord Acton (1830-1902) an English historian. See the *New Dictionary of Cultural Literacy* (3rd ed) (2002) 563. www.bartleby.com.

¹⁸¹⁴ 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.

¹⁸¹⁵ See Heyns *supra* n 256 1388-89.

blossom.¹⁸¹⁶ 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.¹⁸¹⁷

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.¹⁸¹⁸ As a result, the UN was formed, with the aim of promoting respect for human rights and fundamental freedoms as one of its cornerstones.¹⁸¹⁹

¹⁸¹⁶ See, for instance, Okoye "Nigeria's human rights prospects have improved, says Israel parliamentarian." *The Guardian* 2000-05-09 9.

¹⁸¹⁷ 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.

¹⁸¹⁸ See Malan *supra* n 1136 82.

¹⁸¹⁹ 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.¹⁸²⁰ The main UN human rights instruments ratified by Nigeria include the

- Convention on the rights of the child CRC (1989);¹⁸²¹
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. (1984);¹⁸²²
- Convention on the Elimination of all Forms of Discrimination Against Women (1979);¹⁸²³
- Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968);¹⁸²⁴
- International Covenant on Civil and Political Rights (1966);¹⁸²⁵
- International Covenant on Economic, Social and Cultural Rights (1966);¹⁸²⁶
- International Covenant on the Elimination of All Forms of Racial Discrimination (1965);¹⁸²⁷
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery (1956);¹⁸²⁸
- Convention on the Political Rights of Women (1952);¹⁸²⁹
- Protocol Relating to the Status of Refugees (1966);¹⁸³⁰ and

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.

¹⁸²⁰ 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 (accessed December 22 2009)

¹⁸²¹ Ratified April 1991. Source: www.unhchr.ch (as at December 2002).

¹⁸²² Ratified June 2001 *ibid.*

¹⁸²³ Ratified June 1985 *ibid.*

¹⁸²⁴ Ratified Dec. 1970 *ibid.*

¹⁸²⁵ Ratified July 1993 *ibid.*

¹⁸²⁶ Ratified July 1993 *ibid.*

¹⁸²⁷ Ratified Oct 1967 *ibid.*

¹⁸²⁸ Ratified June 1961 *ibid.*

¹⁸²⁹ Ratified Nov 1980 *ibid.*

- Convention Relating to the Status of Refugees (1950);¹⁸³¹

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 1981,¹⁸³² and the
- OAU Convention Governing Specific Aspects of Refugee Problems in Africa 1969;¹⁸³³
- Protocol on Women's Rights in Africa 2005.¹⁸³⁴

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).¹⁸³⁵

Treaties dealing with diplomatic protection and diplomacy incorporated into Nigerian law include

- Diplomatic Immunities and Privileges Act (Cap 99) of 1962.

¹⁸³⁰ Ratified Jan 1988 *ibid.*

¹⁸³¹ Ratified Oct 1967 *ibid.*

¹⁸³² Ratified Oct 1983. See the cases of *General Sani Abacha v Chief Gani Fawehinmi & Fawehinmi v Abacha supra* n 1657.

¹⁸³³ Ratified Oct 1970. www.unhchr.ch

¹⁸³⁴ Ratified 16/12/04

¹⁸³⁵ 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 Court¹⁸³⁶

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.¹⁸³⁷

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”¹⁸³⁸ and the means and processes of safeguarding, protecting, and promoting the enjoyment of those rights.¹⁸³⁹ 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.¹⁸⁴⁰

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.¹⁸⁴¹ The difference

¹⁸³⁶ Ratified on September 27, 2001.

¹⁸³⁷ 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.

¹⁸³⁸ Not “human rights” or “Bill of Rights”.

¹⁸³⁹ See ch IV of the Nigerian Constitution.

¹⁸⁴⁰ 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.

¹⁸⁴¹ 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.¹⁸⁴² 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*¹⁸⁴³ 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.¹⁸⁴⁴

¹⁸⁴² See e.g. the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993 *supra* n 214.

¹⁸⁴³ (1987) 4 NWLR 72.

The importance of the right to life was again stressed in the civil case of *Mustapha v Governor Lagos State*,¹⁸⁴⁵ 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.¹⁸⁴⁶

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*.¹⁸⁴⁷ 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.¹⁸⁴⁸ But the Supreme Court allowed the appeal.¹⁸⁴⁹ 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*,¹⁸⁵⁰ 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.

¹⁸⁴⁴ Per Obaseki JSC at 67.

¹⁸⁴⁵ (1987) 2 NWLR 539.

¹⁸⁴⁶ At 585.

¹⁸⁴⁷ (1986) NSCC vol 17 11; (1986) 5 NWLR 123.

¹⁸⁴⁸ At 829

¹⁸⁴⁹ SC 104/1985

¹⁸⁵⁰ (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.¹⁸⁵¹ 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*,¹⁸⁵² 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.¹⁸⁵³

In *Adenji*,¹⁸⁵⁴ 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.¹⁸⁵⁵ It can also not be said that the provision is invalid or unconstitutional.¹⁸⁵⁶ 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

¹⁸⁵¹ See s 33(2).

¹⁸⁵² (2000) 2 NWLR 114.

¹⁸⁵³ I.e the 1979 Constitution. At 361 par G-H.

¹⁸⁵⁴ *Supra* n 1854.

¹⁸⁵⁵ At 125.

circumstances enumerated under section 33(2)(a)-(c) of the Constitution, does not amount to a violation of the right to life.¹⁸⁵⁷

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.¹⁸⁵⁸ This confirms the right to self defence as a fundamental right.¹⁸⁵⁹

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*,¹⁸⁶⁰ 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

¹⁸⁵⁶ See also *Kalu v The State* (1998) 13 NWLR 531.

¹⁸⁵⁷ At 125.

¹⁸⁵⁸ 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.

¹⁸⁵⁹ Self defence is said to be the first law of nature. See Hobbes *Leviathan* Pt 1 97.

¹⁸⁶⁰ (1986) NSCC 17 (1986) 5 NWLR 123.

escapes, and reasonable force which results in his death is used to apprehend him.¹⁸⁶¹

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.¹⁸⁶²

The security forces often justify their actions by relying on this constitutional provision in defence of their actions.¹⁸⁶³ 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.¹⁸⁶⁴ Although it was said in *Adeniji v The state*¹⁸⁶⁵ 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.¹⁸⁶⁶ 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

¹⁸⁶¹ 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*.

¹⁸⁶² Particularly student demonstrations.

¹⁸⁶³ See Ifejeh “State security and human rights.” *Thisday* 2000-08-11 9. See also *Punch* (ed) “Soldiers and rights abuse.” 2007-05-17 16.

¹⁸⁶⁴ 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.

¹⁸⁶⁵ *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*,¹⁸⁶⁷ Adefarasin C.J.¹⁸⁶⁸ 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.”¹⁸⁶⁹

Again in *Peter Niemi v Attorney General of Lagos State and Another*,¹⁸⁷⁰ the Court of Appeal held *obiter* that a convicted prisoner awaiting execution retains the right to be treated with dignity.¹⁸⁷¹ As such, he may not be deprived of food or medical treatment where such is necessary. However, in *Kalu Onuoha v The State*,¹⁸⁷² 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.¹⁸⁷³

¹⁸⁶⁶ See Chenwi *supra* n 1297 200-210.

¹⁸⁶⁷ (1982) 3 NSLR, 552.

¹⁸⁶⁸ As he then was.

¹⁸⁶⁹ 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.

¹⁸⁷⁰ (1996) 6 NWLR 587.

¹⁸⁷¹ At 596.

¹⁸⁷² (1998) 13 NWLR 531.

¹⁸⁷³ 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.¹⁸⁷⁴ 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.¹⁸⁷⁵

Although section 31(1)(a) prohibited torture, inhuman or degrading treatment, the Supreme Court was of the opinion that the right to life provision¹⁸⁷⁶ was a relevant provision in determining whether the death penalty was a constitutionally valid and recognised form of punishment in Nigeria.¹⁸⁷⁷ 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.¹⁸⁷⁸

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,¹⁸⁷⁹ the crucial words “cruel” and “punishment,” often attached to situations of torture in most, if not in all human rights instruments,¹⁸⁸⁰ 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”

¹⁸⁷⁴ At 534.

¹⁸⁷⁵ *Idem* 575 & 585.

¹⁸⁷⁶ S 30(1).

¹⁸⁷⁷ *Idem* 587.

¹⁸⁷⁸ *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.

¹⁸⁷⁹ le the right to be free from torture, cruel, or inhuman treatment or punishment.

¹⁸⁸⁰ See the UDHR art 5; the ICCPR art 7; and the ACHR, art 5(2).

and “punishment” under that law?¹⁸⁸¹ 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.¹⁸⁸² Its breach is also considered to be a breach of *jus cogens*,¹⁸⁸³ 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.¹⁸⁸⁴

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

¹⁸⁸¹ See Chenwi *supra* n 1235 106 for a discussion of this problem in the constitutions of other countries.

¹⁸⁸² See Jayawickrama *supra* n 149 298.

¹⁸⁸³ 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.”

¹⁸⁸⁴ 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*¹⁸⁸⁵ 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*¹⁸⁸⁶ the Igbo¹⁸⁸⁷ customary law disentitling a female from sharing in her father’s estate, was held to be discriminatory, unconstitutional and, therefore, could not be enforced.¹⁸⁸⁸

¹⁸⁸⁵ (1996) 8 NWLR 17.

¹⁸⁸⁶ (1997) 7 NWLR 403.

¹⁸⁸⁷ A Nigerian tribe.

¹⁸⁸⁸ 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*.¹⁸⁸⁹ 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.¹⁸⁹⁰

Furthermore, it was held in *Alajemba Uke v Albert Iro*¹⁸⁹¹ that any law or custom which sought to relegate women to the status of second-class citizens was unconstitutional.¹⁸⁹² 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.¹⁸⁹³

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.¹⁸⁹⁴

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.¹⁸⁹⁵ Private property includes both physical objects and certain abstract entities.¹⁸⁹⁶ 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.

¹⁸⁸⁹ [2000] 5 NWLR 403.

¹⁸⁹⁰ At 425.

¹⁸⁹¹ [2001] 17 WRN 172.

¹⁸⁹² At 182.

¹⁸⁹³ *Idem* 185.

¹⁸⁹⁴ 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.

¹⁸⁹⁵ 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.¹⁸⁹⁷ A right of occupancy can either be statutory¹⁸⁹⁸ or customary.¹⁸⁹⁹ No alienation of a right of occupancy can be made without the consent of the Governor.¹⁹⁰⁰ The Governor can revoke a right of occupancy for “overriding public interest.”¹⁹⁰¹ Where that happens, compensation must be paid for “unexhausted improvements” on the land.¹⁹⁰² 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

¹⁸⁹⁶ Eg shares in companies, debts and intellectual property.

¹⁸⁹⁷ 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.

¹⁸⁹⁸ The Land Use Act s 5(1).

¹⁸⁹⁹ *Idem* S 6.

¹⁹⁰⁰ S 22 & 23.

¹⁹⁰¹ The Land Use Act s 28(1).

¹⁹⁰² *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*¹⁹⁰³ for instance, the Government of Bendel State of Nigeria¹⁹⁰⁴ 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.¹⁹⁰⁵

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,¹⁹⁰⁶ 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.¹⁹⁰⁷ 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.¹⁹⁰⁸ 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

¹⁹⁰³ (1989) 4 NWLR 646.

¹⁹⁰⁴ Now Edo State of Nigeria.

¹⁹⁰⁵ At 648.

¹⁹⁰⁶ Act 33 of 1976.

¹⁹⁰⁷ 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.¹⁹⁰⁹

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.¹⁹¹⁰ 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.¹⁹¹¹

Thus, in *Ikem v Nwogwugwu*,¹⁹¹² 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.¹⁹¹³ 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 property¹⁹¹⁴ could lawfully be tampered with.¹⁹¹⁵

¹⁹⁰⁸ Appeal No CA/B/ 81/85.

¹⁹⁰⁹ At 667.

¹⁹¹⁰ See the case of *Ikem v Nwogwugwu* [1999] 13 NWLR 140.

¹⁹¹¹ See the Land Use Act s 29.

¹⁹¹² *Supra* n 1907 140.

¹⁹¹³ At 142.

¹⁹¹⁴ At 160.

¹⁹¹⁵ *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.¹⁹¹⁶ 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.¹⁹¹⁷

Under Nigerian customary law, land tenure is usufructory¹⁹¹⁸ in nature. Land cannot be owned absolutely, but can only be used.¹⁹¹⁹ Therefore, land can never be given away absolutely because alienation of land is forbidden.¹⁹²⁰ Ownership of land is vested in the family, the village and the community, and not in any individual.¹⁹²¹ No member of the family or community can alienate land without the consent of the family or community.¹⁹²² Any alienation without consent gives rise to forfeiture.¹⁹²³

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.¹⁹²⁴ Ownership of land in the rural areas is vested in the local government.¹⁹²⁵ However, the Governor can grant statutory rights of occupancy to any person for any purpose,¹⁹²⁶ 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*.¹⁹²⁷

¹⁹¹⁶ See eg Jemide *supra* n 173 .

¹⁹¹⁷ 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.

¹⁹¹⁸ See Elias *Nigerian Land Law* (1971) 115.

¹⁹¹⁹ *Ibid.*

¹⁹²⁰ *Ibid.*

¹⁹²¹ See the case of *Amodu Tijani v Secretary Southern Nigeria* *supra* n 170 399.

¹⁹²² *Ibid.*

¹⁹²³ *Ibid.*

¹⁹²⁴ See the Land Use Act 1978 s 1.

¹⁹²⁵ *Idem* s 2.

¹⁹²⁶ *Idem* s.5.

¹⁹²⁷ 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.¹⁹²⁸ That interest is protected under section 44 of the Constitution.¹⁹²⁹ 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*,¹⁹³⁰ 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.¹⁹³¹ 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.¹⁹³²

¹⁹²⁸ This can be done by using English Conveyancing format to convey the land. See the case of *Balogun v Oshodi* (1929) 10 NLR 36.

¹⁹²⁹ '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.

¹⁹³⁰ *Supra* n 32.

¹⁹³¹ See *supra* n 1306.

¹⁹³² S. 36(1).

The Supreme Court of Nigeria has held, in a plethora of cases,¹⁹³³ 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.¹⁹³⁴ In the case of *Ori-Oge v Attorney General for Ondo State*¹⁹³⁵ 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 cause¹⁹³⁶

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.¹⁹³⁷

Thus in *Ika Local Govt Area v Mba*¹⁹³⁸ 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

¹⁹³³ 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.

¹⁹³⁴ Per Nnaemeka-Agu JSC in *Kotoye v C BN* (1989) 1 NWLR 419 444.

¹⁹³⁵ (1982) 3 NCLR 743.

¹⁹³⁶ At 752.

¹⁹³⁷ *Ika Local Gov. Area v Mba supra* n 197.

¹⁹³⁸ *Ibid.*

the appeal on the basis that by excluding the appellant, the fair hearing provision of the Constitution was breached by the trial court.¹⁹³⁹

Again in *Josiah v The State*,¹⁹⁴⁰ 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.¹⁹⁴¹ A retrial was, however, ordered in view of the circumstances of the case and in the interest of justice.¹⁹⁴²

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.¹⁹⁴³

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

¹⁹³⁹ At 704 par. E-H.

¹⁹⁴⁰ (1985) 1 NWLR 125.

¹⁹⁴¹ At 140.

¹⁹⁴² 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”.

¹⁹⁴³ See *Jonanson Triangle Ltd v CM & Partners Ltd supra* and *Leaders & Co. Ltd v Kusamouutu supra* n 1930.

expelled.¹⁹⁴⁴ 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.¹⁹⁴⁵

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.¹⁹⁴⁶ In *Ohuka v The State (No. 2)*¹⁹⁴⁷ 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.¹⁹⁴⁸ Apart from evidence of the opportunity to

¹⁹⁴⁴ Art 22.

¹⁹⁴⁵ See *Okoro v The State* (1988) 5 NWLR 259.

¹⁹⁴⁶ See *Alaba v The State* (1993) 9 SCNJ 109.

¹⁹⁴⁷ (1988) 1 NWLR539

¹⁹⁴⁸ 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.¹⁹⁴⁹

By virtue of the provisions of section 33(5) of the Nigerian Constitution, an accused person is presumed to be innocent until proved guilty.¹⁹⁵⁰ 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.¹⁹⁵¹ In *Ekang v The State*¹⁹⁵² it was held that what is “reasonable time”¹⁹⁵³ depends on the circumstances of each particular case.¹⁹⁵⁴ 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*¹⁹⁵⁵ 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.¹⁹⁵⁶ It

¹⁹⁴⁹ At 557.

¹⁹⁵⁰ 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.

¹⁹⁵¹ *Adegbite v COP supra* n 1947.

¹⁹⁵² [2000] 20 WRN 30.

¹⁹⁵³ In relation to the question of whether or not an accused has had a fair trial

¹⁹⁵⁴ At 45.

¹⁹⁵⁵ *Supra* n 1954 1

¹⁹⁵⁶ 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.¹⁹⁵⁷

Thus, in *Godspower Asakitikpi v The State*,¹⁹⁵⁸ 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.¹⁹⁵⁹ 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*,¹⁹⁶⁰ 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.¹⁹⁶¹

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.

¹⁹⁵⁷ See also *Effiom v The State* ((1995) 1 NWLR 507.

¹⁹⁵⁸ (1993) 6 SCNJ 201.

¹⁹⁵⁹ The same decision was reached in the South African case of *Coetzee v Attorney General Kwazulu-Natal* 1997 (1) SACR 546.

¹⁹⁶⁰ *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.¹⁹⁶²

In the case of *Jack v Unam*,¹⁹⁶³ 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.¹⁹⁶⁴ 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.¹⁹⁶⁵

17 Treatment of aliens in Nigeria

¹⁹⁶¹ See the case of *R v Sussex Justices ex parte Mc Carthy* [1924] 1 KB 256.

¹⁹⁶² See Fundamental Rights (Enforcement Procedure) Rules 1979. L N 1 of 1979 which took effect on 1980- 01- 1.

¹⁹⁶³ [2004] 5 NWLR 308.

¹⁹⁶⁴ See *Bronik Motors Ltd v Wema Bank Ltd. (1983) 1 SCNL 296* and *Tukur v Government of Gongola State (1989) 4 NWLR 517*.

¹⁹⁶⁵ 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 1985,¹⁹⁶⁶ 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 1991.¹⁹⁶⁷

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.¹⁹⁶⁸

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.¹⁹⁶⁹ In January 1983, the Nigerian government ordered all illegal immigrants to leave the country.¹⁹⁷⁰ This resulted in a mass exodus of illegal immigrants from Nigeria.¹⁹⁷¹

¹⁹⁶⁶ See Ankumah *supra* n 1073 140.

¹⁹⁶⁷ See See Nakanda "How I was deported, by Keeping" *The Guardian* 1991-07-02 1.

¹⁹⁶⁸ 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.

¹⁹⁶⁹ 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.

¹⁹⁷⁰ See Ankumah *supra* n 1073 140.

¹⁹⁷¹ 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.¹⁹⁷² 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.¹⁹⁷³

The Wilmont incident was yet another incident in which the Nigerian authorities expelled a foreigner without due process of law.¹⁹⁷⁴ Wilmont was accused of espionage, of being a spy for apartheid South Africa and an FBI agent.¹⁹⁷⁵ 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.¹⁹⁷⁶ 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.¹⁹⁷⁷ The deportation of Wilmont was condemned by Human Rights activist in Nigeria as “illegal, inhuman and oppressive.”¹⁹⁷⁸ It was said that Wilmont ought to have been arraigned before a court of law before being deported.¹⁹⁷⁹ The Nigerian government was therefore requested to offer a public apology to Wilmont’s wife and to revoke the deportation order.¹⁹⁸⁰

The deportation of a female expatriate lecturer, Firinne Chreachin, at the Bayero University, Kano, in 1988 was another occasion in which the Nigerian government

¹⁹⁷² *Ibid.*

¹⁹⁷³ 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.

¹⁹⁷⁴ See Musa “Why I was kicked out, by Wilmont.” *The Guardian* 1988-04-3 9.

¹⁹⁷⁵ *Ibid.*

¹⁹⁷⁶ *Ibid..*

¹⁹⁷⁷ *Ibid.*

¹⁹⁷⁸ See Oyenekan “FMG asked to apologize to Mrs Wilmont.” *The Mail* 1988-04-11 1.

¹⁹⁷⁹ *Ibid.*

¹⁹⁸⁰ *Ibid.*

deported a foreign national without due process of law.¹⁹⁸¹ 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.¹⁹⁸² 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.”¹⁹⁸³

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.¹⁹⁸⁴ 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.¹⁹⁸⁵ Keeping admitted that before his deportation, he was warned on a number of occasions by Nigerian officials about his misleading and provocative articles.¹⁹⁸⁶

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

¹⁹⁸¹ See Zoro “Another lecturer deported.” *National Concord* 1988-04-29 16.

¹⁹⁸² *Ibid.*

¹⁹⁸³ *Ibid.* It was earlier reported that Chreachin was deported along with Wilmont, but this proved to be false.

¹⁹⁸⁴ See Nakanda “How I was deported, by Keeping.” *supra* n 1945.

¹⁹⁸⁵ *Ibid.*

¹⁹⁸⁶ 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.¹⁹⁸⁷ Although diplomatic protection is not a human right,¹⁹⁸⁸ 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 freedoms¹⁹⁸⁹ 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.¹⁹⁹⁰

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.¹⁹⁹¹ 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.

¹⁹⁸⁷ The ICCPR, ICESCR, etc. This is easy to determine because they draw heavily on the language and structure of these international conventions.

¹⁹⁸⁸ See Dugard *supra* n 57 80.

¹⁹⁸⁹ As in many other countries, aliens do not enjoy political rights and may not be employed in the diplomatic corp or service.

¹⁹⁹⁰ 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.

¹⁹⁹¹ 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.¹⁹⁹² 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.¹⁹⁹³

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.¹⁹⁹⁴

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.

¹⁹⁹² Eg the ECHR and the ACHR.

¹⁹⁹³ 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.

¹⁹⁹⁴ 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.