

The Protection of Ethiopian Nationals Abroad under International Law

A thesis submitted in partial fulfillment of the requirements for the Award of Master of Laws (LLM) in Public International Law at School of Law, College of Law and Governance Studies Addis Ababa University

By

Elsabet Getachew Mulugeta

Supervisor: Mesenbet Assefa (PhD)

June 2019

DECLARATION

I, **ELSABET GETACHEW MULUGETA**, hereby declare that the thesis entitled as '**The Protection of Ethiopian Nationals Abroad under International Law**' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

Elsabet Getachew Mulugeta

Signature 

Date 10 July 2019

Supervisor: **Mesenbet Assefa (PhD)**

Signature 

Date 12 July 2019

Approval Sheet by Board of Examiners

Elsabet Getachew Mulugeta's thesis which entitled as "The Protection of Ethiopian Nationals Abroad

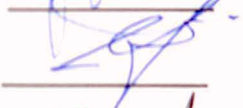
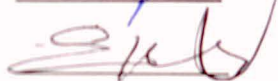
Board of Examiners

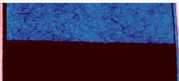
Mesenbet Assefa (PhD)

Yonas Birmeta (PhD)

Destaw Yigzaw (PhD)

Signature



Acknowledgements

Every idea needs a fertile ground and a hard work to be born into a reality, and conducting an LLM thesis is no different. I have seen how individuals and institutions could be helpful in a course of research by extending help and providing some sort of cooperation. My special gratitude goes to my Lord, Thank you God for this day. I would like to express my deepest appreciation to my advisor Dr. Mesenbet Assefa who has provided his unreserved idea and comment based on his expertise knowledge.

I also appreciate my husband, Amare Ashenafi, for his kindly support and advice. I would like to thank my family for their support and encouragement. I am also grateful to my friends for the friendship, kind help and encouragement.

I am indebted to the officials of the MFA, MOLSA and Ato Abebe Gebrehiwot who cooperated for an interview that served as a basis for this research.

Thank You All!!!

Acronyms

CC: Calvo Clause

CMW: Committee on Migrant Workers

DHRINNC: Declaration on the human rights of individuals who are not nationals of the country in which they live

EOE: Ethiopian Oversea Employment

FDRE: Federal Democratic Republic of Ethiopia

FS: Foreign Services

ICJ: International Court of Justice

ICCPR: International Covenant on Civil and Political Rights

ICRMW: International Convention on the protection of the Rights of All Migrant Workers And Members of Their Family

ILC: International Law Commission

ILO: International Labour Organization

IMTS: International Minimum Treatment Standard

IOM: International Organization for Migration

MFA: Ministry of Foreign Affairs

NTS: National Treatment Standard

PCJ: Permanent Court of International Justice

SALL: Saudi Arabia Labor Law

UDHR: Universal Declaration of Human Right

UN: United Nations

UNHCR: United Nations High Commissioner for Refugees

VCCR: Vienna Convention on Consular Relations

VCDR: Vienna Convention on Diplomatic Relations

Contents

Table of Contents	Page
Acknowledgements	i
Acronyms	ii
Abstract	v
INTRODUCTION	vi
CHAPTER ONE	1
1.1 Background	1
1.2 Statement of the Problem	2
1.3 Objective of the Study	3
1.4 Research Questions	4
1.5 Hypothesis of the Study	4
1.6 Significance of the Study	4
1.7 Research Methodology	5
1.8 Scope of the Research	5
1.9 Organization of the Thesis	5
CHAPTER TWO	6
2. Development of Protection of Nationals	6
2.1 Aliens under International Law	6
2.2 Protection of Nationals	9
2.2.1 Early Scholarship	9
2.2.2 Codification by the International Law Commission(ILC)	13
2.4 State Responsibility and Diplomatic Protection	17
CHAPTER THREE	19
3. Protection of Nationals Abroad	19
3.1 Migrant Workers	19
3.1.1 Responsibility of the Receiving State	21
3.1.2 Responsibility of the national state	25
3.2 Employment of Migrant Workers in the Gulf Cooperation Council	27
3.2.1 Migrant Workers in Saudi Arabia	30
3.3 International Human Rights and International Court of Justice	32

CHAPTER FOUR	36
4. PROTECTION OF ETHIOPIAN NATIONALS ABROAD	36
4.1.1. Legislations of Ethiopia on the Protection of Nationals	36
4.1.2. Institutional Framework	38
4.2. Ethiopian Migrant Workers	40
4.3. Protection of Ethiopian Nationals Abroad	46
CHAPTER FIVE	53
5. CONCLUSION AND RECOMMENDATIONS	53
5.1. Conclusion	53
5.2. Recommendations	54
Bibliography	55

Abstract

This study is about the human rights protection of nationals living abroad. Nationals of a state face human right violations in particular ill treatment, illegal detention, enslavement, incarceration to the extent they are being murdered in a foreign state. Their presence to that foreign country might be legal or illegal. But in whatever condition they are in and even States have internationally proven right to protect their boundaries they have the obligation to respect the Universal Declaration of Human rights. That is not to violate the fundamental human rights based on citizenship. Many legal and non-legal measures may be taken to protect a citizen from a violation of international law abroad yet this study focuses on diplomatic protection, Consular assistance and individual human right violation redress mechanisms. The purpose of the study is to better understand how international human rights law, international diplomatic protection law and domestic laws of Ethiopia implemented to protect Ethiopian nationals living abroad. Apart from the legal framework the research examines the practice by interviewing the stakeholders in relation with Ethiopian nationals living abroad especially migrant workers to the Gulf States. States takes the injuries of their nationals as their own and claim redress from the wrongful State in diplomatic protection. However Ethiopia never take a single national's case to International Court of Justice raising diplomatic protection. Overall, the conclusion of the study shows, that the Ethiopian government has some efforts in the regulation of labour migration to the Gulf States and establish legislative and institutional frameworks to that effect. It was, however, revealed that the legal and policy frame works were incomprehensive and insufficient. It was also found that the government preventive interventions were inadequate to avert practices and gaps that give rise to human rights violations and abuses of Ethiopian nationals living abroad.

INTRODUCTION

States are required to treat the national of another state in respect of the minimum human rights standard stated under international law.¹ Host states are responsible if they fail to observe their responsibility and a national state could claim for intentional wrong done on its national in addition to the human right redress mechanisms laid for the individual.² The law on diplomatic protection and its development also reflects the structural change of international law itself and how it has moved from a legal order strictly based on state to state relation towards a legal order that lay more emphasis on the protection of the individual.³ The protection of nationals abroad, or 'protection' in this thesis, refers to a range of legal and non-legal actions by State on behalf of a national abroad in anticipation of or in response to a breach of international laws. The practice of diplomatic protection is a request of State responsibility, and therefore remedial in character. It is rare, except in legal cases, for a State to declare that it is adopting its national's injury as its own.

The thesis, examine the protection of nationals abroad by the national state and the international and domestic legal basis to claim protection and compensation to the wrongful act done to the aliens by the host state. It also engages on analyzing what international law put forward to legally justify that protection of nationals by the national state are possible and the host states are under obligation to be held responsible for the wrongful act they have done to the aliens. In addition how the national state could claim for reparation from the host state for the vulnerable national. The examination basis on international law and domestic laws related to protection of nationals abroad and international human right laws. The focus of the thesis is the protection of nationals living abroad in particular the thesis examines Articles on Diplomatic protection, State responsibility, The Vienna conventions on Consular assistance and diplomatic protection, Migrant workers convention and other international human right laws internationally and domestically the Constitution of the Federal Democratic Republic of

¹ Borchard, Edward M. *The Diplomatic Protection of Citizens Abroad, or, the Law of International Claims*. New York: Banks Law, 1915.

² Draft article on Diplomatic protection 2006, Art 2

³ Vermeert-Kunzli, Annemarijke. *The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument*. (PhD diss, Leiden University, 2007)

Ethiopia, Foreign service proclamation, Oversea employment proclamation and the institutional framework in the protection of Ethiopian nationals living abroad. The research also discusses on how claims for reparation are requested to the international court of justice and the efforts made by Ethiopia for such a claim if any.

This research aims at examining international and domestic laws of protection of nationals abroad and how it is practiced. The research is classified into five chapters. Chapter one is introduction and background. The second chapter deals with the basic concepts of protection of nationals in general and who are protected in particular. The chapter also shows the rationale for exercising diplomatic and peaceful methods of protection of nationals' abroad and its relevance as a tool for protection of human rights. The international human right laws and who is responsible for the protection of nationals with focus on the migrant workers and the abuses they face in particular in the Gulf States are dealt in the third chapter of the research.

Chapter four is about protection of Ethiopian nationals abroad. As such it first deals with the legal and institutional framework that governs protection of Ethiopian nationals residing abroad. This chapter also lays out the challenges of the practical aspect in terms of involvement of Ethiopian government and the respective responsible organ of the government in the commencement, during the protection process and at recognition and enforcement of laws of protection of nationals. The last chapter, chapter five closes the thesis with conclusion and recommendations.

CHAPTER ONE

1.1 Background

Among the mechanism for the protection of one's nationals abroad, using international human right laws, consular protection and diplomatic protection will be discussed in this thesis. International human right laws are recent development in protection of nationals abroad. In general international human right law is founded on the premise that all persons by virtue of their essential humanity, should enjoy all human rights without discrimination whether they are citizen of one's state or not.⁴ Therefore, international human rights law requires the equal treatment of all human beings. All states that ratify the human rights conventions should respect the international human right standards and treat all human beings equally without any discrimination on the basis of their nationality. However, if states act against international human rights norm the aliens have the right to use the international human rights protection regime to get redress under international law.

The other mechanism for protection of nationals abroad is consular protection. States send their missions to other states for diplomatic relation and consular protection. The missions or diplomats provide help to the citizens of the sending states who are living in the host state or traveling across and are in need of assistance such as in case of arbitrary detention, or any human right abuses. These missions provide assistance in accordance with the legal system of the host state. They act in the name or on behalf of the individual or the citizen.

Diplomatic protection is the procedure by which a state acts extra territorially in order to assert its legal interest.⁵ As a substantive right it allows states to demand that international law be observed in the person of its national as a procedural right.⁶ It authorizes the state to act in order to enforce that substantive right. The home state intervenes on behalf of its nationals who suffer a violation of international law by the host state. In this case, the home state acts on its own account as it is considered to be the injured party. The foundations of diplomatic protection were explained in 1924 by the Permanent Court of International Justice in the

⁴ Universal Declaration of Human Rights 1948, Art 2(1)

⁵ David Leys, 'Diplomatic Protection and Individual Rights: A Complementary Approach', (2016) Vol 57

⁶ *Ibid*

Mavrommatis case⁷. Three criteria must be in place for a state to extend its diplomatic protection that is the proper nationality of the injured party, a breach of international law by the host state and exhaustion of local remedies.

Diplomatic protection plays a key role in protecting the right of nationals abroad particularly in view of the lack of universally applicable compliant mechanisms for human right violations.⁸The issue of diplomatic protection was among the first topics under consideration for codification by the International Law Commission (ILC), albeit under the extended heading of state responsibility focusing on injuries suffered by aliens.⁹The diplomatic protection may be a useful and effective tool for ensuring the protection of human rights was already taken up by International Court of Justice (ICJ) and the draft article on diplomatic protection by the ILC.¹⁰

1.2 Statement of the Problem

The constitution of the Federal Democratic Republic of Ethiopia (FDRE) provides for freedom of movement as one of the basic human rights protected (Article 32). Many Ethiopians continue to travel for work or other social and economic reasons to other countries exercising their right. Nevertheless, many Ethiopians living abroad encounter serious problems and violation of their human rights. This is particularly severe for those who live in the Gulf States. Often they are physically abused; inappropriately detained and even enslaved to the extent they are being murdered.

If the right to travel from place to place is a right guaranteed under the constitution it should also has to have a protection method whenever a national is in a human right distress abroad. The state should have the responsibility to safeguard the enjoyment of the right already altered to its citizen's by the constitution weather the national is in the state territory or abroad. The issue is whenever an Ethiopian national encounter problem abroad how is Ethiopia protecting its national? The international law provides a means to protect the national through individual or state compliant mechanisms. The individual can use

⁷ Greece V Britain, The Mavromattis Palestine Concessions,(30 Aug 1924) File E c Docket VI Judgment No2

⁸ Annemarieke (n3)

⁹ John Dugard , 'Articles on Diplomatic protection', (2013) United Nations Audio Visual Library of International Law/< www.un.org/law/avl/> Accessed October 05,2018

¹⁰ Leyx (n5)

international human right compliant mechanisms such as the optional protocol to the international covenant on civil and political rights as well as diplomatic protection. Does Ethiopia exercise diplomatic protection at all and claim another state because it's national has been treated in violation of international law? Is it because of the litigation cost?

This research identifies the duty of states to protect their nationals abroad under international law and it also examines the domestic laws and practice of Ethiopia in protecting its nationals abroad? To what extent is Ethiopia protecting its nationals implementing what is guaranteed under the F.D.R.E. constitution? There are different government institutions that have a role in dealing with the foreign affairs of Ethiopia. One of these institutions is the Ministry of Foreign Affairs of Ethiopia (MFAE). MFAE has the overall responsibility, in cooperation with the appropriate organs, to safeguard the interests of the country, and ensure that they are respected by foreign states and that the interest and right of Ethiopian nationals abroad are protected. Moreover it has the mandate to coordinate other governmental or non-governmental bodies for the same purpose. What did this institution do in protecting the Ethiopian nationals abroad will be examined.

The problem which this research intends to address relates to the existing rules for claim of intentional wrong done to a national of a state by another state and protection of the human rights of Ethiopian nationals living abroad. The detailed legal issues of the diplomatic protection of nationals abroad will be discussed.

1.3 Objective of the Study

The objective of the thesis is to examine the international and domestic laws for the protection of nationals abroad and analyze the challenges and prospect of the practice. To this end, the research:

- A) Examines the responsibility of the host states to protect aliens in line with the right given to states to protect their nationals under the draft article of ILC on diplomatic protection.
- B) Study the viability of the emerging idea that the draft article of ILC on diplomatic protection stipulates in relation to that states can request protection of their nationals (non-diplomats) through diplomatic action or peaceful settlement from the responsible state for an injury caused by an internationally wrongful act.

- C) Identify the existence of domestic law of Ethiopia that deals with the protection of Ethiopian nationals abroad and if there is any legislation what are the limitations and challenges of the law in the protection of Ethiopian nationals abroad.
- D) Explore whether the already existing laws and policies fulfills the standards of international and regional legal instruments.
- E) Identify and examine the institutional frame work of Ethiopia for the protection of Ethiopian nationals abroad.
- F) Identify and analyze solutions to solve legal issues related to the protection of nationals abroad and to recommend methods for protection of nationals abroad.

1.4. Research Questions

The research tries to respond to the following questions:

- 1. What are the legal bases to protect nationals abroad under international law?
- 2. What are the response mechanisms in protecting nationals abroad?
- 3. Does Ethiopia have any domestic law or ratified convention for the protection of nationals abroad and if there is an already established law is it adequate?
- 4. How does Ethiopia protect its nationals abroad?

1.5. Hypothesis of the Study

The hypothesis of this research paper is that, States use different kind of methods to protect their nationals living abroad if they face difficulties in exercising their human rights then protection of aliens is a right or a duty given to states by international laws. Therefore as one of the internationally recognized states of the world Ethiopian nationals living in the Gulf States are suffering from different kind of human right distress because the host state is not providing the minimum standard of human rights treatment stated under international law. The reason behind is that Ethiopia is not requesting the states being responsible for its citizens to be treated with the minimum standard stated under international law.

1.6. Significance of the Study

One can hardly find a thorough analysis of the legal framework as well as the institutional arrangement of protection of Ethiopian national's abroad. Therefore the thesis may serve as academic reference.

By investigating the legal, institutional as well as practical aspects of protection of nationals abroad and systematically outlaying its challenge and prospect, this research contributes in filling the research gap in this area. In addition this thesis may serve as a finding for potential solutions for the protection of Ethiopian nationals as well as to serve as an input for policy makers.

1.7. Research Methodology

The research design for this study is non-doctrinal qualitative method. Primary and secondary sources of international laws and domestic laws are also explored.

1.8. Scope of the Research

The thesis examines the protection of nationals abroad by the national state and the international and domestic legal basis to claim protection and compensation to the wrongful act done to the national by the host state. It also engages on analyzing what international law has as an offer to put or legally justify that protection of nationals by the national state are possible and the host states are under obligation to be held responsible for the wrongful act they have done to the aliens.

The focus of the thesis is the human rights protection of aliens especially to Ethiopian nationals abroad. Domestic legislation of states will be discussed in order to examine how Ethiopian domestic laws to protect nationals abroad should be framed or improved.

1.9. Organization of the Thesis

The thesis is organized in five chapters. Chapter one discusses introductory and background information; chapter two is devoted for discussing what protection of national's abroad means and how protection can be done. Chapter three deals with the international human rights legal framework for the protection of nationals abroad and chapter four discusses about what the Ethiopian legal system provides for the protection of Ethiopian nationals abroad including practical aspects. Chapter five deals with conclusion and recommendations.

CHAPTER TWO

2. Development of Protection of Nationals

2.1. Aliens under International Law

An Alien is an individual who, according to the laws of a given state, is not considered its national.¹¹ This means that the definition of alien is a definition by exclusion. Any person who is not a national of a certain country is considered and treated as an alien by that country. A stateless person is then, an alien everywhere. Two assumptions can be drawn from this: first the importance of the question of nationality regarding the definition of aliens and secondly, the obvious but often over looked fact that anyone is an alien outside the country of one's nationality.

Rejections imposed upon aliens extend far back in history and have their roots deep in primitive suspicions and fears of the outsider.¹² Certain traditional perspectives, since ancient times foreigners have been regarded with suspicion, if not fear, either due to their non-conforming religious and social customs, their assumed inferiority, or because they were considered potential spies and agents of other nations.¹³ Even in the contemporary world, with its ever increasing personal mobility and transnational interactions, the alien is still often assimilated with difficulty in the particulars of the social processes of certain communities.¹⁴ Aliens are commonly subjected to difficult registration requirements and harsh restrictions with regard to their freedom of movement.¹⁵ They may also experience arbitrary arrest, denial of access to appropriate tribunals, and oppressed to arbitrary decisions.¹⁶

With the coming of the modern nation-state, a more humanitarian attitude toward aliens began to develop. Aliens have an inherent right to life, protected by law, and may not be

¹¹ Carmen Tiburcio, *The human right of aliens under international and comparative law* (Kluwer Law International press 2001)1.

¹² Mc Dougal, H.D. Lass Well and Lung-Chu Chen, 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States conjoined with Human Rights', (1976) 70 AJIL 432

¹³ *Ibid*

¹⁴ *Ibid*

¹⁵ *Ibid*

¹⁶ Borcherd, (n1)

arbitrarily deprived.¹⁷ They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude.¹⁸ Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person.¹⁹ They have the right to liberty of movement and free choice of residence; they shall be free to leave the country and shall be equal before the courts and tribunals, also shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law.²⁰

Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law as well as may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.²¹ Therefore aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights.

An alien is subject to two jurisdictions: that of the national State and the host State, thereby raising a number of specific questions. Possible conflicts between the laws of the nation State and those of the State of residence are resolved by domestic law; however, the decision is influenced by international law. Furthermore, the application of administrative, penal, and other laws is decided by the respective domestic law of the State in question. The status of aliens is mainly regulated by treaties, supplemented by customary international law and to some extent by general principles of law.

In general, aliens are subject to the jurisdiction of the receiving State as long as they do not merit special treatment as diplomats. However, international law requires a minimum standard of rights for aliens. Therefore a standard is required that consists of certain fundamental rights, which may be extended by domestic or international law. Rights, which

¹⁷ UN A/RES/40/144, Declaration on the human rights of individuals who are not nationals of the country in which they live, 13 Dec. 1985

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ *Ibid*

are generally accepted, are the recognition of juridical personality and legal capacity, standards of humane treatment, upright due process in cases of detention, the right of unobstructed access to courts, the protection of life and liberty against criminal actions, and the prohibition of confiscation. Human right treaties, which grant certain rights to individuals regardless of nationality, also have to be taken into account, thus enlarging the minimum standard in many important aspects. The situation of aliens and, most notably, individuals in general is more and more regulated and influenced by international human rights law. However, even though, more previously exclusive matters of domestic law have been internationalized at the international stage, the State's national sovereignty still sets limits to a comprehensive protection of the individual. Thereafter, the rules relating to aliens are, in significant terms, still part of the domestic realm, and therefore vary extensively according to State practice. Describing the situation in a nutshell, domestic law is, at present, more and more restricted by public international law and, to some extent, certain legal matters, such as human rights, are more and more regulated by public international law. However, international rules still lack sufficient legal enforcement mechanisms for individuals.

Adopted by the UN General Assembly in 1985, the Declaration on the Human Rights of Individuals who are not Nationals of the country in which they live (DHRINNC) defines an alien as any individual who is not a national of the state in which he or she is present.²² It determines that aliens shall enjoy a broad range of civil, economic, social, and cultural rights; provides that no alien shall be subjected to arbitrary arrest or detention; and provides that no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.²³ Additionally, the declaration provides that all aliens shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national.²⁴

Universal and regional human rights conventions do extend protection to all individuals: national and alien alike within the territory of states parties.²⁵ But there is no multilateral convention that seeks to provide the alien with remedies for the protection of his or her rights. The 1985, DHRINNC which seeks to extend the rights contained in the UDHR to aliens

²² UN A/RES/40/144, DHRINNC, 13 Dec 1995, Art 1

²³ UN A/RES/40/144, DHRINNC, 13 Dec 1995, Art 1(5)(a)

²⁴ UN A/RES/40/144, DHRINNC, 13 Dec 1995, Art 10

²⁵ Universal Declaration of Human Rights, December 10 1948

provides no machinery for its enforcement, but it does reiterate the right of the alien to contact his consulate or diplomatic mission for the purpose of protection²⁶. This starkly illustrates the current position that aliens may have rights under international law as human beings, but they have no remedies under international law in the absence of a human rights treaty except through the intervention of their national state.²⁷

2.2. Protection of Nationals

2.2.1. Early Scholarship

An injury to a national constituted an indirect injury to the national state and that state would have the right to protect it's national against the wrong doing state.²⁸ The origins of protection of nationals can be found earlier²⁹ but even if these systems of protection applied to individuals with obligation to another sovereign, they were different from what is now called diplomatic protection and this only acquired its exact features in the 18th century.³⁰

In the 19th and early 20th century, an outbreak of activity occurred in the field of protection of nationals abroad. The early scholars like Borchard, Freeman and Dunn, which appeared early in the 20th century included various indication to state practice. However, the picture they described is primarily that of the protection of nationals of strong states against weak states. The typical example would be protection exercised by France, the United Kingdom or the United States on behalf of one of their nationals against a Latin American state such as Venezuela for alleged denial of justice or expropriation of property. The means by which states exercised this protection was not yet limited by the prohibition on the use of force or the obligation to settle disputes peacefully and, to put it gently there were numerous cases of abuse of power.³¹ In the mid-19th century, many Latin American countries were wary of these interventions, which resulted in the emergence of the Calvo doctrine and following Calvo

²⁶ U.N. A/RES/40/144, DHRINNC, 13, Dec 1995.

²⁷ U.N. A/RES/40/144, DHRINNC, 13, Dec 1995.

²⁸ Emer De Vattel, *The Law of Nations* (Joseph Chitty Esq, 6 edn, West Brookfield Mass Merriam & Cooke Philadelphia 1844) 298

²⁹ Carmen (n11) 35

³⁰ Borchard (n1) 3-6

³¹ R.B. Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens', Journal article, Vol 73, (1979) 244-249

clause (CC).³²The CC entails that when there is a dispute between an alien and the host state the alien has to resort to local remedies waiving protection from the national state.³³The application of the CC has mostly affected foreign investment and not foreign individuals who suffered violations of their international personal human rights, which puts it largely beyond the scope of the present study. Yet, it has influenced legal thinking about protection of nationals abroad therefore it will be discussed briefly.

The Argentine jurist Carlos Calvo developed a doctrine that soon gained much recognition throughout Latin America and became to be known as the Calvo doctrine and resulted to the emergence of the CC. Under the CC, aliens may only seek redress for any alleged wrong within the local judicial system and may not request diplomatic protection.³⁴Such a clause would be included in any contract between the host state and alien. Some states inserted such clauses in their constitution, thereby applying it generally to all aliens doing business within their borders.³⁵ It was argued that aliens travelling abroad necessarily assume a certain risk and undertake such travelling at their own choosing. The same would apply to investment; individuals investing in another state do so because of the profitable circumstances. In doing so, they willingly subject themselves to the laws and regulations of the host state, and forfeit the right of their state of nationality to demand the application of laws other than the host state's domestic laws. This would generally justify the doctrine and the insertion of the clause in particular. The clause suggests the principle that no nation ought to intervene, diplomatically or otherwise, against another, to enforce its citizen's private claims.³⁶

The CC is related to the principle of national treatment.³⁷This principle dictates that aliens and nationals be treated equally and it advocates against two possible advantages in relation to nationals. First, aliens, by means of diplomatic protection, would have a mechanism to resort to that is unavailable to nationals. Secondly, and more controversially, the international

³²Shen R. Donald, *The Calvo Clause: a Problem of Inter American and International Law & Diplomacy*, Minneapolis (1955), 9-32

³³Ismael R. García- Mora, *The Calvo clause in Latin American Constitution and International Law*, Marquette Law Review, Vol.33, 1950, no 4

³⁴Donald (n32) 16-20

³⁵Donald (n32) 24-27

³⁶Borchard (n1)792

³⁷D.E. Graham, *'The Calvo Clause: It's Current Status as a Contractual Renunciation of Diplomatic Protection'*, (1971), 290

minimum standard may be more advanced than the national standard of human rights, thereby giving aliens a better treatment than nationals enjoy. At first sight, this may indeed seem unfair and it may seem to privilege aliens, which would be particularly unfair if an alien with the nationality of a powerful developed state does business in a developing state. Yet, there is one basic defect in this line of reasoning; aliens hardly ever receive the equal treatment as nationals. Citing a lot of inconvenience aliens encounter in the host state, may perhaps be overstating, but the fact remains that aliens usually do not enjoy the same rights as nationals.³⁸ National treatment will thus not amount to equal treatment, but implies that aliens cannot have more rights and protection than nationals can, even if they usually have less. The application of the IMS and the rejection of the national treatment doctrine were most famously proclaimed in the *Neer* and *Roberts* claims.³⁹

In the latter, the Claims Commission stated that facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.⁴⁰ Without discussing in detail the content and scope of the 'international standard of treatment, which is generally considered not to be clearly defined, the existence of such a standard and its application in the context of diplomatic protection has been generally accepted.⁴¹ Although international human rights law has not replaced the international minimum standard in its entirety, it has certainly influenced the acceptance of the standard and the improvement of the national situation.⁴² Despite some popularity in Latin American states, the CC and the national treatment doctrine have failed to attract universal support.⁴³ While states had political motives to reject such doctrines, they are primarily inconsistent with international law. The rights protected in the

³⁸ Mc Dougal(n17) 432

³⁹ A V Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law', (1946) 40 AJIL 121

⁴⁰ *Harry Roberts Claim, United States Vs Mexico*, (1926) 4 R.I.A.A. 77

⁴¹ Roth Hans Andreas, *The Minimum Standard of International Law Applied to Aliens*, (Leiden 1949).

⁴² R.B. Lillich, 'Editorial Comment: The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who are not Citizens of the Country in Which They Live' (1976) 70 AJIL 507

⁴³ D E Graham(n37) 249

exercise of diplomatic protection may belong to the individual national, but the right to exercise diplomatic protection belongs to the state of nationality.⁴⁴ Any argument that individuals can willingly and bona fide contract out of resort to diplomatic protection can thus not be upheld. It is incompatible with the principle of delegation of powers, the individual does not hold the right to exercise diplomatic protection and since he or she is not the holder of this right, he or she cannot denounce it. It will not be the individual who resorts to diplomatic protection, but his or her state of nationality.

Some have argued that the individual has fully fledged international legal personality and that therefore the individual can renounce an international right.⁴⁵ This line of reasoning is however weak. Even if the individual has international legal personality, he or she still does not have the rights that are specifically assigned to states. The rights and duties that would be the individual's rights and duties do not include the right to exercise diplomatic protection. It is thus irrelevant whether the individual has international legal personality for the purpose of the validity of the CC. Secondly, the underlying principle of national treatment, which would justify the CC, also encounters critical objections. As has been argued above something can be said for restricting preferential treatment of aliens, but since no real equal treatment between aliens and nationals exists, this is not an argument against diplomatic protection. It will be further demonstrated below that the existing conditions for the exercise of diplomatic protection (the existence of an internationally wrongful act, exhaustion of local remedies and nationality of claims) give sufficient guarantees against abuse of diplomatic protection. Only one aspect of the CC is reconcilable with international law. Since it demands resort to national remedies, as opposed to international proceedings, the clause bears some similarity with the local remedies rule. It is this aspect of the clause that has been accepted only and the reasonability of offering the host state the possibility of redressing the wrong through its domestic judicial system has been acknowledged.⁴⁶

⁴⁴ Borchard Edwin, *Diplomatic Protection of Citizens Abroad*, New York 1919, 805-806

⁴⁵ D.E. Graham, 'The Calvo Clause: It's Current Status as a Contractual Renunciation of Diplomatic Protection', 6 Tex. Int'l L.F. 289-308 (1971), 292

⁴⁶ A.V. Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law', (1946) 40AJIL

2.2.2. Codification by the International Law Commission(ILC)

When John Dugard was appointed Special Rapporteur in 2004, the ILC adopted a set of draft articles on first reading, submitted these to the United Nation (UN) member states, and allowed them to comment on the draft. This process resulted in 2006 in the adoption of the draft articles on second reading, a set of 19 articles laying down the secondary rules on diplomatic protection on behalf of natural and legal persons. While the draft articles largely codify customary international law, they also contain some progressive development. Without listing all new elements, some innovations should be mentioned. The definition in Article 1 is a departure from the traditional definition as given *Mavrommatis*, the requirement of continuous nationality was added. Article 8 provides for the protection of refugees and stateless persons. And Article 19 contains a recommendation that invites states to consider the relevance of diplomatic protection in case of significant injury, to consider the views of the individual and to transfer any compensation obtained to the individual.

Individuals whose international human rights are violated outside their state of nationality often have very limited means to address such violations. Their state of nationality however can protect them through the exercise of diplomatic protection, thereby invoking the international responsibility of the host state for a violation of international law. This mechanism has been subject to debate and criticism in recent years because of its (alleged) state-centered and its discretionary nature.⁴⁷ Through an analysis of the nature of diplomatic protection, in particular the legal fiction, the modalities of its exercise and its relation to the general law of state responsibility, and its application in international and national practice the position of diplomatic protection in current international law is defined and the question of whether it is an appropriate mechanism for the protection of individual (human) rights is answered positively. Resort to this mechanism by states should be encouraged in order to increase protection against violations of individual human rights.

Diplomatic protection falls directly within the range of measures available for the enforcement of individual rights. Enforcement of individual rights through the vehicle of the state, while not addressing the general situation, may still improve the life of one individual. This in itself is a respected goal. It has also been claimed that human rights apply to all

⁴⁷Sixth Committee of the GA, UN Doc. A/C.6/61/SR.9 (Italy, Austria), A/C.6/61/SR.10 (Germany, United States, United Kingdom, Romania, France), A/C.6/61/SR.12 (Morocco, Switzerland, Nigeria), A/C.6/61/SR.19 (Algeria, Sierra Leone)

individuals regardless of their nationality and that therefore states have no interest, or at least no special interest, in protecting their nationals abroad. Such individuals would fall under the general human rights protection system.⁴⁸ Gaja is perhaps one of the strongest proponents of this view. He stated that

“It would certainly be clearer if one...refrained from using the term diplomatic Protection when a State makes a claim for the protection of human rights.”⁴⁹

This implies that diplomatic protection is a mechanism not suitable for the protection of human rights, which is difficult to reconcile with recent international practice. On the other hand practice demonstrated by claims based on diplomatic protection such as *La Grand*, *Avena* and *Diallo* before the ICJ and other claims before national courts are a clear indication of the role of diplomatic protection for the protection of individual or human rights. Contrary to the opinion of some authors,⁵⁰ it clearly shows that states can use diplomatic protection as alternative where their nationals have been unable to secure redress for internationally wrongful acts. In this respect, it is a powerful tool, where other mechanisms fail.⁵¹

While the European convention on Human Rights may offer real remedies to millions of Europeans,⁵² it is difficult to argue that the American Convention on Human Rights,⁵³ or the African Charter on Human and Peoples' Rights,⁵⁴ have achieved the same degree of success. Moreover, the majority of the world's population, situated in Asia, is not covered by a regional human rights convention. To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights (ICCPR),⁵⁵ provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of states that accept the right of individual

⁴⁸ G. Gaja, 'Is a State Specially Affected when its Nationals' Human Rights are Infringed?' in L. Chand Fobrua (ed.), *Man's Inhumanity to Man* (The Hague 2003), 373-382, 382

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ H Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens', (1946) 9 Cambridge Law Journal 330

⁵² European Convention for the Protection of Human Rights and Fundamental Freedoms November 4 1950

⁵³ OAS, Treaty Series No 36(1969)

⁵⁴ African Charter on Human and Peoples' Rights, reprinted in 1982

⁵⁵ International Covenant on Civil and Political Rights, 23 March 1976

petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions.

In fact, what came to mind about international protection was the range of pressures applied by international bodies or by States against delinquent States critical diplomatic notes, investigative reports, and recommendatory resolutions; judgments by courts or other dispute resolution bodies; threats to withhold trade or aid; boycotts and embargoes; military interventions in the effort to arrest violations and increase the likelihood of compliance.⁵⁶

2.3. Diplomatic Protection of Nationals Abroad

Traditionally, diplomatic protection was linked to the treatment of aliens abroad. The sort of treatment that forms an internationally wrongful act has been a source of argument between the developing and the developed world.⁵⁷ On the one hand, developing countries adhered to the national treatment standard (NTS), which demands that a State treat aliens not inferior to its nationals.⁵⁸ This custom, however, did not place any substantive limit for the lawfulness of an act and therefore, made aliens exposed to the similar mistreatments that the State effects against its own citizens.⁵⁹ Therefore, developed States put forward the international minimum treatment standard (IMTS) which is violated when the treatment of aliens disobey the human rights principles that States are obliged to extend to their own nationals under conventional or customary human rights law.⁶⁰

The bond of nationality implies that the state must watch over its citizens abroad. Too severe argument of territorial control over them by the state of residence will be met by the emergence of the protective right of the national state and the potential force of this occurrence has largely designed the rights expected by states over resident aliens.⁶¹ The principles of territorial jurisdiction and personal sovereignty are mutually corrective forces to

⁵⁶ H. J. Steiner, 'International Protection of Human Rights', in M. D. Evans (ed.), *International Law*, (Oxford 2006), 754

⁵⁷ Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, (Manchester 1984), 51-61

⁵⁸ Garcia Amador, *First Report on State Responsibility UN Doc. A/CN.4/96* (1956), reproduced in the ILC Yearbook, Vol. II, 1956, 173-231, 201

⁵⁹ Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, (Manchester 1984), 51-61

⁶⁰ Edwin M. Borchard, *Minimum Standard of the Treatment of Aliens* (Minimum Standard of the Treatment of Aliens, Faculty Scholarship Series January 1 1914) 3469 <<http://digitalcommons.law.yale.edu>> accessed March 23 2018

⁶¹ Edwin M. Borchard, 'Basic elements of Diplomatic Protection of citizens Abroad', (1913) 7, AJIL, 497

secure compliance with the rules. An excessive application of the territorial principle is limited by the custom which grants foreign states certain rights over their citizens abroad, sometimes merely the application of foreign law by the local courts, sometimes, in acknowledgment of the principle of protection, a certain amount of jurisdiction.⁶² In the Orient and in semi-civilized states this often involves a complete surrender of local jurisdiction in favor of the foreign state, and in states conforming more closely to the highest type of civilized government, it consists in partial derogations from territorial jurisdiction in special classes of cases.⁶³ These concessions are made to assure individuals the most appropriate regulative agency for their legal relations. It is the obligation of every state to regard the citizens of other states as the subjects of legal rights.⁶⁴ Whether such recognition is compelled by international law or by municipal law in fulfillment of obligations imposed by international law is of some theoretical interest. When the citizen leaves the national territory he or she enters the domain of international law. By residence abroad he or she not merely carries with him or her certain rights and duties imposed by the municipal law of his own state, but he or she enters into a new range of mutual rights and obligations between himself as a resident alien and the state of his residence. A failure on his part to comply with these newly created obligations is met by repression and punishment in the local courts. A failure of the state to fulfill its obligations toward the alien is met by repression on the part of his home state. The extent of this obligation toward the resident alien has been measured by international law and practice, though the very nature of repressive action has permitted the element of physical power and political expediency at times to obscure and even obliterate purely legal rights.⁶⁵

The question of the limits of diplomatic protection is rather complicated. There is a strong tendency to broaden the scope of diplomatic protection by incorporating to the institution also means of consular assistance and informal diplomatic representations. According to a broad definition, diplomatic protection has also a preventive nature, meaning that it encompasses all diplomatic steps taken in order to prevent an imminent injury to the individual abroad.⁶⁶ This view tends to equate diplomatic protection with diplomatic representations, the latter

⁶² *Ibid*

⁶³ *Ibid*

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ Borchard (n61)

covering a wide range of communications from one government to another, in which one expresses its disapproval about some action or inaction of the other.⁶⁷ Apparently, this form of action, which does not necessarily impute unlawful conduct to another State, is closely related to some aspects of consular assistance as envisaged in the Vienna convention on consular relation (VCCR).⁶⁸ Nevertheless, the question is raised whether we should consider some forms of diplomatic assistance included in the VCCR such as the communication of consular authorities with the arrested or prosecuted national and the arrangement of his legal representation as constituting part and parcel of diplomatic protection. Diplomatic protection in broader sense should be distinguished from diplomatic protection in strict sense mainly because the conditions for the exercise of the former are much more flexible.⁶⁹

Diplomatic protection widely represents an expression of efficiency in the use of diplomatic protection in modern international law, in the sense that it can be civilized and recover its acceptance through an excessive and naive expansion.⁷⁰ Considering the effectiveness of diplomatic protection, while assessing a method is a rightful task. It should be, however, in conformity with the realities of international law; and the reality is that in early stage the ILC has shown that it considers the close link between state responsibility and diplomatic protection as one of the most important guidelines in its effort to codify the latter.⁷¹ Because of the relationship between state responsibility and diplomatic protection a state acting on behalf of one of its nationals is invoking state responsibility. Consequently, diplomatic protection is limited to the measures which follow the commission of an internationally wrongful act and the taking place of the injury.

2.4. State Responsibility and Diplomatic Protection

State responsibility is one of the fundamental principles of international law.⁷² It arises out of the international legal system and the principles of State sovereignty and equality of States.⁷³

⁶⁷ Colin W Brick, *Diplomatic Representations and Diplomatic Protection*, (2008) 726-727

⁶⁸ *Vienna Convention on Diplomatic Relations*, 1961(VCDR 1961)art 3

⁶⁹ Paul Weiss, *Diplomatic Protection of Nationals and International Protection of Human Rights*, *Human Rights Journal* (1971), 643-678, 645

⁷⁰ *International Law Commission, Preliminary Report on Diplomatic Protection* (Int Law Com No 484 1998)

⁷¹ *International Law Commission, Diplomatic protection* (Int Law Com No.1, 2000), Paras 29-9

⁷² Malcolm N. Shaw, *International Law*, (8thed.Cambridge, 2008) 778

⁷³ *ibid*

It implies that if a State commits an internationally wrongful or unlawful act against another State, it will be internationally responsible for reparation.⁷⁴

State responsibility is founded on three basic elements.⁷⁵ The first element is the existence of an international legal obligation in force between the concerned States; the second is the occurrence of a wrongful act or the omission of an act in violation of such an obligation, which is attributable to the state.⁷⁶ And the third is that loss or damage has resulted from such wrongful act or omission.⁷⁷ These three elements are the requirements of establishing the responsibility of the State, which have been made in a number of leading international legal cases⁷⁸ and restated by the ILC articles. The articles provide that every internationally wrongful act a state entails responsibility.⁷⁹ It defines internationally wrongful act as a conduct consisting of an action or omission attributable to the state under international law and constitutes a breach of an international obligation of the state.⁸⁰ A breach of an international obligation is defined as an act which is not in conformity with what is required of the state by that obligation, regardless of its origin or character.⁸¹

The conduct of any state organ including any person or entity having that status under the internal law of that state, whether that organ belongs to the constituent, legislative, executive, judicial or other authority, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the state, shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.⁸²

⁷⁴ J. Crawford, *The International Law Commission's Articles on State Responsibility*, (Cambridge 2002)

⁷⁵ Shaw (n72)781

⁷⁶ Shaw(n72)781

⁷⁷ H. Mosler, *The International Society as a Legal Community*, (Dordrecht 1980) 157

⁷⁸ *Spanish Zone of Morocco Claims*, 2 RIAA, 1923,615

⁷⁹ International Law Commission, *Articles on state responsibility*, (Int Law Com No 56/83 2001) Art 1

⁸⁰ *State Responsibility*, Art 2

⁸¹ *State Responsibility*, Art 12

⁸² *State responsibility*, Art 4

CHAPTER THREE

3. Protection of Nationals Abroad

In this chapter the legal basis that governs protection of nationals in particular, migrant workers will be discussed. The responsibility of the national states in the protection of its national abroad and the responsibility of the receiving states respecting the human right of non - citizens will be examined. What is expected of the national state and the host state in protecting human rights conventions especially in the Gulf States will be dealt. The individual in the international arena and the issues related with ICJ in entertaining cases like diplomatic protection as protection of the individual human rights will also be discussed.

3.1. Migrant Workers

Migrant worker refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.⁸³ Migrant workers are people who leave home to find work outside of their hometown or home country. Persons who move for work in their own country are "internal" migrant workers. Persons who move for work to another country are commonly called "foreign" or "international" migrant workers. Labour migration is considered as "regular" and migrant workers are considered as being "in a regular situation" if they are authorized to enter, stay and work pursuant to the law of the destination country and international agreements to which it is a party. When they do not comply with those conditions, they are considered as "undocumented" or "in an irregular situation". Migrant workers in irregular situations are very likely to find themselves vulnerable to abuse and exploitation of all types. Migrant workers in irregular status are entitled to their human rights, including labour rights. From its very inception, the ILO resolved to protect "the interests of workers employed in countries other than their own" regardless of their immigration status.⁸⁴ In principle, unless otherwise stated, all international labour standards cover all workers irrespective of their nationality or immigration status.

⁸³ International Convention on the protection of the Rights of All Migrant Workers And Members of Their Family (ICRMW), New York 18, Decembere 1990, Art 2

⁸⁴ ILO Constitution, 1919, Preamble

The international legal framework for the protection of human rights of migrants is very broad. A number of international treaties contain provisions that protect the human rights of all human beings, irrespective of their citizenship. These include the six main human rights treaties adopted by the UN from 1965 to 1989, as well as the founding document which served as a matrix for those: the UDHR, adopted in 1948. All of them contain a number of rights that are applicable to non-citizens, as clearly spelled out in their consistent and respective non-discrimination clauses, notwithstanding duly specified restrictive clauses. Migrant workers in a regular situation as it is clearly stated in the International Convention on the protection of the Rights of All Migrant Workers And Members of Their Family (ICRMW) have access to specific rights such as the right to be fully informed by their states of origin and employment about conditions applicable to their admission and concerning their stay and the remunerated activities in which they may engage;⁸⁵ they can form trade unions;⁸⁶ they can participate in public affairs of their state of origin and vote or be elected at elections of that state;⁸⁷ and – to some extent – may enjoy political rights in the state of employment.⁸⁸ They enjoy the same opportunities and treatment as nationals in relation to various economic and social services.⁸⁹ Documented migrants can choose their remunerated activity⁹⁰ and must enjoy the same protection as nationals against dismissals, and are entitled to similar unemployment benefits.⁹¹ Finally, they enjoy guarantees against expulsion.⁹²

Migrant women are protected from discrimination in the application of the Convention, which uses inclusive language. Article 1 states that “the present Convention is applicable, except otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind. The Convention is not only a catalogue of rights but also an instrument migrants can use to exercise those rights. Moreover, Article 83 affords them an effective remedy when the rights recognized in the Convention are violated.

⁸⁵ ICRMW Art 37

⁸⁶ ICRMW Art 40

⁸⁷ ICRMW Art 41

⁸⁸ ICRMW Art 42

⁸⁹ ICRMW Art 43

⁹⁰ ICRMW Art 49

⁹¹ ICRMW Art 54

⁹² ICRMW Art 56

The Convention establishes a treaty monitoring body, made up of 10 independent experts “of high moral standing, impartiality and recognized competence in the field covered by the Convention”.⁹³ This Committee on Migrant Workers (CMW) will examine the initial and periodic reports submitted by each State Party. The Convention explicitly refers to the possibility for the Committee to “invite the specialized agencies and organs of the UN, as well as intergovernmental organizations and other concerned bodies to submit written information”.⁹⁴ In its deliberations, it can thus consider comments and materials provided by the International Labour Organization.⁹⁵

3.1.1. Responsibility of the Receiving State

Once a state acquires statehood in international law, it incurs obligations associated with its international status since responsibility is a necessary effect of a right.⁹⁶ All rights of an international character involve international responsibility when the state breaches these rights and obligations; it commits an internationally wrongful act.⁹⁷ Nationals of one State who have lived, traveled, or worked in another State have endured abuse and discrimination throughout history.⁹⁸ Even though a State is under an international obligation not to ill-treat an alien present in its territory and any violation of this obligation will incur international responsibility.⁹⁹ The State is required to make reparations for its international wrongdoing.¹⁰⁰

The entire law of state responsibility for injury to migrants is a matter of existence of correlative rights and duties. The state has a right to expect that the migrant worker will follow its local laws and the state has an obligation to protect their life and property under bilateral or multilateral treaties and conventions of international law. Failure to observe any of these rights and duties entails and gives rise to international responsibility where both the

⁹³ ICRMW Art 72

⁹⁴ ICRMW Art 74

⁹⁵ International Labour Organization Art 74

⁹⁶ Rapporteur Huber in the Spanish Zone of Morocco Claims Case, Great Britain V Spain (1924) *European Journal of International Law*, Vol. 18 no1(2007)

⁹⁷ State responsibility, Art 1

⁹⁸ M.S. McDougal (n12)

⁹⁹ *ibid*

¹⁰⁰ State responsibility, Art 31

parties are entitled to remedies which may be utilized through the various channels available in international law beginning with exhaustion of local remedies.¹⁰¹ Whether or not a State is internationally responsible for the way it treats migrant workers depends on the standard of treatment which international law obliges that State to adopt. It is only when the State falls below this standard that it becomes internationally responsible.

As means of redress in the international sphere, a foreigner who has been injured by any act of a State has to first seek redress from the local judicial authorities.¹⁰² This means that before any claim can be raised internationally, the individual has to exhaust all local remedial channels for want of justice. This rule of exhaustion of local remedies is also a customary practice which is widely accepted. Also, the standard of the judicial remedies and other nuances of the local remedial process do not fetter the chances of the individual under international law.

It should be emphasized that the ICRMW obliges State parties to provide comprehensive information to migrants about their rights and the prerequisites for their admission into and residence in the host states. The migrants' corresponding rights to information acknowledge the special situation of migrants, many of whom live in countries whose culture, language and legislation is foreign to them.¹⁰³ By establishing the duty to inform, the convention acknowledges the experiences of older human rights conventions. These agreements tacitly assumed that their content would be publicized by the States parties, and therefore did not include the duty to inform.¹⁰⁴ However, the monitoring committees have repeatedly noted that migrants are insufficiently aware of their rights as enshrined in these conventions.¹⁰⁵

Although States have legitimate interests in securing their borders and exercising immigration controls, such concerns do not trump the obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfill the rights necessary for them to enjoy a life of dignity and security.¹⁰⁶ In recent decades

¹⁰¹ Articles on State Responsibility, Articles on Diplomatic protection, Art 14

¹⁰² Diplomatic protection, Art 14

¹⁰³ Navi Pillay, United Nations high commissioner for human rights, address at the Fourth Global Forum on Migration and Development, Puerto Vallarta, Mexico, November 10, 2010

¹⁰⁴ *ibid*

¹⁰⁵ *ibid*

¹⁰⁶ Navi Pillay(n103)

the right to liberty and security of person has become particularly pertinent for non-citizens, not least migrant workers and members of their families.¹⁰⁷ This is because the prevalence of laws authorizing and regulating immigration-related detention has increased dramatically in many countries. Somewhat ironically, this has taken place since the adoption of the ICRMW in 1990, which directly addresses concerns about the treatment of non-citizens, including the prohibition on arbitrary detention.

Article 9 of the UDHR establishes that “no one shall be subjected to arbitrary arrest or detention”. This universally recognized principle is also enshrined in article 9 of the International Covenant on Civil and Political Rights (ICCPR), which also sets that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”. In its General Comment No. 8, the Human Rights Committee states that these provisions are applicable to all deprivations of liberty by arrest or detention, including in cases of immigration control. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment reiterates that any form of detention or imprisonment shall be ordered by, or be subject to the effective control of a judicial or other authority.¹⁰⁸ In addition, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority and a detained person shall be entitled at any time to take proceedings before a judicial or other authority to challenge the lawfulness of his/her detention.¹⁰⁹

Article 16 paragraph 4 of ICRMW, states “Migrant Workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law”. Paragraphs 8 and 9 of the same article state respectively “Migrant workers and members of their families who are deprived of their

¹⁰⁷ M Grange & I Majcher ‘Immigration detention under international human rights law: The legal framework and the litmus test of human rights treaty bodies monitoring’ in MJ Flynn & MB Flynn (eds) *Challenging immigration detention: Academics, activists and policy-makers* (2017) 269-71

¹⁰⁸ General Assembly 43/173 of 9 December 1988

¹⁰⁹ ICCPR, A/51/40 vol. I (1996) 17 at para. 96 and *Torres v. Finland* (291/1988), ICCPR, A/45/40 vol. II (2 April 1990) 96 (CCPR/C/38/D/291/1988) at para. 7.2 and *C. v. Australia* (900/1999), ICCPR/C/76/D/900/1999 (28 October 2002) at para 3.3 and 8.3

liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used"; and "Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation".

Governments must do more to ensure that national laws and enforcement complies with their international human rights obligations to protect migrants' rights, and should take greater steps to forge cohesion between immigration and labor laws that are too often discordant, imperiling the protections to which migrants workers are entitled, and even endangering their lives.¹¹⁰ Migrants frequently face barriers to health care and detention can be particularly vulnerable, as they are entirely reliant on the government to provide or facilitate their access to services.¹¹¹ Under international law, states are obligated to ensure medical care for all prisoners at least equivalent to that available to the general population; human rights law also requires that a core minimum of health care services be provided without discrimination on the basis of citizenship or social origin.¹¹² Yet despite these protections, prisoners in various countries, are often held in life-threatening conditions. Migrant detainees held in prisons sometimes inappropriately or unnecessarily also experience discrimination, such as inferior conditions of health care to that provided to non-migrant prison populations.¹¹³

Migration, whether to seek employment in low-wage sectors or to flee instability in home countries, remains a risky enterprise often undertaken with few protections and at great personal and financial cost. Men, women, and children may risk their lives to cross borders and face danger while in grey areas, such as between border checkpoints, on the high seas, or in the international zones of airports.¹¹⁴

¹¹⁰ <http://www.hrw.org> accessed on May 24 2019

¹¹¹ *ibid*

¹¹² *ibid*

¹¹³ *ibid*

¹¹⁴ <http://www.hrw.org>

National human rights institutions (NIs) are entities legally enabled to promote and protect human rights. NIs can play a crucial role in the protection of human rights of migrants as they are the independent human rights antennas in a country and can act as early warning mechanisms to prevent human rights violations. NIs can analyze the legislation, monitor its implementation and its impact on the rights of migrants, and formulate concrete recommendations. This has proven to prevent abuses, arbitrary treatment and discrimination of migrants in the name of either the legislation or valid regulations. Ignorance is also frequently responsible for the application of the legislation by authorities who lack awareness of international obligations in relation to human rights, and the way these are to be applied to migrants. Some NIs can provide migrants with legal and psychological assistance. NIs can prevent the administrative detention of migrants by raising awareness of their rights and by sensitizing, through their promotional and/or training mandates, government officials, civil society and even the private sector. With respect to protection, NIs can undertake a "watchdog" role to ensure that arbitrary detention of migrants does not occur, that conditions under administrative or other custodial detention meet with international standards, that victims of trafficking are not subject to detention, and pay attention to other vulnerable groups such as children in relation to detention. In particular, the mandate of many NIs to access detention centers and their possibility to liaise with consulates of the detainee's country to ensure consular protection offers NIs a crucial role to play. NIs should be an integral part of the actors defending and promoting the existing legal framework to promote and protect the rights of migrants and in particular with respect to the administrative or arbitrary detention of migrants.

3.1.2. Responsibility of the national state

Consular support, in accordance with the international conventions that govern the functions of the missions, have a vital role in protecting the rights of migrant workers. The consular assistance is fundamentally grounded on two UN conventions: the VCDR of 1961: establishes that one of the functions of diplomatic missions is to protect the interests of the sending State and its nationals in the receiving State and the VCCR of 1963: indicates that it is the responsibility of consular staff to protect the interests of the nationals of the State they

represent in the receiving State, to help and assist them and represent them before courts and other authorities.¹¹³

Seeking better job opportunities is the primary reason for global migration, for which the role of consular staff in defending and protecting the rights of workers is of essential importance. Many migrant workers may be in vulnerable situations because of various reasons, including not knowing the local language or customs of the country, among others.¹¹⁶

Inform nationals in receiving countries on: the existing migratory, labor, and social security agreements between countries; their labor rights and the mechanisms to request inspections or report labor rights violations the policies, programs, and mechanisms available for migrant workers to access labor justice; the available sources of aid; the non-governmental organizations which provide support, advice, and potential access to education, social security, and other services to migrants.¹¹⁷

Promote fair and ethical labor recruitment based on the General Principles and Operational Guidelines of the International Labor Organization for Fair Recruitment by: Promoting the signing of bilateral labor agreements that include worker and employers' organizations consultations for their development; registering and monitoring private employment agencies and the contracts of migrant workers; creating networks among consulates in the same area or region.¹¹⁸

Safeguard the rights and working conditions of migrant workers, which involves: verifying working conditions when labor agreements with the receiving country exist; protocols and checklists can be developed for this purpose; visiting workplaces with high concentrations of migrant workers, such as farms, in coordination with the national labor inspection authorities.¹¹⁹ These visits can be used to provide migrants advice and information about their rights; giving legal assistance and representing migrants in judicial processes; coordinating with labor authorities to resolve issues.

¹¹³ Vienna Convention on Consular Relations, 1963

¹¹⁶ VCCR, 1963

¹¹⁷ VCCR, 1963

¹¹⁸ VCCR, 1963

¹¹⁹ VCCR, 1963

The 1963 Vienna Convention on Consular Relations provides that, if so requested, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State that its national has been deprived of his/her liberty.¹²⁰ Any communication to the consular post by the person detained shall be forwarded by the competent authorities without delay. Article 16 paragraph 7 of the ICRMW provides that "When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner: (a) the consular or diplomatic authorities of his or her State of origin or of a State representing the interest of that State shall, if he or she so request, be informed without delay of his or her detention and of the reasons therefore; (b) the person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay; (c) the person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation".

Consular posts are not always informed in a timely manner of detentions, often because detainees are not aware of their right to communicate with consular representatives.¹²¹ Consulates may be informed only when migrants are taken to prison after several days of detention in police posts. In some facilities, the absence of public telephones and the fact that the migrants have to pay for calls discourage or prevent contacts with consular representatives.

3.2. Employment of Migrant Workers in the Gulf Cooperation Council

The majority of migrant workers who face violation of human rights i.e. inhuman and degrading treatment, illegal detention, lack of legal representation, ill treatment and torture in the Gulf States are women domestic workers. Despite some recent reforms, an estimated 2.1 million migrant domestic workers continue to risk severe labor exploitation in Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE) – the members of

¹²⁰ VCCR, Art 36

¹²¹ E/CN.4/2005/15/Add. 4, Report of the Special Rapporteur, on the human rights of migrants

the Gulf Cooperation Council (GCC)¹²². However this estimated number is most probably far higher. Mostly women from Asia and Africa, migrant domestic workers face harsh conditions while employed in the Gulf being confined to the home, they are isolated and at risk of exploitation.¹²³ Commonly, they are not paid, not paid in full or not on time.¹²⁴ The hours of work are often extreme, and some GCC countries do not set maximum hours of work in law.¹²⁵ In those countries that regulate daily rest, workers can still be required to work up to 16 hours a day legally¹²⁶. Some workers are exposed to physical abuse such as beatings and sexual violence, including rape.¹²⁷ The vast majority of migrant domestic workers are obliged to live in their employer's home, which makes them extremely vulnerable. As a result, some African countries temporarily refused to allow their citizens to work in the GCC countries.¹²⁸

Migrant domestic workers who attempt to flee abuse by their employers very often face further victimization since some employers submit false claims of theft or other crimes.¹²⁹ As a result, workers can face administrative and criminal fines, imprisonment, deportation and bans on re-entering the country. Workers also have limited access to justice mechanisms due to language barriers, lack of material resources, lack of legal assistance and the prospect of very lengthy court proceedings.¹³⁰

This exploitation is facilitated by the legal frameworks in most GCC countries which: 1) exclude migrant domestic workers from the scope of the general labor law; and, 2) use a sponsorship system (*kafala*) which grants employers and the government extraordinary control over migrant workers.¹³¹ Despite recent reforms, these laws continue to violate international law and most governments tout standard employment contracts as a solution to

¹²² Professor Philip Alston, Mission report to Saudi Arabia for the 35th session of the Human Rights Council, June 2017 <https://documents-ddp-ny.un.org/doc/UNDOC/ accessed on May19, 2019>

¹²³ *Ibid*

¹²⁴ *Ibid*

¹²⁵ *Ibid*

¹²⁶ *Ibid*

¹²⁷ *Ibid*

¹²⁸ <http://www.hiiraan.com/news4/2016/Jan>

¹²⁹ *Ibid*

¹³⁰ *Ibid*

¹³¹ <https://www.hrw.org>

overcome weak legislation.¹³² While these contracts do contain some beneficial provisions, their use pushes regulation from the public to the private sphere and is difficult to enforce in court.

In order to manage this large influx of migrant workers, countries in the region rely on the “kafala” (sponsorship) system, which is based on historical principles of hospitality governing the treatment and protection of foreign guests.¹³³ Over time this has become formalized in the various national legal frameworks that determine the terms of residence and employment for migrant workers, and today the “kafala” system governs the lives of most migrant workers in the GCC countries. Under the “kafala” system employers are “kafeels” (sponsors), who determine their demand for labour and meet it either by direct recruitment or through intermediaries, such as private employment agencies (PEAs). A migrant worker’s immigration status (their entry, residence, and exit) is tied to an individual sponsor for their contract period. Such workers are thereby rendered vulnerable to abuse and exploitation by the high degree of control their employers have over their legal status in the country.¹³⁴

The national legal systems of the GCC Countries have a number of common features with respect to the rights of migrant domestic workers. For example, all GCC countries exclude, in whole or in part, migrant domestic workers from the scope of their labour laws and use, to varying degrees, a restrictive “kafala” sponsorship system.¹³⁵ The “kafala” sponsorship system fuels the exploitation and abuse of migrant domestic workers and many such workers are unable to exercise any rights which they may have at law or in contract. Under the “kafala” system, a worker’s visa and legal status is tied to the employer and the employer is responsible for the worker’s recruitment fees, completion of medical exams and possession of an identity card and the worker must obtain permission from the employer or sponsor to transfer employment or leave the country.¹³⁶ This creates a profound power imbalance and gives the employer an inordinate amount of power over the worker’s ability to change jobs or

¹³² Ibid.

¹³³ Ibid.

¹³⁴ <http://www.ilo.org>

¹³⁵ Ibid.

¹³⁶ <https://www.bhw.org>

return to country of origin.¹³⁷ The kafala system must be abolished from the GCC Countries. All GCC Countries have weak inspection and dispute resolution mechanisms which, in reality, render the basic entitlements of migrant domestic workers illusory.¹³⁸ In some countries, additional inspectors have been hired, and new complaints systems have been put in place, but the impact of such improvements remains limited. Existing and newer laws criminalizing trafficking for forced labour are also rarely enforced, with only a handful of cases prosecuted each year. Those in government likely to have colluded with traffickers are never investigated, let alone punished.

3.2.1. Migrant Workers in Saudi Arabia

It is estimated that there are 828,425 (2012) domestic workers in Saudi Arabia and that 99.6% of them are migrants.¹³⁹ Trade unions, migrant rights groups and the media have frequently reported horrific situations of exploitation, abuse, torture and murder of migrant domestic workers.¹⁴⁰ Many are victims of forced labour, with wages unpaid, passports withheld, long hours of work without rest and near total confinement to the workplace and some even face deprivation of food and water, verbal threats and physical and sexual abuse.¹⁴¹ Domestic workers in Saudi Arabia work an average of 63.7 hours per week, the second highest estimate worldwide.¹⁴² Embassies of the countries of origin indicate that non-payment of wages is the most widespread complaint from migrant workers in Saudi Arabia.¹⁴³

Unfortunately, the Saudi Arabian legal system does not provide domestic workers with the protections afforded to other workers and as a result, they are vulnerable to abuse with limited or no prospects for seeking redress.¹⁴⁴ The Saudi Arabian Labour Law is the central

¹³⁷ *Ibid*.

¹³⁸ *Ibid*.

¹³⁹ <http://europa.newsworld.com>

¹⁴⁰ United Nations University, Maastricht Graduate School of Governance, 2014 report of Economic and Social Research Institute on Innovation and Technology (MGSOG/UNU-MERIT)

¹⁴¹ *Ibid*.

¹⁴² UN University(n140)

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid*.

law governing labour relations, regulating among other things, wages, working time, occupational health and safety, social security and dispute resolution mechanisms through the labour courts but domestic helpers are excluded from its provisions.¹⁴⁵ Migrant domestic workers are at risk not only due to their exclusion from labour laws but also as a result of the highly restrictive immigration policies that rely on sponsor-based visas.¹⁴⁶ Under the kafala system, a worker's visa and legal status is tied to the employer and the employer is responsible for the worker's recruitment fees, completion of medical exams and possession of an identity card and the worker must obtain permission from the employer or sponsor to transfer employment or leave the country.¹⁴⁷ This creates a profound power imbalance and gives the employer an inordinate amount of power over the worker's ability to change jobs or return to her country of origin.¹⁴⁸

Saudi Arabia has obligations under several important international instruments to which it has acceded, including the Convention on the Elimination of All Forms of Discrimination Against Women and its Protocols (CEDAW), the International Convention of the Elimination of All Forms of Racial Discrimination ("ICERD"), ILO Convention No. 100 on Equal Remuneration; ILO Convention 105 on the Abolition of Forced Labour; ILO Convention No. 29 Concerning Forced or Compulsory Labour; and ILO Convention No. 111 on Non-Discrimination in Employment and Occupation. However, Saudi Arabia has tended to enter broad reservations upon accession to international treaties.¹⁴⁹ With respect to the CEDAW, it stated that in the case of contradiction between any term of the Convention and the forms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.¹⁵⁰ It should be emphasized that reservations which are incompatible with the

¹⁴⁵ *Ibid.*

¹⁴⁶ Rosa Fernandez, Marina de Regi, *Migrant Domestic Workers in the Middle East* lecturer in Development Studies at the University of Melbourne, and University of Amsterdam 2014

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ 1969 Vienna Convention on the Law of Treaties, Art 19, Committee on the Elimination of Discrimination against Women 14th session, 2008, Concluding comments of the Committee on Saudi Arabia, in which the Committee states: The Committee is concerned about the general reservation made upon ratification of the Convention by the State party, which is drawn so widely that it is contrary to the object and purpose of the Convention.

¹⁵⁰ *Ibid.*

object and purpose of a treaty are impermissible because they would render a basic international obligation meaningless.

Saudi Arabian law fails to respect, promote and realize the fundamental principles and rights at work for migrant domestic workers, as set out in Art 3 of the Convention.¹⁵¹ No measures have been taken under Saudi Arabian law to respect, promote and realize the rights of migrant domestic workers to freedom of association and collective bargaining pursuant to Art 1(2)(a) of the Convention. Similarly, measures have not been taken to promote and realize the elimination of compulsory or forced labour for migrant domestic workers pursuant to Art 1(2)(b). Though Saudi Arabia abolished slavery by Royal Decree in 1962, domestic workers remain highly vulnerable to forced labour. Multiple abuses domestic workers experience in Saudi Arabia can intersect to create conditions of forced labour and slavery-like conditions. Saudi Arabia has also not taken sufficient measures to ensure that all domestic workers have effective access to courts, tribunals or other forms of dispute resolution or effective access to complaint mechanisms.

Working and living conditions for migrant domestic workers in the Saudi Arabia, more or less similar to the other Gulf States to, is in extreme violation of international obligation for protection of human rights. Therefore those countries sending their nationals to the Gulf States should redress their national's human rights through consular or diplomatic protection even calling them to the ICJ taking the national's mistreatment as its own. They should assist their national's by consular representation. The international community has to demand international conventions signed by the Gulf States to be respected. Even to the extent, banning the nationals from going to the Gulf States until bilateral or multilateral conventions are signed for the protection of human rights of the migrant workers and respected accordingly.

3.3. International Human Rights and International Court of Justice

Since 1946, the ICJ's contribution to human rights promotion and protection was barely noticeable, but this changed dramatically over the last decade or so with a series of rulings

¹⁵¹ C189 - Domestic Workers Convention, 2011

where the Court emphasized international human rights law and principles.¹⁵² The only contentious cases the ICJ can hear are cases between States. Individuals have no right of direct access.¹⁵³ This is an important difference between the ICJ and other human rights institutions that allow some type of direct access. There are no limits on the sorts of inter-State legal disputes the Court can hear. However, a few types of cases have provided much of its work. There have been a few ICJ (and PCIJ) decisions significantly contributing to human rights law, but historically they have been a small part.¹⁵⁴ The court has jurisdiction to establish the nature and extent of the reparations to be made for breach of international obligations.¹⁵⁵ The right to reparation is firmly embedded under international human rights although its enforcement remains difficult.¹⁵⁶ The most important international documents dealing with reparations are the ILC's Articles on State Responsibility (ILC Articles), which focus on state-to-state responsibility.

The reason behind that the ICJ picked up the human right law and its principle recently is that the ICJ was never intended to function as a human rights court nor was it ever structured could be as one reason.¹⁵⁷ The second reason could be the Court's slow recognition of human rights in the 1950s and 1960s is that international human rights law itself did not exist prior to 1945, except for international labour law.¹⁵⁸ The other reason could be that the ICJ's weak recognition of human rights issues, even after international human rights law had become much more established in content and legal status, could be explained by the Court's own reserve to adopt a more activist position.¹⁵⁹ This silence might have arisen from a concern to reassure States, few of whom had brought any disputes at all to the Court during this period,

¹⁵² *Lafont Case* (Germany v. United States of America) (Judgment) [2001] ICJ Rep 9; *Avena and Other Mexican Nationals* (Mexico v. United States of America) (Judgment) [2004] ICJ Rep 12; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Judgment) [2010] ICJ Rep 639.

¹⁵³ *Statute of the International Court of Justice*, art. 34(1).

¹⁵⁴ M. Schwebel, *The Seminal Contributions of the World Court to the Law of Human Rights*, Address to the International Boethius Committee of UNESCO, Fifth Sess., Proceedings (Dec. 1998).

¹⁵⁵ ICJ Statute, Art. 36(2)(d).

¹⁵⁶ ICJ Statute art. 34(1).

¹⁵⁷ ICJ Statute art. 34(1).

¹⁵⁸ UDHR, Dec. 10, 1948.

¹⁵⁹ E. Milano, *'Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition'* (2004) 35 *Journal: Netherlands Yearbook of International Law* 85.

of the Court's reliability to clearly established legal norms, and a healthy skepticism to apply norms of what the law should be too readily.¹⁶⁰

Since 2004 however, ICJ rulings seem to signal greater willingness on the part of the Court to apply established norms of international human rights law in disputes brought before it.¹⁶¹ In recent, older cases of the ICJ, the cases thus turned on the issue of admissibility and 'the substantive relation between diplomatic protection and human rights had never been at the core of the dispute considered by the Court.'¹⁶² In recent years, this has changed. States not only focus on their own injuries but include human rights. ICJ case law is also moving towards a transformed definition of diplomatic protection that recognizes the interdependence of individual and state rights.¹⁶³ Specifically, some of the cases like *Diallo*, shift the discussion towards an understanding of diplomatic protection that would also apply universally when an individual has suffered harm abroad.¹⁶⁴

The Court hypothesized a two divided understanding of consular assistance; the right of a state to attend to its nationals when they are arrested or detained and the right of the individual to request assistance of his or her state of nationality.¹⁶⁵ The Court noted that measures protecting the individual's right are compulsory. Nonetheless, it can be presumed from this jurisprudence that the ICJ indirectly recognized the function of protecting human rights as a component of diplomatic protection. Importantly, the ICJ did not question the discretionary nature of the state's procedural right to act in diplomatic protection.¹⁶⁶ The state is the "only master to decide" if it will act in diplomatic protection to guarantee the individual rights of its nationals.¹⁶⁷

If that is the case Ethiopia has ratified most of the core UN international human rights treaties. Human right laws by their nature are not boarder limited. Moreover article 9 of the

¹⁶⁰ *Ibid*

¹⁶¹ *La Grand Case* (n152)639.

¹⁶² *T. Milanec*, (n139).

¹⁶³ *Ibid*

¹⁶⁴ *Abmadou Sadio Diallo* (n152) 639

¹⁶⁵ *LaGrand Case* (n152)

¹⁶⁶ *LaGrand Case*(n152)

¹⁶⁷ *LaGrand Case*(n152)

FDRE constitution states that all international instruments ratified by Ethiopia are an integral part of the law of the land. Therefore as the core objective of the thesis is to examine the legal protection of aliens under international law in general and the protection of Ethiopian nationals in particular in the next chapter the thesis will explore if Ethiopia is implementing what has been signed to be practiced. That is to protect the human rights of its nationals living abroad taking it as one of the implementation method of human right treaties signed by the State

CHAPTER FOUR

4. PROTECTION OF ETHIOPIAN NATIONALS ABROAD

4.1.1. Legislations of Ethiopia on the Protection of Nationals

Ethiopia's legal framework encompasses ratified international instruments. According to Article 9 of the FDRE constitution all international instruments ratified by Ethiopia are an integral part of the law of the land.¹⁶⁸ Moreover, article 13 further stipulates that the fundamental rights enshrined in the Constitution shall be interpreted in a manner conforming to the principles of the UDHR, international covenants on human rights and international instruments adopted by Ethiopia respectively.¹⁶⁹ Ethiopia has ratified most of the core UN international human rights treaties.¹⁷⁰ Moreover, it has also ratified the VCDR, which governs the conduct of its consulates in destination countries, with respect to protection of Ethiopian nationals.¹⁷¹ UDHR and Human right conventions are universal that they can apply everywhere without border restriction. Therefore Ethiopia is bound to respect the treaties adopted to protect its nationals beyond borders.

Over all supervision of the foreign Affairs of Ethiopia (FAE) is exercised by the Prime Minister of Ethiopia (PME).¹⁷² As per the constitution Article 55(1) the powers and duties of the executive organs of the FDRE is proclaimed since 1995 in different proclamations. The power and responsibilities of the foreign affairs proclaimed under the different proclamations related with nationals living abroad is more or less similar.¹⁷³ Under the proclamation the FAE is responsible in ensuring the interest and right of Ethiopian nationals residing

¹⁶⁸ FDRE Constitution of 1995, Art.9 (4) and Art.13. Articles 9(4) reads as all international agreements ratified by Ethiopia are an integral part of the law of the land. Art. 13(2) further stipulate that the fundamental rights enshrined in the Constitution shall be interpreted in a manner conforming to the principles of the UDHR, international covenants on human rights and international instruments adopted by Ethiopia.

¹⁶⁹ FDRE Constitution, Art 13(2)

¹⁷⁰ ICCPR, ICESCR, CEDAW, ICERD, CAT and ICRMW

¹⁷¹ <<http://treaties.un.org>> accessed on July 3, 2019

¹⁷² FDRE constitution, Art 74(5)

¹⁷³ Definition of Powers and duties of the Executive organs of the Federal Democratic Republic of Ethiopia,

Proclamation No. 546/2006, 803/2013, 916/2015, 1097/2019

abroad.¹⁷⁴ In cooperation with the appropriate organs, the Minister safeguards the interests and rights of the country, and ensures that they are respected by foreign States.¹⁷⁵

The other domestic law that can be mentioned in relation with the issue at hand is that the Foreign Service proclamation.¹⁷⁶ This law is legislated in order to put in place a legal framework that would enable to administer the Foreign Service (FS) in a consistent and coordinated institutional mechanism to realize the objectives provided by the FAE.¹⁷⁷ It is believed to be important to introduce a system that would allow to carry out the FS related activities of different government offices in a coordinated manner.¹⁷⁸ It has also become necessary to put in place an efficient and effective organizational, administrative and procedural system that would enable the creation of an accomplished and strong human resource capable of fulfilling its national mission with devotion and dedication, and motivation and realize a transparent and accountable career FS.¹⁷⁹ FS means the service provided by the MFA and the missions abroad.¹⁸⁰ Even though this proclamation discusses more about the missions and consular services of Ethiopia, there is an article under the section powers and duties of the FS.¹⁸¹ That is one of the responsibilities of the FS is protecting the rights and interests of Ethiopian nationals abroad (ENA).¹⁸²

The FS provide consular services using the missions that are situated in the fifty nine embassies of Ethiopia in a foreign state. The mission is practiced according to the articles of the Vienna convention of consular relation of 1963, when addressing the requests of ENA¹⁸³.

¹⁷⁴ Procl. No. 1097/2019, Art 15(12)

¹⁷⁵ Procl. No. 1097/2019, Art 15(13)

¹⁷⁶ Foreign Service of Ethiopia, Proclamation No. 790/2013

¹⁷⁷ Procl. No. 790/2013, Article 3(4)

¹⁷⁸ Procl. No. 790/2013

¹⁷⁹ Procl. No. 790/2013

¹⁸⁰ Procl. No. 790/2013

¹⁸¹ Procl. No. 790/2013

¹⁸² Procl. No. 790/2013

¹⁸³ Interview with, Lemlem Fiseha Minale, Acting Director General of International Legal Affairs of Ethiopia, Ministry of Foreign Affairs, Addis Ababa (03 December 2018)

4.1.2. Institutional Framework

As per the previous section discussion the PME exercises the overall supervision of the FAE.¹⁸⁴ Therefore the highest body in dealing with protection of nationals abroad is the Prime Minister office. The MFAE has also the overall responsibility to, in cooperation with the appropriate organs, safeguards the interests and rights of the country, and ensures that they are respected by foreign States and that the interests and rights of Ethiopian nationals abroad are protected.¹⁸⁵ Also it has the mandate to coordinate other governmental and non-governmental bodies for the same purpose. MFAE work through missions of Ethiopia that means Ethiopia's diplomatic mission, permanent mission, consular office or trade office abroad.¹⁸⁶ If there is Ethiopian embassy in the foreign state that is the diplomatic mission and if there is no embassy, the permanent mission representing the FDRE in an inter-governmental organization abroad will take the task.¹⁸⁷ Consular office means a consular office of the FDRE abroad; trade office means a trade office of the FDRE abroad; honorary consul means a consul appointed in a country where there is no mission or in city where there is no mission despite the presence of mission in that country.¹⁸⁸ There are more than one hundred fourteen foreign embassies in Ethiopia. Through these embassies and the Ethiopian embassies abroad and missions and consular offices the work of protection of nationals are supposed to be performed.¹⁸⁹ But the practice is far from what is stated in the laws.

In the absence of effective local redressing mechanisms in the host states for victims of abuse, the foreign mission of the national state play critical role in advocating for their nationals' rights and providing services such as shelters, legal aids and assistance in claiming their rights in the host states. Accordingly, Director of the consular office of Ethiopia is responsible to protect Ethiopian citizens' rights, safety and dignity once they are abroad both

¹⁸⁴ FDRE Constitution Art 74(5)

¹⁸⁵ Procl No 1085/2013, Art 5(13)

¹⁸⁶ Procl No 790/2013

¹⁸⁷ Interview with, Lamtem Fincha Minalit

¹⁸⁸ Procl No 790/2013

¹⁸⁹ Interview with Lamtem Fincha Minalit, Interview with, Ato Abdulbasit Kedir Acting Director of Consular Monitoring and Consulting of the Consular Office of Ethiopia, Ministry of Foreign Affairs December 2018, Adin Ababa

legally as well as illegally.¹⁹⁰ As far as a national illegally entered host state is concerned, as the representative of the directorate stated, it reaches them only when they face problems, detained in other countries or when their families lodged complaints before it where as it reaches legal migrants and their families' lodge complaints. The representative of this directorate noted that since Ethiopians nationals in the middle east has no other mechanisms to lodge their complaints, they usually contact this directorate for support through their family members or sometimes the Ethiopian missions when they are abused and/or stranded , dead in countries of destination .¹⁹¹ When it receives this kind of complaints, the directorate first checks the type of assistance and support needed and react accordingly.¹⁹²

Support from the Ethiopian missions is minimal and staff members are not necessarily caring and understanding.¹⁹³ The Ethiopian counsel especially in the gulf states are symbolic, ill equipped, and full of inhuman, cold hearted, corrupted, representatives to their citizens of Ethiopia.¹⁹⁴ The foreign affairs director general of MFA admitted that the financial and human resources allocated to Ethiopian missions are rather limited compared to the workload and demand for services.¹⁹⁵ It is stated that this will be settled in the near future as additional human resources will be allocated for Ethiopian missions in the major countries of destinations.¹⁹⁶ However, returnees claimed that the Ethiopian embassy in Saudi Arabia lack concern about the human rights abuses of Ethiopian citizens in Saudi Arabia even to the least of its available resources and man powers.¹⁹⁷ The problem is not only resource and man power. The main problem that needs to be addressed is that the counsel or the diplomats even the ambassadors of Ethiopia that are appointed to different countries of the world should be capable and skilled to what the job expects them to be.¹⁹⁸ Most of the selection is not done by

¹⁹⁰ Interview with, Asse Abdulbasit Kadir

¹⁹¹ Interview with, Asse Abdulbasit Kadir

¹⁹² Interview with, Asse Abdulbasit Kadir

¹⁹³ Interview with, Asse Abete Gebrehiwot, an Ethiopian National requested support of the Consular office Jan- Aug. 2018 for a relative named Asse Birche Takale, detained in Saudi Arabia, 2018 Addis Ababa Ethiopia

¹⁹⁴ Interview with, Asse Abete Gebrehiwot

¹⁹⁵ Interview with, Legation Fianche Minale

¹⁹⁶ Interview with, Asse Abdulbasit Kadir

¹⁹⁷ Interview with, Asse Abete Gebrehiwot

¹⁹⁸ Abey Ahmed, statement of Prime minister of Ethiopia, Discussion on foreign policy of Ethiopia with Ambassador, Jan, 2019 <<http://janabn.com>> accessed on March 18, 2019.

merits. The appointment is also considered as a political benefit.¹⁹⁹ The appointees should qualify for the job. Apart from the political and economic development policies consular protection should also be the appointees and the government's concern. The counsels should have diplomatic skills and should be experts in negotiations.²⁰⁰ Their integrities to the mission and their country should be checked. They have to use both legal and diplomatic skills they have for protection of nationals. The Ethiopian government should care more about the protection of its overseas citizens like other countries.

4.2. Ethiopian Migrant Workers

Labour migration, especially in search of employment opportunities, from Ethiopia to the Middle East has been on the rise in recent years. However, the incidences of abuses against migrant workers have raised critics and concerns on migration in this area. Currently, Ethiopia has become an important origin, transit and destination for regular and irregular migration flows in the Horn of Africa. The majority of Ethiopian regular and irregular migrants are destined to the Gulf States. In October 2013, the Ethiopian Government banned migration of domestic workers to the Middle East temporarily. According to Ministry of Labour and Social Affairs of Ethiopia (MOLSA) prior to the temporary ban, 480,480 citizens had migrated regularly to the Middle East between 2011 and 2013.²⁰¹ However, many more have migrated irregularly and are still migrating illegally, predominantly victims of traffickers, and mainly using brokers at the source and destination countries that facilitate the illegal recruitment and labour migration.

Accordingly, the government of Ethiopia legislate laws with the responsibility of protecting the rights, safety and dignity of Ethiopians employed and sent abroad.²⁰² Despite the past efforts of the Ethiopian Government, the human rights of Ethiopian migrants are still at risk. For that reason, it has recently enacted Proclamation 923/2016 to regulate the migration process and provide a better safeguard of the rights, safety, and dignity of its citizens. Its

¹⁹⁹ Aley Ahmed, statement of Prime minister of Ethiopia, (n196)

²⁰⁰ Aley Ahmed, statement of Prime minister of Ethiopia, (n196)

²⁰¹ Interview with, Mesfinbulq Ayoubi Damsaw, Overseas employment & Workers Safety Protection Directorate Director of MOLSA, Addis Ababa, (May 30, 2019)

²⁰² Proclamation No 1041/2008 Private Employment Agency Proclamation of Ethiopia, Proclamation No

522/2008 Employment Exchange Services Proclamation of Ethiopia

principal objectives cover the establishment of bilateral agreements, the fight to human trafficking, and clearly define and regulate the role of the private sector in overseas employment exchange service.²⁰³ The Proclamation declares that the minimum age for overseas employment is eighteen.²⁰⁴ Therefore, the overseas recruitment of persons under the age of eighteen is illegal and produces the revocation of the license of the responsible agency.²⁰⁵ To tackle the hardships that illiterate workers from rural Ethiopia frequently face, the Proclamation incorporates stringent educational requirements. The Proclamation requires the completion of grade eight of education to undertake overseas employment.²⁰⁶ In addition, the Proclamation strictly requires a worker to possess a certificate of occupational competence issued by the appropriate competence assessment centre, which attests the match between the worker's skills and the occupation he/she is going to perform abroad.²⁰⁷ Moreover, the worker must personally provide for its passport, medical certificate, vaccination certificate, and birth certificate. Conversely, the expenses for the entry visa fee, round trip transport, residence and work permit fee, insurance, visa and document authentication, and approval of the employment contract are required to be borne by the employer.²⁰⁸ In addition, if the contract is cancelled due to reasons not attributable to the worker, the employer or the agency are required to reimburse the workers the expenses for the entry visa fee, round trip transport, residence and work permit fee, insurance, visa and document authentication, and approval of the employment contract are required to be borne by the employer.²⁰⁹ In addition, if the contract is cancelled due to reasons not attributable to the worker, the employer or the agency are required to reimburse the worker.²¹⁰ The Proclamation also requires the existence of bilateral agreements between Ethiopia and the receiving countries as a prerequisite for deployment of workers.²¹¹ The Proclamation specifies that the agreements must address the issue of working conditions, means and venues of enforcement, among other details.

²⁰³ Ethiopia's Overseas Employment Proclamation 923/2016, Preamble.

²⁰⁴ Procl 923/2016, Art 48(2).

²⁰⁵ Procl 923/2016, Art 42(3-4).

²⁰⁶ Procl 923/2016, Art 7(1-4).

²⁰⁷ Procl 923/2016, Art 7(1-5).

²⁰⁸ Procl 923/2016, Art 10.

²⁰⁹ Procl 923/2016, Art 10.

²¹⁰ Procl 923/2016, Art 3.

²¹¹ Procl 923/2016, Art 12.

The Proclamation defines three modes of recruitment for overseas employment. The first category is based on the existence of a government-to-government agreement²¹². Accordingly, in presence of an agreement between the government of Ethiopia and that of the receiving country, MOLSA will provide the recruitment and placement services, including interviewing and selection, medical examinations, approval of employment contracts, provision of pre-employment and pre-departure orientations, and facilitation of departure of employed workers.²¹³ The second category is direct employment is allowed only in the exceptional situations provided in Article 6/2. Accordingly, MOLSA may permit direct employment if the employer is part of the staff of an Ethiopian Mission, an international organization, or where the job seeker acquires a job opportunity by his/her own accord, with the exception of the housemaid service²¹⁴. Direct employment based on the worker's initiative is conditional on the fulfillment of stringent requirements ensuring the basic rights and dignity of the worker. In this case, the Ethiopian Mission, or, in its absence, the Mission of the host nation on the Ethiopian territory, and MFA, must assure that the worker will not be exploited in the receiving country²¹⁵. Moreover, the Ministry must advertise this procedure and the need to provide evidence on life and disability insurance coverage, the document related to the transportation service, together with the employment contract.²¹⁶ The third category is the private employment agencies can conduct the recruitment and deployment services in the presence of a license from the MOLSA and must respect the requirements of the Proclamation.²¹⁷

An overseas employment agency must have a business registration certificate and obtain a license from the Ministry of Labour and Social Affairs. If deployment and other operations involve different countries, it is mandatory to obtain a separate license for each operation.²¹⁸ The applicant is required to have a capital of one million Ethiopian birr, and must have no prohibition to operate this kind of business.²¹⁹ Also, any business organization interested in

²¹² Procl. 923/2016, Art 4

²¹³ Procl. 923/2016, Art 5

²¹⁴ Procl. 923/2016, Art 6(2)(a-c)

²¹⁵ Procl. 923/2016, Art 6/3(a)

²¹⁶ Procl. 923/2016, Art 6/3(b-d)

²¹⁷ Procl. 923/2016, Art 4

²¹⁸ Procl. 923/2016, Art 21

²¹⁹ Procl. 923/2016, Art 22

this service must clearly set as its only objective the operation of overseas employment exchange service.

As per article 64(5), the Ministry or the appropriate regional labour body is duty bound to provide legal assistance to workers who have suffered an injustice in connection with overseas employment. This assistance is presumed to include the services of representation before a court of law. One of the notions introduced by this Proclamation has to do with the burden of proof. In the majority of legal proceedings, either civil or criminal, the person who alleges a fact has the burden of proof. Similarly, as per article 72 of Proclamation 923/2016, if the worker alleges that the conditions of work are violated "conditions of work" as defined in article 2.6 of Proclamation 377/2003 the defendant who objects is also required to prove the absence of these violations. The party who alleges violation of the employment contract, and for that matter, violation of the Proclamation, has two options: (i) to lodge a complaint before MHLWA or (ii) to institute an action before the labour benches. However, the period of limitation to be employed in these two venues is different since in the first case the period of limitation is longer. Accordingly, the administrative complaint following the alleged violation of the Proclamation shall be barred by limitation unless brought within three years from the date of violation or knowledge of violation. Nonetheless, who addresses to the regular courts is required to observe the various limitations provided under article 162 of Proclamation 377/2003. The general limitation for an action arising from employment relations, as stated under article 162(1), is one year from the date on which the claim becomes enforceable. However, an action for reinstatement to work and one for payment of wages, overtime pay, and other payments shall be barred within a period of three and six months respectively.²²⁰ Moreover, as provided under article 162(4), the period of limitation for any claim by a worker or employer for any kind of payment is six months from the date of termination of the contract. Challenges to the full implementation of the proclamation to protect Ethiopian employed abroad are discussed briefly.

The rights and interests of distressed overseas Ethiopian nationals, in general, and Ethiopian migrant workers, in particular, must be adequately protected and safeguarded, irrespective of

²²⁰ Procl. 377/2003 Art. 162/2 and 162/3

the presence of regular documentation or not.²²¹ The provision of adequate training to workers deployed overseas is essential to address one of the possible sources of conflict between the workers and their employers. The EOE Proclamation requires an occupational competence certificate to seek overseas employment, but it is silent about the subjects of the training. In addition, it clearly provides that the worker must cover the expenses.²²² Given the poor economic conditions of most Ethiopian job seekers, the responsibility to cover these expenses is likely to represent a burden pushing them to irregular migration, shortcoming that may call for an amendment. Although the presence of bilateral agreements should be a prerequisite for overseas deployment, its absence not always prevents the deployment, Ethiopian citizens are still migrating through illegal means by the help of brokers.²²³ Furthermore, Ethiopian workers can migrate irrespective of the fact that the recipient country has signed or ratified multilateral conventions on the protection of migrant workers, or that it is taking positive and concrete measures on this matter. In the absence of these strict guarantees, the protection of the rights of Ethiopian overseas workers still remains a big challenge, and the exploitation of these workers may continue unrelieved. In the majority of cases, migrant workers cover the expenses associated with travel documents and medical examinations from loans and these loans usually bear very high interest. Repayment of this loan is one of the factors that push overseas workers to accept humiliating working conditions.²²⁴ The Ethiopian Proclamation is silent on this issue. The course of recruitment, deployment or licensing process entail criminal liability, most contraventions result only in administrative measures such as suspension and revocation. In case of criminal acts, the Attorney General is in charge of guiding the prosecution. Nevertheless, due to the massive work under the responsibility of the Public Prosecution Department, the process may result scarcely effective.

Regarding civil liabilities, the regular labour divisions are responsible. As these courts are burdened with a number of employment related cases, the process may take a long period, although articles 138/2 and 139/3 of Proclamation 377/2003 requires disposition of these cases within 60 days. A different organ has to be instituted to see these cases. In case of

²²¹ Interview with Mesfinet Assefa Damtew

²²² Procl 823/2008, Art 108(2)(f)

²²³ Procl 823/2008, Art 12, interview with Mesfinet Assefa Damtew

²²⁴ Interview with Mesfinet Assefa Damtew

unlawful termination or deduction of salary, the overseas worker whose rights are infringed by an employer or by a recruitment agency, or who is illegally recruited, may not have the knowledge and the means to proceed against these parties. In such cases the hiring of foreign counsel through the national government could ensure more effective protection to Ethiopian overseas workers. However the Proclamation exhibits shortcomings, especially concerning the due process right, the equality of treatment of arrested Ethiopians overseas,

Ethiopian overseas workers usually lack sufficient support from the Ethiopian Missions in the receiving countries. Subsequently, the government of Ethiopia should appoint competent individuals who are willing to help their compatriots, rather than making the assignment simply on the basis of political affiliation. Moreover, the government should conduct performance audit of the Missions on a regular basis and encourage those individuals with outstanding performance in assisting overseas workers. In addition, the government must avail appropriate funding for the deployment of labour *attachés* and provide them with adequate training. According to MOLSA appointment of labour *attachés* are being processed.²²¹

Ethiopia strictly prohibits the deployment of overseas workers without the presence of a bilateral agreement signed with the recipient country. Bilateral agreements are signed with Saudi Arabia, Arab Emirates, Jordan and Qatar.²²² Even then, unless these agreements clearly provide details on the rights and duties of the parties and the means and venues of enforcement in case of violations, these arrangements may not give sufficient guarantees. Furthermore, an analysis of the international best practices reveals that bilateral agreement must include clauses on social security arrangements, so that overseas workers can obtain equal entitlements to the benefits granted to nationals. Although requiring bilateral agreement as a prerequisite for overseas deployment is a good measure, it may not be fruitful in the absence of close enforcement mechanisms. Hence, additional effective guarantees from the receiving countries seem to be essential. The proclamation is somehow compatible with the international and domestic legal frameworks, serious gaps are observed in the enforcement

²²¹ Interview with, Meselach Assefa Damtew.

²²² Interview with, Meselach Assefa Damtew.

mechanisms in foreign jurisdiction. Even though the requirement of bilateral agreements between Ethiopia and the recipient countries is a positive step, it is not sufficient. Therefore, in the absence of labour and social laws that protect the rights of migrant workers in the host country when the host country has not ratified multilateral conventions, declarations, or regulations, and is not willing to take concrete measures, the deployment of Ethiopian overseas workers should be strictly prohibited.

4.3 Protection of Ethiopian Nationals Abroad

In this section the researcher seeks to determine whether there are legal or constitutional provisions under Ethiopian law guaranteeing diplomatic protection of human rights to Ethiopian nationals abroad (ENA), the extent to which such legal or constitutional provisions have been invoked by Ethiopian citizens, government responses to such requests and judicial approach or attitude to the requests.

Ethiopian nationals travel or reside abroad for different reasons. When citizens travel if something happen to them in the international arena they look back to their home country. A state is expected to respond to the request of its citizens. Ethiopia sets rules and regulations to respond to such kind of requests in the domestic law. But we need to assess how these laws and regulations are being implemented and their effectiveness. Ethiopia opens offices of Missions in fifty nine different parts of the world.²²⁷ One of the responsibilities of these Missions is to provide advice, protection, and consular assistance in any way possible if it is requested by a citizen or any concerned relative in consideration of the law of the country and international law.²²⁸ The consular Office of the MFA located in Addis Ababa will make contact to the nearest Mission office where the individual facing distress is found if the request is made from Ethiopia.²²⁹ When citizens of Ethiopia face human right violations and imprisoned abroad the Missions give protection.²³⁰ If the request is made by the national, legal advice will be given so that the individual himself or herself could go to the responsible authorities to claim his or her right.²³¹ The office also hires a lawyer for the individual to

²²⁷Interview with, Lamirem Firdia Minalit

²²⁸Interview with, Lamirem Firdia Minalit

²²⁹Interview with, Asa Abdulkadir Kadir

²³⁰Interview with, Lamirem Firdia Minalit

²³¹Interview with, Lamirem Firdia Minalit

redress the violation in accordance to the law of the host state.²³² All in whole the missions provide protection in accordance with the internal procedure which is not disclosed for public²³³ and the VCCR even though Ethiopia is not a signatory to the convention.²³⁴ The office helps the individual to exhaust all local remedies that are provided by the host state.²³⁵ If it is impossible to resolve the case using local remedies the case will be forwarded to the prime Minister office of Ethiopia for further negotiation politically since the supreme body of the foreign affairs of the country is the PME.²³⁶

Recently broadcasting networks have announced that Ethiopian nationals detained abroad have been released and entered to their country following the visit of the PME to Saudi Arabia and Egypt.²³⁷ These cases are one of the situations where the Missions could not solve and has forwarded it to the PME office. These citizens have entered to the host state legally and (illegally) and from the interviews on the media it is learned that they were denied the right to be heard and given justice, they were brutally tortured.²³⁸ Even though the work of the PME is admirable and very thoughtful of his citizens and fulfilling the promise made on the domestic laws, the citizens remedy for being detained without trial and being brutally tortured against international human right laws was just being released from jail and get back to their country.²³⁹ The treatment of aliens with the IMS and protection of human rights were not respected and demanded by the Ethiopian government.²⁴⁰ The international law requests states to provide a MST of aliens and to protect their human right and if a state violates the international law and have done wrong to an alien the state of nationality is given the right to demand redress and the host state to be responsible to the wrong done to the alien.²⁴¹

²³² Interview with, Lamdem Fiseha Minalit.

²³³ Interview with, Lamdem Fiseha Minalit.

²³⁴ Interview with, Lamdem Fiseha Minalit.

²³⁵ Interview with, Lamdem Fiseha Minalit.

²³⁶ Interview with, Lamdem Fiseha Minalit.

²³⁷ The African Bureau of China Global Television Network (CGTN), CGTN Africa, 12 June, 2018 Accessed on Nov. 27, 2018.

²³⁸ Ibid.

²³⁹ Interview with, Lamdem Fiseha Minalit.

²⁴⁰ Interview with, Lamdem Fiseha Minalit.

²⁴¹ R. R. Litch, 'Editorial Comment: The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who are not Citizens of the Country in Which They Live' 70 AJIL 307, 310 (1976), 309, Articles on state responsibility (2001), Articles 1, 31.

In chapter two diplomatic protection is defined as a resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State as adopted by the ILC.²⁴² International laws declare a way how states could have access to protect their nationals abroad. Ethiopia have also enacted a few articles on protection of its nationals abroad on different legislation of the land including the constitution as it is discussed in the previous sections. The mandate to protect nationals is given to the ministry of foreign affairs.²⁴³ The Ministry through the missions provides more or less a consular assistance which is not even binding with the host state since it is not signed by Ethiopia and it is not adequate as the practice interprets it.²⁴⁴

An Ethiopian mother, Halima Mozzamil Hussain whose son Mohammed Abdul Aziz was paralyzed due to medical error in one of Saudi Arabia hospital.²⁴⁵ Mohammed was admitted to the hospital for a minor operation four years ago in February, 2006.²⁴⁶ But the minor surgery caused him a serious injury and he end up motion less in his bed for the past twelve years.²⁴⁷ Three years after the operation and with no end in prospect, Halima approached the Health Ministry of Saudi Arabia but they were not looking in to her case seriously.²⁴⁸ She alleges that her file had begun to gather dust when someone suggested that she approach the Ethiopian Consulate and so she did.²⁴⁹ "The consulate approached the Makkah Governorate through a good prince and it directed the matter to the Health Ministry.²⁵⁰ Once the papers went from the governorate, the ministry sprang into action and the old file was dusted off then the hospital was found guilty and decided to pay her compensation to the damage it caused in 2015 that is after nine years.²⁵¹ The family of Mohammed appealed the case that

²⁴² Articles on Diplomatic Protection Art1

²⁴³ Procl No 1007/2019, Art 15(1)

²⁴⁴ Interview with, Asa Abate Gebrehiwot

²⁴⁵ www.asafgalela.com

²⁴⁶ *Ibid*

²⁴⁷ *Ibid*

²⁴⁸ *Ibid*

²⁴⁹ *Ibid*

²⁵⁰ *Ibid*

²⁵¹ *Ibid*

their son should stay in the hospital because if he is not attached to the machines he will die.²⁵¹ The Ethiopian vice consul also termed the compensation inadequate. "Once Mohammed is out of the hospital, he will not be able to survive for one month with that money," said Vice Consul Yalelet Getachew Ashenafi.

The Ethiopian government involved in 2018 and communicated with the Saudi government.²⁵² Arrangements were made to treat Mohammed in Ethiopia.²⁵⁴ However the Ethiopian government obliged itself to protect its citizens living abroad in the constitution and subsequent laws of the country, the reaction for the case in issue was after twelve years the medical error occurred. And the reaction of the counsel of Ethiopia in Saudi Arabia was also after nine years. Justice delayed is considered as justice denied. Even if the officials of the foreign affairs raise issues of limitation of resources and politics as a barrier for the protection of nationals abroad, they do not have the motivations, strategies and integrity to do what the job expects them. The Ethiopian government did not ask for the appropriate compensation for the human right violations caused by the host states on its national, Mohammed. The protection mechanism is insufficient.

A citizen was also detained in Saudi Arabia, his relative applied to the Consular office Addis Ababa to interfere enquire why he was detained.²⁵⁵ The office of the consular gave him a form to fill in and told the relative that they will look in to it and that they will communicate him.²⁵⁶ When he went to the office after a month they told him that they are still looking in to it and told him that this might take some time because they do not have enough man power and resource to handle the issue case by case.²⁵⁷ These cases are done in collaboration with International Organizations such as IOM and UNHCR by a group basis.²⁵⁸ Therefore they told him they will communicate him but no response for eight months.²⁵⁹ The national who was imprisoned was not convicted of any crime, the court found him not guilty and yet he was

²⁵¹ *Ibid*

²⁵² <https://theafricaincubator.com>

²⁵³ *Ibid*

²⁵⁴ Interview with, Ato Abebe Gebresilassie

²⁵⁵ Interview with, Ato Abebe Gebresilassie

²⁵⁶ Interview with, Ato Abebe Gebresilassie

²⁵⁷ Interview with, Ato Abdulkadir Kadir, Lemlem Fiseha Minale

²⁵⁸ Interview with, Ato Abebe Gebresilassie

imprisoned for more than eight months.²⁶⁰ He was released after eight months without any explanation and no one from the Missions office contacted him and he was just abandoned.²⁶¹ The host state arbitrarily can do anything to any alien that entered to the country. The national state also neither ask for reason why this internationally wrongful act was done or take the case to international court.²⁶² Ethiopia does not go further to demand what the international law facilitates for the national states as a right i.e. diplomatic protection of Nationals abroad.²⁶³

As it is discussed in the previous section the nationality proclamation of Ethiopia, as the constitution, also proclaims that the state shall protect the rights and lawful interests of its nationals and the state shall take such measures as may be necessary to ensure the protection of the rights and lawful interests of its nationals residing abroad. The nationality proclamation of Ethiopia obliges the state to protect its nationals abroad. But the enforcement mechanisms are lessent. The Ethiopian government is just taking only what is given not demanding further.

From the interviews with the officials of the foreign affairs the researcher learned that Ethiopia do not take cases of diplomatic protection to the ICJ at all. For the reason that Ethiopia is not a signatory to the ICJ statute therefore the state is not forced to respect any of the decisions made by the court and also the draft article on diplomatic protection is not binding, it is just a draft it what was replied by one of the higher officials of the MFA.²⁶⁴ The laws should not be binding if it can stretch away how to help protect a citizen abroad. States requested Ethiopia using Articles of diplomatic protection even if it is not binding.²⁶⁵ International laws are narrow to hold a state accountable for the wrong the state has done. But this draft article is a contribution to the world to respect human rights and the wellbeing of a national when it gets in to another states territory as an alien. Whether a national enters in to a foreign state legally or illegally he or she is a citizen of Ethiopia and he or she is a human being. Therefore the state of nationality should give its national protection till the limits of the

²⁶⁰ Interview with, Ato Abetu Gebremeset

²⁶¹ Interview with, Ato Abetu Gebremeset

²⁶² Interview with, Lemlem Firdia Minsale

²⁶³ Interview with, Lemlem Firdia Minsale

²⁶⁴ Interview with, Lemlem Firdia Minsale

²⁶⁵ Interview with, Lemlem Firdia Minsale

international law. The state that has done the internationally wrongful act is expected to redress its fault.²⁶⁴ Ethiopia legislated the laws to give protection to the nationals and safeguard their interest. The basics of protection should be started from the fundamental human rights. Torture and illegal imprisonment violates human rights of citizens. Therefore in order to implement what is promised under the constitution and guaranteed under different domestic legislation of the land, Ethiopia should start rechecking the work done by the responsible authorities about creating the awareness of what is required of citizens before departing from their country.²⁶⁵ Making sure all foreign travelers of Ethiopian citizen are legal and make alert how to handle problems if faced outside their country.²⁶⁶ Most of the citizens abroad are not aware of their right to seek for protection from their national state therefore they may not get help at all or it will be too late for anything to do.²⁶⁷ The Mission office are not enough compared to the flow of travelers abroad.²⁶⁸ Borders of Ethiopia are not secured.²⁶⁹ People flow and lose their lives and are exposed to slavery, imprisonment, torture and even more end up at a civil war countries. Ethiopia has a lot of assignments to do in protecting her citizens.²⁷⁰

Most of Ethiopian nationals travel to the Middle East countries for search of jobs legally or illegally.²⁷¹ Most of the imprisonment and tortures are done by these countries.²⁷² Even if Ethiopia wants to go to ICJ with diplomatic protection these countries won't appear to the courts, so what is the use?²⁷³ It will just destroy our diplomatic relation is the opinion of the official of the foreign affairs.²⁷⁴ The arrangement we have agreed to the Saudi Arabia when we send nationals as domestic worker, gives them the right to determine and to treat her as a

²⁶⁴ Article on state responsibility (2001), Art 31

²⁶⁵ Article on state responsibility (2001), Art 31

²⁶⁶ Article on state responsibility (2001), Art 31

²⁶⁷ Interview with, Asse Abduhant Indir

²⁶⁸ Interview with Lemuelus Fiasfa Minale

²⁶⁹ Interview with Lemuelus Fiasfa Minale

²⁷⁰ Interview with, Asse Abduhant Indir,

²⁷¹ Interview with Lemuelus Fiasfa Minale

²⁷² Interview with Lemuelus Fiasfa Minale

²⁷³ Interview with Lemuelus Fiasfa Minale

²⁷⁴ Interview with Lemuelus Fiasfa Minale

minor part of the family.²⁷⁵ They would treat her in whatever way it is suitable to them. Therefore after the states have agreed to this extent, the concern of the official is how could the states demand to treat nationals by the international standard?²⁷⁶ The point is Ethiopia should not agree to compromise violation of human rights of protection nationals.

Ethiopia stated in the constitution that Ethiopian national's right is protected then who is going to protect it if not the Ethiopian government? If Ethiopia is going to protect the human right of its national how is Ethiopia going to implement it if not diplomatically? Why is there a law or a guide line or a policy to implement that in a domestic law? How could the Ethiopian government safeguard its nationals' interest abroad and keep the promise it gave on the law of the land? These questions were raised for the officials in the interview but their reply was reserved raising that is it cannot be disclosed to the public because of political reasons and economic standard of Ethiopia and the issue of resources.

²⁷⁵ Interview with Ambassador Ferede Mihretu

²⁷⁶ Interview with Ambassador Ferede Mihretu

CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

The research paper focuses on protection of nationals abroad under international law and in particular under Ethiopian law and practice. More emphasis is given to international human rights law, the draft article on diplomatic protection and domestic laws of Ethiopia related with protection of nationals.

Where Ethiopian nationals have face problems abroad, the Ethiopian Government and the Ethiopian Embassies abroad play an important role if acted effectively, especially in the early stages, when it is essential to obtain information regarding the situation quickly, confirm the safety or otherwise of Ethiopian nationals and seek to ensure their safety, requesting the cooperation of the authorities of the host State with a view to having the situation in hand swiftly.

Preventing the occurrence of incidents is essentially a matter of unremitting routine precautions and vigilance on the part of Ethiopian nationals themselves. Once such an incident has actually occurred, it is the government of the host State that is primarily responsible for investigation and other measures for a solution. What the Government of the national State can do is always necessarily limited. Such being the case, it is increasingly necessary for Ethiopian government to create awareness of the fact that nationals who travel or live abroad to have a clear understanding of the limits to what the government can do to protect them and to do everything possible to ensure that the nationals must be alerted to make certain that they know how to act effectively in case they are detained or treated unlawfully. What the government must do is ensure that Ethiopians living or travelling abroad know the facts, providing as much information as possible regarding security, and appropriate advice or guidance. Essentially, in part by outlining the international law aspects, Particularly given the ways in which international law limits the possibility of action for the host State, a full awareness on the part of Ethiopian travelers and overseas residents themselves of the need for adequate knowledge and for their continuous day-to-day precautions to ensure their own safety are of the utmost importance.

The VCCR is a multilateral convention that states has to sign to it in order to be obliged and to claim the other state to be responsible if breached the convention.²⁷⁹ Ethiopia could act according to the Convention to protect their own citizens as one of the officials stated but in order to claim breach of the VCCR should sign the convention. If not a signatory Ethiopian government will be just acting by its own. Ethiopia could not get all the benefits the convention provides to protect nationals abroad. The Ethiopia legal system has devised political, legal and institutional mechanism to protect the rights of nationals abroad. However the domestic laws by themselves are not sufficient since it involves international arena. Therefore Ethiopia has a lot to do in ensuring the rights of citizens abroad are protected and finding a better approach in enforcing the appropriate international law.

5.2. Recommendations

From the aforementioned findings of this thesis the writer puts forwarded the following recommendations to the concerned organs to give due regards.

- Diplomatic protection of nationals abroad should not only be a right of the state, it should also be an obligation to states so that the national can demand the national state's protection abroad.
- Ethiopia has to ratify VCCR so that the government can exercise protection of nationals abroad to full extent in addition to effectively implementing diplomatic protection.
- Ethiopian government should ensure awareness creation for citizens traveling and residing abroad as to their status and their right to seek protection from their national state.
- Bilateral agreement between Ethiopia and the recipient countries is a positive step but not sufficient. Therefore labour and social law is necessary.
- When the host state has not ratified multilateral conventions, declarations and is not willing to take the necessary measures, deployment of Ethiopian nationals oversea should be strictly prohibited.

²⁷⁹ Vienna convention on Consular Relations, 1963

Bibliography

Books

- Amador G, 'State Responsibility: Some New Problems' (1958) 94 Hague Academy of International Law
- Annemarijke V, 'The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument' (PhD diss, University of Leiden, 2007)
- Borchard E, 'The Diplomatic Protection of Citizens Abroad', (MA, thesis, New York 1915)
- Bruck C, *Diplomatic Representations and Diplomatic Protection*, (2008)
- Crawford J, *The International Law Commission's Articles on State Responsibility*, (Cambridge 2002)
- Donald N, *The Calvo Clause: a Problem of Inter American and International Law & Diplomacy*, Minneapolis (1955),
- Gaja G, 'Is a State Specially Affected when its Nationals' Human Rights are Infringed?' in: L. Chand Vohra et al. (ed.), *Man's Inhumanity to Man*, (The Hague 2001),
- Graham D, 'The Calvo Clause: It's Current Status as a Contractual Renunciation of Diplomatic Protection', (1971)
- Haas R, *The Minimum Standard of International Law Applied to Aliens*, (Leiden 1949)
- Heijmans O, 'Consular Affairs' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press, 2013)
- —, 'Change in Consular Assistance and the Emergence of Consular Diplomacy' (Netherlands Institute of International Relations, Diplomacy Papers 2010)
- Lee I. & Quigley J, *Consular Law and Practice* (Oxford University Press, 3rded, 2008)
- Lillich B, *The Human Rights of Aliens in Contemporary International Law*, (Manchester 1984)
- Malanczuk P, *Modern Introduction to International Law*, (British, 1997)
- Mosler H, *The International Society as a Legal Community*, (Dordrecht 1980)

- Satow E., *Diplomatic Practice*, in Ivor Roberts (6th ed, Oxford University Press, 2009)
- Shaw M., *International Law*, (8th ed, Cambridge, 2008)
- Steinert J., 'International Protection of Human Rights', in M.D. Evans (ed), *International Law*, (Oxford 2006)
- Tiburcio C., *The Human Right of Aliens under International and Comparative Law* (Kluwer Law International press 2001)
- Vattel E., *The Law of Nations* (Joseph Chitty Esa, 6 edn, West Brookfield Mass Merriam & Cooke Philadelphia 1844)
- Wouters J., Daquet S & Meuwissen K., 'The Vienna Conventions on Diplomatic and Consular Relations' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Hand book of Modern Diplomacy* (Oxford University Press, 2013)

Journals

- Borchard E., 'Basic elements of Diplomatic Protection of citizens Abroad', (1913) 7, *The American Journal of International law*,
- Brictly L., 'The Theory of Implied State Complicity in International Claims' (1928) 9 *British yearbook of International law*
- Crawford J., 'The UN Human Rights Treaty System: a System in Crisis?' (2003) 19 *Journal of International Law*
- Freeman A., 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law', (1946) 40 *AJIL*
- Huber M., the Spanish Zone of Morocco Claims Case, Great Britain V Spain (1924) *European Journal of International Law*, Vol, 18 no1 (2007)
- Lauterpacht H., 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens', (1946) 9 *Cambridge Law Journal*
- Litch B., 'Editorial Comment: The Problem of the Applicability of Existing International Provisions for The Protection of Human Rights to Individuals Who are not Citizens of the Country in Which They Live' (1976) 70 *AJIL*
 —The Current Status of the Law of State Responsibility for Injuries to Aliens' *Journal Article*, Vol 73, (1979)
- Manner G., *The object Theory of the Individual under international law*, (1952) 46 *The American Journal of International Law*

- McDougal M., *Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights* (1976) Yale law school Journal
- Milano V., *Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition?* (2004) 35 Journal: Netherlands Yearbook of International Law
- Pergentis V., *Towards a "Humanization" of Diplomatic Protection?*, (2006), Journal of International law
- Hoy G., *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* (1961) 55 American Journal of International Law
- Schöwarzenberger G., *International Law as Applied by International Courts and Tribunals*, (London: Stevens & Sons 1957)
- Vreeland H., Grotius H., *Diplomatist*, (1917) 11 American Journal of International Law
- Weiss P., *Diplomatic Protection of Nationals and International Protection of Human Rights*, Human Rights Journal (1971)

UN Documents

- Congress of Vienna, *Relative ranks of Diplomatic Agents*, (Vienna Congress, Martens, march, 1815)
- League of Nations, *Convention regarding diplomatic officers*, (Havana Conference, Treaty Series No. 34 1928)
- Statute of the International Court of Justice 1945
- Universal Declaration of Human Rights December 10 1948
- European Convention for the Protection of Human Rights and Fundamental Freedoms November 4 1950
- Garcia Amador, *First Report on State Responsibility A/CN.4/96* (1956), reproduced in the I.L.C Yearbook, Vol. II, 1956
- OAS, Treaty Series No 36(1969)
- International Covenant on Civil and Political Rights, 23 March 1976
- African Charter on Human and Peoples' Rights, reprinted in 1982
- International Law Commission, *Summary Records of the Ninth Session* (1957) Yearbook I

- *Preliminary Report on Diplomatic Protection* (Int Law Com No 484 1998)
- *Diplomatic protection* (Int. Law Com No.1, 2000)
- *Commentary on Articles on State Responsibility*, (Int Law Com No 56/10 2001)
- *Articles on state responsibility*, (Int Law Com No 56/83 2001)
- *Preliminary report on Diplomatic Protection* (Int Law Com No 6 2006)
- *Draft Articles on Diplomatic Protection* (In Law Com No10, 2006)

- *Vienna Convention on Diplomatic Relations*, 1961
- *Vienna Convention on consular relation*, April 1964
- Dugard J. *First Report of the Special Rapporteur on Diplomatic Protection*, (Int Law Com, No 4 506 March 2000)
- *Third Report of the Special Rapporteur on Diplomatic Protection, International Law Commission*, 54th sess, Agenda Item 4, UN Doc A/CN.4/523 (7 March 2002)
- Sixth Committee of the GA, UN Doc. A/C.6/61/SR.9 (Italy, Austria), A/C.6/61/SR.10 (Germany, United States, United Kingdom, Romania, France), A/C.6/61/ SR.12 (Morocco, Switzerland, Nigeria), A/C.6/61/SR.19 (Algeria, Sierra Leone)

Laws

- Constitution of the Federal Democratic Republic of Ethiopia 1995
- A Proclamation on the Ethiopian Nationality No 378/2003
- Proclamations Nos. 546/2006, 803/2013, 916/2015, 1097/2019 Definition of Powers and duties of the Executive organs of the Federal Democratic Republic of Ethiopia
- Foreign Service of Ethiopia, Proclamation No. 790/2013
- Proclamation No104/1998 Private Employment Agency Proclamation of Ethiopia
- Proclamation No 632/2009 Employment Exchange Services Proclamation of Ethiopia

Cases

- *Spanish Zone of Morocco Claims*, 2 RIAA, 1923
- *Harry Roberts Claim, United States Vs Mexico*, (1926) 4 RIAA, 77
- *Regina (on the application of Abbasi and another) v Secretary of State* [2002] (6 November 2002)
- *LaGrand Case (Germany v United States of America) (Judgment)* [2001] ICJ Rep 9;
- *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12.

- Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo). 2010 I.C.J. 639 (November 30)

Interview

- Interview with, Lemlem FisehaMinale, Acting Director General of International Legal Affairs of Ethiopia, Ministry of Foreign Affairs, Addis Ababa (03 December 2018)
- Ato Abdulbasit Kedir, Acting Director of Consular Monitoring and Consulting of the Consular Office of Ethiopia, Ministry of Foreign Affairs December 2018, Addis Ababa
- Interview with, Meselech Assefa Damtew, Oversea employment & Workers Safety Protection Directorate Director of MOLSA, Addis Ababa, (May 30, 2019)
- Interview with, Ato Abebe Gebrehiwot, an Ethiopian National requested support of the Consular Officer Jan- Aug., 2018 for a relative named AtoBerhe Lakele, detained in Saudi Arabia, 2018 Addis Ababa Ethiopia

Internet Sources

- Dugard J, 'Articles on Diplomatic Protection' (UN Audio Visual Library of International Law 2013) <www.un.org/law/avl> accessed October 05, 2018
- Leys D., *Diplomatic Protection and Individual Rights: A Complementary Approach*, (2016) 57 Harvard International Law Journal Online <www.harvardilj.org> accessed October 5, 2018
- Borchard E., *Minimum Standard of the Treatment of Aliens* (Minimum Standard of the Treatment of Aliens, Faculty Scholarship Series January1 1914) 3469 <<http://digitalcommons.law.yale.edu>> accessed on October 15,2018
- <<http://konzulisszolgalat.kormany.hu/the-short-history-of-honorary-consular-representations>>accessed October 15,2018
- Higgins R, Problems and Process: International Law and How We Use It in Lung Chu Chen, New York Law School Journal of International and Comparative law (1994) <www.digitalcommons.nyls.edu> accessed on November 2, 2018
- Foreign and Common Wealth Office, 'Support for British Nationals Abroad: A Guide' <www.fco.gov.uk> accessed on November 2, 2018