

CHAPTER ONE

Introduction

1 Definition of terms

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

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

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

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

² See 'Diplomacy': http://en.wikipedia.org/wiki/Diplomatic_relations (accessed 2007/09/06).

³ *Ibid.*

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

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

Since the term ‘diplomatic’ has to do with diplomacy and diplomats, diplomatic protection is not just an action taken by a state to protect its nationals abroad, but also an institution¹⁰ and a function.¹¹ This function is performed by diplomatic envoys and missions¹² in respect of their nationals who are in need, or are in distress abroad.¹³ The term is therefore used in this thesis in a dual sense – as an institution, and as a function. It is used firstly to refer to the institution under customary international law whereby a state may invoke diplomatic action to protect its nationals who have suffered a wrongful act abroad, but have not been compensated

⁴ *Ibid.*

⁵ See the *American Heritage Dictionary of the English Language* 482 (2007).

⁶ *Ibid.*

⁷ See the *Large Print English Dictionary* 271 (1991).

⁸ *Ibid.*

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

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

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

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

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

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

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

¹³ See Silva *supra* n 10 63.

¹⁴ This is the traditional institution of diplomatic protection.

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

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

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

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

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

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

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

2 Purpose of the research

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁰ *Idem* (xi).

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

an appropriate court or tribunal to air their grievances.³² Their property may be seized, confiscated or expropriated without compensation³³ and under extreme circumstances; they may be tortured and deprived of their lives without the due process of law.³⁴ This gives rise to the following questions, which must be considered when the rights of foreigners are at hand. What rights do these persons possess? Are there international or municipal laws to protect them? If so, what are those laws and to what extent are they being enforced?

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

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

3 Who is a national?

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

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

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

³⁵ See Garcia-Amador, Sohn & Baxter *supra* n 26 277.

³⁶ PCIJ *Collection of Judgments* series A No 2 (1924).

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

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

4 The concept of nationality

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

³⁷ Garner *supra* n 12 1050.

³⁸ See Tiburcio *supra* n 26 1.

³⁹ *Idem*.

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

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

⁴² Tiburcio *supra* n 26 4.

⁴³ *Ibid*.

⁴⁴ *Idem*.

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

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

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

the state entitled to exercise diplomatic protection is the state of nationality.⁴⁷

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

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

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

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

⁴⁸ ILC Draft Articles on Diplomatic Protection art 4.

⁴⁹ See Dugard *supra* n 1 282.

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

⁵¹ See *Nottebohm's case supra* n 40.

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

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

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

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

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

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

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

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

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

⁵⁷ I.e “national treatment,” eg or “minimum international” standards.

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

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

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

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

⁵⁹ For the rationale see n 58 *supra*.

⁶⁰ *Ibid.*

⁶¹ Dugard *supra* n 25 76.

⁶² *Ibid.*

⁶³ *Idem* 78.

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

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

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

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

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

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

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

⁶⁷ See ch 4 *infra*.

⁶⁸ Based on the bond of his or her nationality.

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

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

⁷¹ *Ibid* art 1.

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

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

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

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

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

⁷⁵ See *supra* n 69.

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

⁷⁷ See Dugard *supra* n 1 270.

⁷⁸ *Ibid.*

⁷⁹ *Idem.*

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

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

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

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

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

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

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

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

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

⁸⁴ See Tiburcio *supra* n 26 37.

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

⁸⁶ *Idem* 53.

⁸⁷ See Crawford *supra* n 10 19.

the special rapporteurship of Garcia Amador of Cuba.⁸⁹ Garcia Amador focused mainly on State Responsibility for Injuries to Aliens and their property, and drew no distinction between primary and secondary rules.⁹⁰ Little progress was made on the topic between 1957 and 1961.⁹¹ In 1963, he was replaced by Roberto Ago of Italy who took the decision to limit the enterprise to the special rules governing State Responsibility, that is to say, secondary rules.⁹²

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

⁸⁸ *Ibid.*

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

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

⁹¹ See Crawford *supra* n 10 20.

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

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

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

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

In 2004, the Commission adopted a set of 19 draft articles on diplomatic protection under the leadership of Dugard. These draft articles were transmitted to various state governments for their comments and observations.⁹⁷ Currently, the ILC has adopted a set of draft articles on diplomatic protection which deals only with secondary rules – that is to say, nationality and the exhaustion of local remedies. The final text was adopted by the ILC in 2006.⁹⁸ The text as adopted is now with the UN General Assembly pending adoption as a treaty.⁹⁹

6 Conditions for the exercise of diplomatic protection

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

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

⁹⁶ Crawford *supra* n 10 21.

⁹⁷ *Ibid.*

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

⁹⁹ *Ibid.*

¹⁰⁰ See *Nottebohm's case supra* n 40 4.

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

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

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

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

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

7 Diplomatic protection and human rights law

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

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

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

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

¹⁰⁵ Draft Art 5(1).

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

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

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

¹⁰⁶ See Garcia-Amador, Sohn & Baxter *supra* n 26 144.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Idem* 6.

¹⁰⁹ See Garner *supra* n 12.

¹¹⁰ See *Interhandel Case* (1959) ICJ Rep 6 27.

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

¹¹² See Garcia-Amador, Sohn & Baxter *supra* n 26 5.

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

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

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

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

As for the requirement that consular officers should also protect their nationals abroad,¹¹⁶ there is no doubt that laws and usages governing the functions, privileges, immunities, *et cetera* of consular officers were codified subject to certain adoptions, alterations and extensions in the VCCR.¹¹⁷ The Convention covers a wider field than the VCDR, but does not preclude states from concluding treaties to confirm, supplement, extend or amplify its provisions.¹¹⁸ Again, matters not expressly regulated by the Convention continue to be governed by customary international law.¹¹⁹ This situation clearly reveals that the two conventions¹²⁰ are not exhaustive or sacrosanct and that there is room for expansion. What then are those areas that can be amplified, extended, supplemented or confirmed?

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

¹¹³ *Ibid.*

¹¹⁴ Dugard *supra* n 25 91.

¹¹⁵ See ch 3 *infra*.

¹¹⁶ VCCR art 5(a).

¹¹⁷ See Shearer *Stake's International Law* (2005) 390.

¹¹⁸ *Ibid.*

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

¹²⁰ Ie the VCDR 1961 & VCCR 1963.

¹²¹ See Shearer *supra* n 117 224.

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

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

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

The establishment of the modern international human rights regime is discussed in this context. The instruments created to safeguard the human rights of all individuals, such as the Charter of the United Nations Organisation (UN), the international Bill of Rights¹²⁹ and other UN human rights instruments are identified, highlighted and

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

¹²³ See Tiburcio *supra* n.26 64.

¹²⁴ See Garcia-Amador *et al supra* n 26 4.

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

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

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

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

¹²⁹ I.e. the UDHR, ICCPR & ICESCR.

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

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

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

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

9 Categorisation of rights

9.1 Fundamental rights

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

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

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

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

¹³³ *Idem* 75.

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

(a) *Right to life*

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

¹³⁴ *Idem.*

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

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

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

¹³⁸ See the UDHR; the ICCPR; CAT; ECHR, ACHR; and the ACHPR etc.

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

¹⁴⁰ Art 1.

¹⁴¹ Art 6(1).

¹⁴² Art 2(1).

¹⁴³ Art 6(1).

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

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

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

The ICCPR, likewise provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation¹⁴⁶

At the regional level, the ACHPR provides that:¹⁴⁷

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

The ECHR also provides that¹⁴⁸ "No one shall be subjected to torture or to inhuman or degrading treatment or punishment', and the ACHR provides that¹⁴⁹ "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."

(c) *Right not to be discriminated against*

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

¹⁴⁴ Art 4.

¹⁴⁵ Art 5.

¹⁴⁶ Art 7.

¹⁴⁷ Art 5.

¹⁴⁸ Art 3.

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

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

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

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

And that,¹⁵²

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

It provides further that:¹⁵³

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

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

9.2 *Property rights*

Property rights are not limited to the rights of foreigners¹⁵⁵ but include the property rights of foreigners to inherit and to dispose of movable or immovable property.¹⁵⁶ Property rights are private rights.¹⁵⁷ According to traditional understanding, the term

¹⁵¹ Art 1.

¹⁵² Art 2(1).

¹⁵³ Art 7.

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

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

¹⁵⁶ See Tiburcio *supra* n 26 135.

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

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

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

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

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

¹⁵⁸ *Ibid.*

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

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

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

¹⁶² Tiburcio *ibid* 104.

¹⁶³ *Ibid.*

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

¹⁶⁵ Borchard *supra* n 1 85. See Tiburcio *supra* n 26 104.

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

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

¹⁶⁸ See Elias *The Nature of African Customary Law* (1956) 162.

¹⁶⁹ *Ibid.*

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

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

9.2.1 Definition of property

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

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

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

¹⁷² See Anzilotti *Hague 26 Recueil Des Course* (1929) 45.

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

¹⁷⁴ See Tiburcio *supra* n 26 103.

¹⁷⁵ Higgins, "Taking of Property" 268. See generally Shaw *International Law* (2003) 740.**

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

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

In the *Liamco* case,¹⁷⁹ for example, the arbitration specifically mentioned concession rights as forming part of incorporeal property.¹⁸⁰ This is a crucial matter, because many expropriation cases in fact involve a wide variety of contractual rights.¹⁸¹ Hence, breach of contracts between the states concerned¹⁸² and foreigners will be discussed in this thesis under matters arising from property rights.

9.3 Procedural rights

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

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

¹⁷⁶ Eg shares in companies, debts and intellectual property.

¹⁷⁷ 55 *AJIL* 1961 548 art 10(7).

¹⁷⁸ *Ibid.*

¹⁷⁹ 20 *ILM* 1981 1; 62 *IHR* 141.

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

¹⁸¹ See generally Shaw *supra* n 175 740.

¹⁸² I.e Nigeria and South Africa.

¹⁸³ See Tiburcio *supra* n 26 245.

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

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

¹⁸⁶ ICCPR art 14(3)(a), ECHR art 6(3) (a).

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

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

¹⁸⁹ See n 187 *supra*.

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

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

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

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

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

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

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

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

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

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

¹⁹⁶ *Ibid.*

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

¹⁹⁸ See Garner *supra* n 12.

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

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

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

¹⁹⁹ (1972) 1 S T R 557.

²⁰⁰ *Ika Local Govt Area v Mba supra* n 197 681.

²⁰¹ See n 188 *supra*.

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

²⁰³ As distinguished from “fundamental” right.

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

²⁰⁵ See Tiburcio *supra* n 26 xxii. See also n 29 *supra*.

²⁰⁶ *Dr. Bentley’s Case supra* n 199.

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

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

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

10 The controversy surrounding the hierarchy of human rights norms

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

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

Generally, the so-called “first generation” rights²¹² are said to be more important than the “second”²¹³ or “third” generation²¹⁴ rights. Moreover, individual rights are also regarded as superior to collective rights.²¹⁵

²⁰⁸ See also n 187 *supra*.

²⁰⁹ See Meron *supra* n 131 1.

²¹⁰ Eg Meron *id*.

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

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

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

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

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

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

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

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

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

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

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

²¹⁸ By exponents of superior rights doctrine eg Meron.

²¹⁹ See Rehman *supra* n 28 5.

²²⁰ Eg Meron, *supra* n 131 80.

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

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

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

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

Opposing this view, Van Boven, maintains that:²²⁷

there is another argument against making a distinction between fundamental human rights and other human rights²²⁸

And that:

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

²²¹ Eg Van Boven *supra* n 211 43.

²²² *Ibid.*

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

²²⁴ Merón *supra* n 131 80.

²²⁵ *Idem* 99.

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

²²⁷ Van Boven *supra* n 211 43.

²²⁸ *Ibid.*

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

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

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

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

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

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

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

²²⁹ *Idem.*

²³⁰ *Idem* 44.

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

²³² *Ibid.*

²³³ *Ibid* 421.

²³⁴ *Idem.*

²³⁵ *Idem.*

²³⁶ *Idem.*

²³⁷ *Idem* 29.

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

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

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

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

²³⁸ Sohn *supra* n 122 61-62.

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

²⁴⁰ Alston *supra* n 214.(1984) 78 *AJIL* 607.

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

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

²⁴³ Par 33.

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

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

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

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

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

11 Political rights

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

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

²⁴⁶ Art 4 par 2.

²⁴⁷ Art 6.

²⁴⁸ Art 7.

²⁴⁹ Art 26.

²⁵⁰ Meron *supra* n 131 87.

²⁵¹ Van Boven *supra* n 211 130.

²⁵² I.e both nationals and aliens alike.

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

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

12 Why Nigeria and South Africa are chosen for the study

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

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

²⁵⁴ Tiburcio *supra* n 26 xiv.

²⁵⁵ *Ibid.*

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

²⁵⁷ *Ibid.*

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

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

The Nigerian legal system consists of indigenous laws of the people, usually referred to as customary law,²⁶⁰ English law, brought into the country by the British colonialists,²⁶¹ and Nigerian legislations enacted by the Nigerian legislature.²⁶² The South African legal system is a mixed or hybrid system²⁶³ which also consists of indigenous law,²⁶⁴ common law,²⁶⁵ statutory law²⁶⁶ and case law.²⁶⁷ While legislation is a primary source of law in South Africa, common law²⁶⁸ also plays a very important role. Both Nigeria and South Africa have written Constitutions. The South African Constitution is the supreme law of the land.²⁶⁹

Although Nigeria is a Federal Republic²⁷⁰ while South Africa is a Republic,²⁷¹ they have a lot in common.²⁷² Both profess democracy. The legal systems of the two countries, however, differ on the grounds that while Nigeria operates a pure common law tradition,²⁷³ South Africa operates a mixed or hybrid legal system.²⁷⁴ A mixed or

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

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

²⁶² Other sources consist of case law, law reports, professional textbooks, etc.

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

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

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

²⁶⁶ Acts of the National and Provincial legislatures and government regulations.

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

²⁶⁸ I.e. Roman-Dutch law as developed by the courts.

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

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

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

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

²⁷³ See Okonkwo *supra* n 261 4.

²⁷⁴ See Church *et al supra* n 159 49.

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

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

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

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

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

²⁷⁶ See Church *et al supra* n 159 62.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

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

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

was amalgamated in 1910 and became independent in 1961.²⁸¹ In essence, both countries have had four constitutions to date,²⁸² are still developing, and both have middle power status in the world.²⁸³

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

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

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

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

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

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

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

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

13 Objectives of the study

This thesis will:

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

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

²⁸⁵ See Heyns *supra* n 256 1388.

²⁸⁶ This was during the reign of General Abacha. See Heyns *ibid*.

²⁸⁷ Heyns *idem* 1506.

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

14 Methodology

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

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

²⁸⁹ *Supra* n 26.

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

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

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

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

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

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

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

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

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

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

²⁹¹ See Simma & Alston *supra* n 20 3.

²⁹² *Ibid.*

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

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

The Special Rapporteur said further that:

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

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

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

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

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

15 Issues for determination

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

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

16 Literature Review

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

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

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

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

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

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

a limitation upon the territorial jurisdiction of the country in which the alien is settled.³⁰⁵

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

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

²⁹⁸ Tiburcio *supra* n 26; Dugard *supra* n 25.

²⁹⁹ See Tiburcio *supra* n 26 35.

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

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

³⁰² See p 12 *supra* n 69.

³⁰³ *Supra* n 1.

³⁰⁴ Tiburcio *supra* n 26 36.

³⁰⁵ At 5.

³⁰⁶ At 6.

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

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

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

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

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

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

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

³⁰⁹ *Supra* n 26.

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

³¹¹ At 4.

³¹² Tiburcio *supra* n 26 54.

³¹³ See 2 *Yearbook of International Law* (1957) 112-113.

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

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

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

The basis of this synthesis is:

the universal respect for and observance of human rights and fundamental freedoms.³¹⁷

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

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

³¹⁵ *Ibid.*

³¹⁶ At 4.

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

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

³¹⁹ *Encyclopedia of Public International Law supra* n 10.

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

³²¹ See Geck *supra* n 10 1026 – 1064.

³²² *Idem* 1059-1061.

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

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

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

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

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

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

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *Idem* 1063.

³²⁶ *Ibid.*

³²⁷ *Idem* 1063-4.

³²⁸ *Idem* 1064.

³²⁹ *Ibid.*

³³⁰ *Supra* n 26.

³³¹ See Ch 3 *supra*.

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

In order to achieve these objectives, Tiburcio establishes a set of seven categories of rights³³³ and painstakingly compares and contrasts the provisions of those rights under review with international and comparative legal instruments and the domestic legislation of the countries concerned. Her conclusion is that although some rights granted to aliens are often strenuously guarded and protected under the domestic legislation of most states,³³⁴ some other rights³³⁵ do not receive the same level of protection. According to her, the most effective typology is to classify the rights of aliens into three categories – rights which cannot be denied to aliens,³³⁶ rights which should be restricted or limited to aliens³³⁷ and rights which may not be granted to aliens under any circumstance.³³⁸ This is what is done in this thesis.

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

³³² At 1.

³³³ At xiii.

³³⁴ Eg the right to life.

³³⁵ Eg property rights.

³³⁶ Eg fundamental rights.

³³⁷ Eg procedural rights.

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

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

³⁴⁰ See Dugard *supra* n 1 & *supra* n 25 respectively.

³⁴¹ See Dugard *supra* n 25 78.

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

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

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

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

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

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

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

Dugard revealed further that:

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

³⁴³ *Supra* n 1 290.

³⁴⁴ *Idem* 291.

³⁴⁵ Ch 13. State Responsibility, Diplomatic Protection & the Treatment of Aliens.

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

³⁴⁷ *Supra* n 25 79.

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

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

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

He therefore admonishes that:

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

Dugard believes that his articles on diplomatic protection and human rights³⁵¹ are a modest contribution to the human rights of aliens³⁵² and hopes that it will provide insights into the work of the ILC.³⁵³ It is submitted that mention should also be made of the work of Crawford on diplomatic protection.³⁵⁴ Crawford, reviewed Dugard's ILC Articles on Diplomatic Protection³⁵⁵ and tackles the main issues raised by them, as a tribute to Dugard – “the pre-eminent South African public lawyer of his generation.”³⁵⁶ In conclusion, it is noteworthy that many current textbooks contain chapters on Diplomatic Protection - State Responsibility and the treatment of

³⁴⁸ *Ibid.*

³⁴⁹ *Idem* 77.

³⁵⁰ *Idem* 78.

³⁵¹ *Supra* n 25.

³⁵² *Ibid.*

³⁵³ *Idem* 75.

³⁵⁴ Crawford *supra* n 10.

³⁵⁵ *Supra* n 25.

³⁵⁶ At 19.

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

17 Context of the research

The specific objectives of this study have been spelt out above and need not be repeated here. However, every effort will be made to explore novel ways of looking at the subject. To this end, the work will examine whether or not diplomatic protection of human rights can also be carried out by special missions of international organisations, and if so, to what extent. It will investigate whether and to what degree the state-state complaints or enforcement mechanism³⁵⁹ laid down under article 40 of the ICCPR and article 47 of the ACHPR can be utilised to advance diplomatic protection of human rights generally and between Nigeria and South Africa in particular. To achieve its objectives, the study is structured as follows:

Chapter two deals with the Institution of diplomatic protection generally. It first investigates the relationship between the individual and his or her country of nationality which gives rise to diplomatic protection. In this connection, the status of the individual is discussed under international law. A comparison is then made between the status of the individual in international law and in municipal law for purposes of diplomatic protection. Since diplomatic protection is based on the nationality of the individual concerned, the concept of nationality,³⁶⁰ and the bond of nationality³⁶¹ are critically analysed and examined with reference to judicial decisions, the provisions of the ILC's Draft Articles on Diplomatic Protection and comments thereon. The nature of diplomatic protection, the rationale for diplomatic protection, the legal basis of diplomatic protection, and other conditions for diplomatic protection are discussed and comprehensively analysed.

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

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

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

³⁶⁰ Which belies the relationship between the individual and his country.

³⁶¹ Which is one of the conditions for diplomatic protection.

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

The role of diplomatic missions in the task of protecting the human rights of nationals abroad, and the international instruments put in place for that purpose is discussed in chapter three of the thesis. This chapter examines the functions of diplomatic missions as they relate to diplomatic protection. It identifies the privileges and immunities granted to diplomatic missions to ensure that they do their work without any fear of hindrance, intimidation, or molestation. The chapter also assesses whether those guarantees are adequate or not. The role of consular posts in protecting the human rights of nationals is also examined. Both the Vienna Convention on Diplomatic Relations 1961³⁶² and the Vienna Convention on Consular Relations 1963³⁶³ provide that diplomatic protection is to be exercised “within the limits permitted by International Law.” The thesis reviews these *provisos* and attempts an explanation of their parameters as far as the diplomatic protection of nationals is concerned.

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

³⁶² Art 3 (b).

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

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

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

The second section examines regional instruments meant for the diplomatic protection of human rights of foreigners in Africa. For purposes of comparative jurisprudence, the general human rights instruments adopted under the ACHPR are also examined to determine whether they also protect the rights of foreigners. The three fundamental rights,³⁶⁵ designated for special examination in this thesis along with property and procedural rights³⁶⁶ are also discussed. Although the search light

³⁶³ Art 5 (a).

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

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

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

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

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

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

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

³⁶⁷ Nigeria is discussed first because the author is a Nigerian

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

³⁶⁹ I.e Fundamental rights.

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

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

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

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



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