



APPRAISAL OF THE CHALLENGES OF DIPLOMATIC PROTECTION OF NIGERIANS UNDER INTERNATIONAL LAW

Abstract

Diplomatic protection recognised the right of a state of nationality of an injured alien to bring international claim(s) against another state in respect of the injury suffered or caused to the person and or property of its nationals abroad. This is because an injury to an alien is considered to be an injury to his home state and in taking up his case the state is seen as asserting its own rights. The state that caused the injury is required to pay reparation for the injury caused the alien. This procedure is called diplomatic protection. This article appraised the challenges of diplomatic protection of Nigerians under international law. The article noted two major approaches to legal research namely, the doctrinal and non-doctrinal approaches. However, the article adopted doctrinal approach relying on both primary and secondary sources. It is the findings of the research that diplomatic protection remained an important remedy for the protection of persons whose human rights have been violated abroad and that states should have obligation to protect their nationals living abroad. The article recommended for a re-evaluation of the concept of diplomatic protection to be in line with current international concerns on human rights and for the amendment of the constitution as well as the fundamental rights enforcement procedure in Nigeria to entrench diplomatic protection.

KEYWORDS: *Diplomatic; Protection; State Responsibility, International Claim and International Law.*

1.1 Introduction

Diplomatic protection enables the country of citizenship to claim reparation for the injury inflicted on its national overseas. Diplomatic protection, both in theory and practice, is thought to have originated in Continental Europe during the 18th century by a Swiss Jurist and Diplomat known as Emmerich De Vattel, who in his seminar treatise of 1758 titled '*The law of Nations, or the principles of Natural Law*' opined that any harm inflicted upon a citizen is tantamount to harm inflicted upon their state, and thus, it is the country's responsibility to safeguard its citizens. The State has an obligation to pursue retribution and, if feasible, compel the perpetrator to provide restitution or face punishment. This is necessary to ensure that citizens can achieve the primary objective of civil society, which is protection.¹ The Vattel theory has faced criticism for its limitation of diplomatic protection solely to states and for advocating the utilisation of force by more powerful governments against weaker ones. Despite these criticisms, the theoretical framework established by Vattel remains unchanged to this day.² The concept of 'Diplomatic Protection' has been officially defined and codified in the Draft Articles on Diplomatic Protection, which in 2006 received official endorsement from the International Law Commission (ILC). The Draft Articles defined Diplomatic Protection as the action taken by one State to hold another State accountable for any harm caused to a citizen or legal entity of the first State as a result of internationally wrongful act committed by the second State. Accountability for the responsible State can be achieved through diplomatic means or other nonviolent techniques.³

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¹ D Carlsson, 'Investors – State Dispute Settlement (ISDS) v Diplomatic Protection' (Master's Thesis in Investment Treaty Arbitration, Department of Law Spring Term 2020)10-12 <www.diva.portal.org> accessed 8 August 2021

² Article 1 of the Draft Articles on Diplomatic Protection with Commentaries (2006)24, adopted by the International Law Commission at its *fifty- eight session* <<https://www.refworld.org/pdfid/525e7929d.pdf>> accessed 8 June 2021

³ A Heeps, 'Diplomatic Protection and Human Rights: Quo Vadis?', The King's Student Law Review [2017]1, Vol, 8, No.2 <<https://blogs.kcl.ac.uk/kslr/wp-content/blogs.dir>> accessed 8 July 2021

Therefore, from the definition of Diplomatic Protection as provided by the International Law Commission (ILC) in its Draft Articles, one can clearly infer that the draft articles only outline the main characteristics of diplomatic protection without providing a comprehensive definition or description of the global unlawful acts that lead to a State's responsibility for harm to a foreign individual. It also does not adequately define the actions that a country can take when invoking diplomatic protection. The proposed articles solely address the regulations that govern the situations in which diplomatic protection can be utilised and the prerequisites that must be fulfilled prior to its execution. The draft articles specifically address the Responsibility of States for globally wrongful conduct and uphold the differentiation between primary and secondary standards, with a particular emphasis on the secondary rules.⁴ Diplomatic protection encompasses several methods such as mediation, arbitration, negotiation, international litigation, and economic sanctions. In recent years, the idea of diplomatic protection has gained significant legal importance and attracted increased interest due to international events. For instance, the incarceration and abuse of foreign individuals by the United States government at its Guantanamo Bay military base. As a result, many countries have taken action to diplomatically secure the safety and return of their own residents. In some cases, the reluctance to take proactive measures has led to domestic court cases where States are legally compelled to fulfil their diplomatic obligations on behalf of their citizens who are held at Guantanamo.⁵ For instance, the civil courts of England have resolved two important cases related to the diplomatic protection of Guantanamo inmates. Feroz Ali Abbasi, a British citizen, made the original assertion after being captured by U.S soldiers in Afghanistan in 2002 and subsequently transferred to Guantanamo Bay. Mr. Abbasi was one of seven British individuals who were being detained indefinitely at the U.S Naval Base. He claimed that his imprisonment was random and violated established international legal norms. Mr. Abbasi, leveraging his mother's influence in England, initiated legal proceedings in the English High Court, requesting an order for the Foreign Secretary to take aggressive steps to address his issue or, at the very least, deliver a satisfactory reaction to his appeal for help. The High Court dismissed Mr. Abbasi's plea.⁶

⁴ Paragraph 1 & 2 of the Commentary to Article 1 of the Draft Articles on Diplomatic Protection with commentaries (2006)24, adopted by the International Law Commission at its Fifty- Eight Session <<https://www.refworld.org/pdfid/525e7929.pdf>> accessed 8 June 2021

⁵ N T Hooge, Responsibility to Protect (R2P) as Duty to Protect?: Reassessing the Traditional Doctrine of Diplomatic Protection in Light of Modern Developments in International Law (a thesis submitted in conformity with the requirements for the Degree of Master of Laws, Faculty of Law, University of Toronto (2010)3 <tspace.library.utoronto.ca> accessed 14 August 2021

⁶ *ibid*

However, the Court of Appeal granted leave to appeal. During the appeal, the administration argued that the legality of measures carried out by a foreign ruler and the executive branch's handling of international relations were not open to scrutiny by the judiciary. The Court of Appeal rejected the argument that the British government was legally obligated, according to international law, to take diplomatic action to protect Mr. Abbasi. His Lordship argues that the ICJ's ruling regarding *Barcelona Traction case* and Professor Dugard's recognition of the need to treat diplomatic protection as a future legal obligation offer a thorough answer. Nevertheless, the Foreign Secretary's conduct towards Mr. Abbasi was assessed based on the domestic administrative law concept of "legitimate expectation". The Court of Appeal stated that the government's public statements about providing diplomatic and consular assistance to its citizens abroad created an expectation that if a British citizen's rights were violated while overseas, the British Government would not ignore the situation and leave them to their own fate.⁷

Though, the Court of Appeal recognised that the act of providing diplomatic protection is dependent on discretion. Nevertheless, the court proceeded to assess whether there exists a restricted chance for judicial review of a denial to offer diplomatic aid to a British citizen who is experiencing a breach of a fundamental human right as a result of the activities of a foreign government. The court established the basis for evaluating such decisions through the utilisation of the idea of genuine expectation. The court determined that a British person possesses a legitimate expectation that their request for assistance will be comprehensively assessed, considering all pertinent factors. The government's public statements regarding the provision of diplomatic and consular assistance to its citizens abroad created an expectation that if a British citizen's rights were violated while overseas, the British Government would not ignore the situation and leave them to deal with it on their own.⁸ However, considering the specifics of the Abassi case, it was concluded that Mr. Abassi could fairly expect that the Foreign Secretary's assessment of the aid request, coupled with his informal discussions with the U.S Government on British prisoners, would be satisfactory.⁹

Furthermore, the case of Omar Khadr in Canada exemplifies the government's reluctance to offer comprehensive diplomatic protection to one of its citizens. Mr. Khadr, who was a mere

⁷ *R. (on the application of Abassi & Anor.) v Secretary of State for Foreign and commonwealth Affairs*, [2002] EWCA Civ. 1598; [2002] All E.R. (D) 70

⁸ *Abassi & Anor. v Secretary of State for Foreign and commonwealth Affairs* (supra)

⁹ See (n 5)

15 years old at the time, was captured in Afghanistan and subsequently transferred to Guantanamo Bay. He remains confined in that location. The Federal Court of Canada's finding determined that the activities in question amounted to cruel and unusual treatment, which is a breach of international law. Despite the treatment and the Supreme Court of Canada's ruling that it is an ongoing violation of Mr. Khadr's fundamental rights within Canada, the Canadian government has continuously declined to seek his return to the country. The Khadr case is notable in the current diplomatic protection jurisprudence arising from Guantanamo Bay because the Federal Court of Canada explicitly directed the government to seek the return of Mr. Khadr. In reaching this determination, Justice O'Reilly concluded that "Citizens possess the entitlement to seek diplomatic aid, and the government's decisions regarding the provision of such aid are subject to judicial scrutiny to assess their suitability."¹⁰

The legal handling of Mr. Khadr, along with that of the other individuals detained at Guantanamo Bay, holds great importance in evaluating the effectiveness of diplomatic protection for several reasons. Crucially, it demonstrates the continued applicability of the philosophy to the conditions of contemporary global society. Although the attempts made in domestic courts were mostly unsuccessful, the mere fact that they were initiated and examined in the manner they were indicates that diplomatic interventions from one's own country are still regarded as a viable means of seeking redress for grave violations of international human rights duties. Granting local courts the authority to subject government decisions on diplomatic protection to judicial scrutiny contributes to the establishment of a consistent state practice that restricts the extent of discretion allowed under the traditional approach.¹¹ In addition, the Court of Appeal categorised certain instances as an "extreme case" where the Foreign and Commonwealth Office (FCO), against its declared norm, outright declines to evaluate the possibility of making diplomatic representations. The court ruled that judicial review would only be applicable to diplomatic protection if the Foreign and Commonwealth Office were to completely reject the idea of making diplomatic representations on behalf of an individual whose fundamental rights were being violated, contrary to its usual practice. In light of these highly unlikely circumstances, we propose that the Court should issue a mandatory order to the Foreign Secretary, compelling them to meticulously assess the applicant's case.¹²

¹⁰ *Abassi & Anor. v Secretary of State for Foreign and Commonwealth Affairs* 9(supra)

¹¹ See (n 5)

¹² *Abassi v Secretary of State for Foreign and Commonwealth Affairs* [supra]

Similarly, in 2017, Mr. Collin Mgbo, the Secretary of Nigeria Union in South Africa, urged the Federal Government of Nigeria to diplomatically pressure the South African government to guarantee the security and well-being of Nigerians residing in their country.¹³ The decision to make the call was prompted by the persistent xenophobic attacks on Nigerians in South Africa. Although no legal action was taken in Nigeria to urge the government to invoke diplomatic protection to safeguard its citizens who were injured in South Africa, the incident of the xenophobic attacks resulted in various reactions, including public condemnations and the threat of retaliatory attacks by Nigerians against South African nationals living in Nigeria.¹⁴

Nevertheless, the term "Diplomatic Protection" consists of two keywords namely: "Diplomatic" and "Protection." The term 'diplomatic' is associated with the management of international relations between governments.¹⁵ The name 'diplomacy' originates from the Greek word 'diploma', which refers to a document that is folded in two. Ancient Greece commonly provided State representatives with twin wooden slabs containing corresponding words when they were sent abroad. The hardwood slabs were referred to as diplomas and functioned as official letters of accreditation for those delegates.¹⁶

The word 'protection' on the other hand, simply means an act of protecting somebody or something.¹⁷ Put simply, it refers to protection or refuge. The word is obtained from the verb "protect," that refers to the act of shielding something from danger. Diplomatic protection refers to the action that one State takes against another State when a citizen of the first country is harmed by an internationally unjust act or omission committed by the second country, resulting in injury to their person or property. This action is taken to defend the person or property of the national.¹⁸

According to international law, only the country of citizenship of the injured foreigner has the authority to use diplomatic methods or actions to safeguard its citizen who has been harmed in the territory of another country. International law traditionally acknowledges a country's right to file a suit against another state for the harm done to its citizens or their belongings in foreign

¹³ O Ukeh, 'Xenophobia: Again, Five Nigerians attacked in South Africa' *Daily Sun* (Abuja, 22 March 2017)9

¹⁴ Emphasis added

¹⁵ MOU Gasiokwu, *International Law and Diplomacy (Selected Essay)*, 41

¹⁶ *ibid*

¹⁷ Oxford Advance Learner's Dictionary, (6th edn.)938

¹⁸ E Okon, 'Diplomatic Protection of human Rights as practiced by South Africa and Nigeria' (a research thesis submitted in fulfillment of the requirement for the degree Doctor Legum (LLD), in the Department of Public Law, Faculty of Law, *University of Pretoria 15 June 2010*)263 <www.repository.up.ac.za/complete> accessed 14 June 2021

countries. The state responsible for the injury is obligated to provide compensation for the harm inflicted.¹⁹ In the *Mavromattes Palestine Concessions Case*, the Permanent Court of International Justice (PCIJ) held that when a State represents one of its citizens and takes diplomatic or legal action on their behalf, it is essentially asserting its own right to guarantee that international law is upheld for its citizens.²⁰

It is crucial to submit that diplomatic protection is subsidiary in nature, meaning that specific requirements shall be satisfied by the citizen prior to any country seeking for the diplomatic protection of its citizen. These requirements were established following the previous instances where diplomatic protection was invoked and determined by the International Court of Justice (ICJ) and the PCIJ. These prerequisites have been codified in the ILC Draft Articles on Diplomatic Protection of 2006. These articles captured the viewpoints of the global community on the proper implementation of diplomatic protection. Consequently, in order for an international claim to be supported, the injured foreign individual must satisfy four consecutive requirements prior to invoking diplomatic protection.²¹ Firstly, harmed shall be caused by an International Wrongful act to the said individual; secondly, the harmed alien must be a citizen of the country seeking for his protection and thirdly, such nationality must continue to exist up to the time of espousing the international claim and fourthly, the harmed alien must exhaust all domestic remedial measures available in the municipal law of the host country that caused the injury before seeking diplomatic protection.²² If these four elements have been fulfilled, the individual has the right to request their country of citizenship to intercede and provide diplomatic protection on behalf of them.²³ While it is true that this criterion must be met, it is worthy to note that the invocation of diplomatic protection is fundamentally discretionary. Therefore, a state may refuse to invoke diplomatic protection despite satisfying the prerequisites.²⁴ This might be justified by the fact that when a state decides to provide diplomatic protection, it will inevitably take certain political factors into account. As Borchard accurately stated, restitution is only sought for harms that the state, at its own discretion, considers a valid reason for diplomatic protection. The state's interposition is determined by evaluating various variables, including the gravity of the violation, the effect on the nation's

¹⁹ See (n 18)

²⁰ *Mavrommatis Palestine Concessions (Greece v UK)* PCIJ Reports series A No. 2 (1924)

²¹ See (n 3)

²² Articles 1, 2 & 3 of the draft Articles on diplomatic protection with commentaries (2006)²⁴, Adopted by the international law commission at its fifty- eight session <<https://www.refworld.org/pdfid/525e7929d.pdf>> accessed 8 June 2021

²³ See (n 3)

²⁴ *ibid*

prestige, and the political benefit of interpreting a personal harm as a collective injustice that necessitates national intervention. In summary, the curiosity of the entire population take precedence over those of an individual citizen when initiating state action.²⁵

Certain countries have incorporated constitutional provisions to ensure the protection of their citizens when they are outside their own country. This has thus led to inquiries about the legal enforceability of diplomatic protection in domestic courts. Some jurisdictions have addressed claims from citizens claiming that their country must be obligated to invoke diplomatic protection. Instances from various legal systems illustrate the effectiveness of these assertions. It can be deduced from this that when a government invokes diplomatic protection, it may prioritise its own interests over and above the interests of its citizens.²⁶ Traditionally, the idea of diplomatic protection has been linked to how persons who are not part of a particular group or society are perceived and treated. There is a significant association between the Draft Articles on Diplomatic Protection and the Articles on Responsibility of States for universally accepted criminal conduct. The ideas outlined in the sections concerning the Responsibility of States for internationally criminal conduct have direct relevance to diplomatic protection. According to Article 44 of the regulations concerning the liability of states for internationally wrongful conduct, a state cannot be held responsible if the claim is not filed in compliance with any applicable rule regarding the nationality of claims, or if the claim requires exhausting local remedies and no effective local remedy has been pursued.”²⁷ A state that causes harm to a foreign individual is required to stop their wrongful behaviour and provide complete compensation for the harm caused by their globally wrongful action. Reparation can be provided through the means of restitution, compensation, or gratification, either individually or together.²⁸

The article notes that there is need for Diplomatic Protection and Human rights law to co-exist in the 21st Century to afford individuals and states the opportunity to rely on the balance between diplomatic protection and human rights law to seek for remedy in case of any breach of their rights abroad. Hence, it is necessary to review our constitution and fundamental rights enforcement procedure to incorporate diplomatic protection so that Nigerian government can

²⁵ E. Borchard, *‘Diplomatic Protection of Nationals Abroad’* (New York: the Banks Law publishing company 1915)351

²⁶ For example, in South Africa, *Samuel Kaunda and others v the president of the Republic of South Africa and others*, [2004] ZACC 5; *Josias Van Zyl and others v The Government of the Republic of South Africa and Others* [2007] ZASCA 109. In Australia, see *Hicks v Ruddock*, [2007] F.C.A 299 and *R(Abbasi) v Secretary of State for Foreign Affairs*, [2002] EWCA Civ. 1598

²⁷ Article 44 of the Articles on Responsibility of States for Internationally Wrongful Acts 2001

²⁸ See (n 3)

be under obligation to adopt diplomatic protection safeguarding its citizens for any injury suffered abroad. This article therefore appraises the challenges of diplomatic protection of Nigerians under international law.

1.2 Challenges of Diplomatic Protection of Nigerians Under International Law.

1.2.1 Locus Standi

Locus standi refers to the legal concept that grants an individual the right to initiate legal proceedings or be heard in a specific jurisdiction.²⁹ In other words, locus standi can be defined as the "position from which one has the right to take legal action." It refers to the legal entitlement or ability of an individual to initiate a lawsuit in a court of law when their rights are violated by someone or a governing body.³⁰ In order to have legal standing to bring a lawsuit, the plaintiff must possess a significant and legitimate stake in the case. An individual is considered to have an interest in something when they possess rights, benefits, obligations, liabilities, losses, or similar connections to it, whether they are current or future, known or potential. However, this is only applicable if the possibility of such connections is not too distant, and the determination of remoteness depends on the purpose that the interest is intended to serve. The potential failure of the individual does not affect their legal right to initiate the legal proceeding. An important factor to consider is whether the party could have been included as a party in the lawsuit. Another factor to consider is whether the person seeking the redress or remedy would experience any harm or difficulty as a result of the legal proceedings. If the Judge determines that the individual will experience such suffering, then they must be given the opportunity to present their case. Another criterion for determining standing is the presence of a disagreement between the parties. Evidence of a disagreement serves as evidence that the involvement of the judiciary is not only beneficial but also essential. Undoubtedly, in order to resolve the issue, there must be a designated individual to make a definitive decision on the dispute.³¹

Unfortunately, diplomatic protection considers harm to a citizen to be a harm to his country. Therefore, his state is the legal actor having rights and interests on the international plane. In order for an international claim to be admissible, receivable by an international court or tribunal, there has to be a sufficient legal interest established by the State on bond of nationality.

²⁹ B A Garner, Black's Law Dictionary, (9th edn, Thomson Reuters 2009) p. 1026.

³⁰ *O & O Networks Ltd. V. Broad Comms. Ltd.* (2021) 5NWLR, (Pt. 1770) 454 at 459, ratio 1.

³¹ *Oshiomhole v. Salihu* (No. 1) (2021) 8 NWLR, (Pt. 1778) 237 at 249-250, ratio 9.

It is apt to state that the victim is not vested with locus standi to espouse international claim to obtain reparation for an injury suffered abroad as diplomatic protection and the ICJ Statute vested locus standi on the State.³²

Furthermore, assuming but not conceding that diplomatic protection is recognized under our municipal law, there will still be a challenge of locus standi to institute action seeking for diplomatic protection in Nigeria since the victim is often resident abroad. Before such a victim can file any action to compel Nigerian Government to exercise diplomatic protection to protect him abroad, he may need to either return back to Nigeria or brief a counsel in Nigeria to file such action using his name because his relatives may lack locus standi to institute action in Nigeria to compel Nigerian Government to invoke diplomatic protection in favour of its citizen who has been injured abroad.³³

1.2.2 Exhaustion of Local Remedies

A state can provide diplomatic protection exclusively to people who have fully utilised the available legal remedies within the defendant state's jurisdiction to address crimes or omissions that contravene international law. Both domestic and international entities, including firms funded primarily or partially by public funds, must utilise local legal options before seeking other remedies.³⁴ Furthermore, there can be variations in local cures throughout different states. If the local legislation permits an appeal in the particular situations of the case to the supreme court, it is imperative to submit an appeal in order to secure a definitive ruling on the issue. This principle remains applicable even in cases where there is no inherent entitlement to appeal to a superior court, but the superior court possesses the authority to exercise its discretion in granting permission to appeal. Within this particular framework, courts cover both conventional and specialty ones.

It is necessary to fully utilise administrative remedies, especially if they have the potential to lead to a final and enforceable ruling. The state making the claim must provide the proof that proves they have attempted to exhaust all available local remedies without achieving any success. The harmed individual must personally have utilised all available local solutions.³⁵

³² Gleider Hernández, *Diplomatic Protection and Issues of Standing* Oxford University Press
<<https://iws.oup.support.com>> accessed 27 October 2023 See also, Article 34(1) of the ICJ Statute.

³³ (Emphasis added)

³⁴ S Koosha1 & S B Abbasi, *The Jurisdiction analyses and admissibility challenges of International Court of Justice in diplomatic protection of legal persons with respect to Mr. Diallo case*, (Journal of American Science, 2011; 771)< <http://www.americanscience.org>> accessed 16th November 2023

³⁵ (n 34)

Therefore, where local remedies have not been exhausted, diplomatic protection cannot be invoked to protect nationals who have been injured abroad.³⁶

It is worthy to note that the condition requiring an injured national to deplete all local solutions before his country may invoke diplomatic protection to protect him abroad may inflict more hardships on injured individual as there is no speedy dispensation of justice in most jurisdictions of the world particularly within the developing and the under-developed countries. For instance, in Nigeria, such proceedings can linger up to ten (10) years with the effect of making parties to either abandon their cases or die during the pendency of their cases in Court.³⁷ This can be evidence in the case of *B. B. Apugo & Sons Ltd. V. Orthopaedic Hospital Management Board (O.H.M.B)*³⁸ where the Appellant instituted the suit vide a writ of summons filed in the High Court of Justice of Enugu State on 5th July, 1988 for breach of contract. The learned trial Judge on 20th December, 2000 entered judgement in favour of the Respondent. Remarkably, the trial Court delivered its judgement after twelve (12) years. The Appellant dissatisfied with the judgement appealed to the Court of Appeal, which on 7th July, 2005 dismissed the appeal. The Appellant aggrieved by the judgement, filed an appeal before the Supreme Court, which on 17th June, 2016 the Supreme Court dismissed the appeal due to lack of locus standi by the Appellant to institute the suit. Unfortunately, the Appellant's suit was finally determined by the Supreme Court after twenty-eight (28) years of legal battle.³⁹

1.2.3 Legislative Challenge

There is no adequate legal regime to protect Nigerians who are victims of human rights abuse overseas. Neither the Nigerian Constitution nor the Fundamental Rights Enforcement Procedure provided for judicial review of government's refusal or neglects to invoke diplomatic protection to protect its nationals residing abroad. Equally, despite the UN General Assembly adopting resolutions transmitting the Draft Articles on Diplomatic Protection in 2007 and 2016 to various member States for response and possible suggestions, the draft article is yet to be submitted to a conference or convention with a view to formalizing them in a treaty.⁴⁰ In addition, this draft article has not been domesticated by the Nigerian Government

³⁶ (Emphasis added)

³⁷ *ibid*

³⁸ *B B Apugo & Sons Ltd. V. Orthopaedic Hospital Management Board (O.H.M.B)* (2016) Vol. 30 WRN 1-187 at pp. 1-73.

³⁹ *ibid*

⁴⁰ E Okon, 'Diplomatic Protection of human Rights as practiced by South Africa and Nigeria' (a research thesis submitted in fulfillment of the requirement for the degree Doctor Legum (LLD), in the Department of Public Law,

to form part of our local laws. Due to this challenge, Nigerian Government appears not to be ready to act in order to safeguard its citizens who suffered injuries overseas.⁴¹

1.2.4 Jurisdictional Challenge

The liberty to invoke diplomatic protection is reserved for sovereign nations. The requirement to participate in any legal disputes before the ICJ is statehood. However, simply being a recognised state does not automatically grant the court jurisdiction over a specific case involving that state. The crucial factor in this regard is the explicit permission or submission of the involved countries for the court to make a decision. The court's jurisdiction is primarily established through a state's explicit consent, especially when addressing claims made by individuals that are supported by a state exercising its right of diplomatic protection.⁴² An individual lacks the legal standing to bring forth an international claim, and if they have not first pursued remedies available within their own country, the court does not have the authority to provide compensation for the harms alleged by the state. In order for the court to have jurisdiction, the essential conditions must be met.⁴³

1.2.5 Political Considerations

A major critique of the concept of diplomatic protection is rooted in the significant level of political influence that is intertwined with it. States often choose not to pursue cases before international courts due to the potential consequences they may face and their unwillingness to accept them. This is done in order to avoid retaliatory measures. For a State to initiate a claim before an international tribunal, the harm inflicted on its citizens must be of significant significance or affect a prominent individual. This is necessary for the State to justify the potential risks associated with engaging in an international legal process.⁴⁴

Nigeria's diplomacy lacks a focus on the needs and interests of its citizens. This difficulty poses a significant obstacle to the diplomatic performance of Nigeria. Citizen diplomacy is a constitutional idea that prioritises the interests of Nigerian citizens, both within Nigeria and abroad. However, despite this premise, the rights, dignity, and privileges of Nigerians,

Faculty of Law, *University of Pretoria 15 June 2010*)263 <www.repository.up.ac.za/complete> accessed 14 June 2021

⁴¹ (Emphasis added)

⁴² (n 34)

⁴³ (Emphasis added)

⁴⁴ Monografía de Grado & Cristina Copete Herrera, the Future of Diplomatic Protection in Light of Recent Developments in International Law, Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas, Departamento de Historia y Filosofía del Derecho, Bogotá, 15 de Marzo de 2010 <[CopeteHerrera.Cristina \(1\).pdf](#)> accessed 22 November 2023

particularly while they are outside of the country, have not been safeguarded or defended. This is seen in the troubling trend of criminalising Nigerians abroad. Nigerians, especially those living abroad, believe that the Nigerian government and its embassies do not show concern for the challenges encountered by its nationals in the diaspora.⁴⁵ The missions have not adequately adapted their efforts to properly acknowledge citizens. Insufficient focus is given to numerous Nigerian citizens. If the Nigerian state had not intervened through diplomatic missions, injuries sustained by Nigerians residing in the overseas could have worsened. Access to counselling and legal services is severely limited for the large number of Nigerians who currently travel overseas in search of better economic opportunities. As a result, Nigerians living abroad are perceived as lacking guidance or leadership. There is uncertainty regarding whether anyone will be persuaded of Nigeria's significance when its nationals are subjected to unlawful mistreatment in most countries of the world. The country's missions and diplomats rarely see the need to approach a competent court to seek for redress regarding the persistent abuse of Nigerians' rights overseas. Nigeria's diplomatic operation lacks inclusivity. The majority of Nigerians lack knowledge about the functioning and conduct of their country's diplomacy. There is a lack of citizen engagement at home, despite the clear statement in the constitution that ultimate authority rests with the people, who ultimately empower the government.⁴⁶

1.2.6 Discrimination and Likelihood of Bias

Discrimination and bigotry are significant challenges that individuals may encounter when residing in a foreign country. An individual of foreign origin may face discrimination in their everyday life solely based on their nationality. These prejudiced and biased attitudes can originate not just from ordinary individuals in their personal lives, but can also apply to government personnel, including national authorities such as the police and immigration officers, politicians, and even judges. Irrespective of the length of time that foreigners have resided in a foreign country, and regardless of whether they have formed families in that country, they can never be certain about their own personal safety or the safety of their families and belongings. They can be expelled without receiving proper legal proceedings. Individuals can be apprehended and held in custody without valid justification, and they may have

⁴⁵ E I Umeonyirioha, *Diplomacy at Crossroads: Challenges of Nigeria's Foreign Service* (World Journal of Social Sciences and Humanities, 2020, Vol. 6, No. 1,) 12-13 <<http://pubs.sciepub.com/wjssh/6/1/2>> accessed 22 November 2023

⁴⁶ *ibid*

difficulties in seeking justice due to the denial of their right to a fair trial, which includes being refused access to a suitable court or tribunal to present their complaints.⁴⁷

Under certain circumstances, their property may be seized, confiscated, or expropriated without any compensation. In some serious situations, they can also be subjected to torture and they may be killed without the complying with the laid down legal procedures. We make bold to state that discrimination is one of the major causes of the xenophobic attacks on Nigerians in South Africa, Togo, Ghana etc..⁴⁸

1.2.7 Lack of International Legal Personality for an Individual

While individuals hold a distinct role in the local legal system, international law has historically paid little attention to them. Its main concentration was predominantly on states. Therefore, international law first functioned as a framework of regulations that governed the interactions exclusively between independent nations. Individuals were not considered within the scope of international law. An individual lacked the status of a subject of international law, hence precluding them from initiating any international legal action or asserting a claim.⁴⁹ It is evident that individuals are not subjects of international law based on the 'restrictive definition' of international personality.

It is safe to opine that an individual does not possess international legal personality.⁵⁰ However, it is a reality that for an extended duration, human beings were subject to the exclusive authority of states. Consequently, persons were devoid of any position or entitlements within the framework of international law.⁵¹ Historically, traditional international law did not encompass universal regulations that granted specific entitlements to persons, irrespective of their citizenship. Consequently, an individual is not eligible to initiate legal action or be subject to legal action under international law. Occasionally, individuals gained significance in global matters, primarily as recipients of commerce and navigation treaties or conventions regarding the treatment of foreigners. However, they were not considered subjects of international law. Conversely, individuals served as a "benchmark" for governmental authorities.⁵²

As per Article 34(1) of the Statute of the ICJ, only sovereign nations have the right to participate as parties in actions before the Court. Furthermore, according to Article 35(1), the Court must

⁴⁷ (n 34)

⁴⁸ (n 34)

⁴⁹ (Emphasis added)

⁵⁰ (n 34)

⁵¹ *ibid*

⁵² (n 34)

be available to the States that are parties to the current Statute. As per Article 93 of the UN Charter, all members of the United Nations are inherently regarded as parties to the Statute of the International Court of Justice.”⁵³ In its advisory opinion in the *Dazing Railway Officials* case, the International Court of Justice (ICJ) offered a thorough description of how international law views individuals. Poland argued that the agreement between her and Dazing, which governed the employment conditions of Dazing officials who joined her railway service, constituted an international treaty that established rights and responsibilities exclusively between Poland and Dazing. Poland contended that as the agreement had not been integrated into Polish domestic legislation, it did not provide rights and obligations for individuals. Consequently, Poland was only responsible for fulfilling its responsibilities to Dazing. Consequently, the courts of Dazing lacked the power to render legal judgements.

It can be confidently asserted that diplomatic protection serves as a means for a country to safeguard its own rights in cases where one of its citizens has experienced harm in a foreign country, as well as to defend the rights of its citizens who lack international legal standing. After this brief and incomplete examination of the international status of individuals in terms of diplomatic protection, it is difficult to argue that individuals are fully recognised as subjects of international law. Indeed, although we have witnessed a significant transformation in the range of rights established by treaties (and other international regulations) that benefit individuals, very little, if anything, has changed in terms of the tools available to them for enforcing these rights at the international level. The fact that diplomatic protection is tasked with safeguarding an individual's human rights is evidence that there are no alternative independent judicial mechanisms available at the global level. Consequently, the individual have minimal or nonexistent standing in the aspect of International Law. The individual's status is ironically regulated by local legislation.⁵⁴

1.2.8 Challenges Associated with Witnesses

There are several challenges associated with assembling witnesses by the plaintiff to prove his case abroad. Some witnesses may be unwilling to cooperate particularly persons enjoying diplomatic immunities and privileges. A diplomatic envoy is not under any obligation to appear as a witness in court in respect of any civil, criminal or administrative matter.⁵⁵ National Courts

⁵³ See, Articles 34 & 35 Para. 1 of the Statute of the International Court of Justice, and Article 93 of the UN Charter

⁵⁴ (n 34)

⁵⁵ Article 31(2) of the Vienna Convention on Diplomatic Relations, 1961

and the International Court of Justice cannot easily determine matters in favour of plaintiffs who failed to assemble witnesses to prove their case. Furthermore, it may be difficult for a plaintiff in some circumstances to locate witnesses in another state. Even where witnesses have been located in another state, it may be too costly for the Plaintiffs to transport such witnesses to the state exercising jurisdiction over such matters and providing testimony through video-conferencing, or, through such facilities may appear very difficult.⁵⁶ There may be language barriers and where such is the case, it may be very difficult to locate experienced and qualified translators that may assist the court to take their evidence. Where the plaintiff is unable to assemble witnesses to prove his case, his case may be dismissed by either the Local Courts or ICJ as the case may be.⁵⁷

1.3 Recommendations

In view of the aforementioned challenges, the following recommendations have been proffered:

1.3.1 Duty to Protect

The researcher is of the opinion that where there is no duty imposed on State to grant diplomatic protection to its nationals who have sustained injury abroad, most States may be unwilling to exercise diplomatic protection in favour of its nationals abroad. Hence, a state should have a duty to protect its nationals abroad. It is the researcher's believe that where states have the duty to protect nationals abroad, this will strengthen the exercise of diplomatic protection as most states will domesticate diplomatic protection in their local laws thereby conferring jurisdiction on their local Courts to review any refusal to grant protection to a national who has been injured abroad. Absence of a duty to protect nationals by States had contributed immensely in weakening the invocation of diplomatic protection under international law. Since international law vested the right to exercise diplomatic protection on States, it is expected that states should be vested with a corresponding duty to protect nationals abroad.

1.3.2 Review of the prerequisite conditions for diplomatic protection

The preconditions for the exercise of diplomatic protection should be reassessed in order to enhance the effectiveness of diplomatic protection under international law. The requirement mandating an injured citizen to fully utilise all available legal options within their own country

⁵⁶ Christopher Keith Hall, Universal jurisdiction The challenges for police and prosecuting authorities (Amnesty International June 2007) <[Phd challenges universal jurisdiction.pdf](#)> accessed 20 November 2023

⁵⁷ (Emphasis added)

before their home nation can intervene diplomatically to safeguard them in a foreign land is superfluous and should not be obligatory according to international law. Consequently, a citizen who is hurt while abroad should be permitted to seek diplomatic protection from their own country without having to first exhaust local legal options. Similarly, the injured national's home country should have the right to claim diplomatic protection to safeguard its citizen without requiring the citizen to first exhaust local legal options. If this condition is eliminated, host states may cease mistreating, harassing, and causing harm to aliens due to their awareness that aliens can seek protection from their home countries without having to go through the arduous process of exhausting local remedies available in the host state.

It is important to note that the enforcement of human rights does not depend on meeting any specific requirement, as human rights are enforced solely by virtue of being a human being. Similarly, diplomatic protection should also be exerted. The concept of human rights is commonly seen as universal and serves to promote the principle of equality. This statement implies that human rights are universally applicable to all individuals, irrespective of their race, gender, religion, or nationality. Furthermore, it is necessary to reassess diplomatic protection in order to enhance and support human rights. The absence of significance assigned to any prerequisite under the human rights framework appears to enhance the appeal of human rights over seeking diplomatic protection. Therefore, it is necessary to eliminate the requirements for invoking diplomatic protection according to this line of thinking.

1.3.3 Judicial review of government's refusal or neglects to invoke diplomatic protection to protect its nationals abroad.

We urge that our courts should have the authority to hear and decide matters that include reviewing the government's failure or negligence in using diplomatic protection to safeguard its citizens overseas. Given that Nigerian Foreign Policy today focuses on 'citizens diplomacy', our courts have the authority to utilise the law of legitimate expectation to legally require the Nigerian government to take diplomatic action in order to safeguard its citizens residing overseas. In the *Abassi & Anor. v Secretary of State for Foreign and Commonwealth Affairs case (supra)*, the court established the grounds for judicial review of the government's decision to withhold diplomatic protection based on the notion of genuine expectation. The court ruled that a citizen of the United Kingdom has a valid anticipation that her appeal for aid will be "evaluated" and that during this evaluation, all pertinent considerations will be taken into account. The government's public statements regarding the provision of diplomatic and consular assistance to its citizens abroad created an expectation that if a British citizen's rights

were violated while overseas, the British Government would not neglect the matter and leave them to their own fate.⁵⁸

In our opinion, allowing judicial review of the government's decision to deny diplomatic cover to its citizens would restrict the discretionary power involved in granting diplomatic protection and serve as a safeguard against any misuse of the doctrine of legitimate expectation by the government. In the *Kaunda case*, the Constitutional Court of South Africa elaborated on the obligation of a State to intervene in order to safeguard one of its citizens from a severe violation of international human rights standards, as well as the legal examination of a denial of a plea for aid. The Court expressed that “the government may have a responsibility, in accordance with its obligations under international law, to intervene and safeguard one of its people from a severe violation of international human rights standards. Government help may be challenging to decline, and in certain instances, it could be virtually hard to refuse when the evidence is unequivocal. The probability of the government refusing such a request is low, nevertheless, if it were to happen, the decision would be subject to legal review and the court would mandate the government to undertake necessary measures.”⁵⁹

1.3.4 Amendment of Local Legislations to entrench diplomatic protection in Nigeria

In order for diplomatic protection to be successful in Nigeria, it is necessary to establish legislation that can impose a legal duty on the Nigerian Government to exercise diplomatic protection in order to safeguard its citizens overseas. The National Assembly should enact legislation to incorporate key provisions of the Draft Articles on Diplomatic Protection. This law should grant jurisdiction to the Federal High Court of Nigeria to handle applications for judicial review of the government's decision to withhold diplomatic protection for its citizens who have been harmed overseas. Alternatively, the National Assembly can amend the Constitution and the Fundamental Rights Enforcement Procedure to provide for diplomatic protection of Nigerians abroad.

1.4 Conclusion

From the above discussed, one can safely concludes that despite the challenges associated with diplomatic protection of Nigerians under international law, there is still room for improvement

58. Abassi & Anor. v Secretary of State for Foreign and Commonwealth Affairs (supra)

59. Kaunda v President of the Republic of South Africa (2005) (4) South African Law Reports 235 (CC), ILM, vol 44 (2005), 173

in the invocation of diplomatic protection by the Nigerian Government to safeguard its nationals abroad. It is hope that if the challenges are remedied by the Nigerian Government and the international community, diplomatic protection will be an effective and viable tool that will curb violations of human rights abroad. There should be speedy dispensation of justice, elimination of discrimination, eradication of Corruption, Proper Funding, adequate training of Personnel, Cooperation and recognition of individual under international law.