

CHAPTER SEVEN

Conclusions

1 Introduction

This closing chapter intends to summarise what has been said about the diplomatic protection of human rights in Nigeria and South Africa and to undertake a comparative analysis of the mode of practice adopted by the respective states. The purpose is to compare, contrast, and critically examine the constitutional provisions, state practice, and judicial attitude to the subject in both countries to determine the extent to which the two countries have gone in the application of diplomatic protection for the protection of human rights of their nationals.²⁶⁰⁴ Conclusions will be drawn and suggestions will be proffered with regard to the ways of improving the institution of diplomatic protection in both countries.

To determine areas of similarity and difference in their approach to the subject however, the experiences of the two states, the strategies adopted by them in the use of diplomatic protection for the protection of the human rights of their nationals abroad, and the overall effect of adopting such strategies will not only be analysed, but will also be compared and contrasted. The extent to which their mode of practice has affected the institution of diplomatic protection generally and the state of human rights within the two states particularly will also be examined.

2 Diplomatic protection in Nigeria and South Africa: A comparative analysis

Although there is no specific constitutional provision for diplomatic protection under either the constitutions of Nigeria or SA, a critical analysis of certain constitutional provisions of the two countries has revealed that diplomatic protection is contemplated. Under the Nigerian Constitution, the applicable sections are sections

²⁶⁰⁴ As portrayed in the chapters *supra*.

14,²⁶⁰⁵ 17,²⁶⁰⁶ 26 and 41²⁶⁰⁷ whereas sections 3, 7, 20 and 33 of the South African Constitution are relevant. Section 14 of the Nigerian Constitution guarantees the right to safety of all Nigerians, section 17 guarantees equal opportunity, section 26 deals with citizenship, while section 41 provides for freedom of movement in and out of the country to all Nigerians. Under the South African Constitution however, section 3 deals with citizenship, section 7 provides for a Bill of Rights to protect all citizens, section 20 provides that no citizen may be deprived of his or her citizenship, while section 33 provides for the right to fair administrative action to all South Africans.

The omission of specific constitutional provisions for diplomatic protection in the two Constitutions is unfortunate, as a growing number of states now have constitutional provisions that recognise the right of individuals to diplomatic protection for injuries sustained abroad.²⁶⁰⁸ This reflects a growing recognition within the international community of the desirability or need to protect human rights across the globe. The conclusion is that this growing trend within the international community of providing diplomatic protection to their nationals abroad is constitutionally lacking in these two countries.²⁶⁰⁹

The effect of this omission in the two Constitutions is that the average Nigerian or South African lawyer may be confounded when searching for the relevant constitutional provisions in a suit for diplomatic protection brought against the government.²⁶¹⁰ Consequently, the citizen may not obtain the benefit of this remedy. That notwithstanding however, it is settled that one of the most important mechanisms that can be used to protect and promote human rights is diplomatic protection.²⁶¹¹

²⁶⁰⁵ Which provides that “The security and welfare of the people shall be the primary purpose of government.”

²⁶⁰⁶ Which provides that every citizen shall have equality of rights, obligations and opportunities before the law.

²⁶⁰⁷ Which deals with citizenship.

²⁶⁰⁸ See *supra* n 1604.

²⁶⁰⁹ See the judgment of O’Regan J in *Kaunda’s case supra* n 688 par 221.

²⁶¹⁰ Text writers do not address this aspect of the law in Nigeria.

²⁶¹¹ As was held in *Kaunda’s case*. It was also said that the right to diplomatic protection should be “spelt out expressly rather than being left to implication.”

The question for analysis, therefore, is the extent to which the governments of Nigeria and SA have gone, or are prepared to go, in order to protect their nationals who are injured abroad in spite of this constitutional *lacuna*. As indicated above, in contrast to Nigeria, issues concerning diplomatic protection regularly come before South African courts.²⁶¹² Such matters range from requests for government assistance in the collection of a debt,²⁶¹³ to avoid criminal prosecution,²⁶¹⁴ to recover expropriated property, to be paid compensation,²⁶¹⁵ to fulfil contractual obligation,²⁶¹⁶ or to avoid criminal interrogation,²⁶¹⁷ to name but a few of such situations

Diplomatic protection is said to be within the exclusive portfolio of the executive arm of government who decides whether “protection will be granted, to what extent it is granted, and when it will cease.”²⁶¹⁸ To determine the extent to which the Nigerian and South African governments are prepared to act in order to protect their nationals abroad, this thesis has examined state practice and government policy on diplomatic protection of the two countries. The Nigerian practice was first analysed, followed by South African practice. The concept of extraterritoriality was also examined. That concept will again be briefly reviewed here followed by the “clean hands” doctrine²⁶¹⁹ because these two concepts often influence government decisions in relation to the practice of diplomatic protection.

2.1 Extraterritoriality

The concept of extraterritoriality has already been defined.²⁶²⁰ It implies the invocation of a state’s constitutional provisions for the protection of its national who is injured abroad. This concept will first be reviewed in relation to South Africa followed by that of Nigeria.

²⁶¹² See the cases cited in ch 6 *supra*.

²⁶¹³ See *Roothman’s case supra* n 2201.

²⁶¹⁴ *Kaunda’s case supra* n 686.

²⁶¹⁵ *Von Abo v Government of RSA supra* n 801. See also *Van Zyl’s case supra* n 556.

²⁶¹⁶ *Roothman’s case supra* n 2201.

²⁶¹⁷ *Thatcher’s case supra* n 2168.

²⁶¹⁸ Because of the foreign policy implications. See *Barcelona Traction case supra* n 26 178.

²⁶¹⁹ See ch 1. This is the concept whereby a state’s decision to exercise diplomatic protection on behalf of its injured national will depend on whether or not the said injury was incurred as a result of an initial offence committed by its national.

2.2 The South African experience

In the South African jurisprudence as already indicated, the decision in *Mohammed's case*²⁶²¹ was generally considered to be an extraterritorial application of the SA Constitution.²⁶²² However, du Plessis has pointed out that the case did not really constitute an extraterritorial application of the Constitution.²⁶²³ The pronouncement of the Constitutional Court on the same subject matter in *Kaunda's case*²⁶²⁴ however dispelled all lingering doubts that had existed on the extraterritoriality of the SA constitution as far as diplomatic protection is concerned.

In that case,²⁶²⁵ the Constitutional Court asserted that jurisdictional competence of the government of South Africa is primarily territorial. According to the Court,

The Constitution provides the framework for the governance of South Africa. In that respect, it is territorially bound, and has no application beyond our borders.²⁶²⁶

Consequently, although rights in the Bill of Rights vest in everyone as long as they are in SA, the individual loses the benefit of that protection when he or she moves beyond its borders.²⁶²⁷

This principle was followed in *Rootman's case*,²⁶²⁸ where the court refused to issue a *mandamus* against the government of the DRC to comply with a South African court order to fulfil its contractual obligation. It was also followed in *Van Zyl's case*²⁶²⁹ where the court refused to grant a request for diplomatic protection against the Kingdom of Lesotho for an alleged violation of the property rights of South African nationals in that Kingdom. However, in *Thatchers' case*,²⁶³⁰ and *Von Abo's case* it

²⁶²⁰ See ch 5 *supra*.

²⁶²¹ *Supra* n 1204.

²⁶²² See Dugard *supra* n. 1 79.

²⁶²³ Du Plessis "The extraterritorial Application of the South African Constitution" (2003) 20 *SAYIL* 797.

²⁶²⁴ *Supra* n 688.

²⁶²⁵ I.e. *Kaunda's case supra* n 688.

²⁶²⁶ *Idem* 36.

²⁶²⁷ *Ibid.*

²⁶²⁸ *Supra* n 2201.

²⁶²⁹ *Van Zyl v Government of the RSA supra* n 556.

²⁶³⁰ *Supra* n 2168.

would appear that the element of extraterritoriality was not in issue. Thus the court ruled in *Thatcher's* case that the decision of the Respondents to comply with a request by the Government of Equatorial Guinea to question the applicant in connection with an alleged *coup* plot to overthrow the government of that country in which he was involved, was not reached irrationally, unreasonably, arbitrarily or unconstitutionally. Again in *Von Abo's* case²⁶³¹, the court granted a request by the applicant to compel the government of South Africa to accord diplomatic protection to him against the government of Zimbabwe, because the SA government failed to treat the applicant's request for diplomatic protection in accordance with the Constitution.

Erasmus and Davidson have, however, argued that the Vatelian customary international law concept of diplomatic protection which gives to the state an exclusive right of diplomatic protection because injury to the individual is said to be an injury to the state of nationality, should be abandoned in South Africa. They argue that the concept should be revisited, re-examined and further developed in light of changing needs and insights.²⁶³² They have also suggested that in addition to its more traditional usage in areas such as the protection against the confiscation of property of foreign nationals abroad, diplomatic protection should be recognised and used as an obligatory means of enhancing respect for human rights in SA.²⁶³³

Accordingly, basic human rights²⁶³⁴ "should be considered part of the international minimum standard of treatment ... the denial of which should trigger the exercise of diplomatic protection."²⁶³⁵ This machinery should be put in motion particularly when gross violations of human rights occur, because "a state that fails to protect its nationals under such conditions runs the risk of retrogradation and failing to provide the minimum protection required."²⁶³⁶ The suggestion implies the extraterritorial application of the constitution for the protection of nationals.

²⁶³¹ *Supra* n 801.

²⁶³² See Erasmus & Davidson *supra* n 293 135. The changing needs and insights include such phenomena as globalisation.

²⁶³³ *Idem* 119.

²⁶³⁴ Such as non-discrimination, fair trial provisions, access to justice and respect for a person's physical integrity and dignity, and one may add the right to life.

²⁶³⁵ Erasmus *supra* n 293 122.

²⁶³⁶ *Ibid* 122. This theme was echoed over and over in *Kaunda's* case *supra* n 686. The premise is that "the ultimate purpose of the State [or government] is related to the protection of individual

As commendable as this suggestion is however, it is submitted that Erasmus and Davidson's views on the traditional customary international law concept and use of diplomatic protection should be qualified. Although diplomatic protection has traditionally been employed by states mostly to protect property rights,²⁶³⁷ such protection has not been restricted to property rights only but has been extended to rights such as the right to life,²⁶³⁸ the right against discrimination,²⁶³⁹ and even to the protection of procedural rights.²⁶⁴⁰

It is also submitted that the problem is not with the extension of the scope or ambit of diplomatic protection to cover the protection of human rights as such, but in dispensing with the discretionary nature of diplomatic protection as a legal remedy in international law.²⁶⁴¹ By dispensing with this discretion, citizens will be assured that their state of nationality will exercise diplomatic protection on their behalf as an obligation if they are injured abroad.²⁶⁴²

There is therefore a compelling argument for the proposition that states have not only a right but also an obligation to protect their nationals abroad against egregious violation of their human rights.²⁶⁴³ The growing trend within the international community of providing diplomatic protection to nationals abroad, is not an irrelevant consideration in determining whether this duty should exist.²⁶⁴⁴

In his first report to the UNILC in 2000, the Special Rapporteur to the ILC on diplomatic protection concluded that:

rights, to maintain a legal order conducive to the promotion of the rule of law, and to allow for conditions that will further human dignity." See *Kaunda's case supra* n 688 par 218.

²⁶³⁷ See the cases of *Barcelona Traction, supra* n 26; *Mavrommantis Palestine Concession Case supra* n 36 & *Panevezys-Sadutiskiis Case supra* n 81.

²⁶³⁸ For e.g the Entebe raid was to save the lives of those Israelis hijacked in the Air France incident.

²⁶³⁹ *Chattins Claim supra* n 32.

²⁶⁴⁰ It would appear that Dugard shares the same view. Dugard *supra* n 25 79 -80.

²⁶⁴¹ See ch 6 395.

²⁶⁴² Dugard the Special Rapporteur on Diplomatic Protection for the ILC submitted a proposal during 2000 on the *de legere ferenda* aspect of diplomatic protection, but the proposal was not accepted. The proposal was to the effect that the state of nationality of the injured person has a legal duty to exercise diplomatic protection on his or her behalf. See Dugard *supra* n 25 79. See also Erasmus & Davidson *supra* n 293 122.

²⁶⁴³ *Kaunda v The President RSA supra* n 688.

²⁶⁴⁴ See the judgment of O'Regan J in *Kaunda's case supra* n 688 par 221.

Today there is general agreement that norms of *jus cogens* reflect the most fundamental values of international community and are therefore to require deserving international protection. It is not unreasonable therefore to require a state to react by way of diplomatic protection to measures taken by a state against its nationals which constitute the grave breach of a norm of *jus cogens*... If a state party to a human rights Convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the Convention and provide adequate means of redress, there is no reason why a state of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.²⁶⁴⁵

2.3 *The Nigerian experience*

Nigeria applies a flexible and pragmatic approach to the issue of diplomatic protection. Her deployment of troops in the Bakassi Peninsula to protect Nigerians living there illustrates extraterritorial exercise of diplomatic protection. Her willingness to withdraw the troops from the Peninsula when ordered by the ICJ to do so, also illustrates this flexibility.

Nigeria's response to the xenophobic attacks of foreigners in SA also demonstrates Nigeria's willingness to act extraterritorially when the exigencies of the occasion demand. The visit of the Nigerian President to SA at that time was proof of Nigeria's genuine concern over the welfare of its nationals abroad and her willingness to invoke her constitutional mandate to protect them.²⁶⁴⁶

The newly introduced "citizen diplomacy" has added a new impetus to the practice of diplomatic protection in Nigeria. It has given the Nigerian government additional "licence" to act extraterritorially when the need arises. Since this new approach is

²⁶⁴⁵ See the First Report of the Special Rapporteur to the UNILC on diplomatic protection in 2000. ILC 52nd Session 2000: A/C 4/506 and Addendum. See also *supra* p 41. However as already mentioned, this recommendation was not accepted by the ILC.

²⁶⁴⁶ Even the British Airways incident of 2008 shows that Nigeria is prepared to act extraterritorially to protect its citizens abroad.

geared towards the protection of Nigeria's image and integrity abroad,²⁶⁴⁷ the policy will definitely change Nigeria's approach to diplomatic protection of her citizens in the foreseeable future.

It is submitted that there are common denominators in the approach of the two states to diplomatic protection. These are their flexibility, consistency and commitment to issues. Just as the Nigerian President visited SA during the xenophobic attacks on foreigners in 2008, it will be recalled that the SA President made diplomatic visits to Zimbabwe and Equatorial Guinea in connection with the *Kaunda* incident even though the court had rejected the application of the mercenaries.²⁶⁴⁸ The difference in their approach appears to lie in their method or style of approach. While SA prefers quiet diplomacy,²⁶⁴⁹ Nigeria's approach appears to be more confrontational.²⁶⁵⁰

3 The doctrine of 'clean hands'

The question of clean hands is related to the issue of extraterritoriality in the exercise of diplomatic protection in that the clean hands doctrine is usually considered by governments when deciding whether or not to exercise diplomatic protection.²⁶⁵¹ The doctrine of clean hands implies that the state of the alien's nationality may decline to espouse the claim of its injured national if the wrongful act of the state complained of resulted from the initial wrongful conduct of the alien.²⁶⁵²

²⁶⁴⁷ See "A 'new' foreign policy thrust?" *The Guardian* (ed) 2007- 09- 20 16.

²⁶⁴⁸ It must be mentioned that the SA mercenaries along with their British counterpart who were involved in the alleged attempted coup to overthrow the government of Equatorial Guinea were pardoned and released from prison in November 2009 as a result of the quiet diplomacy of the SA government.

²⁶⁴⁹ This approach was also adopted by SA in an attempt to resolve the Zimbabwe crises.

²⁶⁵⁰ In the Bakassi incident for instance, the deployment of Nigerian troops in the territory and the stalling of negotiations aimed at resolving the protracted border issue with Cameroon illustrate this confrontational tendency. Although no harsh words were exchanged during President Yar'dua's visit to SA, the mere personal visit of the Nigerian President to SA spoke volumes in terms of diplomacy and diplomatic protection. The dispatch of the Federal A-G and Minister of Justice to UK during the British Airline incident, is also illustrative of this approach.

²⁶⁵¹ See Shapovalov *supra* n 296.

²⁶⁵² *Idem* 831.

The doctrine of “clean hands” is not new in international law.²⁶⁵³ It is closely related to notions of equity and good faith and found expression in the works of eighteenth-century writers particularly that of Richard Francis who stated that “He that had commiteth Iniquity shall not have equity.”²⁶⁵⁴

The clean hands doctrine is commonly understood as requiring that a party claiming an equitable relief, or asserting an equitable defense should itself have acted in accordance with equitable principles.²⁶⁵⁵ In other words, the doctrine emphasizes the equitable maxim that “he who comes to equity, must do equity” and that “he who comes to equity must come with clean hands.”²⁶⁵⁶ The doctrine prohibits anyone from benefiting from his or her own wrongful conduct.

Some commentators are of the view that the doctrine of “clean hands” should be the guiding principle for any state that exercises diplomatic protection.²⁶⁵⁷ They believe that a state should not exercise diplomatic protection on behalf of a national whose hands are soiled.²⁶⁵⁸ Thus, diplomatic protection should only be exercised on behalf of a national with clean hands. Other commentators, however, differ.²⁶⁵⁹

The clean hands doctrine has been a subject of considerable legal debate in the international legal community,²⁶⁶⁰ and has been vigorously debated at the UNILC with a view of incorporating it into the ILC’s Draft Articles on Diplomatic Protection as a condition for admissibility of diplomatic protection.²⁶⁶¹ This, however, did not occur.

²⁶⁵³ *Idem* 834.

²⁶⁵⁴ Francis *Maxims of Equity* (1727) 5.

²⁶⁵⁵ See Garner *Blacks Law Dictionary supra* n 12 which defines clean hands as “the principle that a party may not seek equitable relief or assert an equitable defence if that party has violated an equitable principle such as good faith.”

²⁶⁵⁶ Shapovalov *supra* n 296 831.

²⁶⁵⁷ *Ibid.*

²⁶⁵⁸ *Ibid.*

²⁶⁵⁹ *Idem* 841.

²⁶⁶⁰ *Idem* 830.

²⁶⁶¹ See the *Provisional Summary Record of the 2793rd Meeting* UN Int’l L Comm’n 56th Sess., 3-27 UN Doc. A/CN.4/ SR. 2793 (2004) 05 14) (hereinafter referred to as *ILC Meeting*) noting arguments of the members of the ILC regarding the application of the clean hands doctrine to the field of diplomatic protection. See also the *ILC Meeting 2792* UN Int’l. L. Comm’n 56th Sess., 17-18, U.N. Doc. A/CN.4/SR. 2792 (May 28, (2004) 05 28); and the *ILC Meeting 2819* U.N.Int’l. L. Comm’n, 56th Sess.10 13, U.N. Doc. A/CN.4/SR.2819 (2004) 07 27). The greatest exponent of this doctrine at the ILC has been Peller, while the greatest opponent has been Dugard. See Shapovalov *supra* n 296 852.

This said, Borchard cited several cases and incidents in which states refrained from interfering or exercising diplomatic protection on behalf of their nationals, because their nationals had “unclean hands”.²⁶⁶² The clean hands doctrine is thus one factor that a state may take into consideration when deciding whether to exercise diplomatic protection or not. More specifically, it is an excuse usually employed by a state to avoid exercising diplomatic protection when contemplating doing so.²⁶⁶³ It will now be examined whether or not Nigerian and SA practice incorporate this doctrine.

3.1 *The doctrine of ‘clean hands’ in Nigeria*

It would appear that the Nigerian government is ready and willing to protect any citizen injured abroad no matter what crime he or she has committed. According to Maduekwe, the Nigerian Foreign Affairs minister,

Any nation worth its salt should take the security, plight and lives of its nationals seriously every where in the world. Any maltreatment or act of injustice meted on our [Nigerian] nationals shall henceforth be met with retaliatory actions. This shall be done by ensuring that the course of justice is followed, and that the rights of Nigerians are respected. In other words, “enlightened self interest” shall henceforth be the operative principle of Nigeria’s foreign policy.²⁶⁶⁴

It can therefore be said that the doctrine of clean hands does not apply to diplomatic protection in Nigeria, because it is excluded from operation by the declared government policy on the subject.

²⁶⁶² See Borchard *supra* n 1 713 where he cites numerous instances in which individuals forfeited diplomatic protection on account of their wrongful conducts. He argues that “those cases in which foreign offices or international commissions have refused or at least limited the protection ordinarily extended to injured nationals “ were “because the acts of the claimant himself have made such protection unjustifiable either in whole or in part.”

²⁶⁶³ Shapovalov *supra* n 296 851.

²⁶⁶⁴ See *supra* n 1710. The question is whether states should be encouraged to take retaliatory measures against other states in exercise of diplomatic protection? Although reciprocity continues to form an integral part of relations between states, it is submitted that the circumstances of the situation should determine the reaction to be taken by government. See however, the commentary to art. 1 of the Draft Articles on Diplomatic Protection *supra* n 1. where it is

3.2 The doctrine of “clean hands” in South Africa

In SA, the Constitutional Court said in *Kaunda’s* case²⁶⁶⁵ that although the applicants were on a frolic of their own when they got into trouble in Zimbabwe, they were still covered by the declared government policy on diplomatic protection.²⁶⁶⁶ As already indicated, the avowed government policy is to ensure that all South African citizens receive a fair trial whatever offence they have committed or are charged with, in accordance with the framework of the Vienna Convention.

In that case, all the judges agreed that the applicants should be protected no matter how grave their alleged offences, in accordance with the Constitution and the declared government policy.²⁶⁶⁷ However, while O’Regan J was willing to compel the SA government to make immediate representations on behalf of the applicants to the foreign governments involved, the majority judgment delivered by Chaskalson J adopted a more conservative approach by deciding to reserve to the executive branch the right to exercise its discretion in this direction.²⁶⁶⁸

It can therefore be said that another striking similarity in the practice of diplomatic protection of human rights by Nigeria and South Africa is their rejection of the doctrine of clean hands in the exercise of diplomatic protection. Other areas of similarity include judicial approach to the subject by the two states, lack of specific constitutional provision in the two Constitutions, and similarity in the declared government policies. The main difference, as already indicated, lies in their style of approach.

A comparative analysis of the constitutional provisions specifically related to the protection of human rights in the two states now follows

emphasized that the definition of diplomatic protection under draft art.1 speaks of “peaceful means” of conflict resolution.

²⁶⁶⁵ *Supra* n 688 in apparent reference to the doctrine of “clean hands.”

²⁶⁶⁶ At par 50.

²⁶⁶⁷ See the judgments of Ngcobo J O’ Regan J & Sachs J respectively.

²⁶⁶⁸ “The situation that presently exists calls for skilled diplomacy the outcome of which could be harmed by any order that this court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow. If the situation on the ground changes, the government may have to adapt its approach to address the developments

4 The protection of human rights in Nigeria and South Africa: A comparative analysis

There are striking similarities and differences in the constitutional provisions of Nigeria and SA in the area of protection of human rights. Although both countries have constitutional provisions for the protection of human rights, they differ in the language, designation, method of interpretation and enforcement and in the limitations or restrictions placed on these human rights.

While Nigeria has “Fundamental Rights” provisions under Chapter 4 of its Constitution,²⁶⁶⁹ SA has a Bill of Rights under chapter two of its Constitution.²⁶⁷⁰ A comparative analysis of the constitutional provisions specifically related to the protection of human rights in the two states reveals considerable differences and similarities in the interpretation, limitation, enforcement and justiciability of these rights under the two constitutions. It is interesting to note that there is considerable disparity in the mode of protection and enforcement of these fundamental rights in Nigeria and South Africa. The main focus will be on those fundamental rights designated for special attention in this thesis.

5 Fundamental rights

5.1 *The right to life*

Considering the right to life, the obvious difference between Nigeria and SA is that although the right to life is held dear in both countries, South Africa has abolished the death penalty whereas Nigeria has not.²⁶⁷¹ South Africa abolished the death penalty in 1995 in the leading case of *S v Makwanyane*.²⁶⁷² In the Nigerian case of *Kalu v*

that take place. In the circumstances, it must be left to government, aware of its responsibilities to decide what can best be done.” Per Chakalson J par 127.

²⁶⁶⁹ In the case of *Olufumilayo Ransome-Kuti v The Attorney General of the Federation* (1985) 2 NSCC 879 892 the nature of a “fundamental right” was said to be “a right that stands above the ordinary laws of the land and which in fact is antecedent to the political society itself ... a primary condition to a civilized existence.”

²⁶⁷⁰ The Bill of Rights is the cornerstone of democracy in S A See s 7 of the Constitution.

²⁶⁷¹ See *S v Makwanyane supra* n 1203 in which the death penalty was abolished in SA.

²⁶⁷² *Ibid.*

The State,²⁶⁷³ Iguh J pointed out that one of the fundamental bases upon which the South African Constitutional Court pronounced the death penalty unconstitutional is “on account of the vital fact that the right to life in the relevant constitution was unqualified.”²⁶⁷⁴ As already said, it is hoped that Nigeria will reconsider its stand on this matter in the near future.²⁶⁷⁵

5.2 Freedom from torture, cruel, inhuman or degrading treatment or punishment

The right to be free from torture, cruel, or inhuman treatment or punishment is also not provided for in the same language or with the same spirit in Nigeria as contained in the SA Constitution or in other International Human Rights Instruments. Under the Nigerian Constitution, for instance, it appears that the right has been watered down considerably.²⁶⁷⁶

Whereas the UDHR, for example, stipulates that “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment,”²⁶⁷⁷ and the ICCPR provides in the same vein that “No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment,”²⁶⁷⁸ the Nigerian Constitution only provides that

“no person shall be subjected to torture or to inhuman or degrading treatment”²⁶⁷⁹

The words “cruel” and “punishment” have been omitted. The reason why these key words have been omitted from the constitutional provision is not obvious. Nevertheless, the omission of those words in the Nigerian Constitution gives cause for concern. It would appear, however, that the drafters of the Nigerian Constitution believed that no treatment or punishment may be cruel or inhuman at the same time or that the words used are tautologous. As Chenwi has queried,²⁶⁸⁰ can’t we have

²⁶⁷³ (1988) 13 NWLR 531 *supra* n 1854.

²⁶⁷⁴ At 590.

²⁶⁷⁵ See p 278. *supra* 1850.

²⁶⁷⁶ See s 34(1)(a) of the Constitution.

²⁶⁷⁷ Art 5.

²⁶⁷⁸ Art 7.

²⁶⁷⁹ S 34(1)(a).

²⁶⁸⁰ See Chenwi *supra* n 1235 106.

“punishment” which is “cruel” at the same time?²⁶⁸¹ In contradistinction to the Nigerian Constitution however, the SA Constitution provides that

Everyone has the right to freedom and security of the person which includes the right -

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.²⁶⁸²

It is submitted that this provision is closer to the letter and spirit of the International instruments on the subject than the Nigerian provision.

5.3 Right to be free from discrimination

It would appear that the right to be free from discrimination in Nigeria is mainly geared towards prohibiting discrimination in governmental circles only,²⁶⁸³ whereas that rule is aimed at prohibiting discrimination in official as well as private life under the SA Constitution.²⁶⁸⁴ To this end, the SA Constitution differentiates between “direct” and “indirect” discrimination as well as “fair” and “unfair” discrimination²⁶⁸⁵ - distinctions that do not appear in the Nigerian Constitution.²⁶⁸⁶

That notwithstanding, however, in relation to diplomatic protection, as Pretorius has pointed out:

despite efforts to rid South Africa of discriminatory practices and legislation, particularly discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief,

²⁶⁸¹ Incidentally, under the Matrimonial Causes Act in Nigeria, cruelty is still a ground for divorce. This omission is not apparent under the SA Constitution. See s. 12(1) (d) and (e) of the SA Constitution.

²⁶⁸² S 12(1).

²⁶⁸³ This observation is based upon the wording of s 42(1) of the Constitution. See *supra* p 280.

²⁶⁸⁴ See s 9 (3). These grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

²⁶⁸⁵ See s 9.

²⁶⁸⁶ However, s 14 (3) of the Nigerian Constitution provides that “ the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria.” A Federal Character Commission is also set up under s 153 of the Constitution.

culture, or language, some discrimination is still evident in statutory provisions and case law involving aliens.²⁶⁸⁷

As earlier indicated, discrimination has a tribal rather than a racial connotation in the Nigerian society.²⁶⁸⁸ It also affects mostly women and the physically challenged,²⁶⁸⁹ whereas in SA discrimination is not only racially motivated, but also tribally engendered and has all the nuances of the grounds enumerated under section 9(3) and (4) of the Constitution.²⁶⁹⁰ Whether tribally or racially motivated however, it is trite that discrimination is an important and lethal factor that can trigger the exercise of diplomatic protection by states.²⁶⁹¹

6 Property rights

With regard to property rights, the Nigerian Constitution makes provision for acquisition and ownership of property anywhere in Nigeria, whereas the South African Constitution concentrates mainly on preventing “deprivation” of property and prohibiting “expropriation” without compensation.²⁶⁹² However, as already pointed out, the apparent disparity between the provisions of the Nigerian Constitution on the ownership of property and the Land Use Act renders the right to own property under the Nigerian Constitution nugatory.²⁶⁹³

The concept of property under the South African Constitution is wider than that its Nigerian counterpart. Under the South African Constitution, the concept of property has been enlarged to include things other than land.²⁶⁹⁴ That, notwithstanding, the

²⁶⁸⁷ See Pretorius “Discrimination against aliens – international law, the courts and the Constitution.” *supra* n 2532 261 262. See also the following cases cited in support of this position. *Nyamakazi v President of Bophuthatswana* 1994 (1) BCLR 92 (B).; *Xu v Minister van Binnelandse Sake* 1995 (1) SA 185; and *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T).

²⁶⁸⁸ See *supra* p 280. Prohibition is based upon ethnic group, place of origin, sex, religion or political opinion.

²⁶⁸⁹ See Soniyi, “ECOWAS parliamentarians call for anti-discrimination laws.” *The Punch* 2009-10-21 73 where it was reported that female parliamentarians at the ECOWAS parliament in Abuja, Nigeria have called for laws that will reduce discrimination against women. See also Badejo: “Avoid discrimination against physically challenged, employers urged.” *Punch Ibid* 31.

²⁶⁹⁰ See *supra* n 2679.

²⁶⁹¹ See *Chattin’s Claim supra* n 32.

²⁶⁹² See s 25(1) & (2) of the Constitution. See also *Moster supra* n 2451 567 & *Murvey supra* n 2451 211.

²⁶⁹³ See *supra* p 282 & 285.

²⁶⁹⁴ See s 25(4)(b).

Constitution tries to maintain the *status quo* although an attempt is made to ameliorate past discriminatory practices with regard to property holding in the country.

The question, however, is whether foreigners are allowed to own private property in South Africa and if so, whether the *status quo* is likely to continue. The answer is that foreigners are allowed to own private property in South Africa, but this trend is likely to be reversed.²⁶⁹⁵ Foreigners may no longer be able to own private property in SA in the near future and will instead be allowed only to lease land if the planned legislation is implemented.²⁶⁹⁶

Gwanya, the Director General for the department of Land Affairs in SA, indicated a policy to this extent in Cape Town in 2008.²⁶⁹⁷ He said that a policy which will regulate ownership of land by non South Africans was being developed. Gwanya intimated that the department had engaged the services of experts to compile a report which recommended that the ownership of land by foreigners should be regulated.²⁶⁹⁸

The Director-General however said that it was unlikely that the envisaged legislation will negatively affect foreigners currently owning land in SA. According to him,

It is hoped that the legislation will not be retrospective and therefore the current land owners may not be affected.

It must be borne in mind that the deprivation or expropriation of alien property by receiving states without the payment of compensation has often been a compelling reason for the exercise of diplomatic protection.²⁶⁹⁹ It is therefore hoped that the governments of these two states will refrain from expropriating or confiscating alien

²⁶⁹⁵ See Roos: "SA land not for foreign buyers" 2008-09-04 www.fin24.com. See also "Will South Africa impose a property ownership ban on foreigners?" http://www.shelteroffshore.com/indx.php/property/more/south_africa_property/ (Accessed 2008/11/11).

²⁶⁹⁶ According to a report, stronger foreign currencies (forex) enable foreigners to buy more land including land that is strategically situated in SA such as coastal and agricultural land.

²⁶⁹⁷ See *supra* n 2694.

²⁶⁹⁸ The report recommended a moratorium on the sale of state land to foreigners. It further recommended that land be leased to foreigners as opposed to full ownership. *Ibid.*

²⁶⁹⁹ See e.g the *Barcelona Traction* case *supra* n 26; *Mavrammantis Palestine Concession* case *supra* n 36.

property in their territories without the payment of compensation. This will avoid the painful task of defending diplomatic protection actions preferred against them by the affected states, particularly by the West, which are most often very eager to protect their investments and nationals abroad.²⁷⁰⁰

7 Procedural rights

Although procedural rights are provided for in both the Nigerian and SA constitutions, it would appear that while the right to a fair hearing in Nigeria specifically extends to both civil and criminal proceedings,²⁷⁰¹ emphasis is placed on the protection of this right mostly in criminal trials under the SA Constitution.²⁷⁰² Even though the rules of natural justice apply in all judicial and administrative proceedings in South Africa, this constitutional emphasis on criminal trials tilts the onus of proof in favour of the accused person. To that extent, the ambit of this right in the two states differs.

Another important difference between the procedural rights provisions in the Nigerian and SA Constitutions is seen in the right to be presumed innocent until proven guilty. While the right to the presumption of innocence in Nigeria is not linked with the right to remain silent, under the SA Constitution this right is connected with the right to remain silent and the right to refuse to testify at the trial.²⁷⁰³

With regard to the right to be tried within a reasonable time, the approach adopted by the two countries is similar.²⁷⁰⁴ In Nigeria, section 35(3) of the 1999 Constitution provides that detained persons have to be informed within 24 hours of their crime.

²⁷⁰⁰ As rightly observed by Okowa, “There is here a presumption that nationals [are] indispensable elements of a state’s territorial attributes and wrong done to the nationals, invariably affects the rights of the state.” See Okowa “Issues of admissibility and the law on International Responsibility” in Malcom Evans (ed) *International Law* (2003) 472 477.

²⁷⁰¹ Section 36(1) of the Constitution provides *inter alia* that “in the determination of his civil rights and obligations, ... a person shall be entitled to a fair hearing within a reasonable time ...” S 36(4) goes further to provide that “Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to a fair hearing in public” whereas the right to fair trial only appears under s 35 of the SA Constitution which deals with “Arrested, detained and accused persons.”

²⁷⁰² See s 35 (3) of the Constitution which provides *inter alia* that “Every accused person has a right to a fair trial which includes the right ... “

²⁷⁰³ S 35(3)(h) of the SA Constitution stipulates that “every accused person has a right to a fair trial which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.”

²⁷⁰⁴ See s 35(5) of the Nigerian and s 35 (1) (d) of the South African Constitutions respectively.

Such persons shall be brought before a court of law within 24 hours.²⁷⁰⁵ Further, the accused has to be tried within two months from the date of arrest or detention in the case of a person not entitled to bail, or within three months in the case of a person entitled to bail.²⁷⁰⁶

The situation in SA is similar.²⁷⁰⁷ The Constitution provides that everyone arrested for allegedly committing a crime must be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest, or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours. However, in practice, this provision is often honoured in the breach rather than in compliance.²⁷⁰⁸

The constraints militating against the enjoyment of this right are the same in Nigeria,²⁷⁰⁹ as in SA.²⁷¹⁰ The identified constraints include: (i) The nature of the case; (ii) the time lag between the commission of the crime, the apprehension of the accused person and the commencement of his or her trial; and (iii) the infrastructure or resources in place for a quick trial.²⁷¹¹

With these factors in mind, a court should ask whether or not the burden borne by the accused as a result of the delay is reasonable. To make the enjoyment of this right effective in the two jurisdictions, it is imperative that a procedure be worked out so as to ensure that the trial will proceed “without undue delay” both in the first instance and on appeal, because justice delayed is justice denied.

²⁷⁰⁵ If the court is within 40 kilometers of the place of detention, or 48 hours if more than 40 kilometers.

²⁷⁰⁶ See the Nigerian Constitution s 35(5).

²⁷⁰⁷ See s 35(1) (d) of the Constitution.

²⁷⁰⁸ Accused persons are often denied this right by not being brought promptly to court after their arrest with the usual excuse that investigations are yet to be concluded.

²⁷⁰⁹ See the cases of *Ekang v The State*[2001] 20 WRN 30 *supra* n 1949 and *Asakitikpi v The State supra* n 1955.

²⁷¹⁰ See the case of *Coetzee v Attorney General KwaZulu-Natal supra* n 1956.

²⁷¹¹ See the case of *Feedmill Development v Attorney General KwaZulu -Natal supra* n 2470 where these factors were judicially approved.

8 Interpretation of human rights provisions in the Nigerian and South African constitutions

In interpreting the Fundamental Rights provision of the Nigerian Constitution in relation to diplomatic protection, no special rules of interpretation are prescribed.²⁷¹² The ordinary rules of statutory interpretation are applied and the liberal approach to interpretation applies.²⁷¹³ This was the decision of the Supreme Court of Nigeria in the case of *Director SSS v Agbakoba*,²⁷¹⁴ where the Court said, *inter alia*,

The purposive construction which is incumbent on this court to put on the fundamental rights provisions of our Constitution ...is that whenever possible and in response of the demands of justice, the courts lean to the broader interpretation unless there is something in the rest of the Constitution as to defeat the obvious ends the Constitution was designed to serve.²⁷¹⁵

This method of interpretation is relevant in relation to diplomatic protection. It means that the words of the Constitution relating to fundamental rights under the Nigerian Constitution should be read not as mere legislative provisions, but to infer diplomatic protection where necessary, because, the words were meant

as revelations of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.²⁷¹⁶

In other words, the Constitution must be interpreted liberally to include the sanctity of human rights, and specifically to include the use of diplomatic protection for the protection of human rights.

Under the South African Constitution, the interpretation of the Bill of Rights goes way beyond a liberal interpretation. Certain factors, including international law, and certain “democratic values” must be taken into consideration. Foreign law may also be considered. Section 39(1) of the constitution therefore provides that

When interpreting the Bill of Rights, a court, tribunal or forum:

²⁷¹² *Director SSS v Agbakoba supra* n 1691.

²⁷¹³ A liberal method of statutory interpretation is an interpretation whereby.....

²⁷¹⁴ *Ibid.*

²⁷¹⁵ Per Onu JSC 336-337 par E-B.

²⁷¹⁶ Per Ogundare JSC in *Director SSS v Agbakoba supra* n 1691 357.

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

Section 39(2) goes further to provide that

When interpreting any legislation, and when developing the common law every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Section 39(1) requires a court to interpret the Bill of Rights in a way that promotes the values that underlie an open and democratic society based on human dignity, equality and freedom.

As can be seen from the constitutional provisions and judicial *dicta* in relation to the protection of human rights in the two jurisdictions, it appears that the mandate is to interpret the Constitution not only liberally to protect human rights, but in such a way as to infer diplomatic protection. In SA, the mandate even goes beyond mere liberal interpretation of the Constitution to include the incorporation of democratic values based on human dignity, equality and freedom. The courts are also enjoined to consider international law, and foreign law in the process.

9 Limitation of rights

Human rights are not considered absolute in Nigeria or in SA. Accordingly, these rights are limited under the Constitutions of both countries. However, the methods adopted for the limitations of human rights under the two Constitutions differ. While the Nigerian Constitution grants fundamental rights and immediately limits them under the same constitutional provision, the South African Constitution has one limitation clause in the form of section 36. This clause can be applied for the limitation of any right in the Bill of Rights under the SA Constitution. In relation to diplomatic protection, an illustration of the different approaches adopted by the two states in the limitation of rights under their different Constitutions will suffice.

9.1 Limitation of fundamental rights under the Nigerian constitution

The Nigerian approach is to grant a fundamental right with one hand, and to limit it immediately with the other, irrespective of the right involved. For instance, section 35 (1) of the Nigerian Constitution provides for the right to life. The section provides that,

Every person has a right to life and no one shall be deprived intentionally of his life.

However, the same sub-section goes on to provide that the right to life is not violated,

in execution of the sentence of a court in respect of a criminal offence of which he or she has been found guilty in Nigeria.

Section 33(2) of the Constitution goes further to enumerate specific instances in which limitation is placed on the right to life. It stipulates that,

A person shall not be regarded as being deprived of his life in contravention of this section if he dies as the result of the use to such extent and such circumstances as are permitted by law, of such force as is reasonably necessary –

- (b) for the defense of any person from unlawful violence or for the defense of property.
- (c) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (d) For the purpose of suppressing a riot.

Similarly, under section 34(1) of the Nigerian Constitution, “every individual is entitled to respect for the dignity of his person” and accordingly –

- (a) no person shall be subjected to torture, or to inhuman or degrading treatment;
- (b) no person shall be held in slavery or servitude; and
- (c) no person shall be required to perform forced or compulsory labour.

However, section 34(2) immediately limits this right by providing that

For the purposes of subsection (1) (c) of this section “forced or compulsory labour” does not include –

(a) any labour required in consequence of the sentence or order of a court.

All other fundamental rights are limited in this manner under the Nigerian Constitution.

Furthermore, section 45 of the Constitution spells out other factors to be taken into consideration by the courts in determining whether a limitation of fundamental rights is justified in Nigeria. These factors include, *inter alia*,

- (a) public defence, public safety, public order, public morality or public health;
or
- (b) for the purpose of protecting the rights of other persons

Since human life is said to be sacrosanct, the obvious question is whether the limitation of this right in the Nigerian Constitution is justified.

This brings the issue of the death penalty in Nigeria again into focus. In her seminal book,²⁷¹⁷ Chenwi has made a convincing argument for the abolition of the death penalty on the basis of the international human rights law obligations of states. She argues that states should abolish the death penalty, because it violates the right to life.²⁷¹⁸ Besides, the method of execution often adds a dimension of cruelty which dehumanises all who are involved in the process.²⁷¹⁹

Although there is no consensus that the abolition of the death penalty is a human right, suffice to say that the current trend is towards abolition.²⁷²⁰ Sooner or later, the issue will arise in Nigeria and the country will have to consider its position on the issue of capital punishment. Limitation of human rights under the South African Constitution will now be considered.

²⁷¹⁷ Chenwi *supra* n 1235 15-20.

²⁷¹⁸ *Idem* 58.

²⁷¹⁹ *Ibid.*

²⁷²⁰ Chenwi *supra* n 1235 34-42 & 98 has documented the countries that have embraced abolition over the last ten years. As compared to previous 20 years, the number has doubled.

9.2 *Limitation of rights under the South African Constitution*

The difference between the Nigerian and the South African situation *vis-à-vis* the limitation of rights is that, under the SA Constitution, one umbrella provision is applied in limiting rights stipulated in the Bill of Rights, whereas, in Nigeria, the limitation clause comes immediately after each stipulated right.²⁷²¹ Apart from the right to life which is not limited under the SA Constitution, section 36 applies to all other rights enumerated under the Bill of rights. Thus, one must refer to section 36 of the SA Constitution in limiting any right.

The problem with this method of Constitutional limitation is that it is neither clear nor straight-forward. The limitation clause is shrouded in legalism and technicality and may lead to misinterpretation and, consequently, to a denial of a particular right sought, thereby engendering a denial of justice in the process.²⁷²²

In relation to diplomatic protection, the problem is that in determining whether any legislation limiting this right is valid under the South African Constitution, the court has an obligation to check the limitation complained of against the ten limiting factors enumerated under section 36. The court then has to balance the right sought to be enforced, against the interests of a “democratic society,” to determine whether the limiting legislation in question has passed the required test.²⁷²³

In the process, the right may be erroneously denied resulting in a possible miscarriage of justice. One thing is certain, however, it cannot be denied that under the Nigerian Constitution, every clause limiting a fundamental right is clear and unambiguous and the courts can easily apply it without much hesitation. This is not the case in respect of South Africa.²⁷²⁴

Nevertheless, in respect of the limitation clauses in both Constitutions, the message is loud and clear. Any state desiring or intending to exercise diplomatic protection on

²⁷²¹ See the SA Constitution s 36.

²⁷²² See Woolman “Out of order? Out of Balance? The limitation clause of the final Constitution.” (1997) 13 SAJHR 102.

²⁷²³ *Idem* 113.

behalf of its national against either of the two states must ensure that the violated right is not vitiated by any limitation clause in the Constitution of the state involved.

10 Procedure for enforcement of human rights in Nigeria and South Africa

Another important way in which the protection of human rights under the Nigerian Constitution differs from its South African counterpart is that special procedures are required for the enforcement of fundamental rights under the Nigerian Constitution whereas no special procedures are required under the South African Constitution. These procedures will now be discussed.

10.1 Enforcement procedure for fundamental rights in Nigeria

Section 46 of the Nigerian Constitution grants the High Court special jurisdiction in the enforcement of fundamental rights in Nigeria. The section provides that any person who alleges that any of the provisions of the chapter dealing with fundamental rights has been, is being, or is likely to be contravened in any State in relation to him or her, may apply to any High Court in that State for redress.

However section 46(3) empowers the Chief Justice of Nigeria to make special rules with regard to the practice and procedure of a High Court for purposes of enforcement of these fundamental rights.²⁷²⁵ The shortcoming in this provision is that emphasis is placed on the “form” rather than on the “substance”, of enforcement.²⁷²⁶ Consequently, a fundamental right may be denied because the right forms or procedures were not adopted, thereby leading to a denial of justice.

²⁷²⁴ Olivier is of the view that the limitation test under s 36 of the SA Constitution is a proportionality test which may give a better result than a simple blanket limitation test adopted by Nigeria.

²⁷²⁵ See L.N No. 1 of 1979 Fundamental Rights (Enforcement Procedure) Rules 1979, which took effect from 1980-01-01.

²⁷²⁶ Many cases have been dismissed by the courts because the prescribed formats were not followed by litigants. See e.g the cases of *Jack v the University of Agriculture Makurdi* (2004) 5 NWLR 208; *University of Ilorin v Oluwadare* (2006) 14 NWLR 751; *Edwin Ikem v Innocent Nwogwugwu* (1999) 13 NWLR 140; & *Egbe v Honourable Justice Belgore* (2004) 8 NWLR 336 to name but a few.

10.2 Enforcement procedure in South Africa

Unlike Nigeria, there is no special set of rules for the enforcement of rights in the Bill of Rights under the South African Constitution. What section 38 of the Constitution,²⁷²⁷ requires is simply that

Anyonehas the right to approach a competent court alleging that a right in the Bill of Rights has been infringed, or threatened, and the court may grant appropriate relief including a declaration of rights.

In relation to diplomatic protection, the effect is a guarantee that once a right in the Bill of Rights is infringed and there is an application for relief, the courts can intervene without any formalities in conformity with the general notion that *ubi jus ibi remedium*. This was evident not only in the *Kaunda* case,²⁷²⁸ but in all the cases on diplomatic protection discussed above.²⁷²⁹ The overall effect is to reduce incidents of diplomatic protection in South Africa, because aggrieved persons have easy access to the courts to challenge the violation of their rights since no legal hindrance is imposed.

11 Justiciability of ECOSOC rights

There is yet another difference in the mode of protecting human rights in Nigeria and SA. In Nigeria, only civil and political rights are justiciable. Economic, social and cultural rights are not.²⁷³⁰ In South Africa, all rights - civil, political, as well as economic, social and cultural are justiciable.²⁷³¹

Given the fact that the human rights incorporated into the Constitutions of the two countries were incorporated from the same source,²⁷³² it is ironic that South Africa should allow economic, social and cultural rights to be justiciable while Nigeria does

²⁷²⁷ Which deals with the enforcement of rights.

²⁷²⁸ *Supra* 688.

²⁷²⁹ ee ch 6 *supra* in particular.

²⁷³⁰ See Ladan "Should all category of human rights be justiciable?" in Ladan (ed) *supra* n 1819 66.

²⁷³¹ *Idem* 80. See also Davis "Adjudicating the socio-economic rights in the South African Constitution: Towards 'defference lite'?" (2006) 22 *SAJHR* 301.

²⁷³² Their sources are the UDHR, ICCPR, ICESCR and the ACHPR.

not. A further irony is the fact that South Africa has not ratified the ICESCR. Several implications flow from this dichotomy:

First and foremost, it shows how far the diplomacy of human rights in both countries has been marked by sharp inconsistencies and contradictions.²⁷³³ Secondly, this trend has the potential of granting more rights and freedoms to South Africans than to Nigerians. It has been said that failure by Nigeria to make ECOSOC rights justiciable is not only

evidence of insensitivity to the plight and conditions of the poor, homeless, sick, illiterate, hungry and marginalised citizens of Nigeria, but also evidence of deliberate ignorance of the internationally recognised interdependence principles of all human rights.²⁷³⁴

It also shows a reluctance to follow the precedent set in other African states.²⁷³⁵ In relation to diplomatic protection, a protecting State must ensure that the right that has allegedly been violated is justiciable in the receiving State. If not, the protecting State may be constrained in its attempt to exercise diplomatic protection. This is because, a cardinal requirement for the exercise of diplomatic protection is the exhaustion of local remedies.²⁷³⁶ A claim can only be brought to the international arena if local remedies have been exhausted.²⁷³⁷ If the violated right is an economic, social or cultural right in Nigeria, for instance, the chances are that diplomatic protection may not be available since those rights are not justiciable in Nigeria.

If, however, the violation occurred in SA, then the situation would be different. Since the violation of economic, social and cultural rights are justiciable in SA, the victim of the breach can go to court to seek redress. It is only where there is a denial of justice that diplomatic protection by the state of nationality of the injured alien is possible.

²⁷³³ Stemmet "Walking the tight rope: The diplomacy of human rights." (2002) *Acta Academia* 63.

²⁷³⁴ See Ladan *supra* n 1819 306.

²⁷³⁵ *Ibid.* See pp 259 & ...for comments on this.

²⁷³⁶ See the ILC's Draft Articles on Diplomatic Protection art 14.

²⁷³⁷ See e.g. the *Tinoco Concession case* (1924) 1 U.N.R.A.A.; 18 A.J.I.L.(1924). P.147. *The North American Dredging Company Claim (United States v Mexico)* (1926) 4 U.N.R.A.A, 26-30; and *The Mexican Railway Union Claim (Great Britain v Mexico)* (1930) 5 U.N.R.A.A. 155. See also Sen *supra* n 52 390.

Nevertheless, although South Africa constitutionally has more justiciable rights as compared to Nigeria, the two countries still have a long way to go in entrenching human rights cultures.

12 Other areas of comparison

12.1 *Basic structural similarities in the Nigerian and South African constitutions*

It is submitted that this comparative analysis would be incomplete without mention being made of the basic similarities in the constitutional structures of Nigeria and SA. This is important, because the constitutional structures of both countries have played significant roles in facilitating and motivating the machinery of both states in the provision of diplomatic protection of human rights. These basic constitutional structures constitute the strong or enduring pillars upon which the Nigerian and SA constitutions are premised.

12.2 *Dynamic pillars of the Nigerian and South African Constitutions*

The Nigerian and SA Constitutions have several common basic values which facilitate and enhance the diplomatic protection of human rights. By far the most important of these values are - constitutional supremacy,²⁷³⁸ democracy,²⁷³⁹ the rule of law,²⁷⁴⁰ separation of powers,²⁷⁴¹ accountability,²⁷⁴² and devolution of powers.²⁷⁴³ These basic values or features will now be discussed.

²⁷³⁸ S 1 of the Nigerian Constitution and s 2 of the South African Constitution.

²⁷³⁹ S 14(1) of the Nigerian Constitution; s 1 of the South African Constitution.

²⁷⁴⁰ S.1(3) of the Nigerian Constitution; s.1(c) of the South African Constitution.

²⁷⁴¹ See Part II ss 4-7 of the Nigerian Constitution. Under the S A Constitution, this power is implied. See the case of *South African Association of Personal Injury Lawyers v Heath* 2000 (1) BCLR 77 (CC) See de Waal *et al supra* n 2373 96.

²⁷⁴² S 14 of the Nigerian Constitution; s.1(d) of the SA Constitution.

²⁷⁴³ Both the Nigerian and S A Constitutions stipulate that at the expiration of the terms of office of the President and members of the National/ State/Provincial legislatures, elections shall be conducted to fill these offices. See ss 76(1) & (2), 116, and 132 of the Nigerian Constitution and ss 46 & 86 of the SA Constitution respectively.

12.3 Constitutional supremacy

Constitutional supremacy means that the Constitution is supreme and binds all branches of government.²⁷⁴⁴ Therefore it has priority over any other rules made by the legislature, the executive or the judiciary.²⁷⁴⁵ Since the power to exercise diplomatic protection and protect human rights in Nigeria and SA is derived from the Constitution,²⁷⁴⁶ any law or conduct from any branch of government that obstructs or hinders this process either substantially or otherwise, is null and void.²⁷⁴⁷

12.4 Democracy

Democracy means freedom of choice.²⁷⁴⁸ It means a government based on the will of the people.²⁷⁴⁹ Section 14(1) of the Nigerian Constitution, for instance, provides that “the Federal Republic of Nigeria shall be a State based on democracy and social justice”. Accordingly, section 14(2)(a) of the same Constitution stipulates that “sovereignty belongs to the people of Nigeria from whom government derives its powers and authority.”

Likewise, section 1 of the Constitution of the RSA provides that “The Republic of South Africa is one, sovereign, democratic state.” The Constitution does not only provide for the ‘formulation of the will of the people,’ it also requires government to “respond” to the will of the people.²⁷⁵⁰

Furthermore, references to democracy in the SA Constitution are followed by references to the values of openness, responsiveness and accountability.²⁷⁵¹ There

²⁷⁴⁴ S 1 of the Nigerian Constitution provides that “This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.” Similarly s 2 of the South African Constitution provides that “This Constitution shall be the supreme law of the Republic. Law or conduct inconsistent with it shall be invalid and the obligations imposed by it must be fulfilled.”

²⁷⁴⁵ This is in contradistinction to Parliamentary supremacy whereby Parliament is supreme.

²⁷⁴⁶ As discussed above.

²⁷⁴⁷ See for instance s. 1(3) of the Nigerian constitution, and s 2 of the South African Constitution.

²⁷⁴⁸ This is the basic idea behind the concept of democracy according to contemporary political usage of the term. See the *Large Print English Dictionary supra* n 7 88.

²⁷⁴⁹ Abraham Lincoln defined democracy as the government of the people, by the people and for the people.

²⁷⁵⁰ See the Preamble.

²⁷⁵¹ See eg the SA Constitution ss 33, 215(1), 216(1) & 217(1).

are similar references to these values in the Nigerian Constitution.²⁷⁵²

In the context of diplomatic protection and protection of human rights, this means that it is the will of the people that must prevail in all circumstances with regard to the applicability of this right. The collective will expressed in the Constitution should not be deterred, compromised or limited under any circumstances.

12.5 The rule of law

Another basic similarity between the Nigerian and South African constitutions is the provision for the rule of law. The rule of law means that governmental power should be subject to and constrained by the Constitution.²⁷⁵³ This implies that it is the law and not arbitrary power that should prevail in the land,²⁷⁵⁴ that everybody is equal before the law,²⁷⁵⁵ and that the ordinary laws of the land should be based on or traceable to the Constitution itself.²⁷⁵⁶

In relation to diplomatic protection and protection of human rights, the rule of law means that everybody in Nigeria and SA is equally entitled to these rights since the Constitution has prescribed them. No government should, therefore, deny them.

12.6 Separation of powers

Separation of powers is another basic constitutional value in the Nigerian and South Africa Constitutions that enhances diplomatic protection of human rights.²⁷⁵⁷ As already indicated, governmental powers are legislative,²⁷⁵⁸ executive²⁷⁵⁹ and judicial

²⁷⁵² *Idem* s 1(d).

²⁷⁵³ See the Nigerian Constitution s 14 (1).

²⁷⁵⁴ This means that no person can be punished unless there is a breach of the law.

²⁷⁵⁵ This implies that everybody should be subject to the same law and to the jurisdiction of the ordinary courts of the land.

²⁷⁵⁶ This term was popularized by Dicey in the 20th century although the idea had been a central theme in Western political philosophy for centuries. See Dicey *Introduction to the study of the law of the Constitution* (1885) 10 (ed) (1959) xcvi-cl.

²⁷⁵⁷ The French philosopher Montesquieu (1689-1755) is usually credited with the first formulation of the modern doctrine of separation of powers in his work *L'Esprit des Lois* (1748).

²⁷⁵⁸ See the Nigerian Constitution s 4 & the SA Constitution s 42.

²⁷⁵⁹ The Nigerian Constitution s 5 & the SA Constitution s 83.

in nature.²⁷⁶⁰ The gist of this constitutional principle is that these three governmental powers should be independent of each other so that no single person or agency can control or usurp the functions of the other.²⁷⁶¹ The main objective of this constitutional principle is to safeguard the freedom and liberty of the ordinary citizen and prevent tyranny.²⁷⁶² Since diplomatic protection of human rights is generally seen as a prerogative of the executive branch of government, no other branch of government should interfere, usurp, interrupt, or frustrate its dispensation or implementation.²⁷⁶³

Related to the concept of separation of powers in both the Nigerian and the South African constitutions is the concept of checks and balances. The doctrine of separation of powers does not advocate a water-tight compartmentalisation of powers.²⁷⁶⁴ In its operation over the centuries, it has been complimented with the principles of checks and balances, co-operation and co-ordination.²⁷⁶⁵

The checks prevent one power from overreaching its bounds, while balances reconcile the powers to one another.²⁷⁶⁶ Co-operation and co-ordination ensure that government activities are not hampered by unnecessary conflicts resulting from separation of powers, but that the interest of the people is taken into consideration by government.²⁷⁶⁷

An illustration of the principles of checks and balances in relation to the practice of diplomatic protection of human rights is that if the executive branch fails to discharge its responsibility to provide the right, the courts have the power of judicial review and

²⁷⁶⁰ The Nigerian Constitution s 6 & the SA Constitution s 165.

²⁷⁶¹ *Idem* 13.

²⁷⁶² *Ibid.*

²⁷⁶³ See the dicta of Chaskalson CJ in *Kaunda's case supra* n 628 par 19.

²⁷⁶⁴ See de Waal *et al supra* n 2373 95.

²⁷⁶⁵ *Ibid.*

²⁷⁶⁶ *Ibid.*

²⁷⁶⁷ South Africa practices a co-operative form of federalism, whereas Nigeria practices a competitive form. In a co-operative form of federalism, different spheres of government share the same responsibilities, whereas in a competitive form of federalism governmental powers are divided between the federal or central government and the regions. See de Waal *et al supra* n 2381 119.

can compel the executive branch to comply.²⁷⁶⁸ This principle is applicable both in Nigeria²⁷⁶⁹ and in SA.²⁷⁷⁰

12.7 Devolution of power

Devolution of powers has to do with the way in which power changes hands across the political spectrum.²⁷⁷¹ This is another constitutional value common to the two countries that favours diplomatic protection of human rights. Under the Nigerian and South African Constitutions, it is stipulated that at the expiration of the tenure of office of the President and members of the National and State/Provincial legislatures, free and fair elections will be conducted by an independent body to fill those vacancies.²⁷⁷²

The implication is that if one government is not sensitive to the needs and aspirations of the people, and does not discharge its responsibilities in relation to diplomatic protection of human rights, the next government might. These fundamental constitutional values provide a healthy and conducive environment for the diplomatic protection of human rights under both Constitutions.

13 General appraisal of the Nigerian and South African Constitutions

(a) South Africa

It has been said that the South African Constitution is one of the most progressive constitutions in the world.²⁷⁷³ This is true to the extent that it is one of the more recent constitutions to emerge in this age of globalisation. It has thus embodied

²⁷⁶⁸ Furthermore, the courts may declare any unauthorised exercise of power either by the executive or the legislature invalid.

²⁷⁶⁹ See the *Revenue Allocation Case. Attorney General of Bendel State v The Attorney General of the Federation & 22 Others* (1981) 10 SC 1.

²⁷⁷⁰ See the cases of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 374 (CC) & *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191.

²⁷⁷¹ Garner (ed) *Black's Law Dictionary supra* n 12 484 defines devolution as "the act or instance of transferring one's rights, duties or powers to another."

²⁷⁷² See n 2742 *supra*.

²⁷⁷³ See Mubangizi *supra* n 282 71.

modern constitutional concepts and structures.²⁷⁷⁴ First and foremost, it is human rights oriented.²⁷⁷⁵ The idea of incorporating human rights norms into the SA Constitution was to ameliorate past and present prejudices and injustices.²⁷⁷⁶ Secondly, the South African Constitution is international in outlook.²⁷⁷⁷

This international outlook is reflected in the constitutional injunction that in interpreting the Constitution, the Bill of Rights, and other statutes, or in developing the common law, the courts should refer to international law.²⁷⁷⁸ Other commendable features of the 1996 Constitution of South Africa is the justiciability of all rights under the Constitution, whether they are civil, political, economic, social or cultural rights.

(b) Nigeria

The Preamble to the 1999 Constitution states that the Constitution was made by the people.²⁷⁷⁹ It is submitted that although Nigerians were consulted and given a free hand and opportunity to make contributions and input by way of public debates and hearings before the enactment of that Constitution, the general consensus was to retain the provisions of the 1979 Constitution with very little amendments.²⁷⁸⁰ Unfortunately, the 1979 Constitution had no provisions on international law *stricto sensu*.²⁷⁸¹ Perhaps the 1999 Constitution could have had the same international outlook as that of South Africa if the conditions that prevailed in South Africa had existed in Nigeria at that time and the people thought it necessary to internationalise the Constitution.²⁷⁸²

²⁷⁷⁴ *Ibid.*

²⁷⁷⁵ *Ibid.*

²⁷⁷⁶ *Idem* 45.

²⁷⁷⁷ *Ibid.*

²⁷⁷⁸ See the SA Constitution ss 39(1), 39(2) & s. 233.

²⁷⁷⁹ By proclaiming “*We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved to provide for a Constitution for the purpose of promoting the good government and welfare of all persons...Do hereby make, enact, and give to ourselves the following constitution.*”

²⁷⁸⁰ See Flanz *Constitutions of the Countries of the World* (1999) vol xiv Nigeria: vi.

²⁷⁸¹ “Nowhere in the 1979 Constitution was there a clear cut formulation on the relationship between International Law and Nigerian Law.” Oyeboode *supra* n 1658 283.

²⁷⁸² During the Constitutional process leading to democracy in SA, the urge was to find a “common law” acceptable to all the parties concerned. That “common law” was international law. See Olivier *supra* n 1995 who has documented the negotiating process. See also Botha *supra* n 1995 who says that by embracing Public international law as an equal component in the fabric of SA law, not only has the SA legal system had some hope of legitimacy in the eyes of the population as a whole, but that Public international law has also come of age as an international monitor - a system of checks and balances – healing the rifts between the peoples of the country,

14 Peculiar human rights problems in Nigeria

There are a few current endemic human rights problems in Nigeria. These include issues associated with the Niger Delta and the Sharia law.

14.1 *The Niger Delta problem*

The Niger Delta problem has, however, been diffused. While it lasted, it was an albatross around the neck of the Nigerian nation as far as its human rights record is concerned.²⁷⁸³ Since the bulk of Nigeria's oil reserves are derived from the Niger Delta Region, it is shocking that the environmental, ecological and health effects of oil exploitation on the indigenes of the oil producing areas of the Niger Delta Region of Nigeria was ignored by successive governments and the existing revenue allocation formula in the country.

Water pollution had caused mass unemployment of local fishermen. Land degradation and oil spillage undermined local farmers, resulting in widespread poverty and frustration in the area.²⁷⁸⁴ The people of the Niger Delta therefore complained bitterly of the deprivation and degradation of their environment and neglect by both the Federal Government of Nigeria and the oil companies operating in the area. They felt that they were entitled to some compensation by way of social amenities and job creation for this deprivation and degradation of their environment.²⁷⁸⁵

Since help was not forthcoming, they demanded total control of the resources in the Niger Delta. They felt that the 13% derivation formula in the Constitution was not

smoothing the workings of a new and democratic SA and ultimately ensuring its continued international legitimacy.

²⁷⁸³ See *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*. Comm. No 155/96 (2001) African Commission for Human Rights. See also Smith *Text and Materials on International Human Rights* (2007) 289.

²⁷⁸⁴ *Ibid.*

²⁷⁸⁵ *Idem* 290.

enough. To enforce their demands, they resorted to armed struggle, hostage taking, terrorism and ransom demands.²⁷⁸⁶

Although the Presidential Committee on the Review of the 1999 Constitution, appreciated the injustice in the revenue formula, they failed to make a specific recommendation other than that it should be “increased substantially beyond the 13% minimum.”²⁷⁸⁷

Nigeria’s main source of public revenue is oil, and this has been so since the 1970’s. Paradoxically, this oil comes mostly from the Niger Delta Region.²⁷⁸⁸ It is submitted that there is no sound reason why those who come from the area where the wealth of the nation is derived, should be the most poverty-stricken.

Abductions and terror were unleashed in the area and the Niger Delta became an occupied territory. It is submitted however that a military solution was not the right option to the Niger Delta problem due to the sustained loss of lives and property that had resulted in the use of force.

Although many efforts had been made in the past to solve this intractable problem, no success was achieved. Nevertheless, a diplomatic solution remained the better option. With the increased use of diplomacy and in the fullness of time, a diplomatic break-through was achieved.²⁷⁸⁹

14.2 The Sharia law question in Nigeria

A vexing human rights problem in Nigeria is the impact of the Sharia law on human rights, especially those of women. It is rather ironic and sad that although Nigeria is a secular state,²⁷⁹⁰ the Federal Government of Nigeria has connived at and permitted

²⁷⁸⁶ Things fell apart and anarchy was let loose upon the land.

²⁷⁸⁷ This opened up another controversy as to what is “substantial”. See the Report of the Presidential Committee on the Review of the 1999 Constitution vol 1 (Main Report) (2001) 02) 44.

²⁷⁸⁸ *Supra* n 2782 289.

²⁷⁸⁹ Adopting diplomatic tactics as suggested above, President Yar’Adua declared a 60-day amnesty period (6 August 2009 – 4 October 2009) for militants in the Niger Delta to surrender their arms and be pardoned. At the end of the 60 days, many militants complied. A lot of arms and ammunitions were also surrendered.

²⁷⁹⁰ See the Nigerian Constitution s 10 which prohibits the adoption of any state religion.

the practice of the Sharia legal system in the Northern states of the country with all the attendant abuses.

This has severely dented the human rights image of the country internationally. A good example of this was the conviction and condemnation to death by stoning of one Safiyat Hunsein Tungar, a single mother, for alleged adultery in 2002. Since adultery is not a crime in Nigeria, and section 36 of the Constitution clearly stipulates that

a person shall not be convicted of any criminal offence unless the offence is defined, and the penalty prescribed for in a written law,

The conviction of Safiyat attracted international outrage. The credibility of the Nigerian legal system generally and the Sharia legal system in particular was questioned.

Although the sentence of death in that case was reversed on appeal,²⁷⁹¹ the nation's human rights image was severely tarnished. It is hoped that such an incident will not be repeated.

15 Diplomatic protection and human rights: The final question

The final question is whether diplomatic protection is still available as a legal remedy in international law or whether it has been eclipsed by the advent of human rights law. As pointed out earlier, it was thought that the advent of a human rights regime in international law would render diplomatic protection superfluous.²⁷⁹²

According to Tiburcio,

Notwithstanding that much has been studied and written on both subjects of diplomatic protection and human rights, there have been great controversies as regards the exact limits of each regards to the other. Doctrine has been mostly unclear and controversial referring to this aspect, for it has been said that the modern doctrine of human rights has taken the place of diplomatic

²⁷⁹¹ See Adeyemi & Meya "Court saves Safiyat from death by stoning." *The Guardian* 2002-03-26 1.

protection, and thus diplomatic protection does not exist any more. Conversely, it has been said that diplomatic protection will always exist, because of its specific nature.²⁷⁹³

The growth of international human rights law had led some to argue that diplomatic protection would lose its *raison d'etre* and that it would cease to exist, and be replaced by human rights law.²⁷⁹⁴ That expectation has, however, not materialised.²⁷⁹⁵ The reason is that neither the international nor the regional human rights instruments have adequately protected human rights or offered effective remedies to human rights violations.

Although individuals today enjoy more international remedies for the protection of their rights than ever before, only a few individuals in a few states have obtained satisfactory remedies or redress from the current international and regional human rights conventions to date. Besides, some regions of the world such as Asia are not yet subject to any human rights convention.²⁷⁹⁶

The fate of individuals who are living in countries in which they are not nationals is even worse.²⁷⁹⁷ Although international human rights instruments extend protection to “all individuals,” there is only one multilateral convention that seeks to provide the alien with remedies for the protection of his or her rights outside the field of foreign investment.²⁷⁹⁸ As submitted by Dugard

²⁷⁹² See *supra* ch 2.

²⁷⁹³ See Tiburcio *supra* n 26 66.

²⁷⁹⁴ See Dugard *supra* n 25 76. See also Geck *supra* n 10 1045.

²⁷⁹⁵ The argument advanced for the demise of diplomatic protection was that it is no longer necessary to accord privileged treatment to aliens judged by the international minimum standard, as this standard has been replaced by the human rights standard (which accords to nationals and aliens alike the same standard of treatment under the UDHR.) It was also argued that the individual is now a true subject of International Law with legal standing to enforce his or her human rights at the international level. As a consequence, the right of a state to claim on behalf of its nationals should be restricted to cases where there are no other method of settlement agreed upon by the alien and the injuring State. In such a case, the claimant State acts as an agent of the individual and not in its own right. See Dugard *supra* n 57 76.

²⁷⁹⁶ Dugard First Report to The ILC on Diplomatic Protection *supra* n 9.

²⁷⁹⁷ Dugard *supra* n 25 77.

²⁷⁹⁸ That is the Convention on the Protection of the Human Rights of all Migrant Workers and Members of their Families (1990). See ch 4 *supra*. Dugard *supra* n 25 77 has pointed out that although the Declaration on the Human Rights of those who are not Nationals of the Countries in which they Live (res 40/144) has granted rights to aliens, no machinery has been put in place to enforce them.

As long as the state remains the dominant actor in international relations, the espousal of claims by states for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights.²⁷⁹⁹

and that

until the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection. As an important instrument in the protection of human rights, it should be strengthened and encouraged.²⁸⁰⁰

Crawford agrees with this submission and says that diplomatic protection “undoubtedly continues to be practised”, even though some of the assumptions on which it was based have changed.²⁸⁰¹ He explains that the initial question facing the ILC was how diplomatic protection should be reconciled with human rights in light of developments in international law.²⁸⁰²

According to Crawford,

the international law of human rights is primarily based on multilateral treaties and involves the rights of individuals at international level.²⁸⁰³ Many of these rights overlap with claims that can be brought by way of diplomatic protection if the injured individual is a national of the claimant state. Furthermore, individuals can have rights under international law whether or not these are classified under the rubric of human rights.²⁸⁰⁴

Another relevant development is the multitude of bilateral and multilateral investment protection agreements which give individual investors the right to have direct recourse to international arbitral tribunals.²⁸⁰⁵ If individual investors can invoke these

²⁷⁹⁹ First Report to the ILC on Diplomatic Protection *supra* n 9.

²⁸⁰⁰ Dugard *supra* n 25 78.

²⁸⁰¹ See Crawford *supra* n 10 22.

²⁸⁰² *Idem* 23.

²⁸⁰³ *Ibid.*

²⁸⁰⁴ *Ibid.* In *La Grand* case *supra* n 33 the ICJ held that a detainee’s right to be informed without delay under art 36(1) of the VCCR is an individual right though one that could be invoked by the State of nationality. The Court saw no reason to categorise it as a human right.

²⁸⁰⁵ In most cases without any need to exhaust local remedies.

rights without any need to rely on the state of nationality to espouse their claim, does it remain useful to view them as substantive rights of the State at all?²⁸⁰⁶

According to Crawford, because of these controversial factors, some view the definition of diplomatic protection as “a mechanism or a procedure for invoking the international responsibility of the host state” as an outdated fiction and the *Marvommatis* principle as no more useful.²⁸⁰⁷ That notwithstanding, Dugard proposed to the ILC that the principle of diplomatic protection should be codified in its traditional form, although “he made no attempt to justify the traditional view as based on a consistent or coherent doctrine.”²⁸⁰⁸ Thus diplomatic protection still provides a potent remedy for the protection of millions of aliens who have no access to remedies before international bodies.²⁸⁰⁹

If this is the case, a related, important question is whether diplomatic protection should remain a discretion or whether it should be made an obligation. As was said from the outset, despite the changing legal, socio- economic and political world order and the inadequacy of the *status quo* whereby diplomatic protection is not obligatory on states irrespective of the human rights norm violated, it is submitted that the right to diplomatic protection will always remain a discretion of the state concerned. The reasons for this were clearly stated by the ICJ in the *Barcelona Traction* case.²⁸¹⁰

²⁸⁰⁶ Crawford *ibid*.

²⁸⁰⁷ E.g Dugard says that “the right of a state to assert its own right when it acts on behalf of its national is an outdated fiction which should be discarded – except perhaps in cases in which the real *national* interest of the State is affected.” See First Report to the ILC on Diplomatic Protection *supra* n 9. Dugard identified two flaws in the *Marvommantis* principle (which states that by taking up the case of its national, the State is in essence enforcing its own right). Dugard states first of all that, just because a legal fiction is involved in the concept, is not a good ground for dismissing diplomatic protection as a legal remedy in international law. Secondly, according to Dugard, it is an exaggeration to say that international protection of human rights has developed to the point of rendering diplomatic protection obsolete. See Dugard *supra* n 9 pars 18, 22-32.

²⁸⁰⁸ On that basis the ILC went on to address the standard range of issues associated with diplomatic protection, including the content and scope of the rule of exhaustion of local remedies; nationality of claims, statelessness and dual nationality. It did not deal with the claims process or with certain grounds of admissibility often linked to diplomatic protection such as the clean hands doctrine, and the notion of contributory fault. Special diplomatic activities described in the VCDR and the VCCR were also not part of the topic . See Crawford *supra* n 10 24..Erasmus & Davidson *supra* n 293 on the other hand have however argued that the traditional approach to diplomatic protection should be discarded.

²⁸⁰⁹ *Idem* 79.

²⁸¹⁰ *Supra* n 26 44. See ch 2 *supra* for a further analysis of that case.

Should it therefore be exercised by Nigeria and South Africa as an obligation? ²⁸¹¹

The answer is that *Barcelona Traction* is still good law. Thus any state will have to weigh the “political and other factors” mentioned in *Barcelona Traction* before embarking on diplomatic protection irrespective of whether diplomatic protection is made an obligation or not. If conditions are not favourable for the exercise, diplomatic protection cannot be exercised. In the final analysis, it remains a discretion.

16 Lessons for Nigeria and the Republic of South Africa

The main theme that has emerged from the analysis is that although Nigeria and SA have made tremendous diplomatic efforts to protect human rights, there is still room for improvement. Their approach to this problem is similar. They differ only in terms of procedures, details and terminology adopted for this purpose.

What lesson can Nigeria and South Africa learn from each other in connection with the practice of diplomatic protection of human rights? The lesson is clearly that diplomatic protection of human rights is a journey. That journey has begun. According to a Chinese proverb, “the journey of a thousand miles begins with one step.” Thus, no matter how difficult the terrain, or how dark or slippery the tunnel may be, there is a glimmer of hope ahead. Slow and steady steps will definitely win the race.

Suggestions and recommendations now follow.

17 Suggestions and recommendations

It is therefore suggested that:-

- Since diplomatic protection normally begins with diplomatic missions abroad, diplomatic missions of both Nigeria and South Africa should be reorganised in order to prepare them for the onerous task of protecting their nationals abroad. There have been frequent complaints by Nigerians and South Africans in foreign countries, who, needing assistance from their embassies and High

²⁸¹¹ Some are of the view that diplomatic protection should be made an obligation for states. See

Commissions, are denied such assistance for one reason or another. In some cases, the staff of such embassies are rude and unsympathetic to the very people they are supposed to protect. This problem of insensitivity to the plight of their fellow men and women abroad, must be eliminated. To redress this problem, specific guidelines should be issued by the sending states to diplomatic missions abroad on ways of protecting their nationals more effectively. Any breach of such guidelines should attract disciplinary action. It is submitted that unless these missions are overhauled and reorganised, this task will not be successfully accomplished.

- Since the embassies and High Commissions were set up in part to protect nationals abroad and to do everything humanly possible within their policy framework to solve their problems, the embassy personnel should be made to carry out their responsibility effectively. It is, however, discouraging to note that while some embassy personnel have lived up to expectations, the vast majority of them seem to be afraid even to openly and officially identify with their nationals in their respective countries of accreditation. As a result of this, many Nigerians and South Africans do not even bother to approach their embassies when they encounter problems abroad.²⁸¹²
- The time has certainly come for this fundamental problem to be fully addressed and decisively resolved. In the first place, Nigerians and South Africans should be encouraged to report to their embassies and High Commissions as soon as they arrive in a foreign country, particularly if they are visiting that country for the first time. Some basic information about the country, such as the laws, foreign exchange regulations, and dangerous neighbourhoods, should be made known to them. Although some administrative problems may be posed to missions if every national should reports to them, obviously not everyone will do so. Such a move will at least create an awareness to visiting nationals that this service exists. This policy decision should be taken and enforced by the respective Ministries of Foreign Affairs. Nigerian and South African embassy officials who

²⁸¹² Dugard *supra* n 25 80 & *supra* n 1 290. See also Erasmus & Davidson *supra* 293 123.
²⁸¹² This is a general problem facing both Nigerians and South Africans living abroad.

are unable or unwilling to render such services to their nationals should be relieved of their duties.²⁸¹³

- On the issue of effectiveness of diplomatic personnel, the appointment of politicians as diplomats should stop. This is because, there is no *rationale* in appointing or rewarding party members who have no knowledge or idea of diplomacy, with ambassadorial posting, as they will only become embarrassments to the sending states.
- In view of the provisions of article 10 of resolution 40/144, a hotline should be set up in all Nigerian and South African embassies/High Commissions abroad. This will enable their nationals who need immediate assistance to call the embassies directly and urgently and to lay their complaints or grievances.
- Embassy personnel should be properly trained, educated and drilled on the need and necessity of assisting their nationals. To solve this problem, it is suggested that Foreign Service training institutions of both countries should make training in human rights mandatory. Besides, embassies should be adequately funded.²⁸¹⁴
- A special contingency-fund to be designated ‘diplomatic casualty fund’ should be set up to help those nationals who are genuinely in need in foreign countries.
- With regard to the solution of the Niger Delta problem in Nigeria, it has been suggested that only a Sovereign National Conference can solve the problem. Although a Sovereign National Conference may bring Nigerians together, it is submitted that it may not provide the answer to this problem. Rather, it is likely to aggravate it. This is because, if convened, every delegate to the conference will go armed with his or her community demands. In the final analysis, petty jealousy, envy, the desire to cheat, create confusion, or gain advantage over others will set in and the conference will fail for lack of consensus.²⁸¹⁵
- To accelerate the diplomatic promotion of human rights in Nigeria and SA, a human rights culture aimed at cultivating tolerance towards foreigners must be

²⁸¹³ It is said that many of these embassies are hampered by lack of funds. Consequently, they may be unable to discharge their responsibility unless they are adequately funded. See “Pruning our foreign missions” *Daily Champion* (ed) 2005-10-30 10. In view of new foreign policy objective of the present Nigerian administration, a time has come, for a contingency fund to be created and specifically allocated to Nigerian embassies for the purpose of rendering emergency help to Nigerians who are facing financial difficulties abroad.

²⁸¹⁴ Due to the prevailing global economic down turn.

²⁸¹⁵ The Niger Delta problem in Nigeria has been diffused by the granting of unconditional amnesty to the militants in the Niger Delta. About twenty thousand militants surrendered their weapons in exchange for a monthly stipend of N65,000 which is equivalent to \$430 See also *supra* n 369.

cultivated in both countries. Towards that end, human rights education should be introduced into school curricula at all levels – primary, secondary and tertiary in both countries. The masses should also be educated on human rights issues. The Nigerian-South African Bi-National Commission should champion this crusade. The Commission should be encouraged to play a more proactive role based on human rights obligations to ensure the protection of their nationals in each others' territory.

- A call is hereby made for an intensified awareness campaign to be launched to raise the awareness of the citizens of the two countries to the use of the protection mechanism available under the African Charter and the ICCPR for conflict resolution. This will enhance the prospects of protecting their human rights. Citizens should be educated on when and how to approach regional and other international human rights protecting bodies for appropriate reliefs
- .The popularisation of the knowledge of rights issues and the institutionalisation of training on rights and development along the lines initiated by the University of Pretoria should be encouraged and emulated by other institutions and organizations. All such institutions should however make determined efforts to focus more on the rights of foreigners
- In order to curb xenophobic tendencies in South Africa, it is suggested that the government of South Africa should send out a strong and clear message to the people that xenophobia is against the law and the international obligations of South Africa and shall not be tolerated under any circumstance.
- Furthermore, there should be a co-ordinated approach between various government departments to address xenophobia and its manifestation. Migrant and refugee policies should be clear, coherent, implementable and should reflect South Africa's constitutional and international obligations.
- South Africa should take steps to sign and ratify the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, and other relevant treaties. This should signal South Africa's commitment to abide by international standards in her treatment of resident non-nationals.
- Factors that encourage the manifestation of xenophobia such as poverty, unemployment, crime, corruption in the immigration and police services and

ignorance about the role and significance of non nationals in SA should be stressed

- A nation-wide public awareness and information campaign on racism and xenophobia and their effects, should be organised. Public service officials should undergo training not only on racism and xenophobia, but on the theory and practice of immigration and refugee policies. Above all, South Africans should be urged to practice and cultivate the spirit of *ubuntu*, hospitality and solidarity in their relations with others in their midst.
- Very few human rights treaties have been incorporated into Nigerian/South African municipal law. Besides, no record of international treaties incorporated into the municipal laws of these two countries is kept. It is suggested that Nigeria and South Africa should not only domesticate more international treaties into their legal systems, but a record should be kept of all treaties incorporated into their legal systems. This will enhance the prospects of diplomatic protection of human rights in the two countries as their citizens will know and take advantage of international treaties incorporated into the legal system for their benefit.²⁸¹⁶
- It is also recommended that the two states should constitutionally make provision for diplomatic protection by amending their respective constitutions towards that end, and earnestly resolve, to make human rights the corner-stone of their nascent democracies.
- In order to encourage friendly relations among African states and nip the perennial African refugee problem and xenophobic attacks in the bud, it is suggested that diplomatic channels for conflict resolution - in particular, the inter-state complaint mechanism under the ICCPR and the ACHPR should be explored and adopted by African states to settle inter- and intra-state disputes.
- Finally, the ILC must convene an international Convention for the adoption of the Draft Articles on diplomatic protection as a treaty. All participating states should also be urged to ratify the treaty. When this is done, diplomatic protection will

²⁸¹⁶ Determined efforts were made to know the treaties incorporated into Nigerian/South African law. With regard to South Africa, letters were directed to the Office of the Chief Law Officer, Department of International Relations and Cooperation dated 2010-01-12 and to the Director-General, Ministry of Justice and Constitutional Deveoplment dated 2010-01-21 asking for information concerning incorporated treaties in SA law. No concrete information was received from these sources. However, Mrs Marie Theron of the University of Pretoria law library, in an independent enquiry, confirmed that there is no official record of incorporated treaties in South

rise from the status of customary international law to the status of conventional law. It will then be characterised by certainty and predictability and will earn the respect of the international community.

Africa. With regard to Nigeria, Nigerian embassy sources were exploited with no answer to the enquiry. The Official Nigerian government website was also searched in vain.