

CHAPTER SIX

Diplomatic Protection of Human Rights in South Africa: Legal and Constitutional Issues

1 Introduction

This chapter examines diplomatic protection of human rights under South African law. It seeks to determine whether there are legal or constitutional provisions under South African law guaranteeing diplomatic protection of human rights to South Africans abroad, the extent to which such legal or constitutional provisions have been invoked by South African citizens, government responses to such requests and judicial approach or attitude to the requests.

For purposes of exploring its *modus operandi* towards diplomatic protection, the state of human rights in South Africa is determined. The aim is to identify the international and regional human rights instruments binding on South Africa which have been incorporated into South African law aimed at the protection of both foreigners and South African citizens.¹⁹⁹⁵ The extent to which these instruments have protected the human rights of foreigners in practice, is also assessed.

The application of international law in South African municipal law is the key to determining the issue of diplomatic protection of human rights in the country. Hence, the status of international law in South African law, the method of incorporating international law into South African municipal law, the scope of diplomatic protection of human rights in South Africa, and the instruments from which this protection is derived, will be ascertained. The subject is also discussed from four main perspectives as done in the case of Nigeria; namely, from the constitutional perspective, government policy perspective, state practice and judicial perspectives.¹⁹⁹⁶

¹⁹⁹⁵ See ch 4 *supra*.

¹⁹⁹⁶ I.e from the constitutional perspective, government policy on diplomatic protection, state practice, and judicial perspectives.

2 The position of international law in South African municipal law

International law plays an important part in South African law.¹⁹⁹⁷ Not only does it form part of South African law,¹⁹⁹⁸ but it is also an important interpretative tool for the interpretation of the Constitution and other legislation generally,¹⁹⁹⁹ as well as an interpretative aid in the interpretation of the Bill of Rights in particular.²⁰⁰⁰

International law did not always play an important role in South African law.²⁰⁰¹ Although the country was a founding member of the League of Nations, she nevertheless became a progenitor of one of the most universally condemned policies of all time, the apartheid policy,²⁰⁰² and became a pariah nation, rejected by the international community.²⁰⁰³ Because of this development, the entire field of public international law became polarized.²⁰⁰⁴ In such a climate, Public international law became no more than a subsidiary system of law to be reasoned away.²⁰⁰⁵

With the adoption of the 1993 Constitution (commonly referred to as the Interim Constitution)²⁰⁰⁶ South African law entered into a new relationship not only with Public international law, but also with the international community in general.²⁰⁰⁷ The

¹⁹⁹⁷ See for instance Olivier "The Status of International law in South African law: Section 231 of the 1993 Constitution." (1993 / 1994) 19 *SAYIL* 1; Devine "The relationship between International Law and Municipal Law in the light of the interim South African Constitution 1993." (1995) 44 *ICLQ* 1; Dugard "International Law and the final Constitution." (1995) 11 *SAJHR* 241; & "International Law and the South African Constitution." (1997) *EJIL* 77; Botha "International Law and the South African Interim Constitution." (1994) 9 *SAPLPR* 245, & "The coming of Age of Public International Law in South Africa." (1992/93) 18 *SAYIL* 36; Strydom "International Law and the openness of the South African Constitution." (1995) 20 *SAYIL* 222; & Keightley "Public International law and the Final Constitution." (1996) 12 *SAJHR* 405.

¹⁹⁹⁸ As Customary International Law under s 232 of the Constitution and as conventional law under s 231 of the Constitution.

¹⁹⁹⁹ See s 233.

²⁰⁰⁰ S 39(1).

²⁰⁰¹ See Botha (1992/93) *supra* n 2000 36.

²⁰⁰² *Ibid.*

²⁰⁰³ See GA Res 3206 XXIX of 1974-09-30 by which SA was rejected at the UN. See Botha *idem* 37.

²⁰⁰⁴ Botha *ibid.* According to Olivier, the main points of criticism directed by the international community against apartheid SA were based on the country's non compliance with the norms of International Law. See Olivier *supra* n 2000 1.

²⁰⁰⁵ Botha (1992/93) *supra* n 1993 37.

²⁰⁰⁶ Act 200 of 1993.

²⁰⁰⁷ See Olivier *supra* n 2000 12 & Botha (1992/93) *supra* n 2000 48. According to Olivier, the year 1993 presented a watershed in SA legal history, bringing an end to white minority rule and kick-starting the process of democratic transformation with the adoption of a Constitution providing for

1996 Constitution²⁰⁰⁸ further affected the status of international law in South Africa by retaining certain aspects of the interim constitution, and amending others.²⁰⁰⁹ In relation to diplomatic protection, the provisions regulating the status of international law under the 1996 Constitution are sections 232,²⁰¹⁰ 231,²⁰¹¹ 233,²⁰¹² and 39(1) &(2).²⁰¹³ These sections constitute the main focus of this discussion.

For the first time in South African constitutional history, the Constitution not only made specific mention of the term “Public international law,” but also provided for the status and role of international law constitutionally.²⁰¹⁴

As already indicated, international law comprises mainly customary international law rules and conventional law or treaties.²⁰¹⁵ In South Africa, as in many other jurisdictions, different rules apply to the applicability of customary international law and treaties in South African municipal law. In relation to diplomatic protection, the relevance of customary international law in South African law is first examined before the relevance of international agreements or treaties to the subject is considered.²⁰¹⁶

a transition to a democracy. See Olivier “International Law in South African Municipal Law: Human Rights, Procedure, Policy and Practice” LLD Thesis UNISA 2002 166.

²⁰⁰⁸ I.e the Constitution of the RSA 1996 adopted by the Constitutional Assembly on 8 May 1996 often referred to as the “final” Constitution. See Olivier *supra* n 1993 36; Dugard (1995) *supra* n 1993;& Keightley *supra* n 1993 416.

²⁰⁰⁹ While some commentators feel that the 1996 Constitution affected the interim Constitution negatively, others think otherwise. See for instance Keightley *supra* n 2000 405. See also Dugard (1995) *supra* n 2000. It is not intended to make a comparative analysis of the differences and similarities between the interim and the final Constitutions as far as International Law is concerned. Suffice to say that references will be made to relevant provisions where and when necessary.

²⁰¹⁰ I.e the provision defining the status of Customary International Law under SA law.

²⁰¹¹ The provisions relating to the ratification of international agreements and their incorporation into SA law.

²⁰¹² The provision prescribing that International Law shall be used as an aid in the interpretation of the Constitution and other legislation.

²⁰¹³ Provision dealing with the interpretation of the Bill of Rights.

²⁰¹⁴ See Olivier *supra* n 2003 175 *et seq.*

²⁰¹⁵ See art 38 (1)(a) & (b) of the Statute of the ICJ. Other sources include judicial decisions, general principles of law recognized by civilized nations, and writings of renowned publicists.

²⁰¹⁶ It may be of interest to note that SA is one of the few countries in Africa that has constitutionally incorporated both Customary International Law and treaties as part of its municipal law. See Maluwa “The incorporation of international law and its interpretational role in municipal legal systems in Africa: An exploratory survey” *supra* n 1617 45. The other countries are Namibia and Malawi. Maluwa *ibid.* For a brief summary of the inter-relationship between International Law and Municipal Law and the theories commonly known as monism and dualism, see *supra* ch 5. See also Brownlie *Principles of Public International Law* (1990) 32-56.

3 The status of customary international law in South African municipal law²⁰¹⁷

Section 232 of the 1996 Constitution provides that:

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

The basic characteristic of customary law is that it is unwritten.²⁰¹⁸ This unwritten factor of customary law was perhaps the *raison d' etere* behind the controversy that surrounded the applicability of customary international law in South African law prior to 1993.²⁰¹⁹

Two schools of thought emerged as a result of that controversy. The first school was led by Dugard who was of the view that customary international law was part of South African law and that the courts were obliged to apply it when and where necessary.²⁰²⁰ The other school was championed by Booysen,²⁰²¹ who argued that customary international law was not part of South African law, but only a source of law available to courts in appropriate cases.²⁰²² Despite the clear provisions of the

²⁰¹⁷ See eg Olivier (1993/1994) *supra* n 2000 11. Botha (1992/93) *supra* n 2000 41-42, 46-47; Keightley (1996) *supra* n 2000 406-408; Sanders "The applicability of Customary International Law in Municipal Law- South Africa's monist tradition" (1977) *THRHR* 369 & "The applicability of Customary International Law in Municipal Law -South Africa's monist tradition: The Appeal Court has spoken." (1978) *CILSA* 198. See also Devine "What customary international law is part of South African law?" (1987-88) *SAYIL* 19; Scaffer "The interrelationship between Public International Law and the law of South Africa: An Overview." (1983) *ICLQ* 277; & Booysen "Jurisdiction to try abducted persons and the application of international law in South African law." (1990/91) 17 *SAYIL* 133.

²⁰¹⁸ Customary international law comprises usages regarded as legally binding on states by the majority of the international community. The two ingredients necessary for the formation of customary international law are: (a) state practice and (b) *opinio juris*. See the *Asylum* case *supra* n 1491.

²⁰¹⁹ See Botha (1992/93) *supra* n 2000 41. See also Mubangizi *supra* n 282 45. The controversy was further fuelled by SA's persistent objection to the application of customary international law in its territory. See Botha (1992/93) *supra* n 2000 38; Olivier (1993/1994) *supra* n 2000 14; Dugard (1997) *supra* n 1993 248. The courts also refused to apply International Human Rights rules such as the UDHR. See Dugard "The role of International Law in interpreting the Bill of Rights." (1994) 10 *SAJHR* 208 209.

²⁰²⁰ Dugard (1997) *supra* n 1993 77. O'Shea also belonged to this school See Mubangizi *supra* n 282 45. The following cases supported this proposition *Nduli v Minister of Justice* 1978 (1) SA 89; *Interscience Research and Development Services v Republic Popular DeMocambique* 1980 (2) SA 111 (T); and *Kaffraria Properties v Government of the Republic of Zambia* 1989 (2) SA 709 See also *South Atlantic Islands Development Corporation v Buchan* 1971 (1) SA 234 (C).

²⁰²¹ See Booysen *Volkereg en sy verbouding tot die Suid-Afrikaanse reg* (2ed 1980) 433.

²⁰²² Botha was also of this school of thought. See Mubangizi *supra* n 282 45.

interim Constitution on this subject, the controversy raged on.²⁰²³ The controversy was finally laid to rest by the provisions of section 232 of the 1996 Constitution,²⁰²⁴.

Thus, the interpretation of section 232 of the Constitution has given authority to the doctrine that in South Africa, customary international law is “part of the law of the land.”²⁰²⁵ Maluwa has, however, pointed out that this constitutional provision is virtually unparalleled in Africa at least in so far as the status of customary international law is concerned.²⁰²⁶ This doctrine means that the courts are bound to apply customary international law whether or not it is raised before them.²⁰²⁷

²⁰²³ The 1993 Constitution s 231(4) provided that the rule of Customary International Law binding on the Republic shall, unless inconsistent with the Constitution or an Act of Parliament form part of the law of South Africa. The bone of contention however was the particular rules of Customary International Law binding on the Republic. See Devine (1987/88) *supra* n 2013. Olivier who was part of the drafting team tried to resolve this controversy when she declared that the aim of section s 231(4) was to make Customary International Law part of the law of the land. See Olivier (1993/1994) *supra* n 1995 11.

²⁰²⁴ Under this section, the application of customary international law in SA is subject to two qualifications:

(a) it must not be inconsistent with the Constitution, and (b) it must not be inconsistent with an Act of Parliament. Keightley has however pointed out that while the final constitution introduces no major changes to the interim constitution regarding Customary International Law, there are at least two points worth noting about section 232 of the 1996 Constitution. First, in subjecting customary international law to Acts of Parliament in cases of conflict or inconsistencies between the two, the final constitution draws no distinction between Acts passed after the advent of the new constitutional dispensation in South Africa in 1994, and those passed by the previous government. Secondly, the omission of the word “binding” from section 232 of the final Constitution implies that all rules of customary international law form part of South African law regardless of whether such rules were previously accepted as binding on South Africa or not.

²⁰²⁵ See Olivier *supra* n 2000 11. See also Booysen “The Administrative Law implication of the ‘customary law is part of the South African law’ doctrine.” (1997) 22 *SAYIL* 46 where he opines that the doctrine that Customary International Law is part of the law of SA is not only incorrect in law, but is so sweeping that it has no legal foundation either in theory or in practice. Botha (1992/93) *supra* n 1995 46 on the other hand says that the nominal claim that customary international law is part of the law of SA is subject to so many exceptions that it has become but meaningless.

²⁰²⁶ Maluwa “International human rights norms and the South African Interim Constitution 1993” (1993/1994) 19 *SAYIL* 14 45.

²⁰²⁷ Writing with reference to customary law in the SA Constitution, Dugard observed that “section 232 is not a complete statement on the subject of Customary International Law in South Africa. It will be necessary to turn to judicial precedent to decide which rules of Customary International Law are to be applied and how they are to be proved. Since International Law is not foreign law, courts may take judicial notice of it as if it were part of our common law. In practice, this means that courts turn to the judicial decisions of international tribunals and domestic courts both South African and foreign and to International Law treaties for guidance as to whether or not a particular rule has been accepted as a rule of Customary International Law on the grounds that it meets the twin applications of *usus* and *opinio juris*.” See Dugard *supra* n 1 36.

With regard to the standard of proof, it was held in *S v Petane*²⁰²⁸ that for South African courts to consider the incorporation of a customary international law norm, the customary international law norm must be widely accepted. Nevertheless, the entire *corpus* of customary international law has now been accepted as part of the law of the land in South Africa.²⁰²⁹

Since section 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament, the implication is that diplomatic protection is also part of the law of South Africa, because diplomatic protection operates at the customary international law level.²⁰³⁰ In the absence of any proof of inconsistency, diplomatic protection must be regarded as part of the law of South Africa. As a result, it is not imperative to incorporate it specifically into South African law.

4 Incorporation of international agreements into South African municipal law

The starting point in determining how international agreements are dealt with under South African law and practice under the new democratic dispensation is section 231 of the 1996 Constitution.²⁰³¹ Section 231(1) - (3) lays down the procedures governing domestic negotiation, approval and conclusion of international agreements.²⁰³² In

²⁰²⁸ 1988 (3) SA 51 (CC).

²⁰²⁹ The doctrine is also in vogue in the UK, the US, and other countries of the world. In the US, see the case of *The Paquete Habana* 175 US 677 1900. For England and Canada, see the discussion of Slyz "International Law and national courts" 1995/96 *Journal of International Law and Politics* 65 88ff.

²⁰³⁰ See s 232. See also *Kaunda's case supra n 688* par 23.

²⁰³¹ See Devine "Some problems relating to treaties in the interim South African Constitution and some suggestions for the definitive constitution." (1995) 20 *SAYIL* 1; Scholtz "A few thoughts on section 231 of the South African Constitution Act 108 of 1996" (2004) 29 *SAYIL* 202; Schneeberger, "A labyrinth of tautology: The meaning of the term international agreement and its significance for South African law and treaty making practice" (2001) 26 *SAYIL* 1; Olivier "Informal International Agreements under the 1996 Constitution" (1997) 22 *SAYIL* 63; Scholtz and Ferreira; "The interpretation of section 231 of the South African Constitution: A lost ball in the high weeds" (2008) *XLI CILSA* 324; Michie "The provisional application of treaties in South African law and practice" (2005) 30 *SAYIL* 1 & Scholtz & Olivier "Exploring the doctrine of self-execution as enforcement mechanism of international obligations." (2002) *SAYIL* 99.

²⁰³² "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

relation to diplomatic protection, section 231(4) applies. It deals with the incorporation of international agreements into South African Law. Section 231(4) provides that:

Any international agreement becomes law in the Republic when it is enacted into law by the national legislation, but a self executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.²⁰³³

Section 231(4) of the 1996 Constitution therefore requires a treaty to be incorporated into South African law before it can be applied by the courts. Once this is done, the international agreement can be invoked before national courts and applied like any other domestic source of law. In relation to diplomatic protection and human rights, the consequence of non compliance is particularly relevant because no diplomatic or human rights treaties to which the Republic is a party can be invoked by the individual unless same is incorporated into SA municipal law.²⁰³⁴

However, while this section provides on one hand that an international agreement becomes law in the Republic only when it is enacted into law by national legislation, it also contains a *proviso* that

a self executing provision of an international agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification of (or) accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.”

²⁰³³ Under the interim constitution, the function of negotiating and signing of treaties was reserved for the executive specially the President. This was in line with the pre -1994 position. Parliament was not involved. See Dugard *supra* n 1 53; See also Keightley *supra* n 1995 409 who is of the view that s 231(4) of the 1996 Constitution represents a complete reversal of the interim Constitutional position by providing that a treaty will only become law in SA when enacted into law by national legislation. According to him, the intention behind s 231(4) is presumably to require treaties to be incorporated into SA domestic law through the medium of Acts of Parliament. That is to say, to reintroduce the position as it existed prior to the interim constitution.

²⁰³⁴ Malan *supra* n 1136 82 however maintains that human rights treaties need not be incorporated into domestic law before individuals can acquire rights under such treaties because such treaties are in the nature of *stipulations alteri* (agreements for the benefit of third parties) and have a self executing character.

This *proviso* creates a scenario whereby some international agreements ratified by South Africa become law of the land only when they are enacted into law by national legislation, while others are automatically incorporated.²⁰³⁵ The intention of the drafters in including this *proviso* is unclear, but many commentators seem to agree that the section is bound to create problems.²⁰³⁶ The provision of self executing treaties in the Constitution, therefore, deserves a brief consideration since this scenario is likely to occur with regard to treaties having an impact on diplomatic protection.

5 Judicial interpretation of section 231(4) – the self execution provisions of the South African Constitution

The self-executing provision of section 231(4) of the 1996 Constitution which has given rise to serious debates within academic and judicial circles fell for determination by the Transvaal Provincial Division of the High Court of South Africa.²⁰³⁷

In the *Preller* case, the appellants challenged the constitutional validity of the extradition agreement signed between the RSA and the USA on 16 September 1999. The appellants contended that their arrest and detention in terms of the

²⁰³⁵ Agreements which can be automatically incorporated into SA law are international agreements of a technical, administrative, or executive nature under section 231(3) of the Constitution.

²⁰³⁶ Dugard *supra* n 1 62 agrees that the section can create problems and therefore warns that no general guidelines can be given in this regard and that each case in which it is claimed that a treaty is self executing will have to be decided on its own merit by the courts, with due regard to the nature of the treaty, the precision of the language and the existing SA law on the subject. Olivier *supra* n 2005 284 *et seq* like Dugard, agrees that the self executing nature of an international agreement should be determined through a combination of factors. Such factors should also include the language and subject-matter of the treaty. She believes that the domestic law of a State party to an international agreement should only be relevant in so far as it permits self execution. In other words, should certain treaty provisions be capable of direct application, such direct application can only be effected in the legal systems of State parties permitting the concept of direct application. She submits that the concept of self execution will become increasingly more relevant as treaty regimes develop *ibid*.

²⁰³⁷ The court had the opportunity on two separate occasions to address the various uncertainties concerning the transformation of international agreements into SA law in terms of self executing agreements. The two cases were the *Quagliani* case (*Quagliani v President of the RSA*) 959/04 TPD (unreported) and *Van Rooyen Brown* case (*Van Rooyen /Brown v President of the RSA*) 2824/06 TPD (unreported) decided by Justice Preller on 6/3/08. (Hereinafter referred to as the *Preller* judgment) and the *Goodwin* case (*Goodwin v Director-General Department of Justice and Constitutional Development* 2124/08 TPD. (Unreported), decided on 23/6/08 by Acting Justice Ebersohn. (Hereinafter referred to as the *Ebersohn* judgment).

agreement were unlawful as a result of the alleged invalidity of the agreement.²⁰³⁸
The main allegation was that the agreement was invalid, because it was signed by the Minister of Justice and not by the President.²⁰³⁹

From the outset, the court stressed the consequences of invalidating the agreement which might be disastrous, taking into consideration the fact that the agreement had been in operation for several years and that a number of persons had been extradited in terms of it.²⁰⁴⁰ The court confirmed that it was not a step to be taken lightly, but nevertheless one that must be taken if circumstances demanded.²⁰⁴¹

The court then referred to section 231(1) of the 1996 Constitution which states that the negotiating and signing of all international agreements is the responsibility of the National Executive. Section 83(a) which determines that the President is the Head of State and Head of the National Executive. Section 85(1) and (2) which provide that the executive authority is vested in the President of the Republic and that such authority must be exercised together with other members of the Cabinet. Section 84(2) which lists a number of responsibilities that the President may perform of his own accord – but not including the negotiation and signing of international agreements. The court also cited section 2(1) of the Extradition Act which provides that the President may enter into extradition agreements with foreign states subject to the provisions of the Act. The court came to the conclusion that

International agreements are therefore the responsibility of the Cabinet as a whole. As far as the provisions of section 2(1) of the Extradition Act 67 of 1962 that the President may enter into agreements with foreign states may purport to reserve the power and responsibility of the President to the exclusion of the Cabinet, it would be in conflict with the Constitution and would be void.²⁰⁴²

The court accepted that the term “self executing provision” in section 231(4) of the Constitution was taken from US law and has a technical meaning that is foreign to

²⁰³⁸ At 2.

²⁰³⁹ See Scholtz & Ferreira *supra* n 2033 326.

²⁰⁴⁰ At 5 *linea* 17.

²⁰⁴¹ *Linea* 19.

²⁰⁴² At 10.

the SA legal system.²⁰⁴³ According to the court, it would be impossible to give effect to the intention of the writers of the Constitution by merely attaching their ordinary meaning to those words.²⁰⁴⁴ The court however pointed out that because the words are part and parcel of section 231(4) of the Constitution, it would have to give some meaning to them.²⁰⁴⁵ Finally, the court made a declaration that the extradition agreement signed on 16 September 1999 between the RSA and the USA was not binding since it was not incorporated into SA law as a result of failure to comply with the provisions of section 231(4) of the Constitution.²⁰⁴⁶

The *Ebersohn* judgment dealt with the same extradition agreement, but more background facts were supplied to the extradition agreement in dispute than in the *Preller* judgment.²⁰⁴⁷ According to the court in *Ebersohn* case, the current extradition agreement between the RSA and the USA was preceded by an extradition agreement between the two countries that was concluded on 18 December 1947. During 1998, representatives of the two countries negotiated a new agreement that was intended to replace the 1947 agreement. The new agreement was signed on 16 September 1999 by the Minister of Justice and Constitutional Development on behalf of South Africa in Washington, with the written approval of the President, as contained in the Presidential Minute.

After the agreement had been approved by both Houses of Parliament, the Minister for Foreign Affairs signed the Instrument of Ratification on March 28 2001 so as to bring it into force between the two countries. On May 29 2001, pursuant to section

²⁰⁴³ At 13 *linea* 6 *et seq.*

²⁰⁴⁴ *Ibid.*.

²⁰⁴⁵ *Ibid.* The court then referred to the contention by the respondent that the term “self-executing” should be understood in accordance with the wording of the Afrikaans text of section 231(4) to mean “*direk uitvoerbaar*” and that the drafters of the Constitution contemplated a “quick and simple coming into operation” of treaties that does not require enactment into law by national legislation. The court rejected the submission that in view of the above argument and in view of the provision in article 24 of the Extradition agreement, the Extradition agreement should be regarded as having become law in the Republic. The court based its finding on the fact that before the instrument of ratification can be exchanged, the treaty must have been approved by parliament in terms of section 231 of the Constitution. In its discussion of section 231(4) of the Constitution, the court also referred to the contention by one of the applicants that the words “self executing provision” in section 231(4) is indicative of the fact that the drafters of the Constitution intended that only a provision of an agreement, but not the entire agreement may be “self executing”.

²⁰⁴⁶ At 2.

²⁰⁴⁷ Par. 6 *et seq.*

2(3) of the Extradition Act, the Minister of Justice and Constitutional Development published the required notice in the Government Gazette²⁰⁴⁸ together with the text of the approved agreement.

After his arrest in the US, in terms of the new extradition agreement, and pending his extradition to South Africa, the applicant requested the court in Los Angeles to order his immediate release as a result of the alleged invalidity of the agreement between the two countries.²⁰⁴⁹ The magistrate dismissed the application finding that the agreement was binding on the US. He therefore made an order that any constitutional matters relating to SA in the matter, should be raised in a South African court. Against this background, the current application was lodged.

The applicant then brought an application asking the court firstly, to set aside the decision of the respondent requesting the relevant authorities in the US to arrest him. Secondly, declaring the conduct of the respondent unlawful and inconsistent with the Constitution in making the request to the US authorities and thirdly, prohibiting the respondent from taking any further action in terms of the agreement, pending the final determination of the issues in the *Quagliani* and *Van Rooyen Brown* cases.²⁰⁵⁰

The applicant based his argument, *inter alia*, on the ground that the extradition agreement in question was invalid, because it had not been signed by the President personally and that the respondent acted without any power conferred on him by law in making the request for his arrest.²⁰⁵¹ The court pointed out that the basis for the attack on the validity of the extradition agreement in both the *Preller* and the *Ebersohn* judgments was the fact that the Minister of Justice and not the President signed the agreement in Washington.²⁰⁵²

The court referred to section 2 of the Extradition Act in terms of which the President may enter into extradition agreements with foreign states subject to the provisions of

²⁰⁴⁸ See G G 22430 dated 2001-06-29 53.

²⁰⁴⁹ Par 16.

²⁰⁵⁰ *Supra* par 1.

²⁰⁵¹ Par 13.

²⁰⁵² Par 15.

the Act.²⁰⁵³ The court also referred to section 84(1) of the Constitution in terms of which the President has the power entrusted in him by the Constitution and legislation,²⁰⁵⁴ and section 85 that vests the executive authority of the Republic in the President and requires that his executive authority be exercised together with other members of the Cabinet.²⁰⁵⁵

In view of the aforementioned, the Court found that the decision of the President to authorize the Minister of Justice and Constitutional Development to sign the newly negotiated extradition agreement conformed with the requirements of section 101.²⁰⁵⁶ In this regard the court agreed with the *Preller* judgment that

Section 2 of the Extradition Act could never have intended that the President himself had to perform each and every act that had brought about the finalization of the treaty. All that he had to do is to act as the Head of the Executive as required of him by the Constitution'.²⁰⁵⁷

Concerning the transformation of the extradition agreement into South African law in terms of section 231(4) of the Constitution, the court did not agree with the decision in *Preller* judgment, but found that it had been incorporated into South African law.²⁰⁵⁸

The *Preller* judgment answered the question regarding the effect where an international agreement is ratified but not transformed into national legislation as prescribed by section 231(4) of the 1996 Constitution. In relation to diplomatic

²⁰⁵³ Par 12.

²⁰⁵⁴ Including those necessary to perform the functions of Head of State and Head of the National Executive par 21.

²⁰⁵⁵ Par 22. In addition to the above, the court referred to articles 11 and 13 of the Vienna Convention in terms of which states are bound in international law by the Law of Treaties once there has, *inter alia*, been an exchange of instruments constituting a treaty. The court also cited section 101 of the Constitution that provides for a decision by the President to be in writing and countersigned by another member of the Cabinet if that decision concerns a function assigned to that particular member. Section 231(1) of the Constitution which determines that the negotiating and signing of all international agreements is the responsibility of the National Executive, was also referred to. Both sections 232 and 233 that provide that customary international law is part of South African law unless inconsistent with the Constitution or an Act of Parliament, and that a court when interpreting legislation, must give preference to an interpretation that is consistent with international law, were also referred to.

²⁰⁵⁶ *Ibid*

²⁰⁵⁷ Par 36.

²⁰⁵⁸ Par 31. The court pointed out that should its findings be wrong, South Africa is still bound by the extradition agreement of 1947, and any extradition can and must then proceed in terms thereof.

protection, it must be emphasized that an international agreement may be in force and may create international obligations for South Africa, but if it is not incorporated in terms of section 231(4) of the Constitution it will not have any domestic application. Thus, an international agreement dealing with diplomatic protection, which has not been incorporated into South African municipal law, will not serve as a basis for the application of individual rights and obligations.²⁰⁵⁹

A comparative analysis of the *Preller* and the *Ebersohn* judgments nevertheless reveals that although the issues for determination in the two judgments were the same,²⁰⁶⁰ ironically, the two courts arrived at different decisions. Be that as it may, the disparity in the two judgments underscores the scepticism expressed in academic and judicial circles concerning the interpretation of the self executing provision of section 231(4) of the 1996 Constitution.²⁰⁶¹ That uncertainty still persists. One can only hope that the Constitutional Court will intervene in order to bring greater clarity to this very important constitutional and interpretational issue.²⁰⁶²

One thing is clear, however. Section 231(4) of the South African Constitution has made it possible for the incorporation of international agreements which favour diplomatic protection into SA law. International agreements incorporated into South African law for purposes of diplomatic protection include the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.²⁰⁶³

²⁰⁵⁹ See Scholtz *supra* n 2033 213. Eg the VCDR.

²⁰⁶⁰ I.e the validity of the same extradition agreement, between the same parties – RSA and the USA, signed on the same date.

²⁰⁶¹ Scholtz & Ferreira *supra* n 2033 338 are of the view that in the *Preller* judgment, the court employed the outdated approach of the so-called “intention of the drafters” of the Constitution approach instead of a teleological or purposive interpretation approved by the Constitutional Court in *S v Makwanyane supra* n 1203.

²⁰⁶² *Ibid.* One of criticisms leveled against the provisions of section 231(4) of the Constitution is that it is difficult to see how that section can remedy past anomalies related to the incorporation of treaties into SA municipal law. For instance, it is difficult to see how this provision will remedy the ugly situation whereby government departments delay to submit treaties to parliament because of their desire to ensure that existing SA law accords with new treaty obligations, as was the case in the past.

²⁰⁶³ See the Diplomatic Immunities and Privileges Act 37 of 2001 which incorporated the VCDR 1961 and its VCCR 1963 counterpart. See <http://www.library.up.ac.za/law/index.htm> See also www.it.up.ac.za/documentation/governance/disclaimer/. (accessed 2010-04-17)

6 The interpretational role of international law in South Africa

Another important role of international law in South African law is that it serves as an interpretational aid for the courts when interpreting legislation. Section 233 of the Constitution in particular extends the interpretational role of international law to all legislation. The section provides that

When interpreting any legislation every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The inclusion of this provision in the Constitution is important in that it amplifies the importance of international law in the South African legal system. However, its inclusion has given rise to speculation as to whether the drafters of the Constitution intended the courts to test all legislation against the tenets of international law, or whether the courts are mandated to test only those legislation with international flavour or *nexus* against the tenets of international law.²⁰⁶⁴

Taken literally, the provision appears wide enough to empower all courts in South Africa²⁰⁶⁵ to test all legislation coming before them against the tenets of international law. Botha is, however, of the opinion that such an interpretation would not be in line with common sense.²⁰⁶⁶ Rather, common sense dictates that only legislation with an international flavour or *nexus* should be so tested.²⁰⁶⁷

To achieve this goal, however, the courts must first determine the international law position governing the subject-matter of any legislation before testing such legislation against the tenets of international law.²⁰⁶⁸ It may be concluded that since reference in this provision is made to “Public” international law in the broad sense of the term in interpreting the Constitution or any other legislation for that matter, South African

²⁰⁶⁴ See Botha “Treaty making in South Africa: A reassessment.” (2000) 25 *SAYIL* 91 94.

²⁰⁶⁵ I.e from the lowest courts in the land to the highest.

²⁰⁶⁶ See Botha (2000) *supra* n. 2067 93.

²⁰⁶⁷ *Ibid.*

²⁰⁶⁸ See the case of *Azanian Peoples Organisation [AZAPO] v The President of South Africa* 1996 (4) SA 671 (CC). Although the case did not involve the incorporation of a treaty, it does serve as an example of legislation with an international *nexus* where the courts were required to apply the provisions of section 233.

courts are required to have regard to international law contained in custom, treaties, general principles of law, the writings of publicists, and the decisions of international and municipal courts.²⁰⁶⁹

Section 233 is very significant in relation to diplomatic protection. Since this section enjoins all courts to prefer an interpretation of any legislation which accords with international law over an interpretation which does not, then South African courts are enjoined to interpret any legislation as favouring the applicability of diplomatic protection.

Section 233 of the Constitution compliments and strengthens the provisions of section 232, which makes customary international law part of the law of the land and section 231(4) which serves as a vehicle through which international agreements are incorporated into South Africa municipal law.

Apart from section 233 of the Constitution, the role of international law in the interpretative process under South African legal system is contained in section 39 of the Constitution. This is the section dealing with the interpretation of the Bill of Rights, and will be considered later in this chapter.

In conclusion, therefore, it can be said that diplomatic protection as embodied in international law is not only constitutionally and legally favoured under South African law, it is also entrenched in the national consciousness of the people as will be seen below where decided cases on diplomatic protection are considered.²⁰⁷⁰

²⁰⁶⁹ See Maluwa(1993/1994) *supra* n 2028 35.

²⁰⁷⁰ Botha says that by embracing Public International Law as an equal component in the fabric of SA law, not only will the SA legal system have some hope of legitimacy in the eyes of the population as a whole, but that Public International Law will also come of age as an international monitor - a system of checks and balances – healing the rifts between the peoples of the country in an interim phase, smothering the workings of a new and democratic SA and ultimately ensuring its continued international legitimacy. See Botha *supra* n 1995 43.

7 Diplomatic protection and South African law

7.1 Constitutional provisions

Although diplomatic protection is not specifically provided for under the South African Constitution,²⁰⁷¹ by virtue of sections 232 and 233 of the Constitution²⁰⁷² international law pertaining to diplomatic protection is deemed to form part of South African law.²⁰⁷³ However, in discussing the issue of diplomatic protection under South African law, Erasmus and Davidson²⁰⁷⁴ argue that South African citizens are entitled to diplomatic protection under South African Constitution.²⁰⁷⁵

According to Erasmus and Davidson, the relevant constitutional provisions are to be found in sections 3,²⁰⁷⁶ 7,²⁰⁷⁷ 20,²⁰⁷⁸ and 33 of the SA Constitution.²⁰⁷⁹ In the landmark case of *Kaunda v The President of the RSA*,²⁰⁸⁰ the Constitutional Court accepted that the provisions of sections 3 and 20 of the Constitution, read together with section 7(1)²⁰⁸¹ and (2),²⁰⁸² are applicable to issues of diplomatic protection under South African law.²⁰⁸³

²⁰⁷¹ See for instance Erasmus & Davidson *supra* n 293 113; Pete and Plessis “South African nationals abroad and their right to diplomatic protection –Lessons from the mercenaries case” *supra* n 358 439; Olivier “Diplomatic Protection –Right or privilege” *supra* n 358 238; Dugard (2005) *supra* n 25 75 & Crawford *supra* n 10 19.

²⁰⁷² S 232 stipulates that Customary International Law is law in the Republic, while s 233 plays an interpretative role in respect of the interpretation of legislation concerning International Law.

²⁰⁷³ See for instance Erasmus & Davidson *supra* n 293 113; Pete and Plessis *supra* n 358 439; Olivier *supra* n 358 238; Dugard *supra* n 25 79 & Crawford *supra* n 10 19

²⁰⁷⁴ Erasmus & Davidson *supra* n 293 113.

²⁰⁷⁵ *Idem* 125.

²⁰⁷⁶ (Citizenship).

²⁰⁷⁷ Obligation imposed on the SA Government by the Bill of Rights.

²⁰⁷⁸ The Bill of Rights provision on citizenship.

²⁰⁷⁹ See 125. Erasmus & Davidson are of the view that s 33 of the Constitution also applies. S 33 deals with rules and procedures governing administrative acts of government.

²⁰⁸⁰ *Supra* n 688 par 59. Chaskalson CJ however took exception to the wide interpretation given to s 3 of the Constitution by Erasmus & Davidson (i.e the benefits and privileges of citizens guaranteed by s 3).

²⁰⁸¹ Which prescribes that the Bill of Rights is the cornerstone of democracy in SA.

²⁰⁸² Which prescribes that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

²⁰⁸³ See particularly the judgment of Ngcobo J par 188. The court did not however agree with Erasmus & Davidson that S A citizens have a Constitutional right to diplomatic protection. See the judgment of Chakalson J par 59. See also Olivier (2005) *supra* n 358 238.

In their thought-provoking article, Erasmus and Davidson maintain that the concept of diplomatic protection under customary international law should be revisited²⁰⁸⁴ because under that concept the individual has no right to diplomatic protection. Only the state of nationality can exercise this right.

According to the traditional legal fiction, injury to the individual constitutes an injury to the state. Thus, the State is merely protecting its own right in taking up the case of the individual concerned.²⁰⁸⁵ A corollary of this view is that a state has an absolute discretion whether to extend diplomatic protection to its nationals who have suffered harm or injury abroad or not.²⁰⁸⁶ Since the State has no duty at international law to provide diplomatic protection,²⁰⁸⁷ the end result is that it is the individual who suffers.²⁰⁸⁸

Erasmus and Davidson then attack this traditional customary approach to diplomatic protection.²⁰⁸⁹ They maintain that with the emergence of a human rights regime, the position of the individual in international law is changing.²⁰⁹⁰ Therefore, a need arises to revisit the meaning of diplomatic protection in international law in so far as the protection of basic human rights are concerned.²⁰⁹¹

Furthermore, the changing international world order characterized by globalization makes a change in approach to diplomatic protection inevitable.²⁰⁹² Henceforth, there is a need for diplomatic protection to be used more often for the protection of basic human rights than for the protection of property rights of nationals expropriated by foreign governments.²⁰⁹³ When and where gross violations of basic human rights occur,²⁰⁹⁴ the state should be duty-bound to exercise diplomatic protection.²⁰⁹⁵ Such

²⁰⁸⁴ *Supra* n 293 113.

²⁰⁸⁵ *Barcelona Traction case supra* n 26 44. See also *Mavromatis Palestine Concession case supra* n 36 12.

²⁰⁸⁶ See the *Barcelona Traction case supra* n 26. This traditional approach to diplomatic protection of the individual also applies to corporate entities in International Law.

²⁰⁸⁷ *Barcelona Traction case supra* n 26.

²⁰⁸⁸ Erasmus & Davidson *supra* n 293 115.

²⁰⁸⁹ *Ibid* 120.

²⁰⁹⁰ *Idem* 117.

²⁰⁹¹ *Idem* 117 & 119.

²⁰⁹² *Idem* 120.

²⁰⁹³ *Idem* 121.

²⁰⁹⁴ *Ibid*.

an approach, they argue, will enhance the basic objective of diplomatic protection because, when gross violations of human rights occur, it is the individual and not the state *per se* who suffers.²⁰⁹⁶ They submit that a state that fails to provide the minimum protection to its nationals runs the risk of retrogression.²⁰⁹⁷

Turning to South African law, the authors maintain that South Africans are entitled to diplomatic protection under the 1996 Constitution.²⁰⁹⁸ Sections 3 and 20 in particular which provide that all South Africans are equally entitled to the rights, privileges and benefits of citizenship, and that no citizen may be deprived of citizenship, are the relevant constitutional provisions guaranteeing this right.²⁰⁹⁹ Citizenship should therefore logically include the right or an entitlement to diplomatic protection. They maintain that

Without this dimension, it [diplomatic protection] will lose an essential part of its meaning and effect.²¹⁰⁰

8 Decided cases on diplomatic protection under South African law

A plethora of cases have come before the courts on the subject of diplomatic protection in South Africa²¹⁰¹ In *Kaunda's* case²¹⁰² for instance, it was held that section 3 and 20 of the Constitution are relevant for purposes of diplomatic protection.²¹⁰³ That case discussed all aspects of diplomatic protection of human rights under South African law – government policy, state practice, judicial attitude,

²⁰⁹⁵ *Ibid.* This suggestion was first made to the ILC by Garcia Amador in 1957 and reiterated by Dugard in 2000. It was however rejected by the ILC for lack of state practice. It represents the *lex ferenda*.

²⁰⁹⁶ At 123.

²⁰⁹⁷ *Idem* 122.

²⁰⁹⁸ *Idem* 125.

²⁰⁹⁹ “What are the rights and privileges of citizenship? What is the effect of putting the right to citizenship in the Bill of Rights and in the founding provisions of this supreme and justiciable Constitution?” They query.

²¹⁰⁰ In conclusion, Erasmus & Davidson *supra* n 293 129 call for the harmonization of International and Municipal Law in SA so as to enhance the diplomatic protection of SA citizens.

²¹⁰¹ See e.g. *Kaunda v President RSA* 2005 (4) SA 235 (CC), *Roothman v President RSA* 2005 (3) All SA 600 (T), *Thatcher v Minister of Justice and Constitutional Development* 2005 (1) SA 375 (C), *Van Zyl v Government of the RSA* 2005 (4) All SA 96 (T) & *Von Abo v Government of RSA* 2009 (2) SA 526 (T).

²¹⁰² *Supra* n 688.

²¹⁰³ See the judgment of Chaskalson CJ par 59.

the concept of extraterritoriality, its discretionary nature, human rights constraints, *et cetera*. This subject is therefore discussed *in extenso* below.

In *Kaunda's* case, the applicants were South African nationals who were arrested at Harare airport on 7 March 2004 and detained in Zimbabwe Chikurubi prison along with another group of 15 men arrested in Malabo, the capital of Equatorial Guinea for allegedly being mercenaries bent on overthrowing the government of Equatorial Guinea. They brought an application in which they sought to compel the government of South Africa to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea.²¹⁰⁴ The applicants initially approached the High Court in Pretoria which dismissed their application.²¹⁰⁵ The applicants then approached the Constitutional Court for leave to appeal directly to it.²¹⁰⁶ The Constitutional Court unanimously found that the application for leave to appeal should be granted.²¹⁰⁷

The constitutional issues raised in the appeal were whether the State was bound by the Constitution of South Africa to take steps to protect the applicants in relation to the complaints they had concerning their conditions of detention in Zimbabwe and the prosecution they were facing there. It also raised the issue of the possibility of their being extradited to Equatorial Guinea to face charges which could, if they were convicted, result in their being sentenced to death. The matter raised complex constitutional issues of law which were of great importance not only to the applicants, but to the wider society.²¹⁰⁸

The applicants asked for a *mandamus* to compel the government to take action at a diplomatic level to ensure that the rights they claimed to have under the South African Constitution were respected by the two foreign governments of Zimbabwe and Equatorial Guinea.²¹⁰⁹ They demanded that the government should seek assurances from the foreign governments concerning their prosecutions or

²¹⁰⁴ *Idem* 237.

²¹⁰⁵ *Idem* par 3.

²¹⁰⁶ *Idem* par 5.

²¹⁰⁷ *Ibid.*

²¹⁰⁸ *Ibid.*

²¹⁰⁹ *Idem* par 4.

contemplated prosecutions, in those countries.²¹¹⁰ The applicants asserted that they had rights under the South African Constitution entitling them to make such demands, that the government had failed to comply with their demands and that, in failing to do so, it had breached their constitutional rights.²¹¹¹

The applicants further maintained that their rights to dignity, life, freedom and security of the person, including the right not to be treated or punished in a cruel, inhuman or degrading way, and their right to a fair trial entrenched under sections 10, 11, 12 and 35 of the Constitution were being violated in Zimbabwe, and were likely to be infringed if they were extradited to Equatorial Guinea.²¹¹² They contended that since section 7(2) of the Constitution requires the state to “respect, protect, promote and fulfil the rights in the Bill of Rights,” the State was obliged to protect these rights on their behalf. The only way it could do so under the circumstances, it was argued, was to provide them diplomatic protection.²¹¹³

It therefore became necessary to consider whether the applicants had a right to diplomatic protection by the State according to South African law and whether they could require the State to come to their assistance in Zimbabwe and Equatorial Guinea if they were extradited to that country.

In the majority judgment read by Chaskalson CJ,²¹¹⁴ the court referred to section 232 of the Constitution which recognizes customary international law as part of South African law, before proceeding to examine the term “diplomatic protection.”²¹¹⁵ Diplomatic protection was defined as “action taken by a state against another state in respect of injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter state.”²¹¹⁶

Diplomatic protection includes consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retortion, severance of diplomatic relations and

²¹¹⁰ *Ibid.*

²¹¹¹ *Idem* par 31.

²¹¹² *Ibid.*

²¹¹³ *Idem* par 32.

²¹¹⁴ As he then was.

²¹¹⁵ *Idem* par 25.

²¹¹⁶ *Idem* par 26.

economic pressure.²¹¹⁷ The court pointed out that, traditionally, international law acknowledges that States have the right to protect their nationals beyond their borders, but are under no obligation to do so.²¹¹⁸

The court referred to the case of *Barcelona Traction Light and Power Company Limited*²¹¹⁹ where the ICJ stated that diplomatic protection is a discretionary power of the State and that political and other considerations may influence its exercise.²¹²⁰ The court then referred to a suggestion by the Special Rapporteur to the ILC on Diplomatic Protection, that in cases of grave breaches of the norms of *jus cogens*, a state owes a legal duty to its injured nationals to exercise diplomatic protection on their behalf.²¹²¹

Within this context, the court referred to the two constitutional interpretative clauses, namely sections 233²¹²² and 39 (1) (b).²¹²³ The court was unable to identify any international instrument providing for the right to diplomatic protection and therefore was reluctant to interpret the Constitution in consonance with international law.²¹²⁴ It was of the opinion that the right to diplomatic protection is a highly unusual right “which one would expect to be spelt out expressly rather than being left to implication.”²¹²⁵ It concluded however that diplomatic protection is not recognized as a human right by international law and remains the prerogative of a state to exercise at will.²¹²⁶

The court considered whether diplomatic protection is recognized as a right under South African Municipal Law. Relying on section 7(2) of the Constitution²¹²⁷ the applicants had contended that the same should protect them from the violation or possible violation of their constitutional rights in Zimbabwe and Equatorial Guinea

²¹¹⁷ *Idem* par 27.

²¹¹⁸ Par 23 The court relied on *Barcelona Traction* case *supra* n 26.

²¹¹⁹ *Supra* n 26 relied upon by counsel for the State.

²¹²⁰ Par 44. See also *Geck supra* n 10 1047.

²¹²¹ Par 30.

²¹²² For the interpretation of legislation generally.

²¹²³ For the interpretation of the Bill of Rights.

²¹²⁴ Par 26.

²¹²⁵ Par 15.

²¹²⁶ Par 32.

²¹²⁷ Which demands that the state should respect, protect, promote and fulfil the rights in the Bill of Rights.

respectively.²¹²⁸ According to them, it is the responsibility of the State to stand up for its citizens when their constitutional rights are abused by another state by giving an extraterritorial effect to the Constitution.

The Chief Justice then turned to the issue of whether or not the South African Constitution can be construed as having extraterritorial effect. He concluded that it could not.

For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure that laws and conduct of a foreign state and its officials meet not only the requirement of the foreign States' law, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty.²¹²⁹

The court emphasized the importance of territoriality by pointing out that the rights protected by the Bill of Rights safeguard foreigners present within South African territory, but have no application beyond South Africa's borders. From the international law perspective, national legislation is ordinarily limited to the territory of the particular state. Although there are circumstances where legislation may apply to nationals outside the state, it creates the possibility of conflict with the laws of the foreign state and on the sovereign equality of states.²¹³⁰

The question whether South African citizens can require the SA government to take action to protect them against the conduct of a foreign country was a different issue which depended, in the first instance, on whether the Constitution could be construed as having extra-territorial effect.²¹³¹ In respect of the request to be assisted outside the State, the CJ pointed out that, it must be borne in mind, firstly, that, the Constitution of South Africa provides the framework for the government of South Africa.²¹³² In that respect, the Constitution is territorially bound and has no application beyond its borders.²¹³³ Secondly, the rights in the Bill of Rights upon which reliance is placed by the applicants, are rights that vest in everyone while they

²¹²⁸ Such as the rights to life, security of the person, to a fair trial and not to be tortured.

²¹²⁹ Par 44.

²¹³⁰ Par 36-40.

²¹³¹ Pars 32 98.

²¹³² See par 36 of the judgment.

are in South Africa – nationals and foreigners alike. Clearly, they lose the benefit of that protection when they move beyond the borders of South Africa.²¹³⁴

Chaskalson was of the opinion that the State has a positive obligation to comply with the constitutional provisions requiring it to “respect, protect, and promote and fulfil the rights in the Bill of Rights.”²¹³⁵ He continued that that did not mean however, that the rights which nationals have under the Constitution attach to them when they are outside of South Africa,²¹³⁶ or that the State has an obligation under section 7(2) to “respect, protect, promote and fulfil” the rights in the Bill of Rights beyond its borders.²¹³⁷

Chaskalson then turned to examine the rights, privileges and benefits of citizenship as guaranteed under section 3 of the South African Constitution and concluded that although South African citizens do not possess an enforceable right to diplomatic protection, they are nevertheless entitled to request the SA government for protection under international law against wrongful acts of a foreign State.²¹³⁸ Since, they are not in a position to invoke international law themselves, they are obliged to seek protection through the State of which they are nationals.²¹³⁹ He further said that the State is entitled but not obliged under international law to take such action. It invariably acts only if requested by the national to do so.²¹⁴⁰ Nevertheless, the entitlement to request diplomatic protection has certain consequences.²¹⁴¹ First, government must have a corresponding obligation to consider the request and deal with it in a manner consistent with the Constitution. Furthermore, there may even be a duty in extreme cases for the government to act on its own initiative.²¹⁴²

According to the Chief Justice, the South African Constitution contemplated that the government would act positively to protect its citizens against human rights

²¹³³ *Ibid.*

²¹³⁴ *Ibid.*

²¹³⁵ Par 32.

²¹³⁶ At 12 par 32.

²¹³⁷ See par 32.

²¹³⁸ Par 60.

²¹³⁹ Par 61.

²¹⁴⁰ At 44 par 61.

²¹⁴¹ Par 67.

²¹⁴² At 49 par 67.

abuses.²¹⁴³ There might be a duty on government consistent with its obligations under international law to take action to protect one of its citizens against a gross abuse of international human rights norms.²¹⁴⁴ A request to government for assistance in such circumstances, where the evidence was clear, would be difficult and in extreme cases impossible to refuse.²¹⁴⁵ It was unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and the court would order the government to take appropriate action if necessary.²¹⁴⁶

The applicants placed considerable reliance on the case of *Mohamed v President of the RSA*²¹⁴⁷ to prove that they were entitled to diplomatic protection. The court had to distinguish *Mohamed's* case from the instant case.²¹⁴⁸ In *Mohamed's* case,²¹⁴⁹ Mohamed was on trial on charges of murder and conspiracy to attack a US facility in a US court, flowing from the 1998 bombing of the US embassy in Dar es Salaam.

Mohamed was a Tanzanian national. He fled to South Africa under a false passport, an assumed name and visitor's visa that he had obtained in Dar es Salaam after the bombing.²¹⁵⁰ On arrival in South Africa, he applied for asylum under his assumed name.²¹⁵¹ He was given a temporary residence status which was to be reviewed periodically pending the decision on his application for asylum.²¹⁵²

After the Federal Bureau of Investigation (FBI) detected Mohamed's presence in South Africa, the Chief Immigration Officer of the Department of Home Affairs (DHA) notified the Directorate of Aliens Control (DAC) of the DHA, and requested that Mohamed be declared a prohibited person and to ensure that he was not to be allowed to leave the country.²¹⁵³ When Mohamed called at the refugee receiving

²¹⁴³ Par 66.

²¹⁴⁴ Pars 67& 69.

²¹⁴⁵ Par 69.

²¹⁴⁶ *Ibid.*

²¹⁴⁷ 2001 (7) BCLR 685 (CC) *supra* n 1204.

²¹⁴⁸ Par 46.

²¹⁴⁹ *Supra* n 1204.

²¹⁵⁰ Par 8.

²¹⁵¹ Par 9.

²¹⁵² *Ibid.*

²¹⁵³ *Idem* par 12.

office in Cape Town on 5 October 1999 for the extension of his temporary residence permit, he was arrested.²¹⁵⁴

Due to inconsistent statements by officials of the DHA, there was conflicting evidence before the court regarding whether or not Mohamed was informed of his right to protection against self-incrimination, about his right to remain silent and his right to legal representation.²¹⁵⁵ Mohamed was handed over to the FBI and after interrogation, confessed to the embassy bombing in Dar es Salaam. Mohamed left South Africa for the US in the custody of a number of FBI agents on 6 October 1999.²¹⁵⁶

The court said that *Mohamed's* case dealt with an entirely different situation from the instant case.²¹⁵⁷ In *Mohamed's* case, certain state functionaries had colluded with the FBI to secure the removal of Mohamed from South Africa to the USA and, in so doing, had acted illegally and in breach of Mohammed's rights under the Constitution.²¹⁵⁸ The Court pointed out that Mohamed's rights were violated while he was still in South Africa whereas by contrast, the applicants had left South Africa and placed themselves in danger of their own free will and not as a result of any unlawful conduct of government.²¹⁵⁹

The court denied that *Mohamed's* case was authority for the submission made by the applicants. In conclusion, therefore, the court found that the claims made by the applicants were misconceived and they were dismissed *pro tanto*.²¹⁶⁰

²¹⁵⁴ *Idem* par 15.

²¹⁵⁵ *Idem* par 9.

²¹⁵⁶ *Idem* par 26.

²¹⁵⁷ *Idem* par 47.

²¹⁵⁸ *Ibid.*

²¹⁵⁹ *Idem* par 49.

²¹⁶⁰ Ngcobo J. in a separate judgment agreed substantially with the majority judgment but differed in the approach to the treatment of S.3(2). O'Regan J in a separate judgment also agreed with the majority's analysis of s. 3 of the Constitution, but disagreed in relation to the question whether under the Constitution the State bore any obligation towards the applicants to take steps to protect them. Sachs J, also in a separate concurring judgment maintained that the government had a clear and unambiguous duty to do whatever was reasonable within its power to prevent South Africans living abroad from being subjected to torture.

The majority decision in *Kaunda's* case has been criticised.²¹⁶¹ Olivier is of the view that the court failed to discuss in depth the applicability of customary international law to the case before coming to the conclusion that it did not apply to the situation.²¹⁶² Consequently, in light of the court's inability to identify any applicable international law provision of which Zimbabwe could be in breach if the applicants were extradited to Equatorial Guinea, she finds it strange for the court to have said that although there was a real possibility that they might be extradited, this did not mean that they would in fact be extradited.²¹⁶³

Olivier then wonders why the court, having established that the death penalty does not violate international law, went on to say that

If the allegation by the applicants that they will not get a fair trial in Equatorial Guinea proves to be correct, and they are convicted and sentenced to death, there would have been a grave violation of international law.²¹⁶⁴

Does an unfair trial resulting in the death penalty constitute a breach of international law whereas the death penalty *per se* does not?

She queries. She regards the majority judgment as “fuzzy” and the political undertones as very clear from the international law perspective.²¹⁶⁵ She maintains that:

Courts do not wish to become involved in executive functions not even in pointing out the constitutional and international law parameters for government action. The approach adopted by the court is formalistic and recalls the narrow positivist approach of South African courts under apartheid where the judiciary was reluctant to question legislation and policy and shied away from a value-oriented approach which may challenge government.²¹⁶⁶

Pete and du Plessis are of the view that the majority decision does little more than underline that a South African citizen is entitled to write a letter or in some other

²¹⁶¹ See Olivier *supra* n 358 238 - 240 & Pete & du Plessis *supra* n 358 471

²¹⁶² Olivier *supra* n 358 *ibid*.

²¹⁶³ *Idem* 244 See *Kaunda's* case *supra* n 688 par 104-05 .

²¹⁶⁴ Olivier *supra* n 358 241.

²¹⁶⁵ *Idem* 246.

²¹⁶⁶ *Ibid*

manner ask his or her government for assistance, and that such a “right” is meaningless within the context of diplomatic protection.²¹⁶⁷ Besides, they continued, the court’s approach to the issue under consideration showed undue deference to the executive in the realm of foreign relations.²¹⁶⁸ It showed that judges are reluctant to look critically and astutely at decisions to grant or to refuse diplomatic protection. As a result of this hands-off approach, the executive is often given the opportunity to make sensitive decisions which may tarnish relations with foreign states.²¹⁶⁹

On the question of extraterritoriality of the South African Constitution, Pete and du Plessis opine that the approach adopted by the Constitutional Court is tantamount to allowing the South African government to apply a double standard in respect of the human rights of South African nationals, depending on whether they find themselves inside or outside the country.²¹⁷⁰ Accordingly they support the minority judgment of the Constitutional Court which suggests that there may be a duty on the government to do what it reasonably can within the confines of international law to protect the rights of nationals as they are guaranteed in the South African Constitution even when such nationals are abroad.²¹⁷¹

*Thatcher v Minister of Justice and Constitutional Development*²¹⁷² was another case in which the court was called upon to deal with a matter of diplomatic protection. In that case, the government of Equatorial Guinea, in March 2004, requested the South African government in writing, to render assistance to it by allowing it to question the applicant, Sir Mark Thatcher, a prominent British businessman, resident in Cape Town, on a number of matters relating to an alleged *coup*.²¹⁷³ The alleged *coup* was an attempt to overthrow the government of Equatorial Guinea, in which some South African nationals were implicated. The South African government complied with the request. The applicant therefore brought this urgent application for a review of that decision, urging the court to set it aside and to declare same unconstitutional.²¹⁷⁴

²¹⁶⁷ *Supra* n 358 471.

²¹⁶⁸ At 472.

²¹⁶⁹ At 441.

²¹⁷⁰ At 463.

²¹⁷¹ At 472. Olivier *supra* n 358 246 also prefers the minority judgment.

²¹⁷² 2005 (1) SA 373 (C) ; ILDC 172 (ZA 2004) 24 Nov 2004. The case was an offshoot of *Kaunda’s* case *supra* n 688.

²¹⁷³ Par 4.

²¹⁷⁴ Par 6.

The trend of events was that the authorised representative of the second respondent,²¹⁷⁵ having satisfied himself in terms of section 7(2) of the International Cooperation in Criminal Matters Act (ICCMA) of 1996²¹⁷⁶ that the request complied with the jurisdictional requirements set forth in that section asked the first respondent²¹⁷⁷ to approve the request in terms of sections 7(4) and 7(5) of the Co-operation Act. This approval was conveyed to the third respondent²¹⁷⁸ who thereupon requested the fourth respondent²¹⁷⁹ to deal with the matter.²¹⁸⁰

After satisfying herself that the documentation provided for her contained approval by the first respondent of a request for assistance by Equatorial Guinea in terms of the Co-operation Act, the fourth respondent issued a *subpoena* in terms of section 8(2) of the Act requiring the applicant to attend court for the purpose of responding to certain questions annexed to the *subpoena*.²¹⁸¹

The applicant contended that the decision to comply with the request of the government of Equatorial Guinea to question him was reached irrationally, unreasonably, arbitrarily, capriciously, unlawfully, and unconstitutionally in law.²¹⁸² In the alternative the applicant sought an order declaring section 8(1) of the Co-operation Act unconstitutional.

The applicant averred that no assistance should be given to Equatorial Guinea in the conduct of the case against South Africans already arrested in Equatorial Guinea as they could not be expected to obtain a fair trial there.²¹⁸³ The applicant suggested that the purpose of the interrogation was to elicit evidence which could be used to bolster the case against him by the South African prosecuting authorities, and

²¹⁷⁵ The Director-General in the Department of Justice and Constitutional Development.

²¹⁷⁶ The Co-Operation Act 75 of 1996.

²¹⁷⁷ The Minister for Justice and Constitutional Development.

²¹⁷⁸ The Chief Magistrate of the Magistrate court for the District of Wynberg who issued both the warrant for the applicant's arrest and the search warrant.

²¹⁷⁹ An additional magistrate attached to the Court.

²¹⁸⁰ See *Thacher's case supra* n 2168 par 5

²¹⁸¹ *Idem* par 64.

²¹⁸² *Idem* par 83.

²¹⁸³ *Iddem* par 9.

possibly to facilitate his extradition to Equatorial Guinea, where, it was alleged, his trial would not be in accordance with the requirements of international law.²¹⁸⁴

The applicant submitted that the first respondent had failed to apply her mind in considering the documentation and making her decision in that her decision was irrational. He argued that compelling him to comply with the terms of the *subpoena* prior to the conclusion of his criminal trial in South Africa would enable the prosecuting authorities to gain a comprehensive insight into any defence he might wish to raise.²¹⁸⁵ Furthermore, he said that, this would violate his right to silence and the right of protection against self-incrimination entrenched in sections 35(1)(a) and (c) and sections 35(3)(h) and (j) of the 1996 Constitution. By not taking these considerations into account when making her decision, he contended, the first respondent had acted unconstitutionally.²¹⁸⁶

Finally, the applicant submitted that the respective decisions of the first and second respondents fell foul of the provisions of the Promotion of Administrative Justice Act²¹⁸⁷ in that such decisions constituted arbitrary, capricious, and unreasonable administrative action which should be set aside.²¹⁸⁸

It was held, *inter alia*, that in considering the conduct of the respondents in making decisions in terms of the Co-operative Act, the court had to take into account the fact that procedure was not purely a legal exercise, but involved an interaction between the domestic law of South Africa and its foreign or international relations with Equatorial Guinea.²¹⁸⁹

The court considered the conduct of the third respondent and found that the third respondent took no reviewable decision requiring consideration for purposes of the present application and that no case for any relief had been made against him.²¹⁹⁰ As to the second respondent, having satisfied himself as to the requirements of

²¹⁸⁴ *Idem* par 10.

²¹⁸⁵ Par 11.

²¹⁸⁶ Par 12.

²¹⁸⁷ 3 of 2000 (PAJA).

²¹⁸⁸ Par 14.

²¹⁸⁹ Par 52.

²¹⁹⁰ Par 54.

section 7(2) of the Co-operative Act, he had arranged for the request and supporting documents to be made available to the first respondent in terms of section 7(4) of the Co-operative Act.

From the moment the request and supporting documents were made available to the first respondent, the second respondent became *functus officio*, and it is clear that no basis existed to review or set aside the decision made by the second respondent. It could not be said that in carrying out his statutory functions in terms of the Co-operative Act, he acted irrationally, unreasonably, arbitrarily, capriciously, unlawfully, or unconstitutionally in any respect.²¹⁹¹

The court also found that the fourth respondent acted in terms of the power conferred on her by section 8(1) of the Co-operative Act.²¹⁹² She was not required to consider the applicant's constitutional right before issuing the *subpoena*.²¹⁹³ The correct time to consider these rights was when the applicant appeared before her in terms of the *subpoena*.²¹⁹⁴ Hence no case had been made out against the fourth respondent.²¹⁹⁵

As to the conduct of the first respondent, the court noted that section 7(4) of the Co-operative Act, in terms of which he was required to decide whether to approve a request for assistance, did not lay down any requirement to be complied with prior to the granting of approval.²¹⁹⁶ Considering whether the applicant's constitutional rights had been infringed, the court concluded that the weight of authority was against permitting the applicant to exercise his right to silence and right against self-incrimination at that stage of the proceedings.²¹⁹⁷

In addition, Justice Van Zyl found the applicant's reliance on the decision of the Constitutional Court in *Mohamed's case*²¹⁹⁸ not only misplaced, but also premature

²¹⁹¹ Par 63.

²¹⁹² Par 67

²¹⁹³ *Ibid.*

²¹⁹⁴ Par 71.

²¹⁹⁵ *Ibid.*

²¹⁹⁶ Par 74.

²¹⁹⁷ Par 83-94.

²¹⁹⁸ *Supra* n 1204.

and unjustified.²¹⁹⁹ However, it was held that since no case had been made out against any of the respondents for the relief sought, the application must be dismissed.²²⁰⁰

It is submitted that *Thatcher's* case can not be regarded as a typical case of diplomatic protection *stricto sensu*. First and foremost, the applicant was a British national and not a South African citizen. Secondly, the South Africans on trial in Equatorial Guinea²²⁰¹ were not applicants before the South African court, nor did the applicant hold any brief on their behalf.²²⁰²

Beukes has, however, pointed out that since the PAJA was in issue in this case, one would have expected an examination of the PAJA and its prescripts by the court.²²⁰³ However, such an examination was not forthcoming despite the fact that the PAJA gives effect to the constitutional imperative concerning constitutional administrative duties of government officials. This criticism notwithstanding, the dismissal of the application for review was commendable according to Beukes.²²⁰⁴

In *Roothman v President of RSA*,²²⁰⁵ the court refused to grant the applicant's relief for *mandamus* to compel the government of South Africa to take steps to ensure that the government of the Democratic Republic of the Congo (DRC) complied with a court order to wit: payment of the debt owed to him. Although diplomatic protection was not specifically mentioned in the writ, it was nevertheless obvious that a strong suggestion of the exertion of diplomatic pressure was indicated.²²⁰⁶

The facts of the case were that the applicant, a South African national, entered into a contract with the government of the DRC, whereby he was given the power to locate and seize illegal cobalt exported from the DRC, sell same on behalf of the

²¹⁹⁹ Par 96. The applicant had relied on *Mohamed's* case *supra* n 1204 to show that if extradited, he might face the death penalty in Equatorial Guinea.

²²⁰⁰ Par 109.

²²⁰¹ Du Toit & 7 others.

²²⁰² At par 102.

²²⁰³ See Beukes "South Africa and International co-operation in criminal prosecutions – *Thatcher v Minister of Justice and Constitutional Development*" (2005) 30 SA YIL 253 263.

²²⁰⁴ *Ibid.*

²²⁰⁵ 2005 (3) All SA 600 (T).

²²⁰⁶ At 696 par 6.

government, and receive 30% of the net proceeds.²²⁰⁷ The applicant subsequently brought an action against the government of the DRC for breach of contract and obtained judgment in his favour.²²⁰⁸ Attempts to enforce the judgment were unsuccessful. As a result of the difficulties encountered in enforcing the judgment debt, the plaintiff/applicant brought the current application.²²⁰⁹

The applicant made the following arguments in support of his application. It advocated that the State has a special duty to assist litigants to enforce their rights, including civil claims against debtors.²²¹⁰ It based this argument upon the tenets of the rule of law which it maintained was justiciable.²²¹¹ A further argument was that the relief sought was consistent with the guarantee of the right of access to the courts under section 34 of the Constitution.²²¹² Finally it was argued that the fact that the judgment debtor was a sovereign state meant that the state had a special duty to assist the applicant, since the ordinary remedy of contempt of court proceedings was not available to the applicant in the light of the provisions of the Foreign States Immunities Act.²²¹³

It was, however, held that the applicant could in the present court only obtain relief in respect of assets of the respondent State that were situated in South Africa. The court could not see any recourse for the applicant where it was not shown that any such assets existed in the country. While section 34 of the Constitution guarantees the right of access to courts in the sense that everyone has the right of access to the courts in order to resolve any dispute, this did not mean that the section was of any assistance to the applicant.²²¹⁴ The duty placed on the State in that regard relates to the creation of an enabling environment for litigation.²²¹⁵

Although the application did not set out precisely what assistance was required from the first five respondents it seemed that the exertion of diplomatic pressure was

²²⁰⁷ At 603 par (d).

²²⁰⁸ *Idem* 602 par (h).

²²⁰⁹ *Idem* 603.

²²¹⁰ *Idem* 603 par (a).

²²¹¹ *Idem*.

²²¹² *Idem* 606 par (c).

²²¹³ 87 of 1981. *Idem* 606 par (d).

²²¹⁴ *Idem* 608.

²²¹⁵ *Ibid*.

indicated.²²¹⁶ The court pointed out that where a plaintiff is confronted with a difficult defendant who flouts an order of court with impunity, there could be no basis for invoking the assistance of the State to exert extra-judicial pressure on the defendant in order to achieve compliance with the order.²²¹⁷

The court could not find that a citizen had a right to demand the exercise of diplomacy inside the Republic when he was engaged in civil litigation with a foreign power in a commercial matter and had been unable to obtain satisfaction of the judgement.²²¹⁸ The court distinguished this case from that relied upon by the applicant²²¹⁹ because in this case the state was in no way responsible for the applicant's predicament. The application was therefore dismissed.²²²⁰

The decision in *Roothman's* case must have influenced the decision in *Van Zyl v Government of the RSA*,²²²¹ where the court also refused to extend diplomatic protection to a South African national against the Kingdom of Lesotho in respect of acts performed in its territory, against a company incorporated in Lesotho.²²²²

In that case, the government of Lesotho had expropriated property belonging to the applicants without paying them compensation.²²²³ Maintaining that the Lesotho government had violated the international minimum Standard in its treatment of the applicants, allegedly with the knowledge of and consent of the first respondent,²²²⁴ the applicants demanded diplomatic protection from the respondents. The respondents, however, advised the applicants that their request for diplomatic protection could not be acceded to.²²²⁵ The present application was therefore for the review and setting aside of the respondent's decision.²²²⁶

²²¹⁶ *Idem* 608 par (e).

²²¹⁷ *Idem* par (f).

²²¹⁸ *Idem* par (g).

²²¹⁹ I.e. *Kaunda's* case *supra* n 688.

²²²⁰ At 610.

²²²¹ 2005 (4) All SA 96 (T) ; 171 (ZA 2005) 20 July 2005 *supra* n 556.

²²²² Pars 88 90-93.

²²²³ See 101 par (b).

²²²⁴ The Government of RSA. At 108 par 22.

²²²⁵ *Idem* 104 par 14.

²²²⁶ *Idem* 101 par (b).

A preliminary application was made for the striking out of certain portions of the applicant's replying and supplementary replying affidavits,²²²⁷ but the court ruled that the striking out application required a ventilation of the issues on the merits. It therefore had to be heard together with the main application.²²²⁸

On the merits, the applicants based their right to diplomatic protection on the obligation imposed by the Constitution on the respondents to remedy the violation of the applicant's property rights by the Lesotho government.²²²⁹ They also argued that their right to citizenship entailed a duty on their government to intervene on their behalf when their constitutional rights were violated by another government.²²³⁰

The court first considered the concept of diplomatic protection. It followed the definition offered by the Permanent Court of International Justice.²²³¹ In terms of that definition, a State is entitled to protect its subjects when injured by acts of another state which are in conflict with international law.²²³²

The principles of international law are such that private individuals or companies are not subjects of international law and cannot benefit there from where specific status is not conferred on them by treaties or agreements between states.²²³³ Where a private individual or company contracts with a state, as in the case of the applicants and the Lesotho government, then the remedies for breach of contract flow from the contract and are determined by the proper law of the contract.²²³⁴ A breach by the contracting State does not incur international responsibility.²²³⁵ The applicants were ruled not to be subjects of international law and could not have international law applied in their claim against the Lesotho government.

²²²⁷ *Idem* 102.

²²²⁸ *Idem* 103.

²²²⁹ *Idem* 107 par 22.

²²³⁰ *Idem* 108 par 23.

²²³¹ *Mavromatis Palestine Concession case supra* n 36.

²²³² At 106.

²²³³ At 110 par 27.

²²³⁴ *Idem* par 28.

²²³⁵ *Ibid.*

In conferring diplomatic immunity, the State of nationality has a discretion whether or not it will act upon the infraction of its international law rights.²²³⁶ However, international law places no duty on the State to protect its nationals abroad.²²³⁷ The application for review raised the question about whether the respondent's decision was reviewable, and, if so, on what basis and to what extent.²²³⁸

An examination of foreign law led the court to conclude that the respondent's decision could be reviewed on a very limited basis pertaining to foreign policy and public relations.²²³⁹ Foreign policy and foreign relations considerations are essentially the function of the executive and not the judiciary.²²⁴⁰ The basis of respondent's refusal of the applicants request was that the applicants did not have an enforceable right to effective diplomatic protection. A request for diplomatic protection was received and was properly considered. The court rejected the submission that the decision was objectively irrational and, therefore, not related to the purpose for which the power was granted.

As the applicants had also contended that an international delict and violation of international minimum standards had occurred, the court had to consider whether the requirement for an international delictual claim existed.²²⁴¹ The requirements are nationality and exhaustion of local remedies before the prosecution of a claim before an international tribunal can succeed.²²⁴² The evidence before the court established that the fourth to ninth applicants were not nationals of the Republic of South Africa even though the first three applicants who were South African nationals held some of the shares in those companies.²²⁴³ The first three applicants were therefore not entitled to diplomatic protection as shareholders in the companies .²²⁴⁴ The court

²²³⁶ *Idem* 112 par 32.

²²³⁷ *Ibid.*

²²³⁸ *Idem* 117 par 45.

²²³⁹ *Idem* 122 par 56. In arriving at this conclusion, the court considered both English and Canadian decisions. The English decisions considered included *Council of Civil Service v Minister of the Civil Service* [1985] 3 AC 374; *R v Home Secretary ex parte Bentley* [1993] 4 All ER 442, while the only Canadian case considered was *Operation Dismantle Inc. v The Queen* [1983] 18 DLR 481.

²²⁴⁰ *Idem* 123 par 56(a).

²²⁴¹ *Idem* 145 par 105.

²²⁴² *Idem* 140 par 93.

²²⁴³ *Ibid* par 95.

²²⁴⁴ *Idem* 141.

went on to find that the applicants had not exhausted all local remedies in Lesotho before approaching the courts.

In conclusion, the court found that the elements of international delict claimed by the applicants which would have vested the right in the Republic of South Africa to act against the Kingdom of Lesotho were not satisfied²²⁴⁵ and, consequently, dismissed the application with costs.²²⁴⁶

In a hypothetical case, Schmulow has illustrated that although the company was incorporated in Lesotho, the international law position on the protection of shareholders offered sufficient interest to the Republic of South Africa to have intervened on behalf of the South African nationals-shareholders involved.²²⁴⁷ He concedes that, although international law permits expropriation of foreign owned property,²²⁴⁸ however, for expropriation to be legal in practice, it must be accompanied by adequate, prompt and effective compensation.²²⁴⁹ Since no compensation was paid in this case, the action of the Kingdom of Lesotho “would appear to constitute a breach of international law and would consequently be *prima facie* illegal.”²²⁵⁰

Schmulow therefore argued that the corporate veil ought to have been pierced to show that foreign shareholders have been injured by the very state in which their company was registered – after the injuring state had insisted upon incorporation taking place within its borders.²²⁵¹ He argued further that there was a genuine link between the mining companies and the Republic of South Africa that should have warranted the intervention of the South African government.²²⁵² Since the South African government had refused to assist, it ought to have been compelled to do so by the court in terms of the Constitution.²²⁵³

²²⁴⁵ Par 105.

²²⁴⁶ Par 126.

²²⁴⁷ See Schmulow “Diplomatic intervention in the event of expropriation of a company without compensation.” (1996) 21 *SAYIL* 73 81.

²²⁴⁸ *Idem* 75.

²²⁴⁹ *Idem* 76.

²²⁵⁰ *Idem* 78.

²²⁵¹ *Idem* 82.

²²⁵² *Idem* 92.

²²⁵³ *Ibid.*

In *Von Abo v Government of the Republic of South Africa*,²²⁵⁴ however, it was held by the Gauteng North High Court in Pretoria that the plaintiff had the right to diplomatic protection from the South African government in respect of the violation of his rights by the government of Zimbabwe.²²⁵⁵ In that case, the plaintiff was the sole owner of farming interests in Zimbabwe which he had incorporated under the laws of Zimbabwe for purposes of farming. Over a period of fifty years, the plaintiff's holdings in farmland in Zimbabwe had expanded considerably.

The plaintiff initially financed the farming activities by applying his own resources drawn from South African reserves. In time however, he funded the farming interests using the finances available to him in Zimbabwe. He set about re-investing profit and capital gains in his Zimbabwean interests. In this way he became a beneficial owner of a considerable farming empire.²²⁵⁶

From 1997 onwards, the government of Zimbabwe violated the plaintiff's rights by destroying his property interests in a number of farms in Zimbabwe, or contributed to their destruction.²²⁵⁷ This destruction of property rights was achieved as part of an overall scheme and/or policy of the Zimbabwean government to expropriate land owned by white farmers.²²⁵⁸ No compensation was however paid. Aggrieved that his farming operation had been ruined and that the government of Zimbabwe had not paid compensation for the expropriation or damage he had suffered, the plaintiff brought proceedings against the Zimbabwean government in that country to protect his interests in the properties. His efforts however proved futile.²²⁵⁹

The plaintiff then struggled for more than six years to convince the South African government to act against Zimbabwe's expropriation of his farmland, but his pleas fell on deaf ears.²²⁶⁰ Having exhausted all local remedies available to him in Zimbabwe, and dissatisfied with the response of the government in what he termed

²²⁵⁴ 2009 (2) SA 526 (T) *supra* n 801 .

²²⁵⁵ Par 161.

²²⁵⁶ Par 6.

²²⁵⁷ Par 8.

²²⁵⁸ *Ibid.*

²²⁵⁹ *Idem* par 10.

²²⁶⁰ *Idem* par 91.

its failure to “take diplomatic steps....to protect or fulfil [his] rights” without “meaningful explanation for the failure and/or refusal,” he decided to put it on terms, and threatened legal action.²²⁶¹

No response was forthcoming from the government. In January 2007, Mr. Von Abo approached the High Court in Pretoria. He sought an order declaring amongst other prayers that the failure of the government to consider and decide his application for diplomatic protection in respect of the violation of his rights by the government of Zimbabwe was inconsistent with the Constitution and invalid.²²⁶²

The government and other defendants opposed the application and the reliefs sought.²²⁶³ The defendants contended that the entities on whose behalf the applicant had approached the court for diplomatic protection were Zimbabwean entities and Zimbabwe was a sovereign State. They added that how Zimbabwe treated its citizens, corporations and trusts was a matter for Zimbabwean law, with the result that the court in that case had no jurisdiction to adjudicate on the matter.²²⁶⁴ They further contended that that notwithstanding, they had seriously considered the request for diplomatic protection and had taken reasonable steps to provide the protection sought.²²⁶⁵ They further averred that the government of South Africa had made several diplomatic representations on Mr. Von Abo’s plight to the government of Zimbabwe without success, but had no means to coerce that government to heed the representations.²²⁶⁶

The High court found that the requirements necessary for a state to assert a claim for diplomatic protection on behalf of its citizens were present.²²⁶⁷ According to the court, those requirements are that the claimant must be a national of the country from which diplomatic protection is sought, that there must be a violation of the

²²⁶¹ *Idem* par 17.

²²⁶² *Idem* par 18 & 19.

²²⁶³ See *idem* pars 1, 40, 43 & 91.

²²⁶⁴ *Idem* par 55.

²²⁶⁵ *Idem* par 49.

²²⁶⁶ *Idem* par 51.

²²⁶⁷ *Idem* par 65.

international minimum standard, and that the claimant must have exhausted all available internal remedies.²²⁶⁸

The court also found that the plaintiff had demonstrated that his rightful property in Zimbabwe was unlawfully expropriated under international law,²²⁶⁹ and that he was not compensated.²²⁷⁰ The court was of the view that the action of the Zimbabwean government constituted expropriation without the payment of compensation, which did not comply with the international minimum standard of treatment of aliens or even of nationals.²²⁷¹

Given the almost absolute disregard the government of Zimbabwe showed for orders of its own court, especially regarding the expropriation, the court was of the opinion that there were no more local remedies available to him.²²⁷² If for six or more years, the South African government did absolutely nothing to bring about relief for the applicant, there was no doubt that the government had been dealing with the matter in bad faith.²²⁷³ According to the court

They exhibited neither the will nor the ability to do anything constructive to bring their Northern neighbour to book They paid no regard or any consequence to the plight of valuable citizens such as the applicant/plaintiff.²²⁷⁴

In the circumstances therefore, it was difficult to resist the conclusion that the respondents (government)

were simply stringing the plaintiff along and never had any serious intention to afford him proper protection.²²⁷⁵

The court therefore ruled that the plaintiff/applicant qualified for diplomatic protection,²²⁷⁶ and ordered the government to take all necessary steps within 60

²²⁶⁸ *Idem* par 68.

²²⁶⁹ *Idem* par 79.

²²⁷⁰ *Idem* par 81.

²²⁷¹ *Idem* par 81.

²²⁷² *Idem* par 86.

²²⁷³ *Idem* par 143.

²²⁷⁴ *Idem* par 143.

²²⁷⁵ *Idem* par 112.

²²⁷⁶ *Idem* par 154.

days to remedy the violation of the plaintiff/ applicant's rights and to report back to the court regarding the steps so taken.²²⁷⁷

The applicant, however, appealed to the Constitutional Court²²⁷⁸ for a confirmation of the order of the Gauteng High Court in terms of section 172(2)(a) of the Constitution²²⁷⁹ and Rule 16 of the Constitutional Court.²²⁸⁰ He cited the President of the Republic as the only respondent²²⁸¹ and only sought for the confirmation of paragraph 1 of the order of the Gauteng High Court.²²⁸² In the Constitutional Court Moseneke DCJ, after a comprehensive review of the case before the Gauteng High Court, came to the merits of the case before the Constitutional Court.²²⁸³

He said that the applicant's conviction that the order of the High Court was susceptible to confirmation appeared to have been emboldened by the stance of the High Court.²²⁸⁴ He added that the respondent did not agree with this characterisation and on that basis had opposed the confirmation, since the order in issue did not relate to his conduct as President as envisaged in section 172(2)(a) of the Constitution.²²⁸⁵

According to Moseneke DCJ, at the hearing, the main issue argued before the Constitutional Court was whether the order of the High Court that the conduct of the President was inconsistent with the Constitution and invalid, was subject to confirmation by that court in terms of section 172(2)(a) of the Constitution, while the

²²⁷⁷ *Idem* par 161. According to Prinsloo J, par 90 "This may involve effective diplomatic pressure on the Zimbabwean government to restore the properties to the applicant and his companies and to pay compensation for losses and damages."

²²⁷⁸ See *Von Abo v Government of the Republic of South Africa* 2009 (4) SA 526 (T).

²²⁷⁹ S 172(2)(a) states that "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional validity has no force unless it is confirmed by the Constitutional Court."

²²⁸⁰ Which directs that a copy of the order sought to be confirmed shall be filed at the Constitutional Court within 15 days.

²²⁸¹ At p 2.

²²⁸² *Ibid.* See also par 161(1) of the Order of the High Court which stated *inter alia* "It is declared that the failure of the respondents to rationally, appropriately and in good faith consider, decide and deal with the applicant's application for diplomatic protection in terms of the violation of his rights by the Government of Zimbabwe is inconsistent with the Constitution, 1996 and invalid."

²²⁸³ At 8.

²²⁸⁴ In its judgment, par 155 the High Court had said *obiter* that its order should be referred to the Constitutional Court for confirmation. "The certification process as described by s 172(2)(a) of the Constitution, will be attended to in the normal course..."

sole question of substance for determination was whether the failure of the President to provide diplomatic protection constituted “conduct” for purposes of section 172(2)(a) of the Constitution.²²⁸⁶

While the applicant argued that failure by the President to provide diplomatic protection amounted to “conduct,” within the meaning of section 172(2)(a) of the Constitution, the respondent argued otherwise. The respondent then urged the court to dismiss the application for confirmation because failure to provide proper diplomatic protection does not amount to “conduct” of the President as envisaged in section 172(2)(a) of the Constitution.²²⁸⁷

The Constitutional Court maintained that it had original, concurrent and inherent jurisdiction to enquire into the conduct of the President under the Constitution²²⁸⁸ and that the jurisdiction to enquire into the conduct of the President is contained in sections 172(2)(a), 167(5) and 167(4) of the Constitution.²²⁸⁹ While section 172(2)(a) deals with the “conduct” of the President, section 167(4)(e) deals with “failure to fulfil a constitutional obligation.” The two terms must be distinguished.²²⁹⁰

The question was therefore whether the alleged failure of the President to deal with the applicant’s request for diplomatic protection against the violation of his property rights by the Zimbabwean government can properly be characterized as relating to conduct of the President. To answer this question, the court described briefly the nature of the executive authority envisaged by the Constitution²²⁹¹ and came to the conclusion that it cannot.

It seems to me therefore that it is impermissible to hold that when the conduct of the government as represented by the national executive, or of one or more members of the Cabinet, is impugned on the ground that it is inconsistent with the Constitution and thus invalid, that dispute relates to the conduct of the President and therefore that the ensuing order of constitutional invalidity must

²²⁸⁵ At 8-9.

²²⁸⁶ *Idem* 12-13.

²²⁸⁷ *Idem* 15.

²²⁸⁸ *Ibid.*

²²⁸⁹ *Ibid.*

²²⁹⁰ *Idem* par 34.

²²⁹¹ *Idem* par 39.

be confirmed by this Court on the ground that it relates to the conduct of the President. If that were so, it would mean that in theory every order against the government or a member of the Cabinet must be confirmed before it has any force or effect.²²⁹²

Furthermore, the court pointed out that since the order of the High Court did not single out the offending conduct on the part of the President in particular nor did the order refer to him specifically and whereas there were five respondents in the court below, it would be unfair to confirm the order against just one respondent.²²⁹³

In conclusion Moseneke DCJ said, *inter alia*,

In the light of the above, I find that the applicant has approached this court erroneously. The portion of the order of the High court that declares the conduct of the respondent to be invalid does not concern the conduct of the President within the meaning of section 172(2)(a) of the Constitution despite the fact that he was cited as a party in the proceedings.²²⁹⁴

The application for confirmation of the judgment of the High Court was, therefore, dismissed but without costs.²²⁹⁵

9 Judicial attitude to diplomatic protection in South Africa

It is necessary to take a good look at the judicial attitude to diplomatic protection in South Africa as can be gleaned from the above decided cases. Of the many cases that came before the courts, only one of the cases; namely, *Von Abo v The Government of RSA* succeeded.²²⁹⁶ On appeal, however, the case suffered some

²²⁹² *Idem* at 24 par 42. Moseneke DCJ said that that would defeat the scheme of ch 5 of the Constitution and blur the careful jurisdictional lines between the Constitutional Court and other courts, leading to an unwarranted increase of confirmation proceedings in the Constitutional Court.

²²⁹³ *Idem* par 48.

²²⁹⁴ *Idem* 49. The judge pointed out the import of his conclusion was that the application for confirmation was misconceived because it did not concern the conduct of the President. In the circumstances, the order of the High Court needed no confirmation by the Constitutional Court.

²²⁹⁵ *Idem* par 54.

²²⁹⁶ *Supra* n 801 See also the case of *Campbell (Pty) Ltd v The Republic of Zimbabwe supra* n 1302 where the applicants obtained judgment in their favour at the SADC tribunal against the expropriation of their farm land in Zimbabwe, and were able to enforce the judgment in a South

setback.²²⁹⁷ From the above decided cases, it appears that diplomatic protection has been invoked in South Africa in matters pertaining to debt collection,²²⁹⁸ arrest and detention,²²⁹⁹ extradition²³⁰⁰ and expropriation of property,²³⁰¹ but with very limited success.

It would appear therefore that South African courts place the responsibility for providing diplomatic protection squarely on the shoulders of the executive branch of government and are reluctant to descend into that arena.²³⁰² In *Kaunda's* case²³⁰³ it was said that:

A court cannot tell government how to make diplomatic intervention for the protection of its nationals,²³⁰⁴ and that

A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy, which is essentially the function of the executive²³⁰⁵

The obvious conclusion is that South African courts, like courts in other states are reluctant to order diplomatic protection against the executive arm of government.²³⁰⁶ The interesting aspect of this judicial attitude is that while the courts are always willing to entertain cases on diplomatic protection,²³⁰⁷ they are very reluctant to grant them.²³⁰⁸

African court See Ainsley Brown "White Zimbabwean farmers to get justice in SA" *Commercial Law International* 2010-04-13, www.commerciallawinternational.com/? (accessed 2010-11-08). .
²²⁹⁷ *Supra* n 2274.
²²⁹⁸ *Roothman v President of RSA supra* n 2201
²²⁹⁹ *Kaunda v President of RSA supra* n 688 *Thatcher v Minister of Justice supra* n 2168 & *Mohamed v President of RSA supra* n 1290.
²³⁰⁰ *Ibid.*
²³⁰¹ *Van Zyl v Government of RSA supra* n 556 & *Von Abo v Government of RSA supra* n 801.
²³⁰² See *Olivier supra* n 358 252. See also *Pete & Plessis supra* n 358 441.
²³⁰³ This is the *locus classicus* or the leading case on diplomatic protection in South African law.
²³⁰⁴ Par 73.
²³⁰⁵ This statement re iterated the legal position laid down by the ICJ in the *Barcelona Traction* case *supra* n 26.
²³⁰⁶ See e.g. *Abbassi v Secretary of State for foreign and Commonwealth Affairs* (2002) EWCA civ 1598 in which proceedings were brought against the British government to compel it to protect British nationals accused of involvement in the Afghan war who were taken prisoners and incarcerated in Guantanamo Bay, but the action did not succeed.
²³⁰⁷ As shown e.g. in *Kaunda's* case *supra* n 688.
²³⁰⁸ According to Chaskalson CJ in par 78 of the *Kaunda* judgment however, "This does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection." It appears that the courts always places the onus on the applicant to prove that he or she is entitled to diplomatic protection.

This has led to severe criticism of judicial attitude towards diplomatic protection in South Africa. Commenting on the judicial attitude in *Kaunda's* case, Olivier wonders why the court had to grapple with questions such as the nature of diplomatic intervention and the territorial restrictions on the Bill of Rights which resulted in a complicated and very confusing line of argument delivered by Chaskalson CJ.²³⁰⁹ This led to the conclusion that the Bill of Rights protects only those within the borders of South Africa and that it is up to the executive to decide whether and how to entertain requests on behalf of citizens abroad whose human rights have been or are being abused by a foreign state.

The point of departure should rather have been whether international human rights had been violated.²³¹⁰ If so, an obligation could have arisen for the executive to act in a manner which would have been likely to affect the situation positively.²³¹¹ Besides, according to Olivier, the irony of the situation was that while the court held that the executive must deal with requests for diplomatic protection in terms of the Constitution, it nevertheless gave the executive a wide discretion on how to act, a discretion with which the courts would not lightly interfere.²³¹²

She asks: "Why are courts so wary of setting the constitutional parameters for diplomatic protection?"²³¹³ Olivier's conclusion is that

The decision is neither in line with South African Constitution, concomitant to the protection of human rights, nor with the letter and spirit of the international human rights law.²³¹⁴

Tladi has however pointed out that this view is:

²³⁰⁹ See Olivier *supra* n 358 252.

²³¹⁰ *Ibid.*

²³¹¹ *Ibid.* She is of the opinion that arguing from the perspective of the territoriality of the Bill of Rights brought the court against the wall of sovereignty and territorial integrity and made it impossible for the State to become involved in the plight of its nationals in other states.

²³¹² *Ibid.* The Court said in par 81 that "...government has a broad discretion in such matters which must be respected by the courts...".

²³¹³ *Ibid.* According to her, diplomacy is regarded as a mysterious enclave of executive action, discretionary in nature and not to be tested against the Constitution, and in which a court should not "meddle."

²³¹⁴ At 176.

fundamentally problematic and constitutes a threat not only to the integrity of international law, but also to the very values it purports to speak on behalf of.²³¹⁵

The question he poses is whether a national does (or should have) a right to diplomatic protection against the wrongful conduct of foreign states and whether the state has (or should have) a corresponding duty to diplomatically protect the national.²³¹⁶

Tladi is of the view that diplomatic protection and human rights should be kept separate and apart and that diplomatic protection should not be employed for the protection of human rights.²³¹⁷ According to him,

The argument in support of the individual's right to diplomatic protection postulates that a national's right to diplomatic protection should be seen as a tool for the protection and enforcement of international human rights law.²³¹⁸

The danger posed by this argument and the reasons underlying it are double-edged. Firstly, it is based on the new concept of international law – which places human rights at the centre, and secondly, “it paints a picture of international law without a process, effective or otherwise, for the protection of human rights.”

While agreeing that there may well be a place for diplomatic protection as a tool for international human rights, he believes that

over reliance on diplomatic protection may serve to undermine the very system that serves to promote the right of individuals to claim their own rights.²³¹⁹

His main objection to the use of diplomatic protection for the protection of human rights is based on the ironic premise that:

²³¹⁵ Tladi “South African Lawyers, values and new vision.” (2008) 33 *SAYIL* 167. Ngcobo J had expressed the same view in *Kaunda's case supra* n 688 par 181. Tladi specifically refers to “the views expressed by Justice Ngcobo and Olivier “to be “fundamentally problematic...”.

²³¹⁶ At 175.

²³¹⁷ *Ibid.*

²³¹⁸ *Idem* at 177.

²³¹⁹ *Idem* at p 182.

having achieved the objective of recognising individual's right to act and to enforce his or her own rights under international law independent of the State, human rights supporters now demand of the State the continued enforcement of rights on behalf of individuals.²³²⁰

He, however, agrees with Olivier that the court in *Kaunda's* case, should have considered the matter mainly from the human rights point of view rather than from the diplomatic protection angle.²³²¹ Tladi nevertheless criticises the decision in *Von Abo v The President of the RSA*²³²² as being "fundamental wrong in law" because it is:

illustrative of the appeal to human rights, embodied in the calls for the individual's right to diplomatic protection

This appeal is in turn, based on the current system of international law.²³²³

Tladi's view is thus not only in complete contrast with that of Olivier,²³²⁴ but also with that of Dugard, who, as the Special Rapporteur on Diplomatic Protection to the ILC, sought to convince the ILC to impose some duty on states to exercise diplomatic protection on behalf of their nationals whose fundamental human rights are violated abroad.²³²⁵ In as much as he disagrees with the current system or the "new vision" of international law, his view can best be described as academic or idealistic if not down to earth conservative.²³²⁶ Needless to say, one wonders if Tladi would not seek the protection of his government if any of his fundamental rights were violated in a foreign land.²³²⁷

²³²⁰ *Ibid.*

²³²¹ *Idem* at 184.

²³²² *Supra* n 801.

²³²³ According to her at 178 "I do not believe that the current system of international law is fair and just."

²³²⁴ Whom she describes as a "proponent of the right to diplomatic protection." *Idem* 176.

²³²⁵ Alluding to this, Tladi says at 167 that the ILC "resisted the overtures of the Special Rapporteur for a national's right to diplomatic protection."

²³²⁶ See *supra* n 2315.

²³²⁷ Tladi has something in common with Kelson *supra* n 431 in that just as Kelson believed in a pure theory of law generally, Tladi believes in a pure theory of international law. See Kelson *General Theory of Law and State* (1945) 175-177 & Kelson "The pure theory of Law" (1934) 50 LQR 474. See Tladi *supra* n 2315 169 & 177 respectively.

Pete and du Plessis, like Olivier, have decried the undue deference granted to the executive by the courts within the realm of foreign relations.²³²⁸ As a result of this deference, the judiciary has surrendered to the executive the power to make sensitive decisions on issues concerning diplomatic protection which may affect relations with foreign states.²³²⁹

Pete and du Plessis maintain that judges should be more astute and take bolder decisions in matters relating to diplomatic protection instead of viewing them as an executive prerogative. According to them, this deferential attitude, which they term “the Court’s low-level rationality”, has watered down diplomatic protection to the point of rendering it meaningless.²³³⁰

As justified as these criticisms may be, it is important to note that the courts’ reluctance to compel the executive to grant diplomatic protection is not peculiar to South Africa.²³³¹ In *Kaunda’s* case,²³³² for instance, the court reflected on the expert opinion of the ILC Special Rapporteur on Diplomatic Protection on the subject, which showed that claims by individuals against their governments for diplomatic protection were often dismissed in many jurisdictions. This was manifested in the attitude of British, Dutch, Spanish, Austrian, Belgian and French courts.²³³³ According to the court:

Even in those countries where the Constitution recognizes that the State has an obligation to afford such protection....there is some doubt as to whether that obligation is justiciable under municipal law.²³³⁴

Since the exercise of all public power is subject to constitutional control, such exercise of discretion by government is justiciable. Thus,

²³²⁸ *Supra* n 358 441.

²³²⁹ *Ibid.*

²³³⁰ *Idem* 442.

²³³¹ See *Abassi v Secretary for Foreign and Commonwealth Affairs and Secretary of State for Home Department*. Judgment of (2002) 11 06 [2002] EWCA Civ 1598 and *Rudolf Hess* case ILR vol 90 387.

²³³² *Supra* n 688.

²³³³ *Idem* par 71.

²³³⁴ *Idem* par 72.

if government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly.²³³⁵

It is likely that the doctrine of diplomatic protection will further be deliberated upon and the scope judicially expanded in the near future under South African law.

10 Extraterritoriality

The issue of the extraterritorial application of the constitution for purposes of diplomatic protection in South Africa must begin with the consideration of the case of *Mohamed v President of the RSA*.²³³⁶ In that case, the Constitutional Court held that the deportation of Mohamed, a Tanzanian national to the US to stand trial by the SA authorities with the collusion of US officials, was a violation of the SA Constitution since SA had failed to obtain a prior undertaking that if convicted, the death sentence would not be imposed on him.²³³⁷

The decision in *Mohamed's case*²³³⁸ was generally considered to be an extraterritorial application of the SA Constitution.²³³⁹ However, in a thoughtful analysis of that case, du Plessis²³⁴⁰ has pointed out that the case did not really constitute an extraterritorial application of the Constitution, as the harm to Mohamed in the US was caused by the action of public officials in SA.²³⁴¹ According to him, the 'extraterritorial' application of the Constitution is thus an application of the Bill of Rights, triggered by effects abroad, which would be the end-result of acts of public officials which began in South Africa.²³⁴²

²³³⁵ *Ibid.* See pars 77-80 That was the basis of the decision in *Von Abo's case supra* 801.

²³³⁶ *Mohamed's case supra* n 1204.

²³³⁷ This is said to have violated Mohammed's constitutional rights to human dignity, to life and not to be punished in a cruel, inhuman or degrading manner.

²³³⁸ *Supra* n 1290.

²³³⁹ See Dugard *supra* n 1 79.

²³⁴⁰ Du Plessis *The extraterritorial Application of the South African Constitution* (2003) 20 SAYIL 797.

²³⁴¹ Dugard *supra* n 1 79.

²³⁴² *Idem* 130.

11 South African government policy on diplomatic protection

Apart from the criticisms levelled against the judicial attitude to diplomatic protection in South Africa, the other aspect of diplomatic protection which has been criticised is government policy on the subject. The South African Government policy on diplomatic protection was disclosed in the case of *Kaunda v President of the RSA*²³⁴³ and can be paraphrased as follows:

As their government, we have to ensure that all South African citizens, whatever offence they have carried out or are charged with, must receive a fair trial, they must have access to their lawyers, they must be tried within the framework of the Vienna Convention, they must be held in prison within the framework of the Vienna Convention and international law and we will always, it is our constitutional duty to ensure that this is getting out within the framework of the Geneva Convention and that it is a fair trial.²³⁴⁴

This policy statement by the Department of Foreign Affairs indicated that SA nationals abroad who face criminal charges abroad would obtain a fair trial within the framework of international human rights law. The policy was referred to by the court as being in line with government's constitutional duty under section 3(2) of the Constitution.²³⁴⁵

Based on this policy statement, the court found that

there may be a duty on government consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.²³⁴⁶

²³⁴³ *Supra* n 688.

²³⁴⁴ This policy is based on the statement made by the South African Deputy Minister for Foreign Affairs Mr Aziz Pahad in a media briefing. See *Kaunda's case supra* n 688 par 68.

²³⁴⁵ At 68.

²³⁴⁶ *Idem* par 69. The rest of the judgment indicates that the court did not hold the present set of facts to comply with the requirement for government action set out by this quotation, namely a material infringement of human rights. It is also not clear in the light of the court's earlier conclusion that

The court accepted that given the government's stated foreign policy, there was no reason to believe that this would not be done.²³⁴⁷ In this respect, according to the Chief Justice, the government was in the best position to decide on what action to take:

The situation that presently exists calls for skilled diplomacy the outcome of which could be harmed by any order that this court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow. If the situation on the ground changes, the government may have to adapt its approach to address the developments that take place. In the circumstances, it must be left to government, aware of its responsibilities, to decide what can best be done.²³⁴⁸

The rationale was that

The timing of representations if they are to be made, the language in which they should be couched and sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal.²³⁴⁹

It was however conceded that all public power was subject to constitutional control. Government had a wide discretion in matters of diplomatic protection and the court may not tell government what form such protection should take. Where government has dealt with a request in bad faith or irrationally, the court may review the decision.²³⁵⁰

there was no obligation on a state to render diplomatic protection under International Law whether a separate duty is established in cases of gross violations of human rights.

²³⁴⁷ *Idem* par 127.

²³⁴⁸ This was confirmed by Ngcobo J who said at par 189 that "foreign relations is a matter which is within the domain of the executive" and that states "are better judges of whether to intervene and if so the timing and the manner of such intervention." See also the judgment of O'Regan J to the same effect at par 245.

²³⁴⁹ *Idem* par 77. "The best way to secure relief for the nationals in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges and which could be harmed by court proceedings and the attendant publicity."

²³⁵⁰ *Idem* par 80.

Although government argued that it was doing what it was entitled to do in law and in foreign policy to assist the applicants and although there was nothing to show that government had provided any assistance to them, the court did not investigate the matter further. Nevertheless, the court was prepared to look into the obligations of government to the applicants in the event of there being a possibility of being denied a fair hearing, or should they be sentenced to death.²³⁵¹

The wisdom behind the Government's policy only to intervene once the death penalty has been imposed has been questioned.²³⁵² It has been said that a disappointing feature of the *Kaunda* judgment is the manner in which the Constitutional Court extended the hope of some form of diplomatic protection to South African citizens abroad, only to dash this hope by allowing the authorities an almost complete discretion to decide on the form, if any, that this "protection" would take.²³⁵³

It has also been said that the court's decision may mean that government policy will be allowed to trump the right of South African nationals when they are most desperately in need of the protection of their state.²³⁵⁴ The effect may lead to an evisceration of the corresponding right held by the citizen.²³⁵⁵

It has also been asserted that the court in *Kaunda*, particularly in its majority judgment, showed undue deference to the executive.²³⁵⁶ According to the Court:

This however is a terrain in which the courts must exercise discretion, and recognize that government is better placed than they are to deal with such matters.²³⁵⁷

²³⁵¹ *Idem* par 99.

²³⁵² Pete & Plessis *supra* n 358 469. See also Olivier *supra* n 358 245.

²³⁵³ Pete & Plessis *Idem* 468.

²³⁵⁴ *Ibid.*

²³⁵⁵ *Idem* 448. The Court had said *inter alia* "...The entitlement to request diplomatic protection which is part of the constitutional guarantee given by s 3 has certain consequences. If ... citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution...".

²³⁵⁶ *Idem* 468.

²³⁵⁷ *Idem* par 67.

The risk of adopting an overly deferential approach when confronted with sensitive foreign policy issues is that the promises in the South African Constitution may all too easily be sacrificed on the alter of government's chosen foreign policy.²³⁵⁸ The danger which lies in such deference is not only in the obvious difficulty of proof, but also in the hurdle that an applicant who intends to challenge government foreign policy will have to scale in order to succeed.²³⁵⁹

Furthermore, it has been said that even if it is clear that the government's chosen policy does not reflect a whole-hearted and convincing commitment to, or understanding of, an applicant's human rights predicament, the danger is that the court may be tempted to genuflect to the face of a bold assertion by government that it has given constitutional consideration to the request of the applicant, even if that is not the case.²³⁶⁰

This criticism was borne out in *Van Zyl v Government of RSA*²³⁶¹ where the applicant's application to the Transvaal Provincial High Court for a review of government's policy decision to refuse him diplomatic protection in respect of his property rights expropriated by the government of Lesotho was dismissed.

Although the court came to the conclusion that government's refusal of diplomatic protection to the applicant was reviewable on a very limited basis, it based its decision on a submission that government policy was based on solid legal advice and not on the whims and caprice of government.²³⁶²

According to the court:

²³⁵⁸ *Ibid.*

²³⁵⁹ *Ibid.* It is difficult to imagine how a litigant would successfully show that a policy decision not to afford a South African citizen diplomatic protection should be reviewed on the basis that it was taken in bad faith.

²³⁶⁰ *Idem* 469. Another government policy criticized by the court itself at par 112 was the SA's government policy not to comment on the justice system in foreign countries. At the trial, it was alleged that the judicial system in Equatorial Guinea was so poor and unreliable that if the applicants were extradited to that country they would be charged, convicted & sentenced to death without due process of law. O'Regan J was quick to point out in par 267 that it is not satisfactory for government merely to say that it was not its policy to comment on the criminal justice system of other countries.

²³⁶¹ *Supra* n 688.

²³⁶² The legal advice was obtained from both the Department of Foreign Affairs and the Department of Justice. See par 15.

On the basis of the advice received, the respondent in a letter stated that: regrettably the South African Government is unable to accede to your request.²³⁶³

The court said further that:

This inability cannot be attributed to the view that it was legally impossible to accede to the applicant's request, but the position taken was as a result of a policy decision. That decision was taken within the ambit of exercising the relevant discretion.²³⁶⁴

Yet the court dismissed the applicant's petition without inquiring into the basis upon which the respondent's exercise of discretion was based. The court held that the respondents were correctly advised.²³⁶⁵

Thus having regard to the applicable policy considerations, which were of such a nature that the respondents rationally determined that they could not accede to the applicant's request for diplomatic protection as of right, therefore, none of the grounds on which the applicants seek to have the decision of the respondents set aside can be sustained.²³⁶⁶

The application was then dismissed.²³⁶⁷

In *Von Abo v The Government of the RSA*,²³⁶⁸ the issue of government policy on diplomatic protection was again considered. Because of the lackadaisical manner in which the policy decision was reached by the respondents, the applicant was able to convince the court that the policy decision whereby the respondents arrived at the decision not to grant diplomatic protection to him, was borne out of bad faith.²³⁶⁹

²³⁶³ *Idem* 104 par 14. See also 109 par 25.

²³⁶⁴ *Idem* 126 par 62.

²³⁶⁵ *Idem* par 70.

²³⁶⁶ *Idem* par 71.

²³⁶⁷ *Idem* par 126.

²³⁶⁸ *Supra* 801.

²³⁶⁹ *Idem*. Per Prinsloo J in par 143.

Based on a series of communications, persuasions, suggestions, and insinuations over a period of six years, the court came to the inevitable conclusion that the respondents had not exercised their discretion properly.²³⁷⁰

I regret to say that it is difficult to resist the conclusion that the respondents were simply stringing the applicant along and never had any serious intention to afford him proper protection. Their feeble effort, if any, amounted to little more than quiet acquiescence in the conduct of their Zimbabwean counterparts and their 'war veteran' thugs.²³⁷¹

In the course of the judgment, the court said *inter alia*

The applicant therefore had a right to apply for diplomatic protection and the respondents, at a minimum, were under a Constitutional duty at the very least to properly (that is rationally) apply their minds to the request for diplomatic protection....In my view, and for all the reasons mentioned, the government in the present instance failed to respond appropriately and dealt with the matter in bad faith and irrationally²³⁷²

Hence, in terms of government policy on diplomatic protection and from the decision reached by the courts in the *Van Zyl* case,²³⁷³ it is impossible to disagree with Olivier, Pete and Plessis²³⁷⁴ that the courts have given too much deference to the executive to deal with requests for diplomatic protection. It is also easy to see the difficulty that a litigant faces in order to successfully prove that a policy decision not to afford him or her diplomatic protection in South Africa was taken in bad faith.²³⁷⁵ This makes the *dictum* that executive decisions on diplomatic protection in South Africa are reviewable by the courts, virtually meaningless.²³⁷⁶

²³⁷⁰ *Idem* par 112.

²³⁷¹ *Ibid.*

²³⁷² *Idem* par 143.

²³⁷³ *Supra* n 688.

²³⁷⁴ *Supra* n 358.

²³⁷⁵ It appears that *Von Abo* was an exception to this general rule.

²³⁷⁶ See *Kaunda's case supra* n 688 par 80.

12 Protection of human rights in South Africa

Before 1994, South Africa had a poor human rights record.²³⁷⁷ This was as a result of the apartheid policy adopted and practised by the government in power. The apartheid policy was a policy of segregation and racial discrimination designed to bring about physical segregation between races by creating different residential areas and the use of separate public utilities for different races.²³⁷⁸

The enforcement of this policy was achieved through the enactment of draconian laws. This brought about untold hardship particularly to the black people who were forcibly removed from their homesteads and relocated elsewhere.²³⁷⁹ This, in turn, brought about endless litigation, which, needless to say, always went against the victims.²³⁸⁰ Apartheid constituted a grave violation of the human rights of those affected and elicited international condemnation through the UN.²³⁸¹

²³⁷⁷ See e.g. Olivier "South Africa and international human rights procedure, policy and practice." (parts 1 and 2) (2003) *TSAR* 547; Botha & Olivier "Ten years of international law in the South African Courts: Reviewing the past and assessing the future" (2004) 29 *SAYIL* 42. Dugard "The role of international law in interpreting the Bill of Rights" (1994) 10 *SAJHR* 208; Lourens "The South African Bill of Rights – public, private, or both a viewpoint on its sphere of application" (1994) XXVII *CILSA*; Maluwa "International Human Rights norms and South African Interim Constitution 1993" *supra* n 2005 14; Botha "South African Judicial decisions: International law in the Constitutional Court." (1995) 20 *SAYIL* 222; Klug "Striking down death: *S v Makwanyane & Another* SAJHR 61; Zlotnick "The death penalty and public opinion *S v Makwanyane & Another*" SAJHR 70; Mubangizi *supra* n 282; Waal *et al The Bill of Rights Handbook* (2000); Church *et al supra* n 159.

²³⁷⁸ See Mubangizi *supra* n. 282 36.

²³⁷⁹ See Robertson *supra* n 1257 120. See also Mubangizi *supra* n 282 36.

Apart from forceful relocation of people who were mainly blacks, apartheid laws banned communism through the Suppression of Communist Act 44 of 1950. Hence anybody who opposed the regime, or identified with the Communist Party of South Africa was branded a communist, banned from participation in any political activity, and restricted to a particular area. Apartheid laws also prohibited mixed marriages through the Prohibition of Mixed Marriages Act 55 of 1949, prohibited adultery, attempted adultery or related immoral acts between whites and people of other races, through the Immorality Amendment Act 21 of 1950 as amended by Act 23 of 1957, created a national register in which every person was registered by the Population Registration Act 30 of 1950, removed "coloured" people from the common voters' register by the Separate Representation of Voters Act 46 of 1951 but never registered the blacks to vote. Apartheid laws also banned illegal squatting through the Prevention of Illegal Squatting Act 52 of 1951 to name but a few such laws. Other obnoxious apartheid laws which greatly affected and violated human rights in South Africa before 1994 included the Black Authorities Act 68 of 1951; Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 Black Labour (Settlement of Disputes) Act 48 of 1953; Bantu Education Act 47 of 1953; Reservation of Separate Amenities Act, 49 of 1953, Blacks (Prohibition of Interdicts) Act 64 of 1956; Extension of University Education Act 45 of 1959 and the Terrorism Act 83 of 1967.

²³⁸⁰ Robertson *supra* n 1195 120; Mubangizi *supra* n 282 38.

²³⁸¹ Robertson *idem* 29.

Since the judiciary was reluctant to question legislation and policy which could challenge government, the courts adopted a narrow, positivist approach²³⁸² and were very reluctant, unwilling, or powerless to enforce ordinary human rights norms,²³⁸³ let alone accept international human rights standards as binding on them.²³⁸⁴ Today, however, the situation is quite different. With the coming into force of the 1993 Constitution, followed by the 1996 Constitution the human rights situation in South Africa has radically improved. The 1996 Constitution is the supreme law of the land.²³⁸⁵ It has provisions and institutions which are, amongst other things, democratic and able to uphold human rights.²³⁸⁶

13 Human rights provisions under the South African Constitution

Chapter 2 of the South African Constitution makes provision for a Bill of Rights.²³⁸⁷ The importance of the Bill of Rights under the South African Constitution cannot be underestimated. Not only does it direct the State on the use of its prerogative powers,²³⁸⁸ but also imposes obligations on both the State and the citizenry alike.²³⁸⁹

Section 7(1) of the Constitution provides that

This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom

Section 7(2) provides that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights”, while section 7(3) provides that “the rights in the Bill of

²³⁸² See Olivier *supra* n 358 246.

²³⁸³ Robertson *supra* n 1195 120; Mubangizi *supra* n 282 38. See eg the case of *R v Pitje* 1961 (2) SA 587 (A); *R v Sisulu & Others* 1953 (3) SA 276 (A) *Sobukwe & Another v Minister of Justice* 1972 (1) SA 693 (A); *Omar & Others v Minister of Law and Order* 1987 (3) SA 839 (A); *S v Van Niekerk* 1972 (3) SA 711 (A).

²³⁸⁴ This can be illustrated with reference to a number of cases. In *S v Adams S v Werner* 1981 (1) SA 187 (A) for instance, the Appellate Division of the Supreme Court refused to invoke the provisions of the Charter of the UN in the settlement of judicial disputes. In *S v Petane* 1988 (3) SA 51 (C) the court questioned the binding effect of the UN resolution as a source of Customary International Law. In *Nduli v Minister of Justice* 1978 (1) SA 893 (A) however, while holding that International Law was part of SA municipal or common law, the court stated that International Law can only become part of South African law if it is incorporated by an Act of Parliament. See “The role of International Law in interpreting the Bill of Rights” (1994) 10 *SAJHR* 208 209.

²³⁸⁵ By virtue of s 2.

²³⁸⁶ By virtue of s 108.

²³⁸⁷ Ss 7-39.

²³⁸⁸ S 8(1) See Mubangizi *supra* n 282 42.

²³⁸⁹ See s 7(2).

Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

14 The Bill of Rights under the South African Constitution

The South African Bill of Rights has been described as “one of the most progressive in the world.”²³⁹⁰ As pointed out above, section 7(1) of the Constitution provides that the Bill of Rights is “the cornerstone of democracy in South Africa” and section 7(2) requires the State to “respect, protect, promote and fulfil the rights in the Bill of Rights.” According to section 8(1), the Bill of Rights applies to all laws, and binds the legislature, the executive, the judiciary, and all organs of State. Section 35(1) makes it obligatory for the courts to “have regard to Public international law” and gives them a discretion to “have regard to comparative foreign case law” when interpreting the Bill of Rights. Section 39 of the Constitution requires courts to consider international law, when interpreting the Bill of Rights.²³⁹¹ Section 39(1) provides that:

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

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

It is interesting to note that section 39 of the Constitution extends the interpretational role of international law even further, since it requires not only courts, but other tribunals and fora to consider international law as an interpretational tool when interpreting the Bill of Rights.

In interpreting the provisions of section 39 of the Constitution in relation to diplomatic protection, the court must assume two responsibilities: Firstly, it must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and secondly it must consider international law. In performing

²³⁹⁰ Mubangizi *supra* n 282 71.

²³⁹¹ The Bill of Rights consists of 32 sections made up of all categories of rights ranging from the right to life, freedom and security of the person, freedom from slavery, servitude and forced labour; freedom of expression *etcetera* to the interpretation of the Bill of Rights. Attention will however be

their interpretation function,²³⁹² the courts may also consider foreign law.²³⁹³ That is to say, decisions by foreign national courts or foreign national legislation.²³⁹⁴ As far as the second category of legal sources is concerned, the courts are obliged to promote the spirit, purport and objects of the Bill of Rights.²³⁹⁵ The aim of this provision is to harmonize existing legal principles with the Bill of Rights as far as legislation is concerned.²³⁹⁶ There is also the general obligation to harmonize such legislation with international law.²³⁹⁷

Since customary international law is part of the law of South Africa by virtue of section 232 of the Constitution and diplomatic protection is customary law, by virtue of section 233 of the Constitution,²³⁹⁸ the courts are expected to approach their interpretative function with a view of arriving at an interpretation which favours the overall interest of all South Africans. The favourable interpretation is that the constitutional provision pertaining to international law must be considered as including diplomatic protection when interpreting the Bill of Rights. Any contrary interpretation would be absurd and contrary to the spirit and letter of section 39(1) of the Constitution.

With regard to international agreements, section 231(4) of the Constitution is the vehicle through which international agreements are incorporated into South African municipal law. For purposes of diplomatic protection, both the VCDR and the VCCR have already been incorporated into South African municipal law.²³⁹⁹ It is submitted that in combination with customary international law, the scope of diplomatic protection in South African law is considerably enhanced by this incorporation. In conclusion, therefore, it can be said that the aim of section 39 of the 1996 Constitution is to use international law as a tool in promoting the values that underlie SA society - an open and democratic society based on human dignity, equality and

focused here on the right to life, freedom from torture, cruel, inhuman or degrading treatment, and the right to be free from discrimination, which are discussed as fundamental rights in this thesis.

²³⁹² I.e the Bill of Rights.

²³⁹³ S 39(1) (c).

²³⁹⁴ See Church *et al supra* n 159 194.

²³⁹⁵ S 39(2).

²³⁹⁶ Church *et al supra* n 159 195.

²³⁹⁷ S 233.

²³⁹⁸ S 232.

²³⁹⁹ See the Diplomatic Immunities and Privileges Act 37 of 2001.

freedom in order to guarantee diplomatic protection of human rights and fundamental freedoms of SA citizens.²⁴⁰⁰

15 International human rights instruments and South African law

Before 1993, South Africa was not a party to any human rights instrument apart from those dealing with the suppression of slavery.²⁴⁰¹ Subsequently, South Africa has signed, ratified, or acceded to a number of international human rights instruments.²⁴⁰² The main UN human rights instruments ratified by South Africa include:²⁴⁰³

- The Convention on the Right of the Child 1989.²⁴⁰⁴
- Amendment to article 43(2) of the Convention on the Right of the Child 1995.²⁴⁰⁵
- Protocol 1 and II to the Geneva Convention of 1949 relating to the Protection of Victims of International and Non-International Armed Conflicts 1977²⁴⁰⁶
- The Convention on the Elimination of All Forms of Discrimination Against Women 1979.²⁴⁰⁷
- The Convention relating to the Status of Refugees 1967.²⁴⁰⁸
- Convention on the Elimination of all Forms of Racial Discrimination 1966.²⁴⁰⁹
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.²⁴¹⁰
- The International Convention on Civil and Political Rights, 1966.²⁴¹¹

²⁴⁰⁰ Loures maintains that the crux of the term “values in a democratic society” is that the electorate should have a final say in how they are to be governed. This being the case and because the source of moral value lies in a self determined being, therefore, when the electorate demand [diplomatic] intervention, such intervention will follow because this is the will of the people. See Lourens “The South African Bill of Rights – public, private or both: a viewpoint on its sphere of application.” *supra* n 2383 354.

²⁴⁰¹ See Dugard *supra* n 1 336. As SA was not a party to other human rights instruments, they could not be used as judicial guide for the purposes of statutory interpretation.

²⁴⁰² Initial Human Rights Treaties signed but not ratified by SA include (i) Convention on the Political Rights of Women (1953) signed (1993); (ii) Convention on the Nationality of Married Women (1957) signed 1993; International Covenant on Economic Social and Cultural Rights (ICESCR) (1966) signed on 3 October 1994 but not yet ratified.

²⁴⁰³ Source: See www.unhchr.ch (as at 2009-12-22).

²⁴⁰⁴ Ratified June 1995. (See www.unhchr.ch).

²⁴⁰⁵ Accepted August 1997. (See www.unhchr.ch).

²⁴⁰⁶ Acceded to November 1995. (See www.unhchr.ch).

²⁴⁰⁷ Ratified December 1995. (See www.unhchr.ch).

²⁴⁰⁸ Acceded to January 1995. (See www.unhchr.ch).

²⁴⁰⁹ Ratified December 1998. (See www.unhchr.ch).

²⁴¹⁰ Ratified December 1998. (See www.unhchr.ch).

²⁴¹¹ Ratified December 1998. (See www.unhchr.ch).

- The Optional Protocol to the International Convention on Civil and Political Rights 1966,²⁴¹² and the
- Second Optional Protocol to the International Convention on Civil and Political Rights, aiming at the Abolition of the Death Penalty 1989.²⁴¹³

One of the main UN Conventions on human rights not yet ratified by South Africa is the Convention on the Rights of Migrant Workers and members of their Families (1990) and the ICESCR.

The main OAU human rights treaties ratified by South Africa include:

- The African Charter on Human and People's Rights 1981²⁴¹⁴
- The Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights 1998.²⁴¹⁵
- The OAU Convention Governing Specific Aspects of Refugee Problems in Africa 1969²⁴¹⁶
- Protocol on the Rights of Women²⁴¹⁷
-

Treaties specifically dealing with diplomatic protection that are incorporated into South African municipal law include:

- The Vienna Convention on Diplomatic Relations (1961). Incorporated as Diplomatic Immunities and Privileges Act 2001 and the Vienna Convention on Consular Relations (1963).
- The Rome Statute of the ICC. Incorporated as the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

It is discouraging to note that not many of the treaties signed, ratified or acceded to by South Africa have been incorporated into South African municipal law. It is hoped that Parliament will hasten this process through the legislative process provided by

²⁴¹² Acceded to August 2002.(See www.unhchr.ch).

²⁴¹³ Acceded to August 2002.(See www.unhchr.ch).

²⁴¹⁴ Adhered to July 1996. (See www.unhchr.ch).

²⁴¹⁵ Ratified July 2002.(See www.unhchr.ch).

²⁴¹⁶ Acceded to December 1995.(See www.unhchr.ch).

²⁴¹⁷ Ratified 17/12/04.

section 231(4) in order to harmonise international law and domestic law.²⁴¹⁸ At the moment however, such treaties can only be applied through the interpretative provisions of the Constitution or in so far as they can be regarded as self executing. Many treaty provisions however coincide with provisions of the Constitution and can be enforced as such.

At this juncture, the status of international law *vis-a vis* diplomatic protection under South African law has been determined as well as the place of human rights enshrined in the 1996 Constitution. It is pertinent therefore to examine those “fundamental rights” relating to the protection of both South African citizens and foreigners alike in South Africa. These rights are contained in the Bill of Rights.²⁴¹⁹ The focus however, will be on those rights designated for special study in this thesis.²⁴²⁰ In the process, the scope, limitations, derogations, or prohibition clauses contained in the Bill of Rights if any, will also be discussed. Finally the enforcement procedure for the Bill of Rights and the question whether the Bill of Rights applies to South African nationals and foreigners alike will be examined. The first of these fundamental rights to be discussed is the right to life

16 Fundamental rights

16.1 *The right to life*

Section 11 of the SA Constitution guarantees the right to life. The section provides simply that “everyone has the right to life.” As has already been stressed, this right is the most fundamental of all rights because without life no one can enjoy any other

²⁴¹⁸ See Keightley *supra* n.1995 412. Perhaps certain provisions of these treaties may already have formed part of SA law through the Constitutional Bill of Rights.

²⁴¹⁹ In *Kaunda's case supra* n 688 par 36, the Constitutional Court said that the Bill of Rights protects both South Africans and foreigners alike. See also *Mohamed v The President of RSA supra* n 1204 and *Patel v Minister of Home Affairs* 2000 (2) SA 343.

²⁴²⁰ These include the right to life, the right not to be tortured and the right not to be discriminated against. Others are the right to own property in South Africa and the right to a fair hearing, which is discussed under procedural rights. The two aspects of the right to a fair hearing that are examined include the right to presumption of innocence, and the right to be tried within a reasonable time. It will be recalled that these rights were designated for examination in this thesis. In the process, the scope, limitations, derogations, or prohibition clauses contained in the Bill of Rights if any, will also be discussed. Finally the enforcement procedure for the Bill of Rights and the question whether the Bill of Rights applies to SA nationals and foreigners alike will be examined.

right. In *S v Makwanyane & Others*,²⁴²¹ the importance of this right was stressed by the Constitutional Court as “the most important of all human rights and the source of all personal rights.”²⁴²²

In that case, the issue before the court was whether section 277(1)(a) of the Criminal Procedure Act which prescribes the death penalty was consistent with the Constitution. The facts were that the two accused were convicted on four counts of murder and one count of robbery with aggravating circumstances and sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. The Constitutional Court was required to decide the constitutionality of Section 277(1)(a) of the Criminal Procedure Act. It also had to decide whether the death penalty was cruel, inhuman, and degrading within the meaning of section 11(2) of the 1993 Constitution.

It was held that the carrying out of the death penalty destroyed life and that life was protected without reservation under section 9 of the Constitution, annihilated human dignity protected under section 10, and that elements of arbitrariness were present in its enforcement.²⁴²³ It was further held that, taking these factors into consideration, public opinion prevailing in South Africa, and by section 11(2) of the Constitution, capital punishment or the death penalty was a cruel, inhuman and degrading punishment, which must be abolished.

In *Mohamed v The President of South Africa*,²⁴²⁴ the issue of the right to life again had to be determined. The Constitutional Court held that South Africa could not expose a person to the risk of execution whether by deportation or extradition regardless of consent.²⁴²⁵ The court therefore declared the handing over of Mohamed, arrested by the immigration authorities in connection with the bombing of the US embassy in Tanzania to the FBI to be unlawful.²⁴²⁶ The Court said that an undertaking should first have been obtained from the USA that Mohamed would not be executed should he be found guilty of the charges against him in the US courts.

²⁴²¹ *Supra* n 1203.

²⁴²² Par 144 BCLR.

²⁴²³ *Idem* par 153.

²⁴²⁴ *Supra* n 1204.

²⁴²⁵ Par 36.

Consequently, the court directed the Registrar of the court to draw the attention of the American trial court to the judgment as a matter of urgency.²⁴²⁷

16.2 Right to be free from torture, cruel, inhuman and degrading treatment or punishment

Section 12(1)(d) of the 1996 Constitution provides that

“everyone has the right not to be tortured in any way”.

Section 12(1)(e) provides that

everyone has the right not to be treated or punished in a cruel, inhuman or degrading way.

The right of freedom from torture, cruel, inhuman and degrading treatment is predicated upon the right to freedom and security of the person.²⁴²⁸ In *Makwayane’s* case, the court held that the right to dignity is one of the factors to be taken into consideration in determining whether any punishment is cruel, inhuman or degrading.²⁴²⁹ The right not to be tortured, or treated or punished in a cruel, inhuman or degrading manner under section 12(1) of the Constitution must therefore be read along with section 35(2)(e), which provides for the right to conditions of detention which are consistent with human dignity.²⁴³⁰

In *S v Williams*,²⁴³¹ the Constitutional Court held that corporal punishment of juvenile offenders in terms of section 294 of the Criminal Procedure Act was a violation of the

²⁴²⁶ *Ibid.*

²⁴²⁷ For the extraterritorial implications of this case, see *Extraterritoriality*(10) *supra* p 358. See also the cases of Mariette Bosch and Micheal Molefe, both SA nationals who were sentenced to death in Botswana for murder. Although there was request for diplomatic protection, she unsuccessfully petitioned the African Commission against her death sentence. See *Interrights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003) She was hanged on March 31 2003. See also <http://www.capitalpunishmentuk.org/bosh.html> For Molefe’s case see <http://www.news24.com/SouthAfrica/Politics/SA-man-gets-death-penalty-20080307> (Accessed 2010/08/26).

²⁴²⁸ See s 12 of the Constitution captioned “Freedom and security of the person.”

²⁴²⁹ *Makwanyane supra* n 1203 par 144.

²⁴³⁰ It should be noted that in *De Lange v Smuts* NO 1998 (3) SA 785 (CC); 1998 (7) BCLR 779, the Constitutional Court categorized the right under s. 12(1) into two aspects – the substantive and the procedural aspects.

²⁴³¹ 1995 (3) SA 632; 1995 7 BCLR 861 (CC).

right to freedom from torture, cruel, inhuman and degrading treatment.²⁴³² That case was referred to the Constitutional Court by the Full Bench of the Cape Provincial Division of the Supreme Court.²⁴³³ It was a consolidation of five different cases in which six juveniles were convicted by different magistrates and sentenced to receive a “moderate correction” of a number of strokes with a light cane.²⁴³⁴

The issue was whether the sentence of juvenile whipping pursuant to the provisions of section 294 of the Criminal Procedure Act was consistent with the provisions of the 1993 Constitution.²⁴³⁵ It was held that the section should be interpreted in accordance with the values which underlie an open and democratic society based on dignity, freedom and equality.²⁴³⁶ It was further held that in determining whether punishment is cruel, inhuman or degrading within the meaning of the Constitution, it must be assessed in light of the values which underlie the Constitution.²⁴³⁷ The court accordingly found that the provisions of section 294 of the Criminal Procedure Act violated the provisions of sections 10 and 11(2) of the 1996 Constitution, and therefore declared it invalid and of no force and effect.²⁴³⁸

16.3 Right to be free from discrimination

Section 9(3) and (4) of the 1996 Constitution provides against discrimination. Section 9(3) provides that

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

Section 9(4) provides that:

²⁴³² Par 45.

²⁴³³ As it then was.

²⁴³⁴ At 633.

²⁴³⁵ The case was decided under s 9 the 1993 Constitution which is equivalent to s 10 of the 1996 Constitution. Section 35(1) of the 1996 Constitution provides that the rights entrenched in it, including section 10, must be respected. Section 10 provides that “everyone has inherent dignity and the right to have their dignity respected and protected.”

²⁴³⁶ Par 35.

²⁴³⁷ *Idem* par 37.

²⁴³⁸ *Idem* par 96. See also the cases of *Mariette Bosch & Molefe supra* n 2429.

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

It has been held that discrimination means “treating people differently in a way that impairs their fundamental dignity.”²⁴³⁹ Discrimination is prohibited in South Africa on both vertical and horizontal levels.²⁴⁴⁰

A number of discrimination cases have come before the South African courts.²⁴⁴¹ The courts have, however, held that the non-discrimination clause under section 9(3) of the 1996 Constitution does not prohibit discrimination as such.²⁴⁴² Rather, the section prohibits unfair discrimination. Thus section 9(5) prescribes that

Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The onus is placed on the applicant who alleges discrimination to establish objectively that there has been differentiation on one of the grounds listed under section 9(3).²⁴⁴³ Thus in *President of the Republic of South Africa v Hugo*,²⁴⁴⁴ the Constitutional Court held that although a Presidential Act which granted remission of sentence to all mothers in prison who had children under the age of twelve years was discriminatory, it did not violate the provisions of section 9(3) of the Constitution, and was therefore fair. But in *Matukan v Laerskool Potgietersrus*²⁴⁴⁵ it was held that the administration of a deceased estate along racial lines amounted to unfair discrimination on the bases of race, colour, and ethnic origin.²⁴⁴⁶

²⁴³⁹ See the case of *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) where the Constitutional Court defined discrimination as a particular type of differentiation and held that there are two types of discrimination - discrimination based on one of the grounds listed under section 9(3), and discrimination based on “analogous grounds”. In *Harksen v Lane* 1999 (1) SA (CC) “analogous ground” was defined as one which is “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.”

²⁴⁴⁰ See Mubangizi *supra* n 282 75-81. S 9(3) binds the government on the vertical level while section 9(4) binds private individuals on the horizontal level See also Waal *et al supra* n 2373 41.

²⁴⁴¹ See *supra* n 2441 *infra*.

²⁴⁴² E.g *President of the Republic of SA v Hugo* 1997 (4) SA 1 (CC)

²⁴⁴³ See the seventeen grounds of discrimination enumerated under s 9(3).

²⁴⁴⁴ 1997 (4) SA 1 (CC) *supra* n 2441.

²⁴⁴⁵ 1996 (3) SA 223 (T).

²⁴⁴⁶ See also the cases of *Mfolo v Minister of Education* 1992 (3) SA 181 (BGD) where the Bophuthatswana Supreme Court decided that the suspension of four pregnant students in a

It is submitted that section 9(3) of the 1996 Constitution is intrinsically linked to section 9(1) of the Constitution – the equal protection clause because discrimination is the very antithesis of equality. The section provides that:

everyone is equal before the law and has the right to equal protection and benefit of the law.

This section seeks to ensure equal treatment of all persons by courts of law. It is submitted that in a society such as South Africa, which is unavoidably stratified along racial lines, freedom from discrimination assumes an added importance, particularly to a foreigner, and everything should be done to curb this vice.²⁴⁴⁷

17 Right to own private property

Section 25 of the 1996 Constitution deals comprehensively with property rights. The section provides, *inter alia*, that

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application –
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided

teachers college was discriminatory. However, in *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC) the Labour Appeal Court overturned the decision of the Labour Court to the effect that the plaintiff, whose permanent appointment was reduced to a fixed contract of five months on grounds of her pregnancy was discriminatory. In *Hoffman v South African Airways* 2001 (1) SA 1 (CC) the court warned against the danger of “allowing stereotyping and prejudice to creep in under the guise of commercial interests.” *Prince v President of the Cape Law Society* 2000 (3) SA 845 (SCA) dealt with discrimination based on religious grounds. It was held that the refusal of the Cape Law Society to register the Rastafarian appellant on grounds of his two previous convictions for possession of dagga, was not a violation of his freedom of religion, while the case of *National Coalition for Gay and Lesbian Equality v Minister for Justice* 1999 (1) SA 6 (CC) dealt with “sexual orientation” discrimination.

²⁴⁴⁷ In order to ameliorate past injustices caused by apartheid, an Affirmative Action Clause was introduced into the 1996 Constitution. Section 9(2) of the Constitution stipulates that in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken. As a result, the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 was enacted. See generally Heyns (ed), Westhiizen & Mayimele-Hashatse *Discrimination and the Law in South Africa* (1994).

or approved by the court.²⁴⁴⁸

- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and
 - (e) the purpose of the expropriation.
- (4) For the purpose of this section –
 - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after the 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water, and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact the legislation referred to in subsection 6.

²⁴⁴⁸ It is not indicated whether the compensation payable should be “prompt, effective or adequate”

17.1 The meaning of property under the South African Constitution

Section 25 of the 1996 Constitution provides that no one may be arbitrarily deprived of property and that property cannot be expropriated without compensation. Although in popular parlance the term “property” is used strictly to denote land or real or physical property,²⁴⁴⁹ section 25(4) (b) of the Constitution stipulates that property is not limited to land. It therefore means that the term “property” means more than the ownership of corporeal things, and encompasses a plethora of other rights such as the right to salaries, shares in companies, claims to payment from a pension fund, intellectual property such as ideas, inventions, trade marks and other contractual rights.²⁴⁵⁰

17.2 Distinction between deprivation and expropriation of property under the 1996 Constitution

Sections 25(1) and 25(2) of the 1996 Constitution distinguish between “deprivation” and “expropriation” of property. Section 25(1) deals with the issue of deprivation of property, while section 25(2) deals with expropriation of property. Although none of these terms is defined under the Constitution, it has been said that “deprivation” involves an exercise of the state’s regulatory powers over property, and is therefore permissible,²⁴⁵¹ provided it is not arbitrary and is carried out in terms of a law of general application.²⁴⁵²

Thus, when a person is “deprived” of property in South Africa, such an individual has no right to compensation.²⁴⁵³ Whereas, expropriation means compulsory

as understood in the traditional Western sense.

²⁴⁴⁹ Ordinarily, the concept of property connotes a bundle of rights vested in the owner both under the English and Roman-Dutch legal tradition. The owner of any property has the right to use the thing, to exclude others from it, to receive income from it, to alienate it or transfer it to others etc. See Waal *et al supra* n 2373 382-384.

²⁴⁵⁰ *Idem* 382-386.

²⁴⁵¹ *Idem* 387-388.

²⁴⁵² *Ibid.* See Moster “The distinction between deprivation and expropriation and the future of the ‘doctrine’ of constructive expropriation in South Africa.” (2003) 19 *SAJHR* 567 and Murvey “Property rights in the new Constitution: An analytical framework for constitutional review.” (1993) XXVI *CILSA* 211.

²⁴⁵³ Waal *et al supra* n 2373 387.

acquisition,²⁴⁵⁴ and occurs where the state takes away property and either keeps it for itself, or transfers it to someone else, but imposes restriction on its use.²⁴⁵⁵ Under these circumstances the state is bound to pay compensation.²⁴⁵⁶ There is a paucity of South African case law on the subject. Suffice it to say that the interpretation given to those terms under South African law is based on the interpretation given to them by courts in Zimbabwe and other jurisdictions.²⁴⁵⁷

Another term worthy of definition or interpretation under section 25 of the 1996 Constitution is the term “law of general application.” Section 25(1) requires that any deprivation of property must be done in terms of a law of “general application,” while section 25(2) provides that any expropriation shall also be carried out in terms of a law of “general application.” This term is not defined in the Constitution, but the phrase is also used in section 36 of the Constitution. Under section 36(1), it has been held to mean that any limitation of rights is permissible only (i) where it is authorized by law and (ii) where that law had general application.²⁴⁵⁸

In view of section 36, it would appear that section 25, imposes a duty on the government not to deprive individuals of their property unless it is done under a law which applies to everyone. Such a law should not be discriminatory or arbitrary in any way.²⁴⁵⁹

A law depriving an individual of his or her property may be arbitrary either in substance or in procedure.²⁴⁶⁰ Such a law may be substantially arbitrary if it is unconstitutional,²⁴⁶¹ and may be procedurally arbitrary if it does not follow rules of

²⁴⁵⁴ See *Harksen v Lane* NO 1998 (1) SA 300 (CC).

²⁴⁵⁵ *Waal et al supra* n 2377 388.

²⁴⁵⁶ *Ibid.*

²⁴⁵⁷ See the cases of *Chairman of the Public Service Commission v Zimbabwe Teachers Association* 1996 (9) BCLR 1189 (ZS), *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 (PC) and *Hewlett v Minister of Finance* 1982 (1) SA 502 (ZSC).

²⁴⁵⁸ See *Waal et al supra* n 2377 389.

²⁴⁵⁹ “Arbitrary” means irrational or illegitimate. A deprivation is arbitrary if it follows unfair procedure, if it is irrational, or if it is for no good reason. That is to say, it should not be “capricious or proceed merely from the will, and not based on reason or principle.” See *Waal et al supra* n 2377 390.

²⁴⁶⁰ *Ibid.*

²⁴⁶¹ If such a law is not allowed under the Constitution. Eg section 25(1) stipulates that “no law shall permit arbitrary deprivation of property.”

procedure.²⁴⁶² The requirement is that such a deprivation must be in accordance with due process of law.²⁴⁶³

17.3 Constraints on the expropriation of property under South African law

Section 25(2) of the 1996 Constitution imposes two constraints on government in the process of expropriating property. It provides that any expropriation is permitted: (i) Only for public purpose, or public interest; and (ii) that it must be subject to the payment of compensation. The term “public purpose” can be understood in contrast to “private” purpose.²⁴⁶⁴ Section 25(4), however, provides that the term “public interest” must be interpreted to include “the nation’s commitment to land reform” as well as “reforms to bring about equitable access to all South Africa’s natural resources.”

In connection with the payment of compensation, section 25(2)(b) provides that the amount, timing, and manner of compensation on expropriation, can be agreed upon between the expropriating authority and the person concerned. However, the amount of compensation to be paid may be determined by a court of competent jurisdiction, where, in accordance with the compensation formula set out in section 25(3) of the constitution. No agreement is reached between the state and the person whose property is being expropriated.²⁴⁶⁵

Section 25(5) requires the state to implement measures aimed at achieving land redistribution. Section 25(6) provides for the securing of land tenure which has been made insecure as a result of past racially discriminatory laws or practices. That section, when read in conjunction with section 25(9) of the Constitution, makes it mandatory for legislation to be enacted to address past inequalities in land

²⁴⁶² *Waal et al supra* n 2381 390. They maintain that “the best source of guidance on the interpretation of the substantive element of the arbitrariness requirement in s. 25 (1) is the Constitutional Court’s treatment of s 9 (1)” This is because s 9(1) confers a right to equal treatment and equal benefit of the law. According to the Court, where the State differentiates between individuals or groups of individuals, it must do so in a manner which is both rational and not arbitrary. See *Harksen’s case supra* n 2438.

²⁴⁶³ *Waal et al supra* n 2377 389.

²⁴⁶⁴ A public purpose may include the establishment of projects such as roads, hospitals or bridges which are for the benefit of all.

distribution and land reform.²⁴⁶⁶ Section 25(7) grants the right to restitution of property to persons and communities who were dispossessed of property as a result of the 1913 racially discriminatory legislation, while section 25(8) contains a *proviso* that any departure from section 25 must accord with the provisions of section 36(1) of the Constitution.

It is submitted that the issue of property rights is very sensitive and potentially volatile in South Africa²⁴⁶⁷ and should be handled with care.²⁴⁶⁸ In interpreting section 25 of the Constitution, the courts must not only take the requirements of sections 36(1) and 9(1) of the Constitution into consideration, but must also consider section 39(1).²⁴⁶⁹ It should also be guided by the principles of natural justice, equity, and good conscience. Although neither the ICCPR nor the ICESCR provides for the protection of property rights, the underlying reason for the weak protection of property rights on the international level and in South Africa in particular, is because of the new International Economic Order expressed in numerous resolutions of the General Assembly.²⁴⁷⁰ These resolutions emphasise the sovereignty of states over their natural resources.

In principle however, there is no basis for the thesis that international human right does not extend to the protection of property rights. The better view is that it is for states to protect the property rights of their nationals abroad where and when the need arises.²⁴⁷¹

²⁴⁶⁵ The compensation formula requires that compensation for expropriated property should be “just, and equitable” in its amount, timing, and in the manner of payment.

²⁴⁶⁶ See the Restitution of Land Rights Act 22 of 1994 enacted in compliance with s 25(6) of the Constitution.

²⁴⁶⁷ See Robertson *supra* n 1195 122.

²⁴⁶⁸ Otherwise it will assume the same dimension as seen in Zimbabwe. It has been said however that the inclusion of a constitutional right to property in both the 1993 and the 1996 Constitutions was a subject of great controversy. See Waal *et al supra* n 2377 380.

²⁴⁶⁹ Which provides that “when interpreting the Bill of Rights, a court, tribunal, or forum – must promote the values that underlie an open and democratic society based on human dignity, equality and freedom ...”.

²⁴⁷⁰ E.g General Assembly Charter of Economic Rights and Duties of States (1974) GA Res 3281 (XXIX) 1974 29 UN GAOR Supp (No 31) 52 and General Assembly Resolution on Permanent Sovereignty over Natural Resources (1962).GA Res 1803 (XVII) 1962 17 UN GAOR Supp (No 17).

²⁴⁷¹ See *Van Zyl v Government of RSA supra* n 556 117.

18 Procedural rights

18.1 *Right to fair trial/fair hearing*

Section 35(3) of the 1996 Constitution guarantees the right to a fair trial. The section stipulates, *inter alia*, that

“Every accused person has a right to a fair trial...”

As already indicated, the two aspects of the right to fair trial to be examined in this chapter are (a) The right to be tried within a reasonable time, and (b) the right to presumption of innocence. The right to be tried within a reasonable time is guaranteed under section 35(3)(d) of the Constitution, while the right to presumption of innocence is protected under section 35(3)(h).

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

Section 35(3) of the South African Constitution stipulates that

Every accused person has a right to a fair trial, which includes the right-
(d) to have their trial begin and conclude without unreasonable delay.

What constitutes an unreasonable delay depends on the circumstances of each case.²⁴⁷² However, in *Coetzee v Attorney General KwaZulu-Natal*²⁴⁷³ the court identified a number of factors which must be considered when determining whether the delay was reasonable or not.²⁴⁷⁴ These factors include (i) The nature of the case, the time lag between the commission of the crime, the apprehension of the accused person and the commencement of his trial; (ii) the reasons for the delay; and (iii) the prejudice which the accused is likely to suffer as the result of the delay.²⁴⁷⁵ With

²⁴⁷² See *Coetzee v Attorney General KwaZulu-Natal supra* n 1956. See also *Elang v The State supra* n 1949 30.

²⁴⁷³ 1997 (1) SACR 546 (D) *supra* n 1956.

²⁴⁷⁴ In *Sanderson v Attorney General KwaZulu-Natal* 1998 (2) SA 38 (CC) it was held that a trial can only be vitiated as a result of unreasonable delay where it is established that the accused has probably suffered irreparable prejudice as a result of the delay. See par 39.

²⁴⁷⁵ These factors were approved in the case of *Feedmill Development v Attorney General, KwaZulu-Natal* 1998 (2) SACR 539 (N).

these factors in mind, a court should ask whether the burden borne by the accused as a result of the delay is unreasonable.²⁴⁷⁶

The right to be tried within a reasonable time seeks to protect three interests of the accused person. These are the security of the accused person, his or her liberty, and a fair trial.²⁴⁷⁷ Regard must therefore be had to these factors in determining “reasonable time” in the trial of an accused person.²⁴⁷⁸ Some questions therefore arise for determination. These are: (1) whether foreigners are also protected by this provision?; (2) Whether any remedy is available to an accused person whose trial has been unreasonably delayed in South Africa? and (3) in terms of diplomatic protection, whether there are any responsibility upon the State for violating this right in relation to a foreigner.

The second question was discussed in *Sanderson’s case*.²⁴⁷⁹ The court stated, *inter alia*,

Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of ‘appropriate’ remedies less radical than barring the prosecution. These would include a *mandamus* requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused.²⁴⁸⁰

The first question was discussed generally in *Kaunda’s case*²⁴⁸¹ where the Constitutional Court stated that the rights in the Bill of Rights protect both nationals and non-nationals alike.²⁴⁸² The third question must be answered within the context of judicial precedent set in international law. In *Chattin’s Claim*,²⁴⁸³ for instance, it was held that the delay that occurred during the trial of Chattin in Mexico was

²⁴⁷⁶ *Coetzee v Attorney General KwaZulu-Natal supra* n 2467 par 36.

²⁴⁷⁷ See the case of *Sanderson v Attorney General KwaZulu-Natal supra* n 2469.

²⁴⁷⁸ *Idem* par 39.

²⁴⁷⁹ *Supra* n 2469

²⁴⁸⁰ *Idem* par 42.

²⁴⁸¹ I.e whether foreigners also enjoy this right. See *Kaunda’s case supra* n 688 par 36.

²⁴⁸² *Ibid.* See also *Patel v Minister of Home Affairs* 2000 (2) SA 343. and *Mohamed’s case supra* n 1204.

²⁴⁸³ *Supra* n 29.

unreasonable and that it amounted to a denial of justice under the circumstances.²⁴⁸⁴
The US therefore succeeded in its action for diplomatic protection against Mexico.

18.3 Right to be presumed innocent

Another important aspect of the right to fair hearing under the 1996 Constitution is the right to be presumed innocent until proven guilty in any criminal trial. Section 35(3)(h) of the Constitution provides that an accused has the right:

to be presumed innocent, to remain silent, and not to testify during the proceeding.

Presumption of innocence is thus an established principle of South African law which places the burden of proof squarely on the prosecution to prove its case against an accused person beyond all reasonable doubt before he or she is convicted.²⁴⁸⁵

The importance of the right to presumption of innocence cannot be overemphasized. It protects the fundamental liberty of any person accused of committing a crime.²⁴⁸⁶ Since a person charged with a criminal offence faces personal as well as social consequences of a grave nature, and is liable to lose his or her liberty, and be subjected to social, psychological and economic deprivation, approbation, and even ostracism, this right becomes crucial. As was stated in *R v Oakes*,²⁴⁸⁷

the presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.²⁴⁸⁸

The rule on presumption of innocence has been invoked in several cases in South Africa to rebut the constitutionality of statutory presumptions. In *Scagell v Attorney General Western Cape*²⁴⁸⁹ for instance, the offending provision was section 6(3) of

²⁴⁸⁴ See the judgment of the US-Mexico Joint Commission in *Chattin's Claim supra* n 32.

²⁴⁸⁵ See *S v Zuma supra* n 1344 40. Under SA law, presumptions are categorised into factual or evidential presumptions. See the case of *Scagell v Attorney-General Western Cape* 1996 (2) 579 and reverse-onus presumption. See the case of *S v Zuma supra* n 1344. On irrebuttable presumptions, see the case of *S v Coetzee supra* n 2467.

²⁴⁸⁶ *R v Oakes supra* n 1351.

²⁴⁸⁷ *Ibid.*

²⁴⁸⁸ *Idem* 212-213 quoted with approval in *Zuma's Case supra* n 1344.

²⁴⁸⁹ *Supra* n 2480.

the Gambling Act.²⁴⁹⁰ The section provided that the presence of certain gambling items, including playing cards and dice, on any premises, would constitute a *prima facie* evidence that the person in charge of the premises permitted gambling on the premises. The Court held that the effect of the section was extraordinarily sweeping and, therefore, invalidated that section of the Act.²⁴⁹¹

Again in *S v Zuma*,²⁴⁹² the Court invalidated a provision in the Criminal Procedure Act which placed a legal burden on an accused to show that a confession reduced to writing before a Magistrate was not freely and voluntarily made.²⁴⁹³ In *Zuma's* case, the accused were convicted on two counts of murder and one count of robbery. At their trial, they entered a plea of not guilty. Two of the accused had made statements before a magistrate which counsel for the State tendered as admissible confessions. Admissibility was contested by Counsel for the accused, and a trial within a trial ensued.²⁴⁹⁴

At the outset of the trial, the defence Counsel raised the issue of the constitutionality of section 217(1)(b) of the Criminal Procedure Act and Counsel for the prosecution consented to having the point in issue determined by the trial judge.²⁴⁹⁵ The trial within a trial proceeded. The accused testified that they had made their statements under duress due to threats of further assault on them by the police.²⁴⁹⁶ The policemen concerned denied this, but two women called as witnesses by the defence, said they had seen the police assaulting the accused. At the end of their testimony, the Court concluded that the statements had been freely and voluntarily made and that the accused had failed to discharge the *onus* upon them under *provisio* (b) on a balance of probabilities.

In his judgment, the trial judge said *inter alia*:

Had we been convinced that s 217(1)(b) of the Criminal Procedure Act was still valid and constitutional, we would therefore have had little hesitation in

²⁴⁹⁰ 51 of 1965.

²⁴⁹¹ *Idem* 382.

²⁴⁹² *Supra* n 1344.

²⁴⁹³ *Idem* par 44.

²⁴⁹⁴ *Idem* par 7.

²⁴⁹⁵ In terms of s 101 of the Constitution.

²⁴⁹⁶ *Idem* par 7.

accepting that the accused had not discharged the onus placed upon them by that section. The constitutionality of s 217(1)(b) of the Criminal Procedure Act is therefore crucial to the decision of this case.²⁴⁹⁷

The judge, however, refrained from ruling on the constitutionality of section 217(1)(b) of the Criminal Procedure Act and referred the matter to the Constitutional Court.²⁴⁹⁸ After weighing all the relevant considerations, the Constitutional Court held that a proper balance could be struck by invalidating the admission of the confession in reliance upon the provision of section 217(1)(b) of the Criminal Procedure Act. The provision was therefore invalidated.²⁴⁹⁹

In *S v Mbatha*²⁵⁰⁰ the Constitutional Court dealt with the provisions of sections 40(1), 32(1)(a) and 32(1)(e) of the Arms and Ammunition Act²⁵⁰¹ which provided that persons found in the vicinity of unlicensed firearms were presumed to be possessors of those weapons, unless they established the contrary. The Court held that the right to presumption of innocence was breached and therefore invalidated the presumption. This was because the presumption was so broadly formulated that there was no logical or rational connection between the presumed fact and the proven fact.²⁵⁰²

S v Julies,²⁵⁰³ was also referred to the Constitutional Court by the Cape Provincial Division.²⁵⁰⁴ It concerned the constitutionality of section 21(a)(iii) of the Drug and Drug Trafficking Act.²⁵⁰⁵ In that case, the accused was convicted of dealing in three methaqualone tablets,²⁵⁰⁶ an undesirable dependence producing substance, in contravention of the provisions of the Act. For the conviction, the trial judge relied on the above mentioned statutory provisions which read, *inter alia*,

²⁴⁹⁷ *Idem* par 20.

²⁴⁹⁸ *Idem* par 8-9.

²⁴⁹⁹ *Idem* par 44.

²⁵⁰⁰ 1996 (2) SA 464 (CC).

²⁵⁰¹ 75 of 1969.

²⁵⁰² See also the case of *S v Coeteeze supra* n 2479 where the Constitutional Court also invalidated s 332(5) of the Criminal Procedure Act because it was inconsistent with the right to presumption of innocence.

²⁵⁰³ 1996 (7) BCLR 899 (CC).

²⁵⁰⁴ As it then was.

²⁵⁰⁵ 140 of 1992.

²⁵⁰⁶ More commonly known as mandrax.

If in the prosecution of any person for an offence referred to (a) in section 13(f), it is proved that

(iii) [the person] was found in possession of any undesirable dependence-producing substance, it shall be presumed, until the contrary is proved, that the accused dealt with such a substance...

It was held that the provisions of section 21(1)(a)(iii) of the Drug and Drug Trafficking Act were inconsistent with the Constitution and were therefore declared invalid.²⁵⁰⁷

In *Osman v Attorney General Transvaal*,²⁵⁰⁸ however, the appellant had been charged in the Magistrate's Court with the contravention of section 36 of the General Law Amendment Act²⁵⁰⁹ which provides that any person who is found in possession of any goods in regard to which there is a reasonable suspicion that they have been stolen, and is unable to give a satisfactory account of such possession, shall be guilty of an offence.²⁵¹⁰

At the commencement of the trial, the defence counsel objected to the charge, contending that section 36 was in conflict with sections 25(2)(c) and 25(2)(d) of the 1993 Constitution.²⁵¹¹ The appellants therefore requested a stay of proceedings to enable them to pursue their challenge of the provisions in the High Court. The court ruled against them. They were however granted leave to appeal to the Constitutional Court.²⁵¹² The Constitutional Court held that section 36 of the General Law Amendment Act did not violate any of the rights protected by section 25(2)(c) and 25(3)(d) of the 1993 Constitution²⁵¹³ and dismissed the appeal.²⁵¹⁴

Again, in *Zuma's case*,²⁵¹⁵ the Durban High Court issued a letter of request to the Attorney-General of Mauritius to transmit to the National Director of Public

²⁵⁰⁷ *Idem* 900.

²⁵⁰⁸ 1998 (4) SA 1224 (CC).

²⁵⁰⁹ 62 of 1955.

²⁵¹⁰ *Idem* par 2.

²⁵¹¹ *Idem* par 3.

²⁵¹² *Idem* par 5.

²⁵¹³ Now s 35(h) of the 1996 Constitution. See also the cases of *S v Gwaadiso* 1996 (1) SA 292 & *S v Mello* 1998 (3) SA 712.

²⁵¹⁴ *Idem* par 27.

Prosecution (NDPP) some 14 original documents together with statements of authenticity in terms of s 2(2) of the International Co-operation in Criminal Matters Act²⁵¹⁶ The applicants unsuccessfully challenged the lawfulness of the High Court's decision in the Supreme Court of Appeal (SCA). They subsequently approached the Constitutional Court for leave to appeal against the judgment of the SCA.²⁵¹⁷

Although criminal proceedings had been instituted against the applicants, these had subsequently been struck from the roll.²⁵¹⁸ Apart from arguing that the application was brought under the wrong section of the Act,²⁵¹⁹ Zuma, in the second case, alleged that his right to a fair trial under section 35(3)(h) of the Constitution had been infringed in that his right to personal dignity and presumption of innocence had been compromised.²⁵²⁰

It was held, *inter alia*, that regarding Zuma's right to dignity, this right did not necessarily extend to the right not to be named as a suspect once there was a reasonable suspicion that a crime had been committed. The truth was that Zuma was suspected of corruption, but that did not necessarily signify his guilt. Therefore, his right to be presumed innocent under section 35(3)(h) remained untrammelled.²⁵²¹

From these decided cases, it is clear that SA courts are willing to accord to people who are wrongly presumed to be guilty the benefit of the doubt. The Constitutional Court has struck down several constitutional and statutory provisions which would otherwise have incriminated many accused persons. In relation to aliens, however, the question is whether they are truly covered by this right?

²⁵¹⁵ See *Thint Holding (South Africa) (PTY) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* 2009 (1) SA 141 (CC).

²⁵¹⁶ 75 of 1996.

²⁵¹⁷ S 2(2) of the Act provided for the issue of a letter of request for purposes of a criminal investigation, while s 2(1) provided for its issue during criminal proceedings.

²⁵¹⁸ At 141.

²⁵¹⁹ The applicants argued that s 2(1) should have been used. See par 5.

²⁵²⁰ *Idem* par 26.

²⁵²¹ *Idem* par 50-53.

Relying on *Kaunda's* case,²⁵²² it can be said that the general position is that the law protects everybody in SA, be they nationals or foreigners. In that case, it was said that the Bill of Rights enshrines the rights of all people “in our country”.

The rights in the Bill of Rightsare rights that vest in every one. Foreigners are entitled to require the South African State to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa.²⁵²³

In *Lawyers for Human Rights v Minister of Home Affairs*²⁵²⁴ the Department of the Interior contended that the phrase “in our country” means that the persons have to be formally admitted into South Africa before they are considered to be bearers of the rights enshrined in the South African Bill of Rights and that foreigners who are at the South African Airports or in South African harbours without permission are excluded.²⁵²⁵ The court however held that when a right is formulated in such a way that “everyone” is its beneficiary, everyone who is physically inside the country whether at sea or in airports, are bearers of these rights.²⁵²⁶ The court did not however express itself on the position of people who enter South Africa illegally by road at border posts.²⁵²⁷

It is submitted that respect for the right to presumption of innocence should not be restricted to the courts in SA only, but that ordinary individual in the society should be informed of this right. Incidents in SA over the years have rebutted the impression that the right to presumption of innocence is respected by the ordinary man in South Africa. The xenophobic attacks on foreigners in SA are good examples. One of the reasons advanced for the attacks on foreigners is that foreigners are criminals.²⁵²⁸ If the right to presumption of innocence was taken seriously or respected, it would be in the interest of justice if foreigners who are accused of committing crimes are handed over to the police and made to face the full weight of the law. They should

²⁵²² *Supra* n 688 and *Patel's case supra* n 2414.

²⁵²³ Par 36. See the case of *Mohammed v The President of the RSA supra* n 1204.

²⁵²⁴ 2004 7 BCLR 775 (CC).

²⁵²⁵ Par 8.

²⁵²⁶ *Idem* par 26.

²⁵²⁷ *Idem* par 27.

²⁵²⁸ See ch 5 *supra*.

not be killed or maimed without being tried in a court of law. In other words, the law should be allowed to take its normal course.

19 Limitation on rights under the South African Bill of Rights

The rights enshrined in the Bill of Rights under the 1996 Constitution are limited by section 36 thereof. The section provides that

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom taking into account all relevant factors, including

- (a) the nature of the right
- (b) the importance of the purpose of the limitation
- (c) the nature and extent of the limitation
- (d) the relation between the limitation and purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The inferences to be drawn from the provision of section 36 of the 1996 Constitution with regard to the Bill of Rights are that any limitation must be in the form of a law, and that the law must be a law of general application.²⁵²⁹ Such a limitation must also be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²⁵³⁰ In relation to diplomatic protection, section 36 precludes any law to be enacted to limit the right of the State to exercise diplomatic protection, except such a law is justified by those circumstances enumerated in section 36(1) of the Constitution.

²⁵²⁹ See Mubangizi, *supra* n 282 59. See also the case of *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).

²⁵³⁰ It has been urged by many commentators that in analyzing whether the provisions of the Bill of Rights have been complied with, the two-stage process suggested in the Canadian case of *R v Oakes* *supra* n 1351 should be used by the courts. I.e first, whether there has been an infringement, and second, whether the infringement is reasonable and justifiable.

20 Enforcement of rights under the 1996 Constitution

Section 38 of the Constitution provides the grounds and the *modus* whereby the provisions of the Bill of Rights may be invoked and enforced in South Africa. The section states that:

Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who can not act in their own name;
- (c) anyone acting as a member of or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.’

The operative word in this provision is “anyone.” The question is whether it includes foreigners? It is submitted that it does. Otherwise the Constitution would have said so expressly. Hence, anybody, whether a citizen or a foreigner, who alleges that his or her right has been infringed or threatened in SA can approach a court of competent jurisdiction and file his or her complaint. As already pointed out, in *Lawyers for Human Rights v Minister of Home Affairs*,²⁵³¹ the court held that when a right is formulated in such a way that “everyone” or “anyone” is its beneficiary, everyone who is physically inside the country is a bearer of these rights.²⁵³² It is submitted that this provision is clear and unambiguous.

21 Treatment of aliens in South Africa

The question regarding the protection of foreign nationals in international law is one of those issues in which different approaches have been adopted by both the West

²⁵³¹ *Supra* n 2519.

²⁵³² *Idem* par 26.

and third-world nations in their international relations.²⁵³³ Generally, under international law, aliens are expected to be treated decently in accordance with a civilized standard of behaviour.²⁵³⁴ The acceptable standard of treatment of aliens is either the national standard²⁵³⁵ or the international minimum standard.²⁵³⁶

In South Africa however, it would appear that while the courts have correctly recognized that non-citizens may enjoy some constitutional rights, they have retained an unhelpful rights/privileges distinction with respect to the protection of those rights, particularly in immigration matters.²⁵³⁷

Dugard has however referred to the General Assembly Declaration on the Rights of Individuals who are not Nationals of the Country in which they Live,²⁵³⁸ which recognises that human rights expounded in the UDHR and other international instruments should also accrue to individuals who are not nationals of South Africa.²⁵³⁹

These rights include non-discrimination on the ground of race, the prohibition of torture, cruelty, inhuman or degrading treatment or punishment, and the right to a fair trial.²⁵⁴⁰ In respect of discrimination, as already indicated, discrimination is one of the social problems that individuals who live outside their countries of nationality face or contend with.²⁵⁴¹ Despite legislative efforts to rid South Africa of discriminatory practices, particularly discrimination on the grounds of race, gender, sex, ethnic or

²⁵³³ See Edukere "The legal status of immigrants" *The Guardian* 1986-04-28 7. See also Klaaren "So far not so good: An Analysis of Immigration decisions under the interim Constitution" *SAJHR* 605; See also Pretorius "Protecting the rights of Aliens in South Africa: International and Constitutional law issues" (1996) 21 *SAYIL* 130 134. and the following cases: *Ulde, Manjar Ali Shail Yusuf v The Minister of Home Affairs* Case No. 5353/2006; *Jeebhai v Minister of Home Affairs* (139/2008 [2009] ZASCA35 (2009) 03 31; *Patel v Minister of Home Affairs supra* n 2414; *Lawyers for Human Rights v President supra* n 2519.

²⁵³⁴ See ch 2 *supra*.

²⁵³⁵ Favoured by third-world countries. The standard advocated by these third-world countries is that foreigners should be treated in the same way as the ordinary citizens of the country where they reside.

²⁵³⁶ Favoured by the West who argue that there exists "an international minimum standard" for the protection of foreign nationals that must be upheld irrespective of how the state treats its own nationals.

²⁵³⁷ See Klaaren *supra* n 1204 606.

²⁵³⁸ Res 144(XL).

²⁵³⁹ Dugard *supra* n 25 78.

²⁵⁴⁰ See Res 40/144 arts 5, 6 & 7.

²⁵⁴¹ See e.g *supra* n 28 at p 6.

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language, some discrimination is still evident both in statutory provisions and in the courts.²⁵⁴²

Although discrimination is still prevalent in SA society, the attitude of the courts towards this vice appears to be changing.²⁵⁴³ For instance, in the past, it was believed that the doctrine of *audi alterem partem* was not applicable in deportation cases and that no reason ought to be given for a refusal to extend either a temporary or permanent residence permit to an alien.²⁵⁴⁴

Thus, in *Lewis v Minister of Internal Affairs*,²⁵⁴⁵ the applicant was a lecturer in History at the University of Bophuthatswana and resided in Mmabatho. He was appointed to the position in August 1987 for a period commencing on 1st August 1987 and terminating on 31 December 1990. He applied for and obtained the necessary temporary residence and work permits as required by the Aliens and Travellers Control Act.²⁵⁴⁶ On 31 January 1990, he was handed a warrant for his deportation. On 5 February 1990, the applicant brought an urgent application before the High Court of Bophuthatswana asking the court to set aside the warrant for his deportation since he was not given any hearing. It was held that the *audi alterem partem* rule is excluded in respect of deportation orders made in terms of the South African Act²⁵⁴⁷

In the second case post dating the 1993 Constitution, and decided in favour of the government, *Xu v Minister van Binnelandse*²⁵⁴⁸ the court dismissed two applications in terms of section 24(c) for written reasons for a refusal to grant one temporary residence permit and extend another in terms of the Aliens Control Act.²⁵⁴⁹

²⁵⁴² See Pretorius *supra* n 2528 134.

²⁵⁴³ This point was emphasized by the UN Commissioner for Human Rights on Human Rights day on 2009-12-10. in SA.

²⁵⁴⁴ *Ibid.*

²⁵⁴⁵ Decided before 1993.1991 (3) SA 628 (BG).

²⁵⁴⁶ I.e Aliens Act 1 of 1937.

²⁵⁴⁷ *Ibid.*

²⁵⁴⁸ 1995 (1) SA 185 (T); 1995 (1) BCLR 62 (T).

²⁵⁴⁹ 96 of 1991.

In the third case, *Naidenov v Minister of Home Affairs*,²⁵⁵⁰ the court dismissed an application made in terms of both sections 23 and 24 of the Immigration Act by an alien accused of having committed a serious crime abroad. He sought to extend his temporary residence in SA in order to apply for political asylum. In the fourth case, *Paekh v Minister of Home Affairs*,²⁵⁵¹ the court also dismissed an alien's application for written reasons in relation to a decision not to grant him permanent residence.

Decided cases in this area from the late 1990's to the present however reveal some shift in judicial attitude towards aliens in South Africa.²⁵⁵² This shift began in *Foulds v Minister of Home Affairs*.²⁵⁵³ The case concerned an application for permanent residence that was refused without any reasons being given. Basing its decision on common law rather than on constitutional grounds, the court set aside the refusal and ordered the Home Affairs to give the applicant an opportunity to respond to information adversely affecting him.²⁵⁵⁴

The court in *Foulds v Minister of Home Affairs*²⁵⁵⁵ held that the applicant had a reasonable and legitimate expectation that the Immigration Board would properly and fairly consider his application for a permanent residence permit and give him an opportunity to deal with certain information adverse to him which the Board had obtained. As the Board had failed to disclose this information and there were no special circumstances justifying the non disclosure, its decision to refuse to authorize the issue of a permanent residence permit to him had been fatally flawed and had to be set aside.²⁵⁵⁶

Again, in *Yuen v Minister of Home Affairs*²⁵⁵⁷ the applicant relied on the respondents' failure to apply the maxim *audi alterem partem* before he was deported. At the instance of the respondents and as all the relevant information was before the court, the court dealt with the application for review on the papers before it. It was held that

²⁵⁵⁰ 1995 (7) BCLR, 891 (T).

²⁵⁵¹ 1996 (2) SA 710 (DCLD).

²⁵⁵² The cases are discussed *infra*.

²⁵⁵³ 1996 (4) SA 137 (W).

²⁵⁵⁴ At 149.

²⁵⁵⁵ *Supra* n 2548.

²⁵⁵⁶ *Idem* at 149H.

²⁵⁵⁷ 1998 (1) SA 958 (C).

the right to a fair hearing also implied the right to be informed of the facts and information which might be detrimental to the interest of a private individual. It was not necessary that the information be given in the exact form in which it was received but essential facts were supposed to be divulged to the interested person to enable him or her to reply. The application for review therefore succeeded and the respondent's decision to withdraw the applicant's certificate of permanent residence and deport him was set aside.²⁵⁵⁸

In *Jeebhai v Minister of Home Affairs*²⁵⁵⁹ the Court of Appeal declared the arrest, detention and subsequent removal from South Africa of one Khalid Rashid, a Pakistani national to be unlawful and granted a counter-application by the respondents declaring the appellants to have been in contempt of court.

In that case, the first appellant, Mr. Jeebhai, was a businessman from Lenasia. Rashid was arrested in Escourt at the home of Jeebhai's brother, Mr Mohamed Ali. As Rashid was unable to brief attorneys or depose to an affidavit, Jeebhai the first appellant instituted proceedings on his behalf. Mr. Zehir Omar, the defence attorney in that case, his professional assistant, Ms Yasmine Naidoo and Jeebhai were found guilty of having been in contempt of court. Jeebhai was cautioned and discharged but Omar and Naidoo were each sentenced to a fine of R2000 or six months' imprisonment suspended for a period of three years on condition that they were not convicted of contempt of court during the period of suspension.²⁵⁶⁰

The facts were that on the evening of 31 October 2005, at about 22h00, a senior immigration officer and several members of the South African Police Service descended on Mohamed Ali's home in Fordeville, Escourt in the Province of KwaZulu Natal. The police were armed and clad in protective bulletproof vests. The police first gained entry to the house and, having established that it was safe to enter, the senior immigration officer entered. They found Mohamed Ali and Rashid, the Pakistani national, on the premises. The senior immigration officer asked them

²⁵⁵⁸ See the following cases: *Ulde, Manjar Ali Shail Yusuf v The Minister of Home Affairs* Case No. 5353/2006; *Jeebhai v Minister of Home Affairs* 2008 ZASCA 160 Rashid's case *supra* n 1316; *Patel v Minister of Home Affairs* *supra* n 2477; *Lawyers for Human Rights v President RSA* *supra* n 2519.

²⁵⁵⁹ *Supra* n 1316.

for their identification papers. Rashid was unable to produce any permit authorizing his stay in South Africa. The immigration officer arrested both as illegal foreigners and accompanied them to the police station where they were detained.

On 2 November 2005, a Chief Immigration Officer interviewed Rashid who admitted that he was an illegal alien and to fraudulently obtaining documents purporting to authorize his presence in the country. Rashid was handed a Notice of Deportation as contemplated under regulation 28(2) of the Immigration Regulations.²⁵⁶¹

On 6 November 2005 Rashid was handed over to five Pakistani law enforcement officials at Waterkloof Military Air Base in Pretoria from whence he was flown to Islamabad Airport in Pakistan and held in custody. His removal from South Africa was effected secretly, without his relatives or friends having been apprised of the situation.²⁵⁶² In the meantime Mohamed Ali was transferred to Lindela Repatriation Centre, a facility that the Department of Home Affairs uses to detain illegal immigrants pending their deportation. It appears that he contacted his family from Lindela.²⁵⁶³

The first appellant then instructed his attorneys to commence legal proceedings in the Pretoria High Court for his and Rashid's release. The case had a chequered history. It was struck off the roll on many occasions, relisted on many occasions and postponed indefinitely on many occasions²⁵⁶⁴ By 12 June 2006, more than seven months after his arrest, the first appellant had still not been able to establish what

²⁵⁶⁰ Hence their interest in the case as second and third appellants respectively.

²⁵⁶¹ The notice stated that as the person was an illegal alien he was notified that he was to be deported to his country of origin – in his case Pakistan. The reason given for the deportation was that he was an illegal alien.

²⁵⁶² At par 6.

²⁵⁶³ At par 6.

²⁵⁶⁴ The application was set down for hearing on 2005-11-15. On that day, the application was postponed.(par 7). On 2006-02-14 the matter came before Legardi J.who postponed the application indefinitely.The matter was reenrolled for hearing before Poswa J on 2006-05-10, who granted an urgent application against the respondents to furnish particulars of the deportation of Rashid. (par 10). The matter was relisted before Legodi J as an urgent application, who on 2006-06-19 struck it out for want of urgency (par 12).Another application was filed before Southwood J on 2006-06-22 who also struck out the matter from the roll. The matter wasreenrolled and ordered to be heard by the Full Court.The Full Court heard argument on 2006-08-05 and delivered its judgment striking out the case on 2007-02-16 for failure to comply with the Rules of Court. The case went on appeal on 2008-11-4 and was again struck off the roll again at the Court of Appeal (par 15). The matter was reenrolled at the Court of Appeal on 2009-02-16. Judgment was delivered on 2009-03-31. See *Jeebhai v Minister of Home Affairs* 2009 (4) SA 662 (SCA).

happened to Rashid.²⁵⁶⁵ He launched another urgent application in which he sought among other orders, a declaration that the arrest, detention and “removal” of Rashid from South Africa were unlawful, inconsistent with the Constitution and constituted an “enforced disappearance” as envisaged in Article 7(2)(i) of the Rome Statute of the International Criminal Court.²⁵⁶⁶

In their answering affidavit, filed in response to the application, the respondents applied for the appellants to be committed for contempt of court. On 19 June 2006 Legodi J struck the matter off the roll for want of urgency and ordered the matter to be heard by a full court. The matter was duly enrolled before the full court which directed that the matters be consolidated and heard together.²⁵⁶⁷ The appellants filed a consolidated record comprising twelve volumes, in compliance with the Court’s directions. The Court heard arguments on 25 August 2006 and delivered its judgment on 16 February 2007. The full court decided against the appellants on all the issues raised on appeal but failed to address the argument that the said deportation was effected without a deportation warrant.²⁵⁶⁸

On appeal to the Supreme Court of Appeal, the judgment of the Full Court was set aside and the arrest, detention and deportation of Rashid was declared unlawful.²⁵⁶⁹

Also, in *Patel v Minister of Home Affairs*,²⁵⁷⁰ on the issue of a fair hearing in immigration/deportation matters, it was held that aliens had the same rights under the Constitution that citizens have, unless the contrary emerges from the Constitution.²⁵⁷¹ Accordingly, the second applicant was entitled to the rights set out in sections 9, 10, 12, 21 and in particular, section 33 of the Constitution which required the administrative action taken against him to be lawful, reasonable and administratively fair. He was entitled to the right to be heard in respect of the issue of

²⁵⁶⁵ *Ibid.*

²⁵⁶⁶ *Ibid.*

²⁵⁶⁷ *Idem* par 14.

²⁵⁶⁸ *Idem* par 19.

²⁵⁶⁹ *Idem* 350.

²⁵⁷⁰ *Supra* n 2414

²⁵⁷¹ See also *Kaunda’s supra* n 688 and *Mohamed’s case supra* n 1204.

section 45 of the warrant and an application he had made for permanent residence.²⁵⁷²

In *Patel*, the second applicant, an alien married to a South African citizen²⁵⁷³ had been detained in terms of a deportation warrant issued under section 45 of the Aliens Control Act.²⁵⁷⁴ He had not been given a hearing prior to the issue of the warrant.²⁵⁷⁵ In opposing his application for his release from detention and preventing his deportation, the respondents averred, *inter alia*, that the second applicant as an alien was not entitled to the protection of section 33 of the Constitution.

It was however held that the respondent's decisions in respect of the issue of the warrant and the decision on the second applicant's application for permanent residence had not been taken after due consideration of the applicant's constitutional right to live together with his wife as spouses and of the first applicant's right to freedom of movement.²⁵⁷⁶ The court found that the respondents had not taken into account, or weighed in the balance, the rights of the applicants' children in terms of section 28(1) (b) of the Constitution to family and parental care.²⁵⁷⁷

These recent decisions must be viewed against the backdrop of article 13 of the ICCPR which stipulates that

An alien lawfully in the territory of a state party to the present Covenant may be expelled only in pursuance of a decision reached in accordance with law and shall except where compelling reasons of national security otherwise require, be allowed to submit his reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or a person, or persons especially designated by the competent authority.

²⁵⁷² At 3491 – 350 C/D.

²⁵⁷³ The first applicant.

²⁵⁷⁴ 96 of 1991.

²⁵⁷⁵ *Idem* 343.

²⁵⁷⁶ *Idem* 349.

²⁵⁷⁷ *Idem* 350D.

Finally, the discussion of the treatment of aliens in South Africa would be incomplete without mention being made of *Mohamed's* case,²⁵⁷⁸ where the court held that the South African security agents had no right to extradite Mohamed to the US without obtaining an undertaking from the US that Mohamed would not be sentenced to death if found guilty of the offence charged and would not be executed if sentenced to death.²⁵⁷⁹

If *Mohamed's* case is compared to *Kaunda's* case, it would appear that the SA Constitution protects the rights of foreigners better than those of South African nationals. However, as already indicated, the *rationale* behind the decision in *Mohamed* and the distinction between the two cases were supplied by the Constitutional Court in *Kaunda*.²⁵⁸⁰ It appears that the pendulum is swinging from mere indifference of the law towards the plight of aliens in the past, to active protection in the present. It is hoped that this trend will continue and that aliens will be given greater opportunities for a fair hearing in any decision that adversely affect them, particularly in decisions to expel or deport them. In this way their rights under the Constitution will be further guaranteed.²⁵⁸¹

²⁵⁷⁸ *Supra* n 1204.

²⁵⁷⁹ See *idem* par 47.

²⁵⁸⁰ *Ibid.*

²⁵⁸¹ As far back as 1999, the South African Human Rights Commission (SAHRC) had compiled a report entitled "*Illegal? Report on the Arrest and Detention of Persons in Terms of the Alien Control Act*". This report emerged from the Commission's view that "[g]lowing] hatred and ignorance about the rights and realities of refugees and migrants has become an increasing serious blight in SA's human rights record." The methodology of the report was to give voice to persons who had directly experienced human rights violations in the hands of state officials. While the focus of the report was on the arrest process, a number of conclusions and recommendations related to the conduct of the private security officials in the Lindela camp. The report reveals that the arrest process for immigration purposes is almost entirely arbitrary and capricious. Other findings related to detention conditions. A significant number of persons with apparently valid cases of asylum, did not have their cases investigated or decided. Some persons reported detention in police cells and at Lindela for periods longer than allowed by law, as well as detention alongside criminal suspects. There were widespread reported incidents of bribery and extortion during detention, in addition to incidents of assault. Common complaints about the detention conditions specifically at Lindela included lack of adequate nutrition, inadequate medical care, and interrupted sleep as well as being subjected to degrading treatment or intimidation. See Klaaren "SAHRC Report on the treatment of persons arrested and detained under the Aliens Control Act." *Supra* n 1204 131.

22 Conclusion

In the celebrated case of *Kaunda v The President of the RSA*²⁵⁸² it was held that the SA Constitution does not guarantee a right to diplomatic protection²⁵⁸³ although section 3 of the Constitution provides that all citizens are equally entitled to the rights, privileges and benefits of citizenship. The court held that the key to the enjoyment of the rights, privileges and benefits of citizenship is nationality.²⁵⁸⁴ That notwithstanding however, it was held that a South African national is entitled to request his or her government for diplomatic protection against the wrongful acts of foreign states.²⁵⁸⁵

If a South African is not entitled to diplomatic protection under the Constitution, the question is whether the government's role is merely to receive such requests, without making serious or determined efforts towards granting them?²⁵⁸⁶ It is submitted that the obligation imposed on government by section 3 of the Constitution is not merely to receive requests for diplomatic protection from SA citizens, but to consider such requests in good faith and in a manner consistent with the Constitution.²⁵⁸⁷ In other words, the citizen is entitled to have his or her request considered and determined appropriately.²⁵⁸⁸ Although a decision as to whether and how protection should be granted falls within the executive discretion,²⁵⁸⁹ it is comforting to know that a court could, when the government refuses to consider a legitimate request, or deals with the matter in bad faith or irrationally, order the government to deal with the matter appropriately.²⁵⁹⁰

It is submitted that the problem with the use of diplomatic protection for the protection of human rights lies in the discretionary nature of that right. The discretion

²⁵⁸² *Supra* n 688.

²⁵⁸³ O'Regan J was however prepared to compel the government to afford diplomatic protection to the applicants when she said in par 269 "In my view the appropriate relief would therefore be that a declaratory order be made by this court with regard to the obligations of government...".

²⁵⁸⁴ Which is an incident of citizenship. *Idem* par 61.

²⁵⁸⁵ *Idem* par 62 – 63.

²⁵⁸⁶ In other words does the SA Constitution make adequate provision for the diplomatic protection of SA citizens abroad?

²⁵⁸⁷ *Idem* par 67 191 238.

²⁵⁸⁸ See the *dictum* of Chaskalson J par 63.

²⁵⁸⁹ *Idem* par 76.

²⁵⁹⁰ *Idem* par 80.

is exercised not only by the executive, but also by the courts.²⁵⁹¹ First and foremost, in international law, the state is vested with the discretion to determine whether protection should be granted or not and, if so, what sort of protection should be afforded. This was held in the *Barcelona Traction* case, where it was said that

The state must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted and when it will cease. It remains in this respect a discretionary power²⁵⁹²

Under the Constitution, it also appears that the same principle applies. According to Chaskalson J in *Kaunda's* case,

This is a terrain in which courts must exercise discretion, and recognize that government is better placed than they are to deal with such matters.²⁵⁹³

This discretionary factor, it is submitted, makes judicial supervision or review of the exercise of diplomatic protection difficult.

Although it was said in *Van Zyl's* case that

The executive in invoking the form of diplomatic protection and any intervention, is required to make an informed choice invariably exercising a discretion based on “the application of intelligence and tact to the conduct of relations”²⁵⁹⁴

Yet it may not be possible to obtain the requisite intelligence and tact at all times. The question is, what happens if such intelligence is not available, is not reliable, or where there is lack of tact in the conduct of negotiations?

It is submitted that this double exercise of discretion, both by the courts and by the executive, often jeopardises the cases of citizens who otherwise would have been entitled to diplomatic protection.²⁵⁹⁵ One is therefore forced to agree with Chaskalson J when he said that diplomatic protection is a right which should be spelt out

²⁵⁹¹ *Idem* par 67.

²⁵⁹² *Supra* n 26.

²⁵⁹³ *Ibid.*

²⁵⁹⁴ *Supra* n 556 106.

²⁵⁹⁵ See the cases cited above.

expressly “rather than being left to implication” in the Constitution.²⁵⁹⁶ However, if diplomatic protection is expressly spelt out in the Constitution, it should provide the necessary safeguards or checks and balances, to ameliorate the discretionary factors that impede or hinder the unfettered exercise of this right.²⁵⁹⁷ This will in turn enable citizens to invoke the right to diplomatic protection with increased confidence and certainty.

As for the question whether the Bill of Rights has an extraterritorial effect or not, it was held in *Kaunda’s* case that the Constitution of SA which incorporates the Bill of Rights, has no extraterritorial effect as far as diplomatic protection is concerned.²⁵⁹⁸ The court had to deal with the argument that the duty entrenched in section 7(2) to “respect, protect, promote and fulfil” the rights in the Bill of Rights extends beyond the borders of the State.²⁵⁹⁹ It was also held that any extraterritorial application of the Bill of Rights is limited by the international law principle that the sovereignty of other states may not be impeded.²⁶⁰⁰

There could however be exceptions.²⁶⁰¹ The court further explained that there is a difference between an extraterritorial infringement of a constitutional right by institutions and persons bound by sections 7(1) and 7(2) of the Constitution, and a duty on the South African government to take action in a foreign State that may interfere directly or indirectly with the sovereignty of the affected state. The court left open the possibility that the former instances might be justiciable in South African courts.²⁶⁰² As far as foreigners are concerned, it was also held in *Kaunda’s* case that their human rights are protected under the South African Constitution as long as they are within South African territory.²⁶⁰³

²⁵⁹⁶ *Idem* par 15.

²⁵⁹⁷ The 1996 Constitution s 7.

²⁵⁹⁸ It will be recalled that in that case the court dismissed the application for *mandamus* to compel the SA government to take action at a diplomatic level to ensure that the two foreign governments involved ie Zimbabwe and Equatorial Guinea respect the rights of South African citizens under the South African Constitution..

²⁵⁹⁹ *Idem* par 32.

²⁶⁰⁰ *Idem* pars 36 41 229.

²⁶⁰¹ Where for instance there is a gross violation of the norms of *jus cogens*. *Idem* par 44.

²⁶⁰² *Idem* par 45. It was not necessary to deal conclusively with the question since the *Kaunda* case only involved the question whether South African law imposes a duty on the State to make representations in terms of the government’s right in international law to approach other states on behalf of South African citizens.

²⁶⁰³ *Idem* par 36.