

CHAPTER FOUR

International and Regional Instruments for the Diplomatic Protection of Human Rights.

1 Introduction

Diplomatic protection is often dealt with under the subject of “Treatment of Aliens,”¹¹³⁵ since it deals with the violation of the rights of foreigners. In chapter 3, the instruments often employed by diplomatic missions for the protection of their nationals abroad were discussed.¹¹³⁶ These instruments include both the VCDR of 1961 and the VCCR of 1963.

In this chapter, human rights instruments designed by international and regional bodies for the promotion and protection of human rights are examined.¹¹³⁷ State parties are expected to ratify, adopt and incorporate these international and regional instruments into their municipal law for the protection of the human rights of all in their territories.¹¹³⁸

Human rights instruments are documents drawn up by human rights bodies or institutions for the promotion and protection of human rights.¹¹³⁹ They may be drawn

¹¹³⁵ See the *Official Records of the GA supra* n 1 22.

¹¹³⁶ I.e the VCDR of 1961, and the VCCR of 1963.

¹¹³⁷ The main international human rights instruments for the protection of human rights generally are:- The UDHR (1948); The ICCPR (1966), the two Optional Protocols of (1966)and(1990) respectively;as well as the ICESCR (1966) Others are *inter alia* CERD (1965); CEDAW (1979); CAT (1984); CRC (1989); Resolution 40/144: Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live (1985) ; and International Convention on the Protection of Human Rights of all Migrant Workers and members of their families, CMW (1990). The main regional instruments for the protection of human rights generally on the African continent include:The Constitutive Act of the African Union (200); The OAU Convention (1969); The ACHPR (1981); Protocol on African Court of Human and People’s Rights, (1998); Protocol on Womens Rights (2003); and the African Children’s Charter (1999).

¹¹³⁸ I.e. foreigners and nationals alike. See chs 1 & 2 *supra*.

¹¹³⁹ See Rehman *supra* n 28 8 and Malan “The nature of human rights treaties: Minimum protection agreements to the benefit of third parties.” (2008) *De Jure* 81 82.

up in the form of treaties or may exist as decisions or declarations of international organisations.¹¹⁴⁰

At the international level, the principal body responsible for the protection of human rights and consequently for the adoption of human rights instruments is the UN,¹¹⁴¹ whereas on the regional level, human rights instruments are fashioned by regional bodies such as the European, Inter-American and the African human rights bodies.¹¹⁴² Regional human rights instruments are based upon UN human rights standards and are expected to conform to them.¹¹⁴³

In this thesis, emphasis will be placed upon those instruments meant for the protection of the rights of foreigners because it is the violation of the rights of foreigners by receiving states that often trigger the exercise of diplomatic protection by the affected state.¹¹⁴⁴

International instruments which protect the rights of foreigners discussed here include the Convention on the Protection of the Rights of Migrant Workers and members of their Families,¹¹⁴⁵ and the Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live.¹¹⁴⁶ These instruments were adopted specifically to protect foreign nationals wherever they are and to set a standard for state parties to emulate in their treatment of non-nationals within their territories.

¹¹⁴⁰ Human Rights treaties are multilateral treaties in the nature of *stipulations alteri* (agreements for the benefit of third parties) and provide *minimum protection* for such third parties which are individuals under the jurisdiction of contracting states. See Malan *supra* n 1136 82.

¹¹⁴¹ The progression of International Human Rights Law is generally related to the developments that took place at the end of the second World War. After the war, the UN was established “to save succeeding generations from the scourge of war.” The UN Charter requires that ECOSOC “shall set up commissions in the economic and social field for the promotion of human rights.” See Rehman *supra* n 28 24 & 35.

¹¹⁴² *Idem* 4 135 203 & 235 *et seq.* See also Steneir *et al supra* n 19 925.

¹¹⁴³ Steneir *et al ibid.*

¹¹⁴⁴ On behalf of their injured nationals. As already indicated, diplomatic protection involves the violation of the rights of foreigners. See n. 1132 *supra*

¹¹⁴⁵ Adopted by the UNGA res 45/158 of 1990-12-10.(Hereafter referred to as the CMW.) see *supra* n 1132.

¹¹⁴⁶ Res 40/144, adopted by the UNGA on 1985-12-13. The reason why these two instruments are highlighted is because they are the only international instruments adopted so far specifically for the protection of human rights of foreigners.

2 Objective and approach adopted

The main objective of this examination is to identify international and regional instruments meant for the protection of human rights of foreigners specifically and to analyse them within the context of diplomatic protection. The purpose of this analysis is to determine the extent to which these instruments have set the required standards envisaged, are able to protect the human rights of foreigners, or to influence states in their treatment of foreigners.

In the process of analysing these instruments, the rights which foreigners enjoy under international law are identified. It is then determined whether or not these rights can be diplomatically protected and if so to what extent. The scope and extent to which the rights may be enjoyed by or denied to foreigners in countries where they live, the circumstances under which they may be enforced, derogated from or limited, are also examined and critically analysed.

The approach adopted is first to identify international human rights instruments designed to protect the rights of foreigners specifically. These instruments are analysed against the backdrop of general international human rights instruments formulated by the UN to apply to human society generally irrespective of race, colour, sex, language, birth or other status,¹¹⁴⁷ before the regional instruments are discussed. With regard to the regional instruments, the emphasis is placed on Africa. Hence the African Charter on Human and Peoples' Rights (ACHPR) and the Constitutive Act of the African Union (CAAU) will be the primary focus.¹¹⁴⁸

A deductive approach is adopted in the analysis. This deductive approach makes it easy to draw a fair and accurate conclusion with regard to the extent to which these international and regional instruments have fulfilled the purpose for which they were designed. The question that arises is whether or not there is any necessity for a

¹¹⁴⁷ See Wali JSC "Democracy, human rights and administration of justice" in Ladan (ed) *Law, Human Rights and Administration of Justice* (2001) 21.

¹¹⁴⁸ Emphasis is placed on those instruments because this study has a lot to do not only with inter-states relations *inter se*, but also with how African states protect the human rights of individuals.

double set of instruments to exist for the protection of human rights at the international and regional levels, as far as diplomatic protection is concerned.¹¹⁴⁹

The chapter has two sections. The first section is primarily devoted mainly to a discussion of international instruments for the protection of the rights of foreigners in particular, and instances where their violations have given rise to the exercise of diplomatic protection. However, human rights instruments adopted by states for the protection of human rights of all within their territories are also discussed.¹¹⁵⁰

The second section deals with regional instruments.¹¹⁵¹ These are analysed in the same way as the international instruments. Those rights designated for investigation in this thesis are also examined to determine the extent to which their violation can trigger diplomatic protection.

SECTION ONE

Any meaningful discussion of human rights instruments, whether regional or international in scope, it is submitted, must start with a discussion of the Universal Declaration of Human Rights (UDHR). This is because the UDHR is the very foundation upon which all human rights instruments are built, and the prism through which all human rights programmes and activities are reflected. In this regard, the instruments will be discussed under legally binding and non-legally binding instruments for purposes of clarity and elegance.

3 The UDHR

Envisaged as a “standard setting” document, the Preamble mentions that it sets “a common standard of achievement for all peoples and nations”. Although not initially intended to be legally binding, its status and prestige are such that it is not only regarded as a yardstick by which to measure compliance with human rights

¹¹⁴⁹ One meant to protect the human rights of nationals, and another meant to protect those of foreigners. A corollary to this question is whether or not the instruments meant for the protection of nationals also protect foreigners.

¹¹⁵⁰ See n 1134 *supra*.

¹¹⁵¹ *Ibid*.

standards, but has also come to be viewed as a legally binding instrument.¹¹⁵² Most states and scholars would agree that failure to respect its provisions constitutes a violation of international law.¹¹⁵³

The rights spelt out in the UDHR are diverse, and include, *inter alia*, the right to life,¹¹⁵⁴ liberty and security of the person,¹¹⁵⁵ freedom from slavery or servitude,¹¹⁵⁶ freedom from torture or cruel, inhuman or degrading treatment or punishment,¹¹⁵⁷ recognition as a person before the law,¹¹⁵⁸ the right to nationality,¹¹⁵⁹ the right to own property,¹¹⁶⁰ freedom of thought, conscience and religion,¹¹⁶¹ the right to participate in government,¹¹⁶² the right to social security,¹¹⁶³ the right to work¹¹⁶⁴ and the right to education.¹¹⁶⁵ The rights and freedoms are to be enjoyed without “distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social.”¹¹⁶⁶

The provisions of the UDHR are backed up by two treaties, the ICCPR and the ICESCR adopted by States for the protection of human rights. The ICCPR deals with civil and political rights, while the ICESCR deals with economic, social and cultural rights.¹¹⁶⁷ These two conventions were adopted to give legal force to the UDHR and must be distinguished from each other.¹¹⁶⁸

¹¹⁵² *Ibid.* See the case of *Sei Fuji v California* (1952) 19 ILR 312.

¹¹⁵³ Amien & Farlam *supra* n 1373 6.

¹¹⁵⁴ Art 3. Art 6 of the ICCPR.

¹¹⁵⁵ Art 3. Art 6 of the ICCPR. See Jayawickrama *supra* n 149 27.

¹¹⁵⁶ Art 4. Art 8 of the ICCPR.

¹¹⁵⁷ Art 5. Art 7 of the ICCPR.

¹¹⁵⁸ Art 6. Art 16 of the ICCPR.

¹¹⁵⁹ Art 15. Art 24 of the ICCPR.

¹¹⁶⁰ Art 17 Jayawickrama *supra* n 149 discusses this right 908-920.

¹¹⁶¹ Art 18. Art 18 of the ICCPR.

¹¹⁶² Art 21. This is contained in art 25 of the ICCPR.

¹¹⁶³ Art 25. Now art 9 of the ICESCR.

¹¹⁶⁴ Art 23. Art 6 of the ICESCR. See Smith *supra* n 801 295.

¹¹⁶⁵ Art 26. Now art 13 of the ICESCR. See Tomasevski *Human Rights Obligation in Education* (2006) 115.

¹¹⁶⁶ Art 2.

¹¹⁶⁷ Along with the Universal Declaration, the ICCPR and the ICESCR are what are normally referred to as the International Bill of Rights. These documents were drafted in response to the fact that the Charter of the UN did not contain a Bill of Rights, although it contained a number of references pertaining to human rights.

¹¹⁶⁸ See *infra*.

4 International instruments for the protection of human rights of foreigners

4.1 Rights of foreigners¹¹⁶⁹

As already pointed out, although states possess absolute discretion in the admission of aliens into their territories, a state that admits a foreign national into its territory, whether a natural or juristic person, is bound to extend to them the equal protection of the law. International responsibility therefore arises to the receiving state for failure to do so.¹¹⁷⁰

Aliens are therefore entitled to be protected by the law in countries of their residence.¹¹⁷¹ Under international and comparative law, there are certain rights accorded specifically to foreigners as of right, while other rights may be denied to them.¹¹⁷²

Some of the most important rights conferred upon foreigners in countries where they live include the right to life,¹¹⁷³ the right not to be discriminated against,¹¹⁷⁴ and the right to be free from torture or any inhuman treatment or punishment.¹¹⁷⁵ These rights are fundamental rights - a core of norms from which no derogation is allowed under any circumstances even in times of national emergencies. These rights are guaranteed in all international human rights instruments adopted by states.¹¹⁷⁶

¹¹⁶⁹ The generic term 'foreigners' is used here to denote individuals who voluntarily go to live in countries in which they are not nationals, in contradistinction to refugees for instance, who are forced by circumstances such as wars, famine, etc to flee from their countries of nationality. See res 40/144 & the Refugee Convention of 1951.

¹¹⁷⁰ See Dugard *supra* n 1 296. See also *Barcelona Traction case supra* n 26 par 33.

¹¹⁷¹ E.g Under res 40/144 and the CMW.

¹¹⁷² Eg political rights This may appear as discrimination. But it is generally believed that all rights are not equal. In the United States for instance, the Supreme court has distinguished between "acceptable" and "unacceptable" discrimination. The Equal protection clause only prohibits "invidious discrimination" i.e. arbitrary and capricious discrimination. Reasonable discrimination, on the other hand, is allowed. Denial of political rights to foreigners is not unreasonable, capricious or arbitrary because it is a liberty which has to do with sovereignty and national security.

¹¹⁷³ Art 5(a) of res 40/144 & art 9 of CMW.

¹¹⁷⁴ Art 5(c) of res 40/144 & art 7 of CMW.

¹¹⁷⁵ Art 6 of res 40/144 & art 10 of CMW.

¹¹⁷⁶ See eg the ICCPR arts 6, 5 & 26; the UDHR art 5; the CAT art 1; the CERD art 1, the CADW art 2, etc

With regard to the rights of foreigners specifically, the legally binding instrument examined is the Convention on the Protection of the Rights of Migrant Workers and Members of their Families.¹¹⁷⁷ Another international instrument which deals specifically with the rights of foreigners examined here, although not legally binding, is the Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which They Live.¹¹⁷⁸ The rights discussed particularly are those designated rights namely (a) fundamental rights; (b) property rights; and (c) procedural rights.

5 Legally binding international instrument for the protection of the rights of foreigners.

5.1 International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families

An international human rights instrument specially adopted for the protection of the human rights of foreigners, is the International Convention for the Protection of the Rights of all Migrant Workers and Members of their Families (CMW). Unlike resolution 40/144, this human rights instrument is a treaty and, therefore, binding on state parties. The Convention on Migrant Workers was adopted to protect the human rights of persons belonging to groups which have been rendered vulnerable, to eliminate all forms of discrimination against them, and to facilitate effective means of implementing the existing human rights instruments with regard to these people.¹¹⁷⁹ Thus, states have the obligation to create and maintain measures at the national level for the promotion and protection of the rights of persons in this vulnerable sector of their population to ensure the participation of those among them who are interested in finding a solution to their own problems¹¹⁸⁰.

¹¹⁷⁷ Adopted 1990-12-18. GA Res 45/158 reprinted 30 ILM (1991) 517. It is noteworthy that neither Nigeria nor the South Africa has ratified the CMW. See pp 282 & 371 See also p 202 *infra* for the definition of a migrant worker

¹¹⁷⁸ Adopted by the UNGA on 1985-12-13. Although not a treaty and as such not binding on states, its status is discussed below. See "Declarations & Resolutions of the GA" *infra*. See also the Draft Articles on State Responsibility for Injuries to Aliens in Garcia Amador *et al supra* n 26 244.

¹¹⁷⁹ See the Preamble to the Convention. See also pars 33- 35 of the World Conference on Human Rights (Vienna Convention) of June 1993 *supra* n 214.

This Convention was adopted in 1990.¹¹⁸¹ Migrant workers are those persons who have received or are receiving remuneration for work in a State of which they are not nationals.¹¹⁸² The Convention consists of ninety-four articles.¹¹⁸³ It guarantees the civil, political, economic, social and cultural rights of all migrant workers. Article 7 enjoins State Parties to undertake to ensure to all migrant workers and their families, the rights provided for under the Convention without distinction of any kind.¹¹⁸⁴

Article 8 grants to all migrant workers and members of their families the right of ingress and egress in both the state where they work, and the state of their origin. Article 9 of the Convention stipulates that the right to life of all migrant workers and members of their families shall be protected by law. Article 10 provides that no migrant worker or member of his or her family shall be subjected to torture, cruel, inhuman, degrading treatment or punishment.

Article 11 provides against slavery and servitude. Article 12 guarantees freedom of thought, conscience and religion, while article 13 provides that all migrant workers and members of their families shall have the right to hold opinions without interference. Article 14 stipulates that no migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence, or other communications, or to unlawful attacks on his or her honour and reputation.

¹¹⁸⁰ See par 24 of the World Conference on Human Rights *ibid*.

¹¹⁸¹ *Supra* n 1157.

¹¹⁸² See art 2(1). By art 3 of the Convention, persons sent or employed by International Organizations, persons sent or employed by a state or on its behalf outside its territory, i.e. diplomatic envoys, persons taking up residents in a state different from their state of origin, refugees and stateless persons, students and trainees, as well as seafarers and off-shore workers, are not migrant workers and therefore not covered by the Convention.

¹¹⁸³ Part 1 (arts 1-6) deal with the scope and definitions; part II (art 7) deals with non-discrimination with respect to rights; part III (arts 8- 35) deals with human rights of all migrant workers and members of their families; .part IV (arts 36-56) deals with other rights of migrant workers and their families; part V (arts 57-71) are provisions applicable to particular categories of migrant workers and members of their families; part VI (arts 64- 71) deals with the promotion of sound, equitable, humane and lawful conditions in connection with international migrations of workers and members of their families. Part VII (arts 72-8) deals with the application of the Convention; Part VIII (arts 79-84) are General Provisions; while Part IX (arts 85-93) are final provisions.

¹¹⁸⁴ I.e. without any discrimination as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

With regard to the right to own property, article 15 stipulates that no migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Article 16 guarantees to all migrant workers and members of their families the right to liberty and security of their person. It also guarantees to them protection against violence, physical injury, threats and intimidation from official or private sources.

Under the provision of article 16, migrant workers and members of their families shall not be subjected to individual or collective arrest or detention and shall be brought promptly before a judge or other judicial officer if arrested. Article 17 provides that migrant workers who are deprived of their liberty should be treated humanely.

In relation to their procedural or due process rights, article 18(1) of the Convention provides, *inter alia*, that in the determination of any criminal charge against them, or of their rights and obligations in a suit at law, they shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Article 18(2) provides that migrant workers and members of their families who are charged with a criminal offence shall be presumed innocent until proven guilty according to law, while article 18(3)(c) stipulates that in the determination of any criminal charge against them, migrant workers are to be tried without undue delay.

In terms of article 22, migrant workers and members of their families shall not be subjected to measures of collective expulsion, and shall be expelled only in pursuance of a decision taken by the competent authority in accordance with law. The person involved shall have the right to submit the reason why he or she should not be expelled and have his or her case reviewed by a competent authority if expelled. All migrant workers and members of their families shall have the right to communicate with their consular or diplomatic missions in case of need, and shall be informed of this right promptly ¹¹⁸⁵

¹¹⁸⁵ Art 23.

6 Non-legally binding instruments for the protection of the human rights of foreigners

6.1 The Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live

The Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live is the second instrument to be examined. As the name implies, this instrument, is a declaration of the UN General Assembly, and is discussed here to determine first, the legal effects of declarations and resolutions of the UN General Assembly on States and secondly to see whether this instrument has evolved into customary international law for purposes of diplomatic protection.¹¹⁸⁶ To determine the binding effect of this instrument on states, the legal status of a declaration or resolution in international law is first explained.

7 Legal effect of declarations and resolutions of the General Assembly

A General Assembly Declaration is:

a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.¹¹⁸⁷

A resolution is:

An event or a complex set of events which influences in a significant way the establishment of customary law on the matter dealt with by the resolution.¹¹⁸⁸

It must be noted however, that the Charter of the UN contains a strong presumption against the legally binding character of General Assembly resolutions by designating them as recommendations.¹¹⁸⁹ Nevertheless, declarations by international and regional organizations and the historical reasons for adopting such declarations can

¹¹⁸⁶ Diplomatic Protection is governed by Customary International Law. The extent of state practice and *opinio juris* will determine whether or not the declaration has become Customary International Law.

¹¹⁸⁷ See 34 U.N. ESCOR supp (No 8) 15 U.N. Doc. E / cn / 4/ 610 (1964) (memorandum of Office of Legal Affairs UN Secretariat).

¹¹⁸⁸ See Murty *supra* n 829 619. See also Church, Schulze & Strydom, *supra* n 159 173.

¹¹⁸⁹ See art 13.

be valuable sources of reference and proof of the importance of such issues to mankind..¹¹⁹⁰ This is because declarations adopted by the international community often represent the first concrete step in establishing state consensus in the process of drawing up a binding multilateral convention.¹¹⁹¹

Furthermore, declarations create expectations of adherence, and in so far as the expectation is gradually justified by state practice, a declaration may by custom become recognized as laying down rules binding upon states.¹¹⁹²

General Assembly declarations and resolutions are valuable sources of information internationally in several respects. First, they are the main instruments for adoption as treaties. The treaties are then open for adherence by member states and other states.¹¹⁹³ Besides, they normally contain references to the historical processes prior to the adoption and to the reasons that inspired the adoption of the Declaration.¹¹⁹⁴ In addition, states voting patterns for such a resolution in the General Assembly can shed some light on the involvement of the requisite *opinio juris* in the formation of customary law.

In so far as General Assembly resolutions are potential sources of customary international law, the following remarks by the ICJ in its advisory opinion in the *Nuclear Weapons* case¹¹⁹⁵ are instructive:

The court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can in certain circumstances provide evidence important for establishing the existence of a

¹¹⁹⁰ See Rehman *supra* n 28 60. See also Church *et al supra* n 159 172.

¹¹⁹¹ Church *et al supra* n 159 *ibid*.

¹¹⁹² *Ibid*. See 34 U N ESCOR *supra* n 1170.

¹¹⁹³ Declarations and Resolutions are “soft law.” The term has come to describe the great variety of international instruments, declarations, observations, guidelines, etc, which though not binding as a matter of current International Law, may nevertheless indicate what International Law may or should become. What is however in question is the legal force of such declarations of law, whether general or particular. Could they be regarded as “binding” when the Assembly lacked constitutional authority to adopt mandatory decisions concerning the subject dealt with? If not binding, are they authoritative in some other sense? Another question is whether unanimity required for their authority. If nearly all states agree on what the law is or should be, is there a sufficient reason to deny effect to that determination? These and related questions have given rise to official perplexity and a considerable body of legal analysis. See Church *et al supra* n 159 160.

¹¹⁹⁴ Declarations are adopted by way of resolutions. See eg the UDHR.

¹¹⁹⁵ *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* case *supra* n 832.

rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption: it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule¹¹⁹⁶

In assessing how far a resolution represents customary law, the following factors may have to be taken into consideration:

- (a) The event that culminated in the adoption of the resolution, the claims and counter-claims presented, the responses of competent decision-makers on the claims and counter-claims, and the extent to which the responses disclose a consensus in favour of the policy articulated in the resolution,¹¹⁹⁷ and
- (b) the tenor and content of the resolution; whether it purports merely to articulate linguistically the practice that has already become established along with the requisite *opinio juris*, or to promulgate a new rule or policy for the future.¹¹⁹⁸ The accuracy of the statements in the resolution, such as that it is an articulation of a practice already established, should however be open for questioning and enquiry.

Other factors to be taken into consideration in assessing the importance of a resolution are:¹¹⁹⁹

- (c) The pattern of voting on the Resolution; whether it was adopted unanimously or by what majority, whether all the important interests involved had voted for it, who had voted against it, and who had abstained. The basis of power available to those who voted in favour and those against, must also be taken into consideration in implementing the policy articulated in the resolution or opposing its implementation¹²⁰⁰
- (d) The subsequent response to the resolution, and the extent of the implementation given to the policies articulated in the resolution, and.

¹¹⁹⁶ Church *et al supra* n 159 204 -205.

¹¹⁹⁷ Murty *supra* n 829 619.

¹¹⁹⁸ *Idem* 620.

¹¹⁹⁹ See Rehman *supra* n 28 58-9.

¹²⁰⁰ *Ibid.*

- (e) The general approbation it has received and whether any acts have been done in the implementation of the resolution.¹²⁰¹ Here, one should observe not merely the responses of states but also those of international organizations, including the reaffirmations made by the organ that had initially adopted the resolution.¹²⁰²

As already stated, the Charter of the UN designates General Assembly resolutions as recommendations and therefore not legally binding on states.¹²⁰³ Resolutions are also not a formal source of law within the explicit categories of Article 38(1) of the Statute of the ICJ. However, the General Assembly as the central forum for the international community, with the competence to discuss all questions of international concern, has become a major forum of states for articulating their national interests and seeking general support for them.¹²⁰⁴ The conception of General Assembly resolutions as expressions of common interests and the “general will” of the international community has therefore become a natural consequence.

The *Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they live* was adopted after the mass expulsion of persons of Asian origin from Uganda by Idi Amin in 1972.¹²⁰⁵ The UN Commission on Human Rights then began a study of the implications of extending international human rights instruments to non-citizens, and appointed Baroness Elles to write a report on the subject.¹²⁰⁶ The report was first published in 1980 as a Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in which They Live

¹²⁰¹ What normally adds to the force of a resolution is the concomitant State practice showing compliance with such a resolution. A classic example is the way in which states complied with GA resolutions imposing sanctions against South Africa during the apartheid years. See Church *et al supra* n 159 160.

¹²⁰² There was discussion at one time whether the resolutions adopted by the U.N. General Assembly on the peaceful uses of outer space represented customary international law and in that connection, the theory of “instant customary law” was postulated. The question in so far as it concerned outer space may not be considered academic because of the adoption of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies 1967 by the G A in 1966.

¹²⁰³ See *supra* n 1191 & 1195

¹²⁰⁴ Under arts 11 & 12 of the UN Charter, the GA is authorised to discuss all questions of international concern.

¹²⁰⁵ See Tiburcio *supra* n 26 56.

¹²⁰⁶ *Ibid.*

and was later adopted by consensus as Resolution 40/144 in 1985.¹²⁰⁷ Because of its relevance to this research, its provisions shall be highlighted *in extenso*.

8 Provisions of the Declaration on the Human Rights of Individuals who are not Nationals of the Countries in which they Live

Article 1 of Resolution 40/144 defines an alien as any individual who is not a national of the State in which he or she is present. Article 2 prohibits illegal immigration and authorizes states to enact laws on immigration which should conform to international law. Article 3 provides that “every State shall make public its national legislation or regulations affecting aliens,” while article 4 provides that:

Aliens shall observe the laws of the state in which they reside, or are present and regard with respect, the customs and traditions of the people of that state.

Article 5 enumerates the rights which aliens must be allowed to enjoy in a foreign land. These include: (a) The right to life and security of person, (b) the right to protection against arbitrary or unlawful interference with privacy, family, home, or correspondence; (c) the right to be equal before the courts, tribunals, and other organs of administration of justice; (d) the right to choose a spouse, to marry, to found a family; (e) the right to freedom of thought, opinion, conscience, and religion; (f) the right to retain their language, culture and tradition; and (g) the right to transfer their earnings, savings, and other personal monetary assets abroad. Article 5(2) further guarantees to aliens the freedom to leave the country, freedom of expression, the right to peaceful assembly, and the right to own property. Freedom of movement, and the right to choose a place of residence are also guaranteed under this subsection.

Article 6 forbids aliens to be subjected to torture, or cruel, inhuman or degrading treatment or punishment while Article 7 provides that an alien who is lawfully in any

¹²⁰⁷ G A Res 144 U N GAOR 40th Ses Supp No 53 U N Doc A RES/ 40/144 (1985). The draft prepared by Baroness Elles was in response to Economic Social and Cultural Council resolutions which questioned the application of contemporary international human rights instruments to non-nationals on the same basis as nationals, due to the controversy on whether human rights instruments should be applied equally to aliens and nationals, as these instruments do not expressly equate aliens to nationals. See Tiburcio *supra* n 26 56 See also Wallace *International Human Rights Text and Materials* (1996) 413.

foreign country shall not be expelled without due process of law. Article 8 expands the rights of an alien lawfully resident in a country to include, *inter alia*, the right to safe and healthy working conditions, fair wages, and equal remuneration for work done; (ii) the right to join trade unions; and (iii) the right to health protection, medical care, social security and services, education, rest and leisure.

Article 9 provides that “No alien shall be arbitrarily deprived of his or her lawfully acquired assets,” while article 10 allows any alien to communicate with the consulate or diplomatic mission of which he or she is a national. Most of these rights are however subject to limitations.

It can therefore be seen that the provisions of Resolution 40/144, and those of the CMW have much in common despite the fact that the latter is a formal source of international law while the former is only a recommendation. Their common source is the UDHR.¹²⁰⁸ However, the provisions of the Convention on the rights of Migrant workers are more comprehensive.¹²⁰⁹ Thus, article 1(2) of the Convention on the Rights of Migrant Workers shall apply during the entire migration process. The migration process comprises preparation for migration, departure, transit and the entire period of stay and enumerated activity in the State of employment, as well as return to the State of origin or State of habitual residence.¹²¹⁰

Having examined the international instruments adopted specifically for the protection of the human rights of aliens, what follows is a brief examination of the international instruments adopted to regulate the protection of human rights by states within their domestic jurisdictions.

¹²⁰⁸ See Dugard *supra* n 1 297-8.

¹²⁰⁹ While res 40/144 has ten arts, the CMW has 93 arts.

¹²¹⁰ Art 72.

9 Legally binding international instruments regulating the protection of human rights of all individuals

The growth and expansion of human rights law has brought about a radical change in the protection of human rights by states. How a country treats its citizens is no longer a matter of its own exclusive determination but a concern of the international community also.¹²¹¹ State parties are, therefore, obliged to ratify human rights treaties and incorporate them into their domestic law. These treaties constitute the international human rights instruments discussed in this chapter.¹²¹² The most important of these instruments are the UDHR, the ICCPR and the ICESCR.

The UDHR has already been discussed.¹²¹³ The search light will now focus on both the ICCPR and the ICESCR.

9.1 The ICCPR

The ICCPR incorporates and expands on the civil and political rights contained in the UDHR.¹²¹⁴ Where the UDHR, for example, provides for the right not to be arbitrarily detained, the ICCPR adds a right against arbitrary imprisonment,¹²¹⁵ a right not to be imprisoned for debt,¹²¹⁶ a right to be informed of the reason for arrest and detention,¹²¹⁷ a right to counsel¹²¹⁸ and a right to *habeas corpus*.¹²¹⁹

The rights protected under the ICCPR include the rights to life,¹²²⁰ liberty and security,¹²²¹ to equality before the courts,¹²²² to peaceful assembly,¹²²³ to marry and

¹²¹¹ See Lauterpacht *International and Human Rights* (1950) 61, Rehman *supra* n 28 8 & Stenier *et al supra* n 19 144.

¹²¹² See *supra* n 1132.

¹²¹³ See *supra* p 198.

¹²¹⁴ See Stenier *et al supra* n 19 152 & Rehman *supra* 28 64.

¹²¹⁵ Art 14.

¹²¹⁶ Art 11.

¹²¹⁷ Art 9(4).

¹²¹⁸ Art 14(3).

¹²¹⁹ Art 9(4).

¹²²⁰ Art 6 See Harris & Joseph *International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 155-184.

¹²²¹ Art 9 See Jayawickrama *supra* n 149 369 – 424.

¹²²² Art 14 *idem* 816 – 841.

¹²²³ Art 21 See Harris & Joseph *supra* n 1398 459 - 464.

found a family¹²²⁴ and to vote.¹²²⁵ The freedoms articulated therein include those of association,¹²²⁶ thought, conscience and religion¹²²⁷. The covenant explicitly prohibits torture, cruel, inhuman or degrading treatment or punishment,¹²²⁸ slavery, servitude and forced or compulsory labour.¹²²⁹

Concerning the right to life, article 6 of the ICCPR provides that

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Concerning the right to be free from torture, the ICCPR provides that

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

Concerning freedom from discrimination, article 26 of the ICCPR provides that

all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

The due process rights are contained in article 14 of the ICCPR

9.2 *The ICESCR*

The ICESCR was adopted in 1966 and came into force in 1976. It incorporates and expands on the economic, social and cultural rights provided for by the UDHR.¹²³⁰ What the ICCPR does in respect of the civil and political rights,¹²³¹ the ICESCR does in respect of Economic, Social and Cultural rights. It guarantees those rights spelt out in Articles 22- 27 of the Universal Declaration, for example, the right to work,¹²³²

¹²²⁴ Art 23 *Ibid* 491 – 534.

¹²²⁵ Art 25. *Idem* 535 –561.

¹²²⁶ Art 22. *Idem* 465 – 490.

¹²²⁷ Art 18 *Idem* 355 –390.

¹²²⁸ Art 5. See Smith *supra* n 801 219.

¹²²⁹ Art 4 Other important international human rights instruments include (a) CERD 1973; (b) CEDAW 1984; (c) CAT 1989; & (d) CRC.

¹²³⁰ Rehman *supra* n 28 106.

¹²³¹ *Ibid*.

¹²³² Art 6 See generally Steiner, *et al supra* n 19 263 particularly at 275. See also de Burca & Wittle *Social Rights in Europe* 2005; Rameharan *Judicial Protection of Economic, Social and Cultural Rights* (2005) 237.

to just and favourable conditions of work,¹²³³ and rights to medical and social services and social security.¹²³⁴ Article 4 of ICESCR provides that these rights are subject “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”¹²³⁵

9.3 *An analysis of the obligations imposed by ICESCR and ICCPR*

The ICESCR simply requires each “State Party ... to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights in the covenant,”¹²³⁶ whereas, each State party to the ICCPR is obliged to “respect and to ensure to all individuals within its territory, and subject to its jurisdiction the rights recognized in the covenant without discrimination.”¹²³⁷

Further, States’ compliance with the provisions of the ICESCR is monitored solely by reports which the state parties are required to submit to the Economic and Social Council of the UN,¹²³⁸ while parties’ compliance with the ICCPR is monitored not only by country report, but also by procedures allowing other state parties to lodge a complaint.¹²³⁹ There are provisions in the Optional Protocol to the Covenant, which permit individuals to lodge applications alleging violation of their human rights.¹²⁴⁰ There is also a Second Optional Protocol, aimed at the abolition of the death penalty.¹²⁴¹

¹²³³ Art 7 *ibid* 273.

¹²³⁴ Art 9. See Gauri “Social Rights and Economics: Claims to Health Care and Education in Developing Countries” Alston & Robinson (eds) *Human Rights and Development. Towards Mutual Reinforcement* (2005) 65. See also Jayawickrama *supra* n 149 119.

¹²³⁵ See for instance Neir *Social and Economic Rights: A Crique 13/2 Hum.Rts. Brief* (2006). See also Plant: “Social and Economic Rights Revisited” 14 *King’s College L. L.* (2003) 1 13 and White “Social Rights and the Social Contract – Political Theory and the new Welfare Politics” 30 *Brit. J. Pol S.* (2000) 507 509.

¹²³⁶ Art 2(1).

¹²³⁷ Art 2(3). See Norwak *U.N. Covenant on Civil and Political Rights: CCPR Commentary.* (2005) 215.

¹²³⁸ Arts 16 – 25.

¹²³⁹ See art 41 of the ICCPR.

¹²⁴⁰ The Protocol came into operation on 1976-03-23 and by 2002-03-31, there were 101 State parties to it. See Rehman *supra* n 28 89.

¹²⁴¹ The second Optional Protocol prohibits the execution of any person and requires States to take all necessary measures to abolish the death penalty. See Jayawickrama *supra* n 149 56.

Neither the ICCPR nor the ICESCR has made any provision concerning the right to own property. A question, however, arises whether or not these international human rights instruments highlighted here for the protection of nationals also apply to foreigners? While some commentators believe that they do because their provisions, mention “everyone,”¹²⁴² as beneficiaries with rare exceptions, other commentators however think differently.¹²⁴³ They argue that the International Bill of Rights does not protect aliens, because nationality is not listed as a prohibited ground for differentiation.¹²⁴⁴ Concerning the terms of the above mentioned conventions, it seems that in most cases, the rights are granted to everyone, nationals and non-nationals alike.¹²⁴⁵

The existence of the instruments granting rights to aliens alone¹²⁴⁶ casts some doubt on this viewpoint.¹²⁴⁷ It must be noted however that other vulnerable groups such as women and children have been protected through separate conventions. The question is, if these international human rights instruments are applicable to everybody, why then was it necessary to adopt those specific or particular instruments for the protection of foreigners and other vulnerable groups? Why would the UN adopt instruments for the protection of specific groups of people if they were already protected under the general international human rights instruments?¹²⁴⁸ Are the instruments for the protection of foreigners motivated by the same spirit?

The better view however, is that as these international human rights instruments provide for guarantees for “everyone”, foreigners are also included.¹²⁴⁹ The duplication of these rights in separate or specific instruments is simply to emphasize the importance of the rights to the beneficiaries concerned and to remind the

¹²⁴² Lillich *supra* n 1 25. See Tiburcio *supra* n 26 56.

¹²⁴³ Tiburcio *ibid*.

¹²⁴⁴ See McKean *Equality and Discrimination under International Law* (1983) 199.

¹²⁴⁵ This is the general consensus. See Tiburcio *supra* n 26 56.

¹²⁴⁶ Such as res 40/144 & the CMW.

¹²⁴⁷ See Tiburcio *supra* n 26 56.

¹²⁴⁸ As was done with the rights of children, women, racial discrimination, etc. See Tiburcio *supra* n 26 57.

¹²⁴⁹ Tiburcio *idem* 268. See however art 2(3) of the ICECR on the issue of non-nationals and the obligations of developing countries. The art stipulates that “developing countries with due regard to human rights and their national economy may determine to what extent they would guarantee the economic rights recognized in the present covenant to non-nationals.” See also art 25 of the ICCPR which restricts the enjoyment of that right only to citizens.

international community in general that these groups of people are “endangered.” This is the generally accepted UN practice.¹²⁵⁰

The specific rights designated for examination in this chapter, will now be discussed. These are fundamental rights, right to property, and procedural rights.

10 Fundamental rights

10.1 *Right to life and security of the person*

The right to life and security of the human person are dealt with together under article 5(a) of Resolution 40/144, and they will therefore be discussed together.¹²⁵¹

The right to life appears in virtually every international human rights instrument because of its fundamental importance. This right is said to be “the supreme right of the human being”.¹²⁵² It is the right from which all other rights flow, and is therefore basic to all human rights. It is one of the rights which constitute “the irreducible core of human rights”¹²⁵³ The right to life is, therefore, non-derogable even in times of public emergency which threaten the life of any nation.¹²⁵⁴

The interpretation of the term “life” has given rise to some difficulties.¹²⁵⁵ The problem common to all instruments containing a right to life is its abstract character.¹²⁵⁶ The argument is whether the term should be given a wide¹²⁵⁷ or a

¹²⁵⁰ According to Harris *supra* n 385 204 “The proliferation of international instruments protecting specific human rights can be seen as an indication of the growing awareness that the broad instruments protecting a wide variety of rights may not be sufficient to protect some rights which do not easily fit within that scheme. Many treaties enable states and others, to focus on the need to protect a specific right or rights. This proliferation, is also an example of the constant evolution of the international society as its members begin to understand about those who are oppressed within the society and who require the protection of human rights instruments.”

¹²⁵¹ This is similar to art 9 of the CMW.

¹²⁵² See the case of *Camargo v Colombia* Human Rights Committee, Communications No 45/1979 HRC (1982) Report Annex XI.

¹²⁵³ Per Weeramantry J, *Legality of the threat or Use of Nuclear Weapons* case *supra* n 834 506.

¹²⁵⁴ This is confirmed by the provisions of the Second Optional Protocol to the ICCPR which is aimed at abolishing the death penalty. See the Annex to GA Res 44/128. Reprinted in 29 ILM (1990) 1464.

¹²⁵⁵ See Robertson (ed) *Human Rights for South Africans* (1991) 31.

¹²⁵⁶ *Ibid.*

¹²⁵⁷ E.g. to include the right to the dignity and security of the human person.

restricted meaning.¹²⁵⁸ Some have argued that the term “life” should be construed in a strict sense, and that the right to life should concern only two issues: the termination and preservation of life.¹²⁵⁹ It would therefore be more realistic to speak of the right not to be deprived of one’s life, and the corresponding duties on the State to take all reasonable steps to prevent untimely death. Emphasis might ultimately depend on a very narrow interpretation of the term that all what the state owes to the individual is merely the duty not to take his or her life arbitrarily.

This narrow biological view was, however, criticised and rejected as far back as 1877 by the US Supreme Court in the case of *Munn v Illinois*.¹²⁶⁰

By the term ‘life’ as here used (14th Amendment) something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The prohibition equally prohibits the mutilation of the body by the amputation of an arm or leg or the pulling out of the eye or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation of not only life but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question....

This decision conforms squarely with the views of those who argue that the right to life should be construed more liberally to include all those attributes that make life wholesome and worth living.¹²⁶¹ On a wider interpretation, therefore, the right to life might mean that the State should abolish the death penalty, and on the widest interpretation possible, the right to life might mean that the State should take steps to reduce the incidence of death by preventable causes.¹²⁶²

¹²⁵⁸ See Robertson *supra* n 1195 31. It is however submitted that the term “life” has material, spiritual, psychological and other dimensions.

¹²⁵⁹ Robertson *ibid*.

¹²⁶⁰ *Munn v Illinois* 94 US 113 1877 142 per Field J. (dissenting opinion).

¹²⁶¹ Those who agitate for a liberal interpretation of the right to life argue that man has an inherent right to life. This inherent right to life is intended to emphasize the supreme character of this right—a right which is not conferred on the individual by society or by the State, but which inheres by reason of one’s humanity. It follows therefore that one’s right to life cannot be taken away by the State or waived, surrendered or renounced by him, since a human being cannot be divested, nor can he divest himself of his human nature. See Robertson *supra* n 1195 32.

Judicial decisions in recent times have even given the term “life” a relatively broader interpretation.¹²⁶³ It includes (a) *Right to dignity*, because the right to life is more than mere existence. In international and comparative law, the right to life incorporates the right not to be subjected to torture, not to be held in slavery, and not to be arbitrarily arrested. In relation to aliens, this right is mostly violated in immigration and extradition cases.¹²⁶⁴ That is why article 7 of resolution 40/144 provides that aliens should not be expelled without due process of law. This liberal interpretation implies that it is a right to be treated as a human being with dignity because, without dignity, human life is substantially diminished.¹²⁶⁵

(b) *Right to Livelihood*. The right to life also includes the right to livelihood. This right should therefore be protected by law. There is no gainsaying that human life has some relationship with the material needs of a human being. Few will dispute that a person in abject condition, deprived of adequate means of subsistence or denied the opportunity to work, suffers profound affront to his or her sense of dignity and intrinsic worth.

The question however, is to what extent will states go in protecting the right to life of foreigners against unwarranted actions by public or private persons in their territories, and to what extent will international law go to enforce this right?¹²⁶⁶ The answer is that states are internationally obliged to protect the right to life of

¹²⁶² By improving its health and welfare services, prohibiting or limiting the sale of alcohol, cigarettes, firearms, and by educating its citizens against the spread of HIV/ Aids and other fatal diseases. Robertson *idem* 34.

¹²⁶³ See the *dictum* of O'Regan J in *The State v Makwanyane* 1995 1 LRC 269 where she said *inter alia* “..It is not life as a mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of the broader community, to share in the experience of humanity.”

¹²⁶⁴ Often by extraditing people to States where they are exposed to real risk of being deprived of their right to life, their right to life is threatened. See e.g *Mohammed v The President of the R SA* 2001 (7) BCLR 685 (CC) & *Soering v UK*. July 7, 1989, RUDH 99 (1989). See Jayawickrama *supra* n 149 265. Besides, conditions at extradition centers in many countries are very poor and can lead to premature death. See Klaaren “SAHRC Report on the treatment of persons arrested or detained under the Alien Contron Act.”(1999) 15 *SAJHR* 131 where it is stated *inter alia* that “Common complaints about detention conditions ...include lack of adequate nutrition, inadequate medical care and...being subjected to degrading treatment or intimidation.” See *infra* p 400.

¹²⁶⁵ See the case of *The State v Makwanyane supra* n 1203 269. where O'Regan J. of the Constitutional Court of South Africa also said that the right to life is in one sense, antecedent to all other rights. “Without life in the sense of existence it would not be possible to exercise rights, or be bearers of them.” A similar view was expressed in the Constitutional Court of Hungary. (Case No. 23/1990, A.B.) See Jayawickrama *supra* n 149 258.

¹²⁶⁶ See UN doc A/2929 ch VI s 4.

foreigners.¹²⁶⁷ Even if a state is not a member of the UN or a signatory to any international human rights convention, such a state is still bound to respect the right to life under customary international law.¹²⁶⁸ This should be done by enacting appropriate laws to criminalize the intentional taking of life generally, and by ensuring that such laws are enforced. Therefore, when a case of arbitral taking of life is brought against a state at the international level, such a state should be severely sanctioned.¹²⁶⁹

Needless to say, the right to life generally, and those of foreigners in particular, is often threatened when such an individual is under arrest, or is held in custody and the authorities fail to take appropriate measures to protect the life of such a person.¹²⁷⁰ The right to life of a foreigner may also be threatened during migration, extradition or deportation processes.¹²⁷¹

With regard to detention in the migration context, the court in *Anuur v France*¹²⁷² held that the power of the State to control the entry of foreigners can be limited by international law.¹²⁷³ In that case, an individual was held in detention in an international area of the airport in France soon after his arrival. The Court decided that the mere existence of this area did not violate the provisions of article 5 of the European Convention.¹²⁷⁴ Nevertheless, the court considered that France was in breach of article 5, because the detention was prolonged, there was no possibility of submitting this detention to judicial review, and because no possibility of judicial or social assistance was given to the alien in accordance with the rules then in force.¹²⁷⁵

In the case of *Scott v Spain*,¹²⁷⁶ the court examined the issue of the length of the period of detention in a situation involving both an extradition request and a rape

¹²⁶⁷ See O'Regan in *Makwanyane supra* n 1203.

¹²⁶⁸ The violation of the right to life is a breach of *jus cogens*, which operates at customary international law.

¹²⁶⁹ See Jayawickrama *supra* n 149 160

¹²⁷⁰ *Idem* 263.

¹²⁷¹ See *supra* n 1266.

¹²⁷² Decision of 1996-06-25 (1996) RUDH 144. See also (1997) RUDH 9

¹²⁷³ *Ibid.*

¹²⁷⁴ Art 5 of the ECHR deals with the right to the liberty and security of the person.

¹²⁷⁵ At 150.

charge. In that case, Mr. Scott was kept in detention for more than four years. The court held that the detention followed domestic requirements, and in view of the new evidence obtained in the rape case, was not arbitrary.¹²⁷⁷ However, despite the fact that the right of States to control immigration has been widely recognised, the European Court has held that where the right to personal integrity of an individual was violated during immigration process, the defendant State would be held liable.¹²⁷⁸

The length of time a person may be detained before he or she is deported during extradition proceedings has been adjudicated upon several times by the European Court of Human Rights.¹²⁷⁹ In the case of *Quinn v France*,¹²⁸⁰ for instance, the Court determined that the length of the provisional detention must be reasonable.¹²⁸¹ That notwithstanding, this rule does not apply to extradition proceedings if they are conducted with diligence.¹²⁸² Likewise, in the case of *Kolompar v Belgium*,¹²⁸³ the Court decided that the detention in an extradition case, which lasted two years and eight months did not violate article 5 of the European Convention as duration of the proceedings was affected by the many appeals filed by the alien himself.

If a state takes a decision to extradite a person within its jurisdiction and the necessary and foreseeable consequence is that that person's right to life is in jeopardy in another jurisdiction, then that state will be in violation of its obligation to protect the right to life, if it extradites the person.¹²⁸⁴ Thus in *Soering v UK*,¹²⁸⁵ the court decided that a state party was in violation of article 3 of the Convention when it decided to extradite an individual to a state where personal security could not be guaranteed. The same argument was used in the case of expulsion¹²⁸⁶ and in a

¹²⁷⁶ LXVIII *British Yearbook of International Law* (1997) 429.

¹²⁷⁷ *Ibid*

¹²⁷⁸ See *Soering v UK supra* n 1202 99.

¹²⁷⁹ See eg *Quinn v France supra* n 1220 *infra* & *Kolompar v Belgium infra* n 1223.

¹²⁸⁰ Lassirat-Coustere, *La Jurisprudence de la Cour Europeenne des Droit de L'Homme en 1995*, XLI *Annuaire Francais De Droit International* 491 (1995).

¹²⁸¹ In accordance with art 5 of the AU Convention. See *Tiburcio supra* n 26 83.

¹²⁸² *Supra* n 1220 491.

¹²⁸³ Decided 1992- 09- 24.

¹²⁸⁴ See art 5 of CAT. See also the case of *Mohammed v The President of the R SA supra* n 1204 .

¹²⁸⁵ *Ibid*.

¹²⁸⁶ *Cruz Varas case* March 20 (1991) RUDH 209 (1991).

denial of entry – “refoulement”¹²⁸⁷ case, because the State would be exposing the individual to torture, or inhuman and degrading treatment or punishment in the state of destination. In the South African case of *Mohammed v President of the Republic of SA*, the same decision was reached.¹²⁸⁸

From the above cases and decisions, it can be concluded that international law is guided by the principles of reasonableness and national security in the protection of the rights of aliens. If the action taken by a state is reasonable in the circumstances of the case, international law will support it. Otherwise the action will be condemned.¹²⁸⁹ The right to freedom from torture is discussed next.

10.2 Freedom from torture, cruel, inhuman and degrading treatment or punishment

Article 6 of resolution 40/144 forbids aliens to be subjected to torture, or cruel, inhuman or degrading treatment or punishment.¹²⁹⁰ The word “torture” is used to describe any treatment which is aimed at eliciting information or confession.¹²⁹¹ Torture also includes non-physical treatment such as anguish or stress produced by mental suffering¹²⁹² *The Oxford English Dictionary* defines “cruel” as “causing or inflicting pain without pity”, “inhuman” as “destitute of natural kindness or pity, brutal, unfeeling, savage, barbarous”, and “degrading” as “lowering in character or quality, moral or intellectual debasement.”¹²⁹³

The UN Convention against Torture or Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as

Any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a

¹²⁸⁷ *Vilvarajah* case October 30 1991. RUDH 537 (1991).

¹²⁸⁸ *Mohammed v The President of the RSA supra* n 1204. See also the cases of (1) *Chohal v UK* (Decision of (1996) 11 15; *D v UK* (1997) 2; *HLR v France* (Decision of the European Court (1997) 10 30. *Journal De International* 226-7 (1998); 3 *Paez v Sweden* Decision of the European Court of October 30 1977 *Journal de Droit International* (1998) 226-7; *Case R.B. v France*, decided on 1998-09-7 *Journal De Droit International* 217-218 (1999).

¹²⁸⁹ The situation in Nigeria and the Republic of South Africa will be discussed in chs 5 & 6 *infra*.

¹²⁹⁰ This is similar to art 10 of the CMW.

¹²⁹¹ See the *Oxford English Dictionary* (1996) 186.

¹²⁹² See *Robertson supra* n 1195 41.

third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity. It does not include pain or suffering arising from, inherent in, or incidental to, lawful sanctions.¹²⁹⁴

Although “cruel, inhuman, or degrading treatment or punishment” is not defined in human rights instruments, different bodies have laid down the various components of this prohibition.¹²⁹⁵ What constitutes this prohibition is, therefore, subjective.¹²⁹⁶ When all is said and done, however, cruel and degrading punishment is not a static notion. It reflects the evolving standards of decency that mark the progress of a maturing society.¹²⁹⁷

Cruel and degrading treatment therefore amounts to acts designed to lower the victim in the eyes of other people or that of the victim him or herself. This humiliation or debasement of the victim must, however, be far beyond the usual element of humiliation experienced in the ordinary operation of the criminal justice system.¹²⁹⁸ A great majority of countries grant to everyone in their legislations the right not to be tortured, and not to be subjected to cruel, inhuman or degrading treatment or punishment.¹²⁹⁹

¹²⁹³ At 160.

¹²⁹⁴ Art. 1(1) of CAT.

¹²⁹⁵ See Chenwi *Towards the Abolition of the Death Penalty: A Human Rights Perspective* (2007) 97.

¹²⁹⁶ *Ibid.*

¹²⁹⁷ See Schabas “International legal aspects” in Hodgkinson & Rutherford (eds.) *Capital Punishment: Global Issues and prospects* (1996) 21. See also Chenwi *supra* n 1235 98.

¹²⁹⁸ Robertson *supra* n 1195 41. In the interpretation of the Eighth Amendment to the US Constitution which prohibits the infliction of “cruel and unusual punishment”, the US Supreme Court has recognized that the meaning of this prohibition is highly elastic, and that its meaning will be determined by “evolving standards of decency that mark the progress of a maturing society.”

¹²⁹⁹ France for instance, introduced an amendment to the Aliens Act and maintained in its 1998 law the rule that, an alien, seriously ill should not be deported or expelled, unless very grave reasons of national security demanded otherwise. Additionally, whenever an alien is expelled or deported to a certain country, generally to his or her country of origin, and if in his or her country his or her life, physical freedom or integrity is threatened, the expulsion or deportation cannot take place. Additionally, French courts applied this guarantee, established in art 3 of the European Convention, even before the above mentioned change in domestic legislation. See Tiburcio *supra* n 26 87.

A plethora of international human rights instruments already referred to prohibit torture or cruel, inhuman or degrading treatment or punishment.¹³⁰⁰ In relation to the human rights of foreigners, the rule against torture, cruel, and inhuman treatment or punishment also becomes very relevant in migration, extradition and deportation cases or proceedings.¹³⁰¹ Cases abound of arbitrary administrative decisions to torture or imprison aliens before deportation.¹³⁰² Even if such imprisonments are considered to be in accordance with the basic principles of law, should the individual remain in prison custody indefinitely without the case being submitted to the judiciary for determination? ¹³⁰³

As demonstrated above, in many immigration cases, detention may last longer than it should be or may be ordered arbitrarily. Such detentions constitute inhuman and degrading treatment, and are therefore contrary to international law. International law sets forth that detention has to be authorised by local legislation and should not last longer than is reasonable.¹³⁰⁴

Regarding the time limit for detention, international law also determines that there should be a duration.¹³⁰⁵ It does not, however, establish the precise time limit. Therefore, the criteria set by international law may give rise to some difficulties with reference to their applicability. In *Mezei's*, case¹³⁰⁶ for instance, Mezei was kept in Ellis Island for two years by the orders of the Attorney General but the detention was upheld by the US Supreme Court.

¹³⁰⁰ See for instance art 1 of CAT; art 5 of the UDHR; & art 7 of the ICCPR. See also the Human Rights Committee General Comment on art 7 of the ICCPR & the Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman and Degrading Treatment or Punishment adopted by the UN G A Res 3452 (XXX) of 1975 -12- 9.

¹³⁰¹ Tiburcio *supra* n 26 88.

¹³⁰² *Ibid.*

¹³⁰³ In accordance with the 1998 amendment, France permits only 12 days of imprisonment, the UK has established no time limit to such detention whereas Germany sets a time limit of 6 months extendable to 12 months. Belgium, Austria, Sweden, and Luxemburg determine a period of 2 to 6 months, while Spain, Norway, and the Netherlands have a limit of 15 to 40 days. See Tiburcio *supra* n 26 90. Nigeria and South Africa have no time limit for such detentions. In case of South Africa, see See Klaaren "SAHRC Report on the treatment of persons arrested or detained under the Alien Contron Act."(1999) 15 *SAJHR supra* n 1204 131. On the Nigerian situation, see Chenwi *supra* n 1235 168.

¹³⁰⁴ See art 14(1) of the ICCPR.

¹³⁰⁵ Art 14(2) of the ICCPR.

¹³⁰⁶ *Mezei case Shanglemessy v US 345 US 206.*

That decision did not however, escape scrutiny. According to the dissenting opinion of Justice Jackson

no free man should be imprisoned, disposed, outlawed, or exiled, save by the judgement of his peers, or by the law of the land

That notwithstanding, in many instances, aliens are kept in prison for various reasons which are difficult to explain. Some countries keep aliens in transit camps for months on end.¹³⁰⁷ However, in Australia, the High Court in *Lim's case*¹³⁰⁸ decided that the section of the Immigration Act which confers upon the executive the power to detain an alien in custody for the purposes of expulsion or deportation has to be interpreted as having limits imposed by what is reasonable.¹³⁰⁹

In a case involving the deportation of an individual suffering from a serious disease, the Administrative Court of France decided that the EU Convention prohibited such deportation, if the treatment can not be continued in the country of destination.¹³¹⁰ However, in Canada, an alien convicted of a serious crime was ordered to be deported by the authorities in accordance with the Aliens Act, which determines that an alien may be deported if he or she is sentenced to a term of imprisonment for more than 5 years.¹³¹¹

The convict appealed to the Supreme Court of Canada alleging that his expulsion would amount to cruel and unusual punishment or treatment prohibited by the Canadian Charter because he was a permanent resident of the country.¹³¹² The Court, however, replied that as an alien has no right to reside in the country of residence, the country can establish the conditions and requirements leading to his or her deportation or expulsion.¹³¹³

¹³⁰⁷ See n 1204 & 1243 *supra*.

¹³⁰⁸ 15 *Australian Yearbook of International Law* (1994) 549.

¹³⁰⁹ In that case, the judge indicated that the 273 days time limit was an appropriate time to ensure that the power of detention was adequately limited *ibid*.

¹³¹⁰ The Administrative Tribunal of Versailles, decision of 1996-09-26. 87 *Revue Critique In Droit International Prve* 688 (1998). See also the case of *B B v France* decided on 1998- 09- 07.

¹³¹¹ See the case of *Minister for Employment and Immigration v Chiarelli* 1992-03-26. File no 21/920

¹³¹² *Ibid*.

¹³¹³ See Tiburcio *supra* n 26 88.

In *Canada (Minister of Justice) v Burns and Another*,¹³¹⁴ the Canadian Supreme Court had occasion to reconsider its position with regard to the extradition of fugitives to a country where they would face the death penalty. In that case, the respondents, whose extradition was sought, were wanted for murder in Washington State where, if found guilty, they faced either life imprisonment without parole or the death penalty.

After evaluating the respondents' particular circumstances, the Minister of Justice of Canada ordered their extradition without seeking or obtaining assurances from the US as required under article 6 of the Extradition Treaty between the two countries.¹³¹⁵ The respondents appealed against the Minister's decision to extradite them and the Court of Appeal set aside the extradition order on the grounds that it was unconstitutional. On further appeal to the Supreme Court, the decision of the Court of Appeal was affirmed.¹³¹⁶

10.3 Right not to be discriminated against¹³¹⁷

Article 5 (c) of resolution 40/144 guarantees the right of aliens to be equal before the courts, tribunals, and other organs of administration of justice in the receiving state. This means that they should not be discriminated against as far as their access to the law and to the courts of law are concerned.

Discrimination means any discernment or distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying, or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.¹³¹⁸

¹³¹⁴ (2001) SCC 7; (2001)5 LRC 19.

¹³¹⁵ I.e that the death penalty will not be imposed and if imposed, will not be carried out.

¹³¹⁶ The Supreme Court, after weighing the factors in favour and against the extradition without assurances, held unanimously that the unconditional extradition of the respondents to a country where the death penalty is not abolished without assurance that the death penalty would not be imposed, violated s 7 of the Canadian Charter. (pars 130 &132) The situation in Nigeria and the Republic of South Africa will be discussed in chs 5 & 6 *infra*.

¹³¹⁷ See art 7 of the CMW.

¹³¹⁸ See art 1(1) of CERD.

The issue of discrimination is an issue that has concerned the international community for decades. Many non-discrimination instruments have therefore been adopted by the UN to curb this menace. These include the Convention Against Racial Discrimination,¹³¹⁹ the Convention on Discrimination against Women,¹³²⁰ and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.¹³²¹ Several other international instruments contain express provisions prohibiting discrimination. They include (a) The Convention Relating to the Status of Refugees¹³²² (b) The Convention Relating to the Status of Stateless Persons of 1954¹³²³ and (c) The ILO Convention relating to Discrimination on Professions of 1958¹³²⁴ *et cetera*.

Article 2 of the UDHR goes further to provide that everybody is entitled to all the rights and freedoms enumerated therein without discrimination. Therefore, the race, colour, gender, etcetera of a person should not determine whether he or she should enjoy legal rights in the country in which he or she lives, because all are equal before the law.

A significant purpose of these various provisions on equality or non discrimination is to instruct governments to adopt measures for the promotion of equality. This is because, the world community views discrimination as morally wrong, as fundamentally unjust, and an evil which ought to be eradicated.¹³²⁵ The European Court of Human Rights, for instance, in the *Belgium Linguistics* case,¹³²⁶ held that the rights and freedoms protected by the European Convention are to be secured without discrimination. The court held further that “equality of treatment is violated if the distinction has no objective and reasonable justification”¹³²⁷ since discrimination is the negative side of equality of treatment.

¹³¹⁹ CERD.

¹³²⁰ CEDAW.

¹³²¹ Adopted in 1981. GA Res 36/55, 36 UN GOAR Upp. (No.4) at 171 UN Doc. A/36/51. See Robertson *supra* n 1195 26.

¹³²² Art 3.

¹³²³ *Ibid*.

¹³²⁴ Art 1 par 1.

¹³²⁵ Robertson *supra* n 1195 26.

¹³²⁶ *Belgian Linguistic Case* 5 Eur Ct H R (ser A) (1968). See also Bayefsky *The Principles of Equality or Non-Discrimination in International Law*. 11 *HUM. RTS. L. J.* 1-34 (1990).

The rule against discrimination is part of the general principles of international law. Consequently, many states have expressed in their constitutions the right to equality before the law and/or prohibition against discrimination. In the US, for instance, the rule is contained in the Fourteenth Amendment – the equal protection clause. The US Supreme Court has also decided the exact meaning of equality before the law on several occasions.¹³²⁸

With regard to aliens, the US Supreme Court has not established that equal protection prohibits discrimination against aliens as such, because it may be legitimate to treat aliens and nationals differently under certain circumstances.¹³²⁹ Nevertheless, it should be said that any legislation treating nationals and foreigners differently should be carefully analysed to determine whether it constitutes invalid discrimination.¹³³⁰

In France, the French Constitution states, *inter alia*, that “the law must be the same for all whether it punishes or protects.” But, in the *Social Measures* case¹³³¹ the *Conseil Constitutionnel* decided that legislation may establish specific distinctions, with regard to foreigners and that only when the *Conseil* believes that the difference in treatment is the result of arbitrary legislation, will it be deemed to violate the rule against equality.¹³³²

Brazilian legislation grants equality before the law both to nationals and resident aliens alike.¹³³³ The situation in Nigeria and South Africa will be discussed in

¹³²⁷ *Belgian Linguistic Case supra* n 1266 par 10.

¹³²⁸ See the cases of *Hurtado v California* 110 US 516 (1884); *Maxwell v Dow* 178 US 581 (1900); *Twining v New Jersey* 211 US 78 (1908); *Powell v Alabama* 287 US 45 (1932); and *Palko v Connecticut* 302 US 319 (1937).

¹³²⁹ Such as in the area of political rights. See *Tiburcio supra* n 26 98.

¹³³⁰ Because of this, s 722 of the Revised *Restatement* deals specifically with the topic of aliens in the following terms:

- 1) *An alien in the United States is entitled to all the guarantees of the Constitution of the United States other than those expressly reserved to citizens*
- 2) *Under Sub-section (1), an alien in the United States may not be denied the equal protection of the laws, but equal protection does not preclude reasonable distinction between aliens and citizens, or between different categories of aliens.*

¹³³¹ Decided on 1990-01-12.

¹³³² See *Soltész Implications of the Conseil Constitutionnel's Immigration and Asylum Decisions of August 1993* 18 B C INT'L & COMP.L.REV. 271(1995) 283-4. Another decision of the *Conseil Constitutionnel* of (1990) 01 9 states that simply being a foreigner places a person in a different legal situation and thus warrants different treatment under the law. See *Soltész* 289.

¹³³³ Art 5 of the 1988 Constitution.

subsequent chapters of this thesis, but suffice it to say that both Nigerian and South African Constitutions grant equality of treatment to all.¹³³⁴ Nevertheless, despite the fact that the right not to be discriminated against is clearly entrenched in international law, many countries still grant this right only to their nationals through national legislations.¹³³⁵ There are however certain states that prohibit discrimination against nationals and foreigners alike in their laws.¹³³⁶

11 Right to own property

Property rights are granted to foreigners under article 5(2) of resolution 40/144 and article 15 of the CMW.¹³³⁷ The right to own property comprises the right to own fixed and movable assets, and the right to inherit and dispose of such property. As already indicated, the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, discusses the concept of property as comprising all movable and immovable assets, whether tangible or intangible, including industrial, literary and artistic property, as well as rights and interests in such property.¹³³⁸

The Harvard Draft interpretation conforms to the practice of some states and judicial decisions.¹³³⁹ Thus, in the national jurisprudence of several states, the term “property” has been given a wide and liberal construction to include not only concrete rights to property, but also abstract rights,¹³⁴⁰ such as the right to manage a company,¹³⁴¹ choses-in-action,¹³⁴² money,¹³⁴³ contract,¹³⁴⁴ and even judgement

¹³³⁴ See s 42 of the Nigerian Constitution & s 9 of the SA Constitution. See chs 5 & 6 *infra*.

¹³³⁵ E.g Belgium, Austria, China. See Tiburcio, *supra* n 26 100.

¹³³⁶ E.g Brazil, Germany, Liberia. etc. See Tiburcio *ibid*

¹³³⁷ See also art 15 of the CMW.

¹³³⁸ 55 *AJIL* 1961 548 art 10(7).

¹³³⁹ *Ibid*.

¹³⁴⁰ See s 25(4)(b) of the South African Constitution.

¹³⁴¹ See the case of *Attorney General v Lawrence* Court of Appeal of St. Christopher & Nevis (1983) 31 WR 176 [1985] LRC (Const) 921.

¹³⁴² Such as a debt of a banker to a customer. See the case of *Attorney-General v Jobe* Privy Council on appeal from The Gambia [1985] LRC (Const) 556.

¹³⁴³ *Lilleyman v Inland Revenue Commissioners* Supreme Court of British Guyana (1964) 13 WLR 224. See also *State of Bihar v Kameshwar Singh* Supreme Court of India [1952] SCR 889.

¹³⁴⁴ *Shar v Attorney-General (No 2)* High Court of Uganda [1970] EA 523.

debt.¹³⁴⁵ In the *Liamco* case¹³⁴⁶ for instance, the arbitration specifically mentioned concession rights as forming part of incorporeal property.¹³⁴⁷

Resolution 40/144 not only mentions the right of aliens to own property, but also guarantees the right of protection against any deprivation. Article 9, therefore, provides that “No alien shall be arbitrarily deprived of his or her lawfully acquired assets.” Deprivation within this context means divesting, keeping out of enjoyment, or causing loss of the right.¹³⁴⁸ The concept of “deprivation” not only covers formal expropriation, but also *de facto* expropriation.¹³⁴⁹

Under international and comparative law, the right to hold property is not granted without limitations.¹³⁵⁰ Therefore, an alien can be excluded from acquiring property if public interest so requires.¹³⁵¹ But, once acquired, and if allowed by local law, the property cannot be expropriated without compensation.¹³⁵² In general, however, the great majority of restrictions imposed on aliens lie in the area of real property. It has been said that allowing an alien to own part of the soil of a foreign country has some bearing on the concept of sovereignty and national security.¹³⁵³

National laws in respect of ownership of landed property by aliens differ, but in general, the difference lies in the degree of limitations imposed on aliens.¹³⁵⁴ As a rule, making a will and transmitting property are not denied to aliens, but if the heir is also an alien, restrictions are often imposed on alien property.¹³⁵⁵ In Peru, for instance, aliens cannot acquire or hold lands, waters, mines, or minerals within a fifty

¹³⁴⁵ *Ibid.*

¹³⁴⁶ *Supra* n 179.

¹³⁴⁷ At 145.

¹³⁴⁸ Eg by taking away, by destruction, or extinction of property rights i.e by expropriation or nationalisation.

¹³⁴⁹ I.e a measure which can be assimilated to a deprivation of property. See Sen *supra* n 52 382.

¹³⁵⁰ Tiburcio *supra* n 26 114.

¹³⁵¹ *Ibid* This is a general rule of both National and International Law.

¹³⁵² As far as aliens are concerned, the question is whether such deprivation is against the International Law rule which prohibits discrimination, or whether such deprivation is within the exceptions admitted under International Law i.e national security, national interests and public order?

¹³⁵³ As Borchard *supra* n 1 86 puts it “fear that control of national territory by foreigners opened too great a danger of foreign influence, domination and conflict.”

¹³⁵⁴ See Tiburcio *supra* n 26 106.

¹³⁵⁵ See Tiburcio *idem* 137.

kilometre zone along the frontiers.¹³⁵⁶ Aliens cannot hold or acquire rural property in the border provinces or in the immediate vicinity of military installations.¹³⁵⁷ Foreign investment in assets is permitted subject to prior authorisation, and such investments should be registered with the appropriate authorities.¹³⁵⁸

In this regard, reference can be made to the national legislation of states. In Argentina, for example, foreigners can buy, sell and own real property,¹³⁵⁹ In Brazil however, article 5 of the Brazilian Constitution of 1988 guarantees to Brazilians and foreigners alike, the right to property.¹³⁶⁰ Under that provision, everyone is equal before the law, without any distinction whatsoever. In Greece, according to article 4 of the Greek Civil Code, aliens are also granted the same rights as nationals in respect to the acquisition of real property. However, internal legislation forbids individual aliens or legal entities from the acquisition or lease of real property in rural areas.¹³⁶¹

Zimbabwe is another notable example. Although foreigners were allowed to own landed property, following the nationalization policies of the Zimbabwean Administration, the expropriation and confiscation of the property of aliens without the payment of compensation has given rise to a serious internal and international political, legal and socio-economic crisis in the country.¹³⁶²

¹³⁵⁶ *Ibid.*

¹³⁵⁷ *Ibid.*

¹³⁵⁸ *Idem* 138.

¹³⁵⁹ Art 20 of the Argentinean Constitution 1853.

¹³⁶⁰ Tiburcio *supra* n 26 110.

¹³⁶¹ Law no 3250 of 1924 EL 1366 of 1938. See Tiburcio *supra* n 26 141. Other countries establish in their legislations that distinction may be created by further legislation in general terms. They include Denmark which in its Constitution of 1953 states; "article 44(2) The extent of the right of aliens to become owners of real property shall be laid down by statute." In Canada the Civil Code of 1866 art 25 grants aliens the same rights to property as are granted to British subjects. In Mexico, as regards land ownership in general, the 1917 Constitution restricts acquisition of land by foreigners and in the USA several restrictions on land ownership are imposed. See Tiburcio *supra* n 26 142- 3. In South Africa, the situation is governed by s 25(6) & (9) of the Constitution which empowers Parliament to enact legislation with regards to property rights of those deprived.

¹³⁶² Mugabe has accused Britain and America of imposing sanctions on Zimbabwe and trying to bring down his government because of this Nationalisation Policy. Towards that end, the Constitution of Zimbabwe has been amended in art. 16 to include art 16A which defines property in relation to land to mean improvements on land and not bare land, to justify the massive land seizures orchestrated in that country of foreign commercial farms without compensation A lot of litigation have also arisen because of this policy. See for instance the case of *Von Abo v The Government of the RSA supra* n 801. See also the case of *Campbell (Pvt) Ltd v The Republic of Zimbabwe SADC (T) Case No 2/2007*. The situation in Nigeria and the Republic of South Africa will be discussed in chps 5 & 6 *infra*.

It may therefore be concluded from this analysis that all civil rights of aliens do not have the same level of protection as those of nationals under national law. Although fundamental rights are often recognised and respected, the right to property has received a lower degree of protection and enforcement.¹³⁶³ As already said, perhaps, the rationale lies in the fear of undermining the very concept of sovereignty or national security. Nevertheless, if granted, such rights are often subject to several restrictions.¹³⁶⁴ Otherwise, in many countries, the right of aliens to own private property may be completely denied or restricted, or granted upon very strict conditions or requirements.¹³⁶⁵

12 Procedural rights

Procedural rights are rights which guarantee the enforcement of substantive rights.¹³⁶⁶ They present the mode or procedure for enforcing a legal or substantive right, as distinguished from a corollary or adjectival right.¹³⁶⁷ These procedural rules are of fundamental importance, as they guarantee compliance with all other rights, including rights considered non-derogable and fundamental. In practice, their importance is so great that some legal commentators consider them non-derogable.¹³⁶⁸ The right to due process of law is the right discussed within this category.

The due process right discussed here is the right to a fair hearing or fair trial. The two aspects of the right to fair hearing discussed are (a) The right to presumption of innocence; and (b) the right to be tried within a reasonable time. These rights are analysed in general terms particularly within the context of article 7 of resolution 40/144, which provides that an alien who is lawfully in any foreign country shall not be expelled without due process of law. Thus, in expulsion, extradition or even immigration cases, international law demands that aliens should be entitled to some

¹³⁶³ Tiburcio *supra* n 26 144.

¹³⁶⁴ *Ibid*

¹³⁶⁵ *Ibid*. See ch 1 19 - 21 for cases and materials from other jurisdictions.

¹³⁶⁶ Tiburcio *supra* n 26 245.

¹³⁶⁷ *Ibid*.

¹³⁶⁸ See Oraa *Human Rights in States of Emergency in International Law* 115 (1996) and Meron *Human Rights Law-Making in the United Nations* 186 (1986).

procedural rights, and should not be expelled without due process of law. But, in most cases, the main issue or problem for foreign nationals to contend with regarding this right, is the ouster clauses often contained in national legislations preventing them from access to a fair trial.¹³⁶⁹

12.1 *Right to due process of law*

The right to due process of law is difficult to define in objective terms. It means that a person should be given an opportunity to a fair judgement with all the guarantees deemed necessary to be able to present one's defence. In its broadest meaning therefore, the right to due process of law embraces many procedural rights.¹³⁷⁰

Article 7 of Resolution 40/144 guarantees due process of law to any alien who is lawfully in any country from which he or she is to be expelled.¹³⁷¹ Thus, except where compelling reasons of national security require otherwise, an alien should be allowed to submit reasons against his or her expulsion and to have his or her case reviewed by the appropriate authorities. Unfortunately, however, in situations having to do with expulsion, deportation, or entry of aliens, this rule is not always taken into consideration.¹³⁷²

Generally, aliens whose residence in a country is stable and lawful are entitled, like nationals, to lead a normal family life.¹³⁷³ Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in a prescribed manner and only on prescribed grounds.¹³⁷⁴ Since such restrictions must, *inter alia*, be consistent with other recognized rights,¹³⁷⁵ a

¹³⁶⁹ See the case of *Von Abo supra* n 801.

¹³⁷⁰ Eg the right to be informed promptly and in detail of the charges, the right to be present at one's trial, the right of presumption of innocence, the right of appeal, the right to be tried within a reasonable time, etc.

¹³⁷¹ See also art 13 of ICCPR and the case of *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (African Commission on Human and People's Rights Comm No 71/92 (1996).

¹³⁷² *Tiburcio supra* n 26 255.

¹³⁷³ See *Jayawickrama supra* n 149 469.

¹³⁷⁴ See art 8 of the MWC.

¹³⁷⁵ *Ibid.*

state cannot by restraining an alien or deporting him to a third country arbitrarily prevent his return to his own country.¹³⁷⁶

An alien is therefore free at any time to communicate with the consulate or diplomatic mission of the state of which he or she is a national or with the consulate or diplomatic mission of any other state entrusted with the protection of the interests of the state of which he or she is a national whenever he or she feels that his or her rights are threatened or are being violated in the receiving State.¹³⁷⁷

The right not to be expelled without due process of law is, however, enjoyed only by those aliens who are lawfully in the territory of the state.¹³⁷⁸ In determining the scope of this protection, national law concerning the requirement for entry and stay, will need to be considered.¹³⁷⁹ If, however, the legality of an alien's entry or stay is in dispute, any decision on that matter leading to his expulsion or deportation will also have to be reached in accordance with due process of law.¹³⁸⁰

An alien who is lawfully in any country can thus only be expelled only in pursuance of a decision reached in accordance with due process of law.¹³⁸¹ This means that the grounds for the expulsion of an alien must have a legal basis, and the procedure leading to the expulsion must be prescribed by law.¹³⁸² A separate decision must therefore be reached in respect of each alien, thereby invalidating collective or mass expulsion.¹³⁸³ The reference to "law" in this context is to the domestic law of the state concerned, though the relevant provisions of the domestic law must be compatible with the relevant human rights instruments.¹³⁸⁴

¹³⁷⁶ The general rule is that an alien who is expelled must be allowed to leave for any country that agrees to take him. Human Rights Committee, General Comment 15 (1986) See also Rashid's case (*Jeebhai v Minister of Home Affairs*) 2007 (4) SA 294.

¹³⁷⁷ Res 40/144 art 10.

¹³⁷⁸ Illegal aliens are not vested with this right.

¹³⁷⁹ Illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not within this scope.

¹³⁸⁰ Human Rights Committee General Comment 15 (1986).

¹³⁸¹ *Jayawickrama supra* n 149 469.

¹³⁸² UN document A/2929 Chapter VI s 63.

¹³⁸³ Human Rights Committee General Comments 15 (1986).

¹³⁸⁴ Otherwise it will be null and void.

An alien must therefore be given full facilities for pursuing his or her remedy against expulsion, so that this right will, in all the circumstances of his or her case, be an effective one.¹³⁸⁵ However, the circumstances surrounding the arrest and deportation of Anna Maroufidou, a Greek citizen who sought asylum in Sweden in 1976 did not seem to meet this requirement. She was granted a residence permit in 1976. In April 1977, she was arrested on suspicion of being involved in a terror plot to abduct a former member of the Swedish government. The central immigration authority therefore applied for her expulsion from Sweden on the grounds that there was reason to believe that she belonged to or worked for a terrorist organisation or group, and that there was a danger that she would be involved in Sweden in a terrorist act of a kind referred to in the Aliens Act.¹³⁸⁶

A lawyer was appointed to represent her in the proceedings under the Act. On May 5, 1977 the Swedish government decided to expel her and the decision was immediately executed. Nevertheless, the Human Rights Committee held that the decision to expel her was “in accordance with law.”¹³⁸⁷ It would appear however that in view of the grave allegation levelled against her, and the fact that a lawyer was appointed to defend her, the requirement of due process was met in this case.¹³⁸⁸

In the case concerning Pierre Giry who was expelled from the Dominican Republic, his expulsion was said to be without due process of law.¹³⁸⁹ Giry was a French citizen residing in Saint Barthelemy in the Antilles. He arrived in the Dominican Republic and stayed there for two days. When he went to the airport to buy a ticket for his return home, he was arrested by two uniformed agents who took him to the airport police office where he was searched. After two hours and forty minutes, he was taken out by the back door leading directly to the runway and forced to board a plane bound for Puerto Rico.

¹³⁸⁵ Human Rights Committee General Comments 15 (1986).

¹³⁸⁶ The Aliens Act of Sweden of 1954 provided that an alien may be expelled “if there is reason to assume that he belongs to, or works for, a terrorist organisation or group” and if “there is a danger considering what is known about his previous activities or otherwise that he will participate in Sweden’s terrorist act.”

¹³⁸⁷ See *Maroufidou v Sweden* Human Rights Committee Communication No 58/1979 Report Annex IX C.

¹³⁸⁸ Maroufidou had a summary trial. The question is whether that trial was fair. Although it is generally said that justice delayed is justice denied, it is submitted that a very quick trial may also have a negative effect.

Upon his arrival in Puerto Rico, Giry was arrested, charged, and convicted of conspiracy to import cocaine into the US and of the use of a communications facility, the telephone, to commit the crime of conspiracy. He was sentenced to twenty eight years' imprisonment and fined \$250,000.¹³⁹⁰ The Human Rights Committee observed that irrespective of whether the action taken by the Dominican government was termed expulsion or extradition, there was no due process of law.¹³⁹¹

Due process demands that an alien who is about to be expelled must be allowed to submit reasons why he or she should not be expelled, and to have his case reviewed by the appropriate authorities.¹³⁹² He or she should also be allowed to have the benefit of legal representation. The right of an alien to submit reasons against his or her expulsion or to have his or her case reviewed and to be represented for that purpose, may only be departed from when "compelling reasons of national security" so require.¹³⁹³

In Madagascar, a French national who had been a practising attorney for nineteen years, was arrested at his law office by the political police. He was held incommunicado in a basement cell in the political prison for three days before he was notified of an expulsion order issued on that day by the minister of the interior.¹³⁹⁴ He was taken under guard to his house where he had two hours to pack his belongings. He was deported on the same evening to France.¹³⁹⁵

A subsequent application by him to have the expulsion order revoked was rejected by the Madagascar Supreme Court on the grounds that he had

¹³⁸⁹ See *Giry v Dominican Republic* Communication No 193/1985 HRC 1990 Report Annex IX C.

¹³⁹⁰ *Ibid.*

¹³⁹¹ At 35. The committee noted with concern that based on information received from the State, the decision to expel Hammel appeared to have been linked to the fact that he had represented persons before the committee.

¹³⁹² ICCPR art 13.

¹³⁹³ *Ibid.* See also UN document A/2929 ch VI s 63 and Human Rights Committee General Comment 15 (1986).

¹³⁹⁴ See *Hammel v Madagascar* Communication No 155/1983 HRC 1987 Report, Annex VIII A.

¹³⁹⁵ See Jayawickrama *supra* n 149 473.

made use both of his status as a corresponding member of the Amnesty International and as a barrister, to discredit Madagascar.¹³⁹⁶

The Human Rights Committee, however, found no compelling reasons of national security to deprive him of an effective remedy to challenge his expulsion.¹³⁹⁷

All relevant facts and circumstances must, therefore, be taken into consideration in their entirety whenever the expulsion of an alien is under consideration. In Finland, where a foreigner who had been staying in the country without a visa or residence permit was ordered by the ministry of interior to be deported, the Supreme Administrative Court found that doctors' statements were facts which ought to have been, but were not taken into consideration when ordering his deportation.¹³⁹⁸ According to the doctors' statements, he had been hospitalised in Finland on at least ten occasions because of severe depression, and had been entertaining thoughts of suicide, and was therefore in need of repeated treatment,¹³⁹⁹ accordingly, the court held that the deportation would be "inhuman."¹⁴⁰⁰ Under the circumstances, the court held that there were not sufficient grounds to deport him from the country, and that to do so would violate his rights.¹⁴⁰¹

13 The right to a fair trial

Article 18 of the CMW and article 7 of Resolution 40/144 guarantee the right of fair trial to aliens. The importance of the right to fair trial in the protection of human rights of aliens is underscored by the fact that the implementation of all other rights depends upon the proper administration of justice. The right of every individual to a fair trial is recognized without any distinction whatsoever as to race, colour, sex,

¹³⁹⁶ *Ibid.*

¹³⁹⁷ *Ibid.* The committee noted further that it would be both untenable and incompatible with the spirit of the ICCPR and the Optional Protocol for State parties to take exception to anyone acting as legal counsel to the committee

¹³⁹⁸ Decision no 2743 of the Supreme Administrative Court of Finland, Fourth Chamber, 27 June 1995 (1995) 2 *Bulletin on Constitutional Case-law* 154.

¹³⁹⁹ Decision no 2743 of the Supreme Administrative Court of Finland, Fourth Chamber, 27 June 1995 (1995) 2 *Bulletin on Constitutional Case-law* 154.

¹⁴⁰⁰ See Jayawickrama *supra* n 149 473

¹⁴⁰¹ At 172.

language, religion, political or other considerations, national or social origin, means, status, or other circumstances.

That said, the requirements inherent in the concept of ‘fair hearing’ are not necessarily the same in cases concerning the determination of rights and obligations in a suit at law, as in cases concerning the determination of a criminal charge. There is greater latitude when dealing with civil cases concerning civil rights and obligations, than when dealing with criminal cases.¹⁴⁰² In fact, the requirement of fair hearing in the determination of a criminal charge elaborated in international and regional instruments,¹⁴⁰³ are minimum guarantees, the observance of which is not always sufficient to guarantee fairness of hearing.¹⁴⁰⁴

It is submitted, however, that the right to a fair hearing embraces a concept of “substantive fairness” broader than these minimum requirements.¹⁴⁰⁵ A judge’s instructions to the jury, for instance, must meet particularly high standards as to their thoroughness and impartiality in a case in which a sentence of death may be pronounced on the accused.¹⁴⁰⁶ Irrespective of whether the proceeding is civil or criminal in nature, the broader concept of fair hearing includes not only the obligation of impartiality and independence on the part of judicial authorities, but also respect for the principles of adversarial proceedings,¹⁴⁰⁷ of equal protection and of expeditious proceedings.¹⁴⁰⁸

¹⁴⁰² *Societe Levage Prestations v France* European Court (1996) 24 EHRR 351.

¹⁴⁰³ See ICCPR arts 14(2) - 14(7) & 15; ECHR arts 6(2) & 6(3); ACHPR art 7.

¹⁴⁰⁴ Human Rights Committee General Comment 13 (1984) See also *De Weer v Belgium* European Court (1980) 2 EHRR 439; *Artico v Italy* European Court (1980) 3 EHRR 1; *Jespers v Belgium* European Commission (1981) 5 EHRR 305.

¹⁴⁰⁵ See the case of *S v Zuma* C C SA Reports [1995] 1 LRC 145.

¹⁴⁰⁶ *Pinto v Trinidad and Tobago* Human Rights Committee, Communication No. 232/1987, HRC 1990 Report, Annex IX H. In a trial by jury, it is important that all jurors are placed in a position in which they may assess the facts and the evidence in an objective manner so as to be able to return a just verdict.

¹⁴⁰⁷ The principles of adversarial proceedings mean that each party to a criminal or civil trial must have the opportunity not only to make known any evidence needed for his or her claims to succeed, but also to have knowledge of and comment on all evidence adduced or observation filed with a view of influencing the court’s decision. Adversarial proceedings also imply the observance of the rules of natural justice. See *Mantovanelli v France* European Court (1997) 24 EHRR 370.

¹⁴⁰⁸ *Fej v Columbia* Human Rights Committee Communication No 514/1992 HRC 1995 Report Annex X1. The situation in Nigeria and the Republic of South Africa will be discussed in chs 5 & 6 *infra*.

The discussion of this right will be restricted to two aspects, namely, the right to be presumed innocent and the right to be tried within a reasonable time.

13.1 The right to presumption of innocence

The right to be presumed innocent at common law means that the prosecution has the burden of establishing the guilt of the accused person beyond reasonable doubt.¹⁴⁰⁹ If, at the conclusion of the case, there is any reasonable doubt on any element of the offence charged, the accused person must be discharged and acquitted.¹⁴¹⁰ In a more refined sense, the presumption of innocence gives the accused person the benefit of the right to remain silent and the ultimate benefit of any reasonable doubt.¹⁴¹¹

The presumption of innocence comprises three fundamental components. These are: (i) That the onus of proof lies with the prosecution; (ii) that the standard of proof is beyond reasonable doubt; and (iii) that the method of proof must accord with fairness.¹⁴¹² The purpose of the presumption of innocence is to minimize the risk that innocent persons may be convicted and imprisoned.¹⁴¹³ It does so by imposing on the prosecution the burden of proving the essential ingredients of the offence charged beyond reasonable doubt, thereby reducing to an acceptable level the risk of error in a court's overall assessment of evidence tendered in the course of the trial.¹⁴¹⁴

Article 18(2) of the CMW provides that a person shall be presumed innocent until proved guilty by law. The presumption of innocence implies the right to be treated in accordance with this principle. Thus, where public authorities prejudged a trial where the accused had not yet been convicted, it was held that the trial court may not necessarily find him or her guilty.¹⁴¹⁵

¹⁴⁰⁹ See Jayawickrama *supra* n 149 535

¹⁴¹⁰ *Ibid.*

¹⁴¹¹ *Ibid.*

¹⁴¹² *R v Oakes* Supreme Court of Canada [1987] LRC (Const) 477 489.

¹⁴¹³ See *Woolmington v DPP* [1935] AC 462.

¹⁴¹⁴ See *State v Manamela* C C SA 2000 (5) LRC 65.

¹⁴¹⁵ See the case of *Barbera, Messegue and Jabardo v Spain* European Court, (1988) 11 EHRR 360.

The presumption of innocence is applicable only in criminal cases.¹⁴¹⁶ The presumption of innocence may be breached not only by a judge or a court, but also by other public authorities.¹⁴¹⁷ Thus, where, shortly after an arrest of a person, a senior police officer referred to him as “one of the instigators of a murder” during a press conference, the European Court of Human Rights described the conduct as “clearly a declaration of guilt”¹⁴¹⁸ and therefore, a breach of the right of presumption of innocence.¹⁴¹⁹

In *State v Manamela*¹⁴²⁰ for instance, the South African Constitutional Court declared a reverse onus of proof placed on persons found in possession of goods suspected to have been stolen under section 37 of the General Law Amendment Act¹⁴²¹ to be invalid. In assessing whether the interference with the right to be presumed innocent by section 37 of the General Law Amendment Act was reasonable,¹⁴²² the Court weighed the risk that might have operated against innocent people being erroneously convicted contrary to the clear purpose or intent of the Act (namely to eradicate a flourishing market in stolen goods). The majority, therefore, came to the conclusion that the statutory reverse burden of proof should be invalidated.¹⁴²³

13.2 The right to be tried without undue delay

The right to be tried within a reasonable time encompasses the principles of expeditious proceedings which in turn, requires that justice be rendered without undue delay.¹⁴²⁴ The purpose of this right is to minimize the adverse effect which a pending criminal charge may have on the person charged.¹⁴²⁵ The right, therefore,

¹⁴¹⁶ Jayawickrama *supra* n 149 550. *Quare* whether deportation cases are criminal or civil cases *strictu sensu*? See Rasheed's case *supra* n 1316.

¹⁴¹⁷ E.g Administrative Tribunals.

¹⁴¹⁸ See also the case of *International Pen and others (on behalf of Ken Saro-Wiwa) v Nigeria*. Communication 48/90, 50/91, 52/91, 89/93, 13th Annual Activity Report: 1999-2000 (2000) AHRLR 297 (ACHPR 1999).

¹⁴¹⁹ Because firstly, it encouraged the public to believe him to be guilty, and secondly, it prejudiced the assessment of facts by the judicial authorities.

¹⁴²⁰ Constitutional Court of South Africa [2000] 5 LCR 65.

¹⁴²¹ 62 of 1955.

¹⁴²² At 75.

¹⁴²³ At 83. The situation in Nigeria and the Republic of South Africa will be discussed in chs 5 & 6 *infra*.

¹⁴²⁴ *Hermoza v Peru* Human Rights Commission, Communication No. 203/1986, HRC 1995 Report, Annex X.1.

¹⁴²⁵ Jayawickrama *supra* n 149 550.

recognizes that, with the passage of time, a pending criminal charge gives rise to restrictions on liberty, inconvenience, social stigma, and pressures detrimental to mental and physical health of the individual.¹⁴²⁶ The time awaiting trial can be an agonizing experience for an accused person and his immediate family. If this happens in a foreign land, it may heighten the tension of the situation considerably.

Article 18(3)(c) of the Convention on Migrant Workers and Members of their Families therefore provides that a migrant worker accused of a crime should be tried without undue delay. The right to a trial without undue delay is the right to a trial which also produces a final judgement and sentence without undue delay.¹⁴²⁷

A trial held within a reasonable time has its own intrinsic value. The accused person should be discharged and acquitted with the minimum disruptions to his social and family relationships if he or she is found to be innocent. If guilty, he or she should be convicted, and appropriate punishment imposed without undue delay. This is because, society has a collective interest in making certain that those who commit crimes are brought to trial quickly and dealt with fairly and justly.¹⁴²⁸

SECTION TWO

Regional Instruments for the protection of human rights: The African System

14 Introduction

The focus in the first section, was on the international instruments adopted by the UN for the protection of human rights. In this section, the focus is on regional instruments adopted for the protection of human rights. Although the Charter of the UN makes provision for regional arrangements in the maintenance of international

¹⁴²⁶ *Idem* 508.

¹⁴²⁷ *R v Mac Dougall* Supreme court of Canada [2000] 1 LRC 390.

¹⁴²⁸ *R v Askov* Supreme Court of Canada [1990] 2 SCR 119. The situation in Nigeria and South Africa will be discussed in chaps 5 & 6 *infra*.

peace and security,¹⁴²⁹ it is silent on the establishment of regional institutions for the protection of human rights.

Article 52(1) of the UN Charter states, *inter alia*,

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.¹⁴³⁰

However, whether or not regional human rights institutions were foreseen at the time the Charter was drafted, several factors have made such a development necessary.¹⁴³¹ Regional institutions such as the EU, OAS and the OAU were created, which adopted instruments for the protection of human rights.¹⁴³² The focus in this thesis however, is on the OAU and the African system, since Nigeria and South Africa, the countries under review in this research, are in Africa.

The OAU was launched in 1963 with the adoption of a Charter that proclaimed the aims of ending colonization and *apartheid* promoting solidarity among African states, providing a forum for cooperation in development, and ensuring the sovereignty and territorial integrity of independent states of Africa.¹⁴³³ The OAU Charter was adopted by a conference of African Heads of State and Governments in Addis Ababa, Ethiopia.¹⁴³⁴

¹⁴²⁹ See ch VIII of the UN Charter.

¹⁴³⁰ Art 52(2) of the Charter reads “The members of the United Nations entering into such regional arrangements or constituting such agencies, shall make every effort to achieve peaceful settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council”.

¹⁴³¹ These factors are geographical, historical, cultural and legal in nature. See Steiner *et al supra* n 19 926-28. See also Rehman *supra* n 28 235-6.

¹⁴³² They include the European Convention on Human Rights and Fundamental Freedoms, the African Convention on Human and Peoples’ Rights and the Inter-American Convention on Human Rights.

¹⁴³³ See the Preamble.

¹⁴³⁴ The Charter was signed by 23 states. It is reprinted in 3 *International Legal Materials* (1984) 1116.

That notwithstanding, diplomatic efforts aimed at the creation of a legal instrument for the protection of human rights in Africa took twenty years to materialise.¹⁴³⁵ The process began in 1961 with a unanimous resolution by the International Commission of Jurists at the African Conference on the Rule of Law held in Lagos, Nigeria,¹⁴³⁶ calling on African Governments to study the possibility of adopting an African Convention on Human Rights.¹⁴³⁷

The process gathered momentum thereafter, and culminated in 1981 with the Assembly of Heads of State and Government of the OAU (now AU)¹⁴³⁸ adopting the African Charter on Human and Peoples Rights.¹⁴³⁹ Africa consequently became the third region in the world to achieve some result in its moves to constitute a regional human rights system.¹⁴⁴⁰ The African Charter possesses some unique features.¹⁴⁴¹

¹⁴³⁵ See Nanjira, "The protection of human rights in Africa: The African Charter on Human and Peoples' Rights." Symonides (ed) *Human Rights: International Protection, Monitoring, Enforcement* (2003) 219.

¹⁴³⁶ The so-called "Law of Lagos". The idea was to give full effect to the UDHR. See Umozurike, *The African Charter on Human and Peoples' Rights*, (1996) 24.

¹⁴³⁷ Europe was the first region to constitute such a regional human rights system, followed by American States.

¹⁴³⁸ In 1999 member states of the OAU agreed on a new organization known as the African Union (AU). In 2000 the Assembly adopted the Constitutive Act of the African Union, which provides for "non-indifference" instead of "non-interference" in the internal affairs of member countries where human rights violations and security issues are concerned. See Haas *International Human Rights* (2005) 311. See also Murray *Human Rights in Africa: From OAU – African Union* (2004) 25.

¹⁴³⁹ The "African Charter" or the "Banjul Charter" named after Banjul, the capital of the Gambia, the city where it was drafted. The Charter received a sufficient number of ratifications to enter into legal force in 1986. By the end of 2001, 52 states had ratified it. The Charter is reprinted in *Human Rights Law Journal* 7 (1988) 403. See Heyns *supra* n 256 86.

¹⁴⁴⁰ See Nmehielle *The African Human Rights System – Its Laws, Practice and Institutions* (2001) 10.

¹⁴⁴¹ The need for an African convention on human rights was very pressing at the time. First and foremost, there was a need to give full effect to the UDHR which had been proclaimed by the UN since 1948. Secondly, after attaining political independence, some African leaders became even more dictatorial than their erstwhile imperialist European colonial masters and set out to demonstrate their superiority in brutal actions against the very people they ruled. Besides, the massive human rights violations in post colonial Africa was embarrassing to some African elite and leaders who were ashamed at the uncivilized and primitive behaviour of their peers, who denied the continent not only the dignity it deserved in the eyes of the world, but also the necessary adjustment to the changing times and circumstances of the post WW II era. Consequently, they felt the need to do something in order to ensure respect for the rule of law and to protect Africa's image by restoring African liberties and rights in the post colonial period. The ACHPR, it was hoped, would be the answer to that aspiration.

15 OAU and human rights

The Charter of the OAU¹⁴⁴² did not explicitly include human rights as part of its mandate. The OAU member states were only required to have “due regard” to the human rights set out in the UDHR.¹⁴⁴³ In this way, the UN human rights initiative became relevant to Africa.¹⁴⁴⁴ In spite of this oversight however, some of OAU’s notable successes have been in the field of human rights.¹⁴⁴⁵ Initially, emphasis was placed on the right to independence of colonial African “peoples,” and on the unity of the newly independent African states.¹⁴⁴⁶

To this end, African states made tremendous diplomatic efforts at the UN to protect human rights on the continent.¹⁴⁴⁷ Efforts were made for instance, to pressurize Rhodesia (Zimbabwe) and apartheid South Africa to stop their racist policies, and ultimately persuaded the world to impose economic sanctions against these regimes.¹⁴⁴⁸ These efforts were extended to fight colonial policies in South West Africa (Namibia)¹⁴⁴⁹ and the then remaining Portuguese colonies of Angola, Guinea Bissau, Mozambique, and other countries still under colonial rule.¹⁴⁵⁰ These efforts helped to bring about the restoration of majority rule in those countries.¹⁴⁵¹

Empowered by the African Charter, the OAU adopted a number of human rights-related instruments for the protection of human rights in Africa. They include, *inter alia*, the OAU Convention Governing the Specific Aspects of Refugee Problems in

¹⁴⁴² The OAU was launched with the adoption of a Charter in 1963, that proclaimed the aims of ending colonization and *apartheid*; promoting solidarity among African states; providing a forum for cooperation in development; and ensuring the sovereignty and territorial integrity of independent states of Africa. See Haas *supra* n 1439 311.

¹⁴⁴³ Art. 2(1) (e) of the OAU Charter. The Preamble to the OAU Charter also recognizes the UDHR as the foundation of peaceful and positive cooperation between states.

¹⁴⁴⁴ Apart from the endorsement in the OAU Charter, African nations, have either signed or ratified various other UN human rights Instruments. Their ratification of the UN Charter has often been followed by inserting the UDHR in their Constitutions and ratifying other covenants.

¹⁴⁴⁵ See Heyns *supra* n 256 386.

¹⁴⁴⁶ See Heyns *supra* n 256 386-7. The OAU’s human rights initiative between 1963 and 1981 related to four main areas, *viz* the eradication of colonialism from Africa; Self determination of African people; a collective effort to rid Africa of apartheid in South Africa; and tackling African refugee problems.

¹⁴⁴⁷ See Forsythe *Human rights in International Relations* (2000) 132-3.

¹⁴⁴⁸ *Ibid.*

¹⁴⁴⁹ See the South West Africa Cases (*Ethiopia v South Africa; Liberia v South Africa*) (Preliminary Objections) ICJ Rep. 1962 319.

¹⁴⁵⁰ Forsythe *supra* n 1449 132 – 3.

Africa;¹⁴⁵² the Bamako Convention on the Ban of Import into Africa and Control of Trans-boundary Movement and Management of Hazardous Waste within Africa;¹⁴⁵³ the African Charter on the Rights and Welfare of the Child;¹⁴⁵⁴ and the Protocol on the Rights of Women.¹⁴⁵⁵ The African Charter, together with the above instruments, comprise what is generally referred to as the “African regional human rights system”.¹⁴⁵⁶

16 Resolutions, declarations and decisions of OAU Heads of State and Governments (The Assembly)

Just as the UN has adopted numerous treaties, resolutions and declarations for the protection of human rights internationally, so have African States also adopted several resolutions and declarations for the diplomatic protection of human rights in Africa.¹⁴⁵⁷ As already indicated, although resolutions and declarations are not binding on states, they help in sensitizing human conscience towards the action sought to be promoted or prohibited.

17 Constitutive Act of the AU

The OAU was replaced in 2000 by the AU.¹⁴⁵⁸ The AU became a legal reality in May 2001 when its Constitutive Act, adopted in 2000, entered into force. The Constitutive Act was intended to reform and update the provisions of the OAU Charter, in particular, by placing greater emphasis on principles of democracy, good governance and human rights, and by limiting the sovereignty of member states with provision for intervention on humanitarian grounds.¹⁴⁵⁹

¹⁴⁵¹ *Ibid.*

¹⁴⁵² The ‘OAU Refugee Convention.’

¹⁴⁵³ The ‘Bamako Convention.’

¹⁴⁵⁴ The ‘African Children’s Charter.’

¹⁴⁵⁵ A draft Protocol on Women’s Rights was adopted by the African Commission on Human Rights and forwarded to the OAU for discussion in 2003. The draft sought to respond to the Beijing Principles (UN) and Plan of Action. The Protocol on Womens Rights was finally adopted in 2005 See Smith *supra* n 802 See also Heyns *supra* n 256 495.

¹⁴⁵⁶ See Heyns *supra* n 256 386.

¹⁴⁵⁷ Between 1964 and 2002, about 66 resolutions, declarations and decisions on human rights were adopted by the Assembly of Heads of State and Governments of Africa.

¹⁴⁵⁸ The Constitutive Act of the African Union, which was accepted in Lome, Togo on 2000-07-11 entered into force on 2001-05-26. CAB/LEG 23 15.

¹⁴⁵⁹ See Heyns, *supra* n 256 99.

The Constitutive Act of the AU has also replaced the OAU Charter. The establishment of the AU was partially informed by the desire to amalgamate the OAU and the African Economic Community (AEC).¹⁴⁶⁰ The Constitutive Act of the AU(CAAU) has become yet another principal instrument for the diplomatic protection of human rights in Africa.¹⁴⁶¹

18 The African Charter on Human and People's Rights (ACHPR)

The principal instrument for the protection of human rights in Africa is the ACHPR. The ACHPR is a unique instrument of human rights diplomacy. It encompasses an absolute endorsement of certain civil and political rights familiar to Western liberalism,¹⁴⁶² a conditional endorsement of other civil and political rights that are limited by 'claw back' clauses, permitting deviation¹⁴⁶³ from international standards, on the basis of national laws, national security, public health and morality.

It mentions fundamental economic and social rights requiring considerable material resources for their application, a list of individual duties, and a list of "people's" rights such as the right to existence, self determination, and disposal of natural resources not hitherto mentioned in other regional human rights conventions.¹⁴⁶⁴ It reaffirms the "African spirit," which can best be described as the spirit of African "brotherhood", built on a solid rock of kinship and communalism, which transcends everything African.¹⁴⁶⁵

¹⁴⁶⁰ Otherwise known as the Abuja Treaty. The AEC was established as an integral part of the OAU as a 34-year plan for Africa's economic, social and cultural development, recovery and integration and to create a framework for the development and mobilization of material and human resources in Africa.

¹⁴⁶¹ According to the Constitutive Act of the AU, the Assembly of Heads of State and Government is the supreme organ of the AU and the AEC. Its role is to determine the common policies of the Union and monitor their implementation and compliance by member states. The Assembly may impose sanctions on any member state and authorize intervention to prevent war crimes, genocides, and crimes against humanity. Thus, the Assembly has continued to promote and protect human rights through diplomatic channels.

¹⁴⁶² See Legesse, "Human Rights in African Political Culture" in Thomson (ed) *The Moral Imperatives of Human Rights* (1980) 124.

¹⁴⁶³ But not derogations.

¹⁴⁶⁴ See Forsythe *supra* n 1449 133. See also Nmehielle *supra* n 1442 219.

¹⁴⁶⁵ See Nkurumah *The Revolutionary Path* (1973) 216. The drafters of the ACHPR were guided by the principle that the Instrument should reflect the African concept of human rights and should not only take as a pattern the African philosophy of law, but should also meet African social & cultural

Apart from the Preamble, the ACHPR comprises 68 articles¹⁴⁶⁶ divided into three sections. The first section is on “Rights and Duties” and comprises 29 articles.¹⁴⁶⁷ The second section comprises 33 articles¹⁴⁶⁸ and deals with “Measures of Safeguard” of human rights, while the third section is on “General Provisions;” measures designed to deal with the signing and ratification protocol to the Charter.

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19 Implementation of the African Charter - The African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights (The African Commission) is the main executive organ of the African Charter and is also responsible for the supervision and enforcement of the provisions of the Charter. The Commission consists of eleven members chosen from among :

needs. See OAU CAB/LEG rev 11. Perhaps it is this same basic communal spirit that Savigny of the historical school of Jurisprudence referred to as the “volksgeist”.

¹⁴⁶⁶ According to art 1, state parties are enjoined to recognise the rights, duties and freedoms in the Charter and to adopt legislative and other measures to comply therewith. The subsequent arts deal with the followings rights: Art 2 The right to non-discrimination; art 3: The right of equality before the law; art 4: The right to respect for life and integrity of the person; art 5: Freedom from exploitation and degradation, including slavery, torture and cruel, inhuman and degrading punishment; art 6: The right to liberty and security of the person; art 7(1): The right to a fair trial; art 7(2): Freedom from retrospective punishment; art 8 freedom of conscience, the profession and free practice of religion; art 9(1): The right to receive information; art 9(2): The right to express and disseminate opinion; art.10 freedom of association; art 11 freedom of assembly; art 12(1) freedom of movement; art 12(2): Right to leave any country and the right to return; art 12(3): Right to seek and obtain asylum; art 12(5): Prohibition of mass expulsion; art 13(1): The right to participate in government; art 13(2): The right to equal access to the public services; art 13(3): The right to equal access to to public property and to public services; art 14: Right to property; art 15: The right to work; art 16: The right to health; art 17(1): The right to education; art 17(2): The right to participate in the cultural life of ones community; art 17(3): The duty of the state to to promote and protect the moral and traditional values; art 18(1): Recognition of family as the natural unit and basis of society; art 18(2): Family to be assisted as a custodian of morals and traditional values; art 18(3): Protection of the rights of women and children; art 19: Peoples’ right to equality; art 20(1): Peoples’ right to existence; art 20(2)-(3): People’ right to self-determination; art 21(1): Peoples’ right to dispose of their wealth and natural resources; art 22: Peoples’ right to economic, social and cultural development; art 23: Peoples’ right to national and international peace; & art 24: Peoples’ right to a general satisfactory environment.

¹⁴⁶⁷ Arts 1 – 29.

¹⁴⁶⁸ Arts 30 – 63.

¹⁴⁶⁹ The Preamble states that the parties are convinced that it is essential to pay particular attention to the right to development. It also notes that civil and political rights cannot be dissociated from economic, social and cultural rights. It blazes the trail, by being the first Human Rights Charter in the world so far, to combine all types of rights in one instrument.

African personalities of highest reputation known for their high morality, integrity, impartiality, and competence in matters of Human and Peoples' rights; particular consideration being given to persons having legal experience.¹⁴⁷⁰

Members of the Commission are elected by Heads of State and Governments of the member states for a renewable term of six years, from a list of persons nominated by state parties.¹⁴⁷¹ The Commission then appoints a Chairman and a vice Chairman for a two-year term.¹⁴⁷²

On election, the Commissioners make a solemn declaration of impartiality and faithfulness.¹⁴⁷³ They serve in their individual capacities, not as agents of their national states, and mediate between governments and individuals.¹⁴⁷⁴ They must be available to carry out their functions and must be impartial.¹⁴⁷⁵ Attendance at sessional meetings, participation in human rights conferences, and other promotional activities are evidence of availability.¹⁴⁷⁶

The promotional functions of the Commission include the collection of documents and the undertaking of studies and research on African human rights problems, as well as the formulation and establishment of principles and rules for the solving of human rights disputes. It is also obliged to forge cooperation links with other regional and international human rights agencies.¹⁴⁷⁷

Human rights violations may be brought to the attention of the Commission by an inter-state communication.¹⁴⁷⁸ The Commission must investigate the matter with a view to reaching an amicable settlement.¹⁴⁷⁹ If reconciliation fails, the Commission must report on the matter to the Assembly of Heads of State and Government and also submit a report on the matter to the states concerned. Any report submitted to

¹⁴⁷⁰ Art. 31.

¹⁴⁷¹ Arts 33 & 36. Note that a Commissioner's work is part-time.

¹⁴⁷² Art 42.

¹⁴⁷³ Art 38.

¹⁴⁷⁴ Art 31(2).

¹⁴⁷⁵ Art 39(2).

¹⁴⁷⁶ See Umozurike *supra* n 1438 68.

¹⁴⁷⁷ Art 45(1) of the Charter.

¹⁴⁷⁸ *Ibid* art 47.

¹⁴⁷⁹ *Idem* arts 51 & 52.

the Assembly of Heads of State and Government in terms of any measure taken shall remain confidential until the Assembly of Heads of States and Government authorise its publication.¹⁴⁸⁰

Apart from inter-state communications, there are 'other communications'¹⁴⁸¹ which can be considered by the Commission on certain conditions.¹⁴⁸² This refers to individual communications, although there is no clear indication of this in that provision. At its third session, the Commission established a procedure for dealing with individual communications.¹⁴⁸³

20 The African Charter and diplomatic protection: Rights of foreigners under the African Charter

Does the African Charter encourage diplomatic protection? Are there provisions envisaging diplomatic protection in the Charter? It is pertinent to take a critical look at the provisions of the African Charter before these questions are answered.

Of particular interest to a foreigner in the African Charter are the provisions of articles 2, 3, 7 and 12 of the Charter. Article 2 provides that

every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3 stipulates that

every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

¹⁴⁸⁰ Art 59.(1).

¹⁴⁸¹ *Idem* art 55.

¹⁴⁸² *Idem* art 56.

¹⁴⁸³ See Umozurike *supra* n 1438 163.

Article 7 provides, *inter alia*, that every individual shall have the right to have his cause heard, while article 12 stipulates that

- (1) Every individual shall have the right to freedom of movement and residence within the borders of a state, provided he abides by the law.
- (2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.
- (3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.
- (4) A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
- (5) The mass expulsion of non nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Thus, the mass expulsion of non-nationals is prohibited under the Charter. The mass expulsion of nationals is defined as “one aimed at national, racial, ethnic or religious groups.” Since it is the maltreatment of foreigners that often gives rise to diplomatic protection, it can be said without any fear of contradiction that the drafters of the African Charter envisaged situations of wrongful treatment of foreigners and, therefore that diplomatic protection was contemplated in the Charter.¹⁴⁸⁴

However, there have been cases of mass expulsions of foreigners from African countries in the recent past for such reasons as increase in crime rate by foreigners, rampant vagrancy, increased unemployment in the affected countries, unfair competition from foreigners,¹⁴⁸⁵ *et cetera*, without any action being taken by the affected states on behalf of their nationals. On several occasions, Ghanaians have been expelled from the Ivory Coast, and *vice versa*.¹⁴⁸⁶ The mass expulsion of Nigerians from Ghana in 1969, and the mass expulsion of Ghanaians from Nigeria in

¹⁴⁸⁴ The word non-nationals is used instead of “aliens” or “foreigners,” perhaps in the spirit of African brotherhood. See Umozurike *supra* n 1436 38.

¹⁴⁸⁵ See Ankumah *supra* 1073 140.

1983 and 1985 are further examples. The collective expulsion of Nigerians, Cameroonians and other foreign nationals from Gabon in 1994, is yet another example.¹⁴⁸⁷ The xenophobic attacks on foreigners in South Africa in 2008 and 2009 are still fresh in the memory.¹⁴⁸⁸

In the case of *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia*,¹⁴⁸⁹ for instance, the issue of mass expulsion of non nationals came up for determination before the African Commission. In that case, the plaintiff, a Senegalese NGO brought proceedings before the African Commission on behalf of 517 West African nationals against the Zambian government for alleged mass expulsion of those West Africans from Zambia.

The Zambian government argued that the case should be declared inadmissible, because domestic remedies had not been exhausted. The Commission overruled the objection on the grounds that no domestic remedies were available in the first place to be exhausted.¹⁴⁹⁰ According to the Commission, the mass nature of the arrest, the fact that the victims were kept in detention prior to their expulsion, and the speed with which the expulsion were carried out gave the complainants no opportunity to establish the legality of these actions in the courts.¹⁴⁹¹

The Commission found that Zambia breached articles 2, 7, 1(a), and 12(5) of the African Charter by deporting the West Africans.¹⁴⁹² However, it was a Senegalese NGO that instituted the action on behalf of the expelled West Africans in this case. Their government took no diplomatic action on their behalf. The question is whether

¹⁴⁸⁶ *Ibid*

¹⁴⁸⁷ Ankumah *supra* n 1073 140 has given a detailed account of incidents of expulsion of non-nationals in Africa in the recent past. When Nigeria expelled non-nationals in 1983 and 1985, these were the reasons advanced for her action. See Ankumah *ibid*. The same reasons were advanced for the xenophobic attacks on foreign nationals in South Africa in 2008. See Enobong "Immigrants flee South Africa's wave of violence" *P M News* 2008-05-23 3; Azubuike "Attacks on foreigners spread in South Africa" *The Punch* 2008-05-22 53.

¹⁴⁸⁸ See *supra* n 1486.

¹⁴⁸⁹ See <http://wwwl.umn.edu/humanrts/africa/comcases/71-92.html> (accessed 2009/05/19).

¹⁴⁹⁰ *Ibid*

¹⁴⁹¹ *Ibid* 2.

¹⁴⁹² *Ibid* 4. See also the case of *Institute for Human Rights and Development in Africa v Angola* (2008) *ACHRLR* 43 (ACHPR 2008) where the Commission came to the same conclusion in respect of the mass expulsion of non-nationals from Angola..

the action taken by the NGO amounted to diplomatic protection and if not, whether there has been any reported case of diplomatic protection on African soil?¹⁴⁹³

Before the civil, political and the socio-economic rights entrenched in the African Charter are examined, the right to asylum as contained in article 12(3) of the Charter will be discussed. The article provides that:

Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

Notwithstanding the availability of this provision, however, the question is whether it is justiciable and, if so, whether it can engender diplomatic protection. If some Nigerians for instance, migrate to Togo to seek asylum based on their alleged persecution in Nigeria, but they are not only refused asylum in Togo, but are molested, tortured and even killed in that country. Can they claim to be entitled to diplomatic protection by Nigeria? If not, who can protect them? Can they bring any Communication before the African Commission for redress under article 12 of the African Charter?

It is interesting to note that article 12(3) speaks of “in accordance with the law of those countries and International Conventions,” and not “in accordance with the provisions of this Charter.” Be that as it may, there is no doubt that the issue of asylum in general and that of diplomatic asylum in particular, is a controversial

¹⁴⁹³ It would appear that the only unique case of diplomatic protection on African soil occurred in Uganda. That was the Entebbe Raid of 1976 in which the Israeli government undertook a rescue mission to save the lives of 103 Israeli nationals who were hijacked by Palestinian and German militants. The French airliner in which the Israelis were travelling was first diverted to Benghazi in Libya and then to Entebbe Airport in Uganda. (Operation Thunderbolt) The hijackers had threatened to kill all the hostages if their prisoners release demand was not met. The Israeli Commandos stormed Entebbe airport and released the hostages. See en.wikipedia.org/wiki/Operation_Thunderbolt. The other case was the invasion of Uganda by Tanzania in 1978/9. The question however is whether the invasion of Uganda can be described *strictu sensu* as a case of diplomatic protection? This is because the move was made by Tanzania to oust the dictator, Idi Amin, from power and not to protect Tanzanian nationals. However some commentators maintain that Idi Amin had encroached into and annexed part of Tanzanian territory along the Ugandan -Tanzanian border and that the move to oust him was also a move to protect the human rights of those Tanzanians living in the occupied territory. Needless to say, the OAU denounced the Tanzanian invasion of Uganda. See en.wikipedia.org/wiki/Ugandan%E2%80%3Tanzanian_War.

subject in international law. In the *Asylum* case,¹⁴⁹⁴ for instance, the ICJ, in declining to find a custom relating to diplomatic asylum stated that the practice

has been so much influenced by considerations of political expediency ... that it is not possible to discern in all this any constant and uniform usage, accepted as law¹⁴⁹⁵

Diplomatic asylum apart, the issue of political asylum is also problematic. If asylum seekers are regarded as refugees, though they may not qualify for diplomatic asylum, they can still be diplomatically protected in international law under the draft articles on diplomatic protection.¹⁴⁹⁶ This is because, article 8 of the draft articles on diplomatic protection permits the diplomatic protection of stateless persons and refugees. Refugees are people, who alleging persecution by their own governments, leave their own countries to seek asylum in other countries.¹⁴⁹⁷

Article 8(2) of the draft article stipulates that

A State may exercise diplomatic protection in respect of a person who is recognised as a refugee by that state when that person at the time of injury and at the date of the official presentation of the claim is lawfully and habitually resident in that state.

In the hypothetical example given above, however, it would appear that those Nigerians who escape to Togo to seek asylum may be left without any protection whatsoever because article 8(3) of the draft articles cancels the effect of article 8(2) by stipulating that

Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the state of nationality of the refugee.

¹⁴⁹⁴ (1950) ICJ Rep 266.

¹⁴⁹⁵ At 274.

¹⁴⁹⁶ See art 8 of the ILC's draft arts on diplomatic protection.

¹⁴⁹⁷ An example was the xenophobic attacks on Zimbabwean nationals resident in Cape Town in Nov 2009. The Zimbabwe government appeared to have said nothing about the incident. Another example was "Operation Thunderstorm" mounted by the Singapore Armed Forces to prevent refugees fleeing from South Vietnam after the fall of Saigon in 1975 from entering into Singapore. Following the fall of Saigon, large numbers of refugees fled to Singapore for fear of persecution, heralding the arrival of the Boat People. But they were sent back. Their government could not protect them.

Besides, state practice does not support the exercise of diplomatic protection under such circumstances by Nigeria, the country of nationality of the refugees, against Togo, the country of refuge.¹⁴⁹⁸

Draft article 8(3) forbids Togo, the state of refuge, to exercise diplomatic protection against Nigeria, the state of nationality of the asylum seekers. The rationale is that to allow such claims would contradict the very basis of diplomatic protection generally and the draft articles on diplomatic protection in particular. It “would open the floodgates for international litigation” and the fear of demands for such action might deter states from accepting refugees.¹⁴⁹⁹ It can thus be said that though the right to asylum is not a justiciable right in international law, it is however capable of being diplomatically protected.

21 Civil and political rights: Can a violation of civil or political rights under the African Charter trigger diplomatic protection?

Given the right to asylum under the African Charter, it leads to the question whether other civil and political rights can be diplomatically protected? Civil rights must be distinguished from political rights for purposes of diplomatic protection. Civil rights are rights which belong to all human beings whether they are citizens or not, whereas political rights are those rights which require the status of a citizen to be enjoyed.¹⁵⁰⁰ The ACHPR guarantees virtually all the established civil and political rights mentioned in the UDHR and the ICCPR.¹⁵⁰¹ Each Member State is expected to respect the rights, freedoms and duties enshrined in the Charter, adopt legislation and other measures to give effect to them.¹⁵⁰²

¹⁴⁹⁸ Draft art 8 par 6 on Diplomatic Protection states that refugees are “unable or unwilling to avail [themselves]of the protection of their State of Nationality.” See the *Official Records of the GA supra* n 1 50.

¹⁴⁹⁹ Commentary to draft art on Diplomatic Protection art 8 par 10 *idem* 51.

¹⁵⁰⁰ They include the right to vote and be voted for, the right of access to public jobs, the right to serve in the armed forces etc. See Tiburcio *supra* n 26 xiv.

¹⁵⁰¹ See Umozurike *supra* n 1436 29.

¹⁵⁰² Art.1 There are two groups of rights – those that may be restricted and those that must not be restricted. The restrictions are not by way of derogations, but by claw-back clauses. Umozurike *ibid*.

An example of a civil right under the Charter that may not be restricted is the right of non-discrimination.¹⁵⁰³ Another is the right of equality before the law and equal protection of the law.¹⁵⁰⁴ The Charter affirms the right to human dignity and to the recognition of one's legal status, and prohibits all forms of degradation, including torture, cruel, inhuman or degrading punishment and treatment.¹⁵⁰⁵ The Charter also prohibits slavery and slave trade.¹⁵⁰⁶ Obviously, these rights can be diplomatically protected, since they are justiciable. They are rights which must be respected in all circumstances and if violated especially on a large scale, the right to diplomatic protection arises.

The same cannot be said of political rights contained in article 13 of the Charter. Article 13 provides, *inter alia*,

- (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law,
- (2) Every citizen shall have the right of equal access to the public service of his country, and
- (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

As already indicated, political rights are rights specifically reserved for citizens and in many countries, foreigners are not entitled to them. Foreigners cannot therefore complain if they are denied political rights in countries where they reside. It is submitted therefore that this is also the case under the African Charter. A foreigner in Africa cannot complain of being denied political rights so as to ground diplomatic protection.

¹⁵⁰³ Whether based on "race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, wealth, birth or other status." See art 2.

¹⁵⁰⁴ Art 3.

¹⁵⁰⁵ Art.5.

¹⁵⁰⁶ *Ibid.*

22 The protection of socio-economic rights under the African Charter

Another burning question is whether the socio-economic rights provided for in the African Charter can be diplomatically protected. In relation to socio-economic rights, the Charter emphasizes that

the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights¹⁵⁰⁷

It therefore provides that :

every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.¹⁵⁰⁸

The Charter also protects the right to enjoy the best attainable state of physical and mental health and to medical attention in case of sickness¹⁵⁰⁹ as well as to unlimited education up to any level.¹⁵¹⁰

The conclusion is that a foreigner who is denied employment in the country where he or she resides or, if employed, is paid less than the citizens of that country, or who is not allowed to enjoy the same medical facilities as the citizens, or whose children are not allowed into certain public or private schools in that country, cannot complain to his or her home government. If any complaint is made, it is submitted that his or her government cannot take diplomatic action to protect him or her. In other words, the violation of socio-economic rights cannot *ipso facto* ground the right to diplomatic protection in Africa.¹⁵¹¹ The rights meant for special investigation in this thesis *vis-à-vis* diplomatic protection are examined below.

¹⁵⁰⁷ See the preamble.

¹⁵⁰⁸ Art 15.

¹⁵⁰⁹ Art 16(2).

¹⁵¹⁰ Art 17. This includes the right to primary, secondary, vocational, adult and tertiary education. It also includes the right to education for illiterate adults, and the right to special education. See Umozurike *supra* n 1436 47.

¹⁵¹¹ Note however that the African Commission has made it abundantly clear that economic, social and cultural rights are justiciable. See eg the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 2004. See also the cases of *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endrois Welfare Council v Kenya* (Communication 276/2003, 27th Activity Report (2009) and *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60. (ACHPR 2001) to name but a few instances where the African Commission has emphasized that state parties should incorporate into domestic law and fully

23 Fundamental rights

Fundamental rights have already been defined and distinguished from mere human rights.¹⁵¹² The first of the fundamental rights under the ACHPR to be discussed here is the right to life.

23.1 *Right to life under the ACHPR*

The ACHPR guarantees the right to life. Article 4 of the Charter provides that human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

As already said, all international human rights instruments emphasize the fundamental nature of this right.¹⁵¹³

The importance of the right to life in Africa cannot be overemphasized. This is more so, because it is a right which has been violated with impunity by successive brutal regimes in Africa.¹⁵¹⁴ A well known case was the brutal hanging of Ken Saro-Wiwa a Nigerian writer and President of the Movement for the Survival of the Ogoni People (MOSOP).¹⁵¹⁵ In that case, Saro-Wiwa was arrested, detained, and tortured by the military administration in Nigeria. He was chained hands and feet, denied medical attention and access to his lawyers. He was later hanged. The African Commission found a violation of article 4 on the grounds that the execution rendered the deprivation of life arbitrary because the trial of Saro-Wiwa violated article 7 of the Charter. According to the Commission

implement the provisions of regional and international treaties on economic, social and cultural rights.

¹⁵¹² See ch 1 21 *supra*. See also the case of *Ezoukuru v Ezeonu* (1991) 6 NWLR 708.

¹⁵¹³ *Idem* ch 1 22 *supra*.

¹⁵¹⁴ According to one report, during the period 1992 – 1993 the UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions documented evidence of arbitrary executions in 27 African countries. See Nmehielle *supra* n 1439 191. See also Ankumah *supra* n 1071 112.

¹⁵¹⁵ See the case of *International Pen and others (on behalf of Ken Saro-Wiwa) v Nigeria supra* n 1357.

given that the trial which ordered the execution itself violates article 7 any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4.

In *Amnesty International and others v Sudan*,¹⁵¹⁶ the Commission found the execution of prisoners after summary and arbitrary trials to be in violation of article 4 of the Charter. Again, in *Forum of Conscience v Sierra Leone*,¹⁵¹⁷ the Commission found that an execution after a trial that was in violation of due process of law as guaranteed under article 7(1)(a) of the Charter, constituted an arbitrary deprivation of life under article 4 of the Charter.

Political rivalry is another factor that has threatened the right to life in Africa. Attempts to stifle opposition have often led politicians to threaten or take the lives of their opponents arbitrarily, in breach of article 4 of the African Charter. A well known case was the case of *Orton and Vera v Malawi*¹⁵¹⁸ in which Mr and Mrs Chirwa, prominent opposition figures in the government of Malawi, were abducted by security forces from Zambia. Orton and Vera Chirwa were tried in Malawi and given death sentences which were later commuted to life imprisonment. The Chirwas were held in solitary confinement, given poor food, inadequate medical care, shackled for a long period of time in their cells, and prevented from seeing each other for years. Mr Chirwa later died in jail.¹⁵¹⁹

Mention should also be made of *Tsvangirai's case*.¹⁵²⁰ Tsvangirai, an opposition leader of the Movement for Democratic Change (MDC), together with two others¹⁵²¹ were accused of treason, an offence that carries the death penalty in Zimbabwe. Although Tsvangirai was later acquitted, the events surrounding the case pointed to

¹⁵¹⁶ Annual Activity Report: 1999-2000 (2000) AHRLR 297 (ACHPR 1999) *ibid*.

¹⁵¹⁷ Communication 223/98, 14th Annual Activity Report; 2000-2001; (2000) AHRLR 293 (ACHPR 2000) par 20.

¹⁵¹⁸ Communication 64/92, 68/92 & 72/92 filed by Amnesty International on behalf of the victims. Opinion of 3 Nov 1994 (16th Ordinary Session) 28 June 1995. (AHG/Res 240 (XXXI)).

¹⁵¹⁹ See Chenwi *supra* n 1235 196.

¹⁵²⁰ *Idem* 195.

¹⁵²¹ Ncube, Secretary General of the MDC and Gasela, spokesman of the MDC.

the fact that the charge of treason was a means of intimidating an opposition leader.¹⁵²²

One thing is clear, although article 4 of the Charter provides that no one may be arbitrarily deprived of his or her life, it does not define what constitutes the arbitrary taking of life. It appears however that the general understanding of arbitrary deprivation of life is extra-judicial killing.¹⁵²³ This is because the subject of extrajudicial killings is of particular concern in Africa.¹⁵²⁴ As already said, it is a right which has been violated with impunity by successive brutal regimes in Africa over the years. The general consensus in the interpretation of the right to life in human rights instruments is that it is not derogable except in certain judicially recognized circumstance or resulting from lawful acts of war or self-defence.¹⁵²⁵

In relation to diplomatic protection, the violation of this right especially on a large scale should trigger the exercise of diplomatic protection in Africa more than the violation of any other right.¹⁵²⁶ Regrettably, it does not. Many wars have been fought, many empires have risen and fallen, and countless treaties have been signed because of the violation of this right. Yet the violation continues unabated.¹⁵²⁷

The right to the integrity of the person is appended to the right to life. This is not accidental. It must be read and understood in the context of wholesome life and not mere physical existence. It is hoped that the African Commission will develop sufficient jurisprudence, and that the African Court of Human and People's Rights

¹⁵²² According to Chenwi *supra* n 1235 195-6 on 13 June four prisoners convicted of murder were hanged at the prison complex where Tsvangrai was being held, prompting allegations that Mugabe was seeking to intimidate his political rivals.

¹⁵²³ See Ankumah *supra* n 1073 112.

¹⁵²⁴ *Ibid.*

¹⁵²⁵ See Davidson *The Inter-American Human Rights System* (1997) 262 -263 for the interpretation of this right under the Inter-American system. See also Chenwi *supra* n 1235 58.

¹⁵²⁶ Such a violation would amount to a breach of the norm of *jus cogens*.

¹⁵²⁷ This brings to mind the Rwanda massacre of 1994 where thousands of lives were lost. See Steiner *et al supra* n 19 1273-4. It is on record that after the Entebbe raid of 1976, Idi Amin, the then leader of Uganda believing that Kenya had colluded with Israel in planning the raid, ordered the massacre of hundreds of Kenyans living in Uganda soon after. See en.wikipedia.org/wiki/Ugandan%E2%80%3Tanzanian_War The incident that led to the Nigerian civil war was no exception. After the military coup of 1966, there was a wide spread killing of people of southern extraction who were resident in northern Nigeria. The killings were generally regarded as a pogrom. See Heyns *supra* n 256 1387- 9. The list is endless.

will establish sufficient case law on this subject so as to forestall future unlawful deprivation of life.

23.2 Freedom from torture, cruel, inhuman and degrading treatment or punishment

Freedom from torture, cruel, inhuman and degrading treatment or punishment is enshrined under article 5 of the Charter. The article provides *inter alia*:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman and degrading treatment or punishment shall be prohibited.

The ACHPR does not define the word torture, but the CAT defines torture *inter alia* as:

Any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession ...¹⁵²⁸

Although the African Charter does not offer any definition of torture,¹⁵²⁹ generally certain acts are assumed as amounting to torture, cruel, inhuman or degrading punishment or treatment provided they are intentionally done to inflict physical or mental suffering or orchestrated as a violation of human rights.¹⁵³⁰ Like the right to life, cases involving violations of the right to freedom from torture are very conspicuous in Africa.¹⁵³¹

Freedom from torture is a core human rights. It should not be derogated from, even in times of national emergencies. However, the right is often violated without remorse in Africa.¹⁵³² In many African states, the right is violated by the use of torture as a political weapon. Opponents are tortured to submission or to obtain

¹⁵²⁸ See art 1(1).

¹⁵²⁹ See however the provisions of arts 60 & 61 of the Charter. See also art 1 of CAT.

¹⁵³⁰ See the case of *Ireland v UK* (1978) ECHR A 25 par 167 for the definition of torture.

¹⁵³¹ *Ankumah supra* n 1073 118.

incriminating evidence. This is illustrated by both the Nigerian case involving Ken Saro-Wiwa, and the Malawi case of *Orton and Vera* discussed above.

Most African national constitutions prohibit cruel, inhuman or degrading treatment or punishment. However, some constitutions do not make provision for this important right.¹⁵³³ Besides, all constitutions in African countries do not use the same terminology.¹⁵³⁴ While some constitutions employ the words “treatment” and “punishment” together,¹⁵³⁵ other constitutions omit them altogether.¹⁵³⁶

In Nigeria, for instance, the words “cruel” and “punishment” are omitted.¹⁵³⁷ It has been submitted that the variation in terminology does not and should not undermine the underlying concept – to protect persons from unnecessary and undue suffering.¹⁵³⁸ In South Africa, the Constitution provides that:

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

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

(e) not to be treated or punished in a cruel, inhuman or degrading way.¹⁵³⁹

As stated later,¹⁵⁴⁰ the SA provision is more comprehensive than the Nigerian provision. It is hoped that the African Court of Human and People’s Rights will deal with cases of torture appropriately when such cases are brought before it.¹⁵⁴¹

¹⁵³² In countries like Nigeria, Sudan and Mauritania for instance, the provision is violated through the application of Sharia law.

¹⁵³³ Constitutions which do not prohibit cruel, inhuman or degrading treatment or punishment include those of Equatorial Guinea (1991), Liberia (1984), Madagascar (1998), Rwanda (1991), Senegal (2001), Tanzania (1995), & Tunisia (1991). See Chenwi *supra* n 1233 106.

¹⁵³⁴ See Chenwi *supra* n 1235 106.

¹⁵³⁵ Such as the Constitution of South Africa s 12(1)(e) which provides *inter alia*. “not to be treated or punished in a cruel, inhuman or degrading way.”

¹⁵³⁶ E.g the Constitution of Cameroon.

¹⁵³⁷ See the Nigerian Constitution s 34(1)(a).

¹⁵³⁸ See Hudson “Does the death row phenomenon violate a prisoner’s rights under international law?” (2000) 11 *European Journal of International Law* 817.

¹⁵³⁹ S 12(1).

¹⁵⁴⁰ See ch 7 *infra*.

¹⁵⁴¹ It is submitted that safeguards against torture in Africa should include laws against detention *incommunicado*, grant of access without prejudice to investigation by persons such as doctors, lawyers, and family members; laws requiring that detainees be held in publicly recognized places, and that their names and places of detention entered in a civil register; and laws excluding evidence obtained through the use of torture. Important issues which the African Commission should address in developing the jurisprudence on this subject include, the following: (1) Whether long periods of detention without charge constitute torture, cruel, inhuman and degrading

The pain and suffering associated with torture attracts sympathy and pity.¹⁵⁴² States are often ready to protect their nationals from torture, cruel, inhuman or degrading treatment or punishment inflicted on them abroad particularly when and where the vital interests of the State are affected.

23.3 Right not to be discriminated against

Interestingly, non-discrimination and tolerance of others is a duty under the Charter. This is reflected in articles 19 and 28 of the Charter.¹⁵⁴³ It is trite that the right to equality and non-discrimination forms the basis of modern human rights law. Although the right to equality is an individual right, it may also be applied to support particular group members *qua* individuals.¹⁵⁴⁴

Article 2 of the ACHPR protects against discrimination. The article reads:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed under the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

It would appear that with reference to the 'rights and freedoms in the Charter', it is clear that article 2 can not be invoked unless one of the substantive rights in the Charter is in issue. For full effect, article 2 must therefore be read together with article 3 of the Charter. Article 3 reads:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

treatment or punishment in violation of article 5; (2) Whether the practice of female genital mutilation also constitutes torture, cruel, inhuman and degrading treatment or punishment in violation of this provision and (3) Whether corporal punishment of children in schools and at home constitutes torture. The African Court when operational, should also address these issues. See Ankumah *supra* n 1073 118-9.

¹⁵⁴² See Chenwi *supra* 1235 99.

¹⁵⁴³ See also arts 29(7).

¹⁵⁴⁴ See Ankumah *supra* n 1073 175.

It should be pointed out that the non-discrimination provision under the African Charter is only concerned with the equal enjoyment of the substantive rights and freedoms enshrined under the Charter.¹⁵⁴⁵ Article 3 is however concerned with the application and enforcement of rights and freedoms. Unlike the non-discrimination provision which deals with substantive rights, equality before the law involves procedural aspects of the law.¹⁵⁴⁶

Equal protection as provided for in paragraph 2 of article 3 is concerned with the implementation of the law.¹⁵⁴⁷ In connection with the right not to be discriminated against, the obligation goes beyond individual responsibility to other individuals. Thus individuals are under an obligation to preserve the harmonious development of the family, serve the community, preserve and strengthen national independence and territorial integrity.¹⁵⁴⁸

24 Right to property under the African Charter: Are aliens protected?

In contrast to the ICCPR and the ICESCR, the African Charter protects the right to property, but states that it may be encroached upon in the interest of public need or the general interest of the community and in accordance with the provisions of appropriate laws.¹⁵⁴⁹ There is no mention of the standard for compensation payable upon encroachment.¹⁵⁵⁰

The right of aliens to own property has gained considerable approval in international law as a human right. The recognition of the right under the African Charter is followed by a provision that empowers the State to encroach upon such private property only for public or community interest in accordance with appropriate laws.

The Charter fails to define “public or community interest.” In addition, the instrument does not contain an express provision for the payment of compensation in situations where such properties are encroached upon by the State. The fact that such

¹⁵⁴⁵ *Idem* 173-4.

¹⁵⁴⁶ *Ibid.*

¹⁵⁴⁷ *Ibid.*

¹⁵⁴⁸ *Idem* 160.

¹⁵⁴⁹ Art 14.

encroachment by the State should be in accordance with appropriate laws does not necessarily mean that compensation will be paid nor does it suggest the standard for such payment. It is submitted that the international standard for payment of compensation should apply.¹⁵⁵¹ In relation to diplomatic protection, expropriation without compensation is among the most notable causes of diplomatic intervention. The *Anglo-Iranian Oil Co* case is a good example.¹⁵⁵²

25 Procedural rights under the African Charter

Among the procedural rights guaranteed by the Charter are the rights to fair hearing. These include the right of appeal, the presumption of innocence, the right to defence by a counsel of one's choice, and the right to be tried by an impartial court or tribunal. No one may be tried for an act or omission which did not constitute an offence at the time it was committed.¹⁵⁵³ Some rights may however be limited under certain circumstances as permitted under the UDHR ¹⁵⁵⁴ Thus under article 4 of the Charter, no one may be deprived of his or her life or integrity. But this right is subject to law, and may be denied in circumstances prescribed by law.

The right to a fair trial will now be discussed. The two aspects of this right examined are the right to be presumed innocent until proved guilty, and the right to be tried within a reasonable time. Failure to observe these rules constitutes deprivation of justice which may trigger diplomatic protection in appropriate situations.

¹⁵⁵⁰ Whether "prompt, effective and adequate" as understood in the traditional Western sense?

¹⁵⁵¹ See *Chorzow Factory Case supra* n 33 29. Apart from the issue of acquisition of private property and payment of compensation by the State, article 14 presents a number of questions with regards to property inheritance in Africa especially as it affects women. This is because in many African countries women are not entitled to inherit property, even where they are survivors of their parents. One wonders whether article 14 contemplates that kind of situation See Nmehielle *supra* n 1442 120 See also Ankumah *supra* n 1073 46.

¹⁵⁵² (1951) ICJ Rep 89; 1952 ICJ Rep 93.

¹⁵⁵³ Art 7.

¹⁵⁵⁴ See art 29(2).

25.1 *The right to a fair trial*

The right to a fair trial is the very cornerstone of justice in any society.¹⁵⁵⁵ A fair trial is a basic element of the notion of the rule of law.¹⁵⁵⁶ In Africa, however, the right to a fair trial has been grossly undermined by structural deficiencies in the criminal justice systems.¹⁵⁵⁷ This has greatly increased the risk of unfair trial proceedings on the continent.¹⁵⁵⁸

The fairness of the legal process has a particular significance in the legal system, particularly in criminal cases. Article 7 of the African Charter, therefore, provides that

- 1) Every person shall have the right to have his cause heard. This right shall embrace *inter alia*...
 - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal...
 - (d) the right to be tried within a reasonable time by an impartial court or tribunal.

The right to a fair trial under the African Charter, as in all other human rights instruments, is fundamental in the judicial protection of all persons in a democratic society.¹⁵⁵⁹ It embraces the right of due process of law which is a necessary prerequisite to ensure adequate protection of those persons whose rights or obligations are pending determination before a court or tribunal.¹⁵⁶⁰ The consequences of failure to respect the right to a fair trial are so grave that they can destroy or erode the parameters of proper administration of justice.¹⁵⁶¹

Consequently, the dispensation of justice may become discriminatory, disproportionate and/or arbitrary.¹⁵⁶² It is submitted that the concept of a fair trial ought to be applied to all judicial guarantees in the Charter and in the domestic

¹⁵⁵⁵ See Jayawickrama *supra* n 149 480.

¹⁵⁵⁶ Ovey & White *The European Convention on Human Rights* (2002) 139.

¹⁵⁵⁷ *Ibid.* See also Chenwi *supra* n 1235 149.

¹⁵⁵⁸ Chenwi *idem* vi.

¹⁵⁵⁹ *Ibid.*

¹⁵⁶⁰ The African Commission has dealt with fair trial rights in its resolutions and in a number of cases. See for instance the cases of *Amnesty International (On behalf of Orton and Vera Chirwi) v Malawi supra*, n 1516 *International Pen and others (on behalf of Saro-Wiwa) v Nigeria* and others *supra* n 1357.

¹⁵⁶¹ Tiburcio *supra* n 26 245.

legislation of all African states. As already indicated, the two aspects of the right to fair trial discussed under the African Charter are (a) the right to be presumed innocent and (b) the right to be tried within a reasonable time.¹⁵⁶³

25.2 The right to be presumed innocent

The presumption of innocence provided for under article 7(1) (b) of the African Charter is fundamental to the protection of human rights in Africa. The burden of proof is thus placed on the prosecution to establish the guilt of the accused beyond reasonable doubt.¹⁵⁶⁴ Since the burden is generally placed on the prosecution to prove the guilt of the accused, a court has the responsibility of conducting the trial without forming any opinion on the guilt or innocence of the accused in advance.¹⁵⁶⁵

The right to be presumed innocent requires that the respondent should refrain from making open statements prior to or during the trial at press conferences or at public gathering regarding the guilt of the accused.¹⁵⁶⁶ In the *Saro-Wiwa's* case,¹⁵⁶⁷ for example, the African Commission found the government of Nigeria to be in violation of this right, because the government pronounced the accused guilty of the crime in question at various press conferences and before the UN prior to the trial.¹⁵⁶⁸

The constitutions of many African states also recognise this right.¹⁵⁶⁹ According to Ankumah, however, in many of these states¹⁵⁷⁰ the attitude towards accused persons is that “there is no smoke without fire.”¹⁵⁷¹ Article 7(1) (b) is closely related to article 26, which requires that states should guarantee the independence of the courts.¹⁵⁷²

¹⁵⁶² *Ibid.*

¹⁵⁶³ See p 26 *supra* n 188 & 189.

¹⁵⁶⁴ Ankumah *supra* n 1073 125.

¹⁵⁶⁵ See Chenwi, *supra* n 1297 172.

¹⁵⁶⁶ *Ibid.*

¹⁵⁶⁷ *International Pen and others (on behalf of Saro-Wiwa) v Nigeria supra* n 1357.

¹⁵⁶⁸ See Communication 137/94, 139/94, 154/96 and 161/97, 12th Annual Activity Rep: 1998-1999; (2000) AHRLR 212 (ACHPR 1998) par 96. See Chenwi *supra* n 1233 172.

¹⁵⁶⁹ Ankumah *supra* n 1073 125.

¹⁵⁷⁰ *Ibid.*

¹⁵⁷¹ *Ibid.*

¹⁵⁷² As pointed out by Chenwi *supra* n 1235 171, the right to be presumed innocent is directly linked to the right to be tried within a reasonable time because “to give effect to the former, the accused has to be tried within a reasonable time. Respect for the latter right mitigates the tension between

25.3 *The right to be tried within a reasonable time*

Article 7(1)(d) of the African Charter guarantees the right to be tried within a reasonable time by a competent court or tribunal. The right to a speedy trial has a strong *rationale*.¹⁵⁷³ It minimizes, *inter alia*, oppressive pre-trial incarceration or restrictive bail, the anxiety of the person awaiting trial, and the deterioration of the evidence necessary to enable the accused to answer fully or make a full defence.¹⁵⁷⁴ Undue delay between arrest and punishment may also have a detrimental effect on rehabilitation.¹⁵⁷⁵

This right relates not only to the time within which a trial should commence, but also the time within which it should be completed and judgment rendered.¹⁵⁷⁶ All stages of the proceedings must take place “without undue delay” or within a reasonable time.¹⁵⁷⁷ To ensure the effectiveness of this right, it is submitted that a procedure must be available to ensure that the trial will proceed without undue delay both at the court of first instance and on appeal.¹⁵⁷⁸

Factors such as the nature and complexity of the case, the availability of state resources, and the kind of prejudice suffered by the accused, have to be taken into consideration in determining whether or not this right has been violated.¹⁵⁷⁹ Unfortunately, criminal trials in Africa take many years because accused persons are not brought before a court within a reasonable time.¹⁵⁸⁰

In Nigeria, for instance, although section 35(3) of the 1999 Constitution provides that detained persons must be brought before a court of law within 24 hours, and further

the presumption of innocence and the publicity of the trial, thus rendering the criminal justice system more coherent and fair.”

¹⁵⁷³ Chenwi *idem* 166.

¹⁵⁷⁴ *Ibid.*

¹⁵⁷⁵ See generally the case of *Stogmuller v Austria* 11 EHRR 155 (1979-80); and the Canadian decision in *R v Askov* (1990) 59 CCC (3d) 449.

¹⁵⁷⁶ Chenwi *supra* n 1297 166.

¹⁵⁷⁷ UN Human Rights Committee, General Comment No. 13. See Chenwi *supra* n 1235 167.

¹⁵⁷⁸ CCPR General Comment No. 13. See Chenwi *ibid.*

¹⁵⁷⁹ This is because it is very difficult to establish undue delay. Delay *per se* does not amount to a violation of this right. See the case of *Sanderson v A-G* [1997] 12 BCLR 1675.

¹⁵⁸⁰ See Chenwi *supra* n 1297 167.

that an accused person must be tried within two months of the date of arrest or detention, this is not the case in practice.¹⁵⁸¹ The pre-trial time in detention is rarely less than six months to one year.¹⁵⁸²

Since it is difficult to establish undue delay because it is governed by circumstances surrounding the case¹⁵⁸³ it was held in *Smyth v Uhsewakunze*¹⁵⁸⁴ that the right to be tried within a reasonable time is of a constitutional value of supreme importance that must be interpreted in a broad and creative manner.¹⁵⁸⁵ Delay, in itself, might not constitute a violation of the right to a trial within a reasonable time.¹⁵⁸⁶ However, the cases that have come before the African Commission in respect of article 7(1)(d) of the Charter¹⁵⁸⁷ reveal that the Commission holds the view that in circumstances where the state deliberately denies a detained person access to justice, no delay may be excused.¹⁵⁸⁸

*Chattin's case*¹⁵⁸⁹ must be borne in mind in relation to diplomatic protection. Referring to undue delay in that trial, the Commission said, *inter alia*,

Irregularity of court proceedings is proven with reference to absence of confrontation, withholding from the accused the opportunity to know all of the charges brought against him, *undue delay of the proceedings*, making the hearings in open court a mere formality¹⁵⁹⁰

¹⁵⁸¹ *Idem* 168.

¹⁵⁸² *Ibid* 168. In *Pagnouille (on behalf of Mazou v Cameroon)*, Communication 39/90, 10th Annual Activity Report, 1996-1997; (2000) AHRLR 57 (ACHPR, 1997) par 19, it was held by the African Commission that two years without any hearing or projected trial date constitutes a violation of art. 7(1)(d). The Commission came to that conclusion based on the fact that no reason had been given for the delays.

¹⁵⁸³ Eg the nature and complexity of the case, the availability of state resources with regard to investigation or prosecution of the case, and the kind of prejudice suffered by the accused, etc.

¹⁵⁸⁴ (1998) 4 LRC 120.

¹⁵⁸⁵ At 129b.

¹⁵⁸⁶ Eg in *Sanderson v A-G* [1997] 12 BCLR 1675 it was held that failure to bring an accused person to trial two years after his first appearance did not constitute a violation of the right to a trial within a reasonable time. See also the case of *Asakitkpi v The State* (1993) 6 SCNJ 201.

¹⁵⁸⁷ See e.g the case of *Orton & Vera v Malawi supra* n 1516. See also *Pagnouille (on behalf of Mazou v Cameroon)* Communication 39/90; 10th Annual Activity Report; 1996-1997 (2000) AHRLR 57 (ACHPR 1997) par 19.

¹⁵⁸⁸ See Communication 64/92, 68/92, 78/92, Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) Amnesty International (on behalf of Orton Chirwa and Vera Chirwa v Malawi) par 44 *supra* n 1516.

¹⁵⁸⁹ *Supra* n 32.

¹⁵⁹⁰ Emphasis mine.

26 Conclusion

The rights enshrined in international and regional human rights instruments are meant to set the required standard to be followed by states. In their day to day activities, states are expected to fashion their legislative, administrative and judicial acts in conformity with the provisions of these instruments, failing which they will be deemed to be acting in violation of international law.¹⁵⁹¹

With regard to aliens, it appears that, apart from political and property rights which some states often limit or restrict to some degree under international and comparative law, the range of rights specifically allowed to aliens under the instruments discussed above is sufficiently wide enough.¹⁵⁹² These rights range from civil and procedural rights to such socio-economic rights as the right to work and the right to healthy working conditions, fair wages and equal remuneration for work done,¹⁵⁹³ It also includes the right to communicate with their consular or diplomatic missions in case a need arises.¹⁵⁹⁴ It is hoped that the right to communicate with the consular and/or diplomatic missions of foreign nationals will further enhance the prospects of diplomatic protection.

Since states are required to make public, laws affecting aliens in their territories,¹⁵⁹⁵ the provisions of such laws, it is submitted, should not only be spelt out clearly but the rights and obligations placed on aliens, should also be guaranteed. Enforcement mechanisms must also be created, otherwise, such laws may become mere innocuous rules.¹⁵⁹⁶ National legislation affecting aliens should, therefore, not only have a controlling influence, but must be protective in their overall effect on aliens irrespective of their status, sex, religion or nationality.¹⁵⁹⁷

¹⁵⁹¹ Tiburcio *supra* n 26 xvi.

¹⁵⁹² I.e res 40/144 & the CMW.

¹⁵⁹³ To those individuals who are not migrant workers.

¹⁵⁹⁴ Art 10 of res. 40/144; art 23 of the CMW.

¹⁵⁹⁵ See art 3 of res.40/144. Dugard has pointed out that res 40/144 itself has not provided any mechanism for the enforcement of the instrument. See Dugard *supra* n 25 78.

¹⁵⁹⁶ Tiburcio *supra* n 26 272.

¹⁵⁹⁷ See art 3 of res 40/144.

A question nevertheless, remains, regarding the effectiveness of the African Charter, namely, whether, apart from the provisions of article 12(5), other provisions of the Charter protect the rights of foreigners. It is further questionable whether there is any political will or commitment by African leaders to enforce the provisions of the Charter for the benefit of foreigners. It is submitted that although the Charter provides generally that “every individual” is protected or that “no one” shall be denied the benefits of those rights, it is doubtful whether there is any political will or commitment on the part of African states and the African Commission in particular to effectively implement the provisions of the Charter.¹⁵⁹⁸

It must however be borne in mind that when states join any convention regime, they should commit themselves to upholding the norms of the convention, supporting and strengthening them and not to undermine them.¹⁵⁹⁹ This undermining tendency may ultimately be the undoing of the African Charter.

In her seminal book *African Commission and Human Rights*¹⁶⁰⁰ Ankumah has pointed out some of the deficiencies inherent in the fair trial/fair hearing provisions of the African Charter.¹⁶⁰¹ It is encouraging to note that the Commission has taken steps to rectify some of these anomalies.¹⁶⁰² It is hoped that the African Court on

¹⁵⁹⁸ The Commission is said to be poorly funded, its independence subjugated, and its powers limited. See Ankumah *supra* n 1071 18. See also Murray *supra* n 1438 49. Furthermore, the remedies it provides are said to be weak and, at times slow in coming. According to Ngcobo J in *Kaunda's case supra* n 688 par 166 “An individual may lodge a complaint with the African Commission concerning the violation of a fundamental human right guaranteed in the African Charter. However in circumstances where urgent action is required, procedure that has to be followed in processing the complaint may result in delays. What is more, its powers are to make recommendations to the offending state. This points to the urgent need to establish a Court of Justice to enforce the rights guaranteed in the African Charter.” Par 166.

¹⁵⁹⁹ See Barker *supra* n 872 12.

¹⁶⁰⁰ *Supra* n 1073.

¹⁶⁰¹ She points out that there are some *lacuna* in some of the provisions of the Charter. These include *inter alia* with particular reference to the fair trial/hearing provisions, the right of individuals to have free access to an interpreter if they cannot speak the language used in the court, the right of individuals to have adequate time and facilities for the preparation of their defence, the right to legal aid, the right to a public hearing by a legally constituted, competent, independent and impartial judicial body, the right to consult and be represented by a legal representative or other qualified persons of one's choice at all stages of the proceedings, the right of an appeal to a higher judicial body when necessary. Other suggestions made by Ankumah include compensation to victims of torture, etc. See Ankumah *supra* n 1073 particularly 123-132.

¹⁶⁰² The African Commission has dealt with the fair trial/ hearing rights in some of its resolutions. Such resolutions incorporate and expand the fair hearing rights contained in the African Charter. These include e.g the Resolution on the Right to Recourse and Fair Trial of 1992 (Resolution on the Right to Recourse and Fair Trial, 11th session in Tunis, Tunisia 2-9 March 1992.) In 1999 the African Commission adopted another resolution on the Right to a Fair Trial and Legal Assistance

Human and Peoples' Rights will help to strengthen the enforcement mechanism of the African Charter.

As for the international instruments, although they play important roles in extending protection to both aliens and nationals alike in the territories of respective state parties, they should be enforced by domestic courts in Africa who are parties to these treaties, since there is no international Court of Human Rights to enforce them.. A call is hereby made for the establishment of an international court of human rights. Such a court will not only help in determining human rights issues on appeal from decisions of regional courts or decisions of the Human Rights Committee under articles 41 and 42 of the ICCPR,¹⁶⁰³ but will go a long way towards fulfilling the dreams and aspirations of the founding fathers of the UN in “promoting and encouraging respect for human rights and fundamental freedoms for all.”¹⁶⁰⁴

in Africa (Resolution on the Right to a Fair Trial and Legal Assistance in Africa, 26th session in Kigali, Rwanda 1-15 Nov1999) In addition, in 2003 the Commission adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Aid in Africa (African Commission's principles and Guidelines adopted at its 33rd ordinary session in Niamey, Niger in May 2003). See Chenwi *supra* n 1233 158-160. These resolutions have addressed some of the various deficiencies observed by Ankumah on the fair hearing provisions of the Charter.

¹⁶⁰³ Art 42(1)(a) stipulates that if a matter referred to the Human Rights Committee in accordance with art 41 of the ICCPR is not resolved to the satisfaction of the parties, a 'Commission' should be set up to handle the matter. It is submitted that such matters should go to the International Human Rights Court instead. With its judicial authority, an international court of human rights will bring finality to any lingering international human rights dispute. Fortunately or otherwise, no inter-state complaint has so far been received by the Committee. Besides, the International Criminal Court (ICC) has been established to take care of gross violations of human rights – genocide, war crimes, and crimes against humanity.

¹⁶⁰⁴ See art 1(3) of the UN Charter.