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The protection of individuals by means of diplomatic protection : diplomatic protection as a human rights instrument

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VI Restricting Discretion: Judicial Review of Diplomatic Protection

1 INTRODUCTION

Diplomatic protection is one of the oldest rights of a state in international law. The standard rule, as reflected in the International Law Commission's Draft Articles on Diplomatic Protection adopted on second reading, is that a state may exercise its right to diplomatic protection if an internationally wrongful act has been committed against one of its nationals and if the national has exhausted local remedies.¹ Diplomatic protection has been the basis for many international inter-state claims and proceedings, from mixed claims commissions such as the US–Mexican Claims Commission (famous for the *Roberts* and the *Neer* claims) to contentious cases before the Permanent Court of International Justice and, to a lesser extent, its successor, the ICJ. In addition, however, nationals of various states have in the past 30 years, filed complaints against their own national governments for failure to exercise diplomatic protection. The individuals concerned have generally complained of arbitrary detention, unfair trial or other treatment prohibited under international human rights law, such as torture or inhumane or degrading treatment or punishment in a foreign country. In other instances the subject of the claim was deprivation of property and subsequent denial of justice, a traditional foundation for the exercise of diplomatic protection.² Referring to the growing importance of human rights and the relative lack of enforcement measures available to individuals for those rights, the applicants have argued that the obligation to provide access to court and an effective remedy under international human rights law should be construed to oblige states to exercise diplomatic protection in case of serious human rights violations. As will be discussed in section two of this chapter, the attitude towards human rights has changed over the years. Increasingly, human rights are considered to be individual rights, giving individuals the corresponding right to claim compliance with those rights or reparation in case of violation of these rights. The analysis of the national judgments will show that this development has influenced the courts' decisions. The states against which the complaints have been filed have invariably

1 Draft Articles on Diplomatic Protection, Articles 1, 3 and 14, at 1, 2 and 5 respectively. See also ILC Report 2006. This chapter was published as an article entitled 'Restricting Discretion: Judicial Review of Diplomatic Protection' in 75 *Nordic JIL* 279-307 (2006).

2 See I. Brownlie, *Principles of Public International Law*, Oxford 2003, at 505-522.

been parties to the major UN human rights treaties, such as the International Covenant on Civil and Political Rights, and regional human rights treaties, such as the European Convention on Human Rights and the African Charter on Human and Peoples' Rights. Although no Court has endorsed an applicant's claims in its entirety, Courts have shown a willingness to accept to a limited extent the growing importance of human rights protection and enforcement through active measures by states and governments, in other words through the exercise of diplomatic protection.

Traditionally, diplomatic protection has been regarded as the discretionary right of a state.³ The logical consequence of this position is that Courts should declare any request for review of action (or inaction) undertaken under diplomatic protection to be non-justiciable as the subject belongs to the discretionary realm of the executive.⁴ French judicial decisions between 1904 and 1970⁵ show exactly this approach: diplomatic protection is an *acte de gouvernement* and

submissions by which [the claimants] asked for the annulment of the decision [not to exercise diplomatic protection] ... raise questions which are not capable, by their nature, of being brought before the administrative court.⁶

However, an investigation into more recent other national decisions will show that this view on the nature of diplomatic protection has evolved and indeed has been modified. Surprisingly, without exception, the judges rendering these decisions have entered into the merits of the case. They have acknowledged the discretionary nature of diplomatic protection and the fact that the executive would usually be more suited to the task of assessing the required level and kind of protection, but they have indicated simultaneously that a conclusion to the contrary, that is that the executive failed to exercise this right adequately, should not be excluded *a priori*. For instance, they have held in cases showing arbitrary decision-making, due to inadequate investigation by the executive, or when serious and fundamental human rights violations are at stake, that the refusal to exercise diplomatic protection may be in breach of the government's obligations.

3 See for instance Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 29. See also the Commentary to draft article 2, ILC Report 2006, at 29.

4 See for non-justiciability of acts of the executive: Brownlie, *Principles of Public International Law*, Oxford 2003, at 49-50; M. N. Shaw, *International Law*, Cambridge 2003, at 162; H. Fox, 'International Law and the Restraint on the Exercise of Jurisdiction by National Courts of States', in M. D. Evans (ed.), *International Law*, Oxford 2006, 361-394, at 384 *et seq.*; A. Cassese *International Law*, Oxford 2005, at 99.

5 See generally G. Ress, 'Mangelhafte diplomatische Protektion und Staatshaftung', 32 *ZaöRV* (1972), at 425-450.

6 *Société Sapvin*, Conseil d'Etat, 25 March 1998, 89 ILR 7.

The question of which law is violated is not always answered clearly: is it national (constitutional) law, in which an obligation towards national citizens is enshrined, is it general international law or is it human rights law, or a combination of these fields of law? Although reference is usually made to international law, the decisions are primarily based on obligations under national (constitutional) law and obligations under international human rights law, thus to a certain extent combining these two fields of law. However, even so these decisions do contribute to the development of international law in the form of state practice. It could even be argued that they are a subsidiary source of law under Article 38(1)(d) of the ICJ Statute.⁷

The way in which national judges have responded to claims based on an alleged right to diplomatic protection is particularly interesting in view of the current discussion in the International Law Commission (ILC). The ILC decided that the topic of diplomatic protection was appropriate for codification and progressive development in 1996.⁸ The predecessor of the current Special Rapporteur submitted a Preliminary Report in 1998⁹ in which he suggested that diplomatic protection 'is not amenable to judicial review' and that any obligation on the part of the national state is more a 'moral duty than a legal obligation'.¹⁰ The reference to a 'moral duty' echoes the argument presented by Borchard in 1919.¹¹ Despite acknowledging the findings of the German Constitutional Court in the *Rudolf Hess* decision,¹² the former Special Rapporteur, Mohamed Bennouna, refrained from discussing more recent developments and appeared to endorse the traditional view on the discretionary nature of diplomatic protection.¹³ In 1999 the former Special Rapporteur was replaced by the current Special Rapporteur, John Dugard.

In his First Report, the current Special Rapporteur investigated more recent developments and suggested that states should, under certain specified circumstances, be obliged to exercise diplomatic protection. Draft Article 4, as presented in the First Report, provides under paragraph 1 that

[u]nless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if

7 See H. Thirlway, 'The Sources of International Law', in Evans (ed.), *International Law*, Oxford 2006, 115-140, at 129-130. See also the *Arrest Warrant* case (Democratic Republic of the Congo v. Belgium), ICJ Reports 2002, at 23-25 (paras. 56-59).

8 Yearbook of the ILC, 1996, (Vol. II), at 97, para. 248.

9 Bennouna, Preliminary Report, para. 48.

10 *Id.*, para. 48.

11 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 29.

12 To be discussed more in detail *infra*, section 3.A.

13 Bennouna, Preliminary Report, para. 48.

the injury results from a grave breach of a *jus cogens* norm attributable to another State.¹⁴

In the commentary, the Special Rapporteur indicated that although there were differing views on the issue, 'there are signs ... of support for the view that States have not only a right but a legal obligation to protect their nationals abroad'.¹⁵ The proposed Article was to be interpreted as an 'exercise in progressive development'.¹⁶ The discussion in the ILC however showed that this provision was too progressive to be accepted and it was as a result not included in the Draft Articles as submitted to the Sixth Committee on First Reading in 2004. Article 2 of the Draft Articles merely states that 'A State has the right to exercise diplomatic protection in accordance with the present draft articles'.¹⁷

The Draft Articles adopted on first reading were submitted for consideration to UN Member States prior to the Second Reading. Due to the existing controversy on the precise status and nature of the right to diplomatic protection, it was not surprising that most of the commenting States did not suggest the adoption of the earlier abandoned Article.¹⁸ However, Italy did suggest that a duty to exercise diplomatic protection in case of a violation of a norm of *jus cogens* should be included in the Draft Articles¹⁹ and this proposal received some support from members of the ILC. Consequently, the drafting committee of the ILC discussed the matter again. Although it has not adopted the proposal as suggested by Italy, it did adopt a new Draft Article in an exercise of progressive development. Under the heading of 'recommended practice', this provision, Draft Article 19, encourages states to exercise diplomatic protection, 'especially when significant injury occurred', to have regard to the wishes of the injured individual with respect to the kind of compensation, if any, and to transfer such compensation to the individual.²⁰ This provision has deliberately been drafted in soft language and thus does

14 Dugard, First Report, para. 74.

15 Dugard, First Report, para. 87.

16 Dugard, First Report, para. 88.

17 The article included in the Draft Articles adopted on first reading has been retained on second reading, Draft Articles on Diplomatic Protection.

18 Indeed, no such suggestion was made by states. See Government Comments and observations, and Government Comments and Observations, Add. 1 and 2 (2006).

19 See Government Comments and observations received, Add.2 (2006)

20 Article 19 reads: 'A State entitled to exercise diplomatic protection according to the present draft articles, should:

- a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury occurred;
- b) take into account, whenever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
- c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.' See Draft Articles on Diplomatic Protection.

not create binding obligations. Nevertheless, together with the judicial decisions discussed below it shows that the rights and duties connected to diplomatic protection are developing. As will be argued, these decisions in fact show some support for the initial position of the Special Rapporteur presented in his First Report and the inclusion of the new article 19 in the Draft Articles.

2 BACKGROUND: HUMAN RIGHTS AS INDIVIDUAL RIGHTS

The decisions to be discussed below almost all concern (alleged) violations of obligations under human rights law. The fact that the individuals concerned have been claiming protection against violations of these rights relates to a general development in human rights law from states' rights to individual rights. This development of human rights as individual rights is commonly considered to have started in the aftermath of the Second World War.²¹ While pre-war Borchard clearly considered diplomatic protection to be an adequate mechanism for the protection of individual human rights,²² he still derived the rights of individuals from the rights of their state of nationality:

in the present state of our civilization, the individual, as a human being, is accorded certain fundamental rights *by all states* professing membership in the international community²³

and

whatever rights the individual has in a state not his own are derived from international law, and are due him by virtue of his nationality.²⁴

Human rights were thus not considered to be vested in individuals as such but to derive from states as holders of international rights. In addition, human rights were generally considered to be a domestic affair.²⁵

21 See e.g., Brownlie, *Principles of Public International Law*, Oxford 2003, at 529; Shaw, *International Law*, Cambridge 2003, at 253; Cassese, *International Law*, Oxford 2005, at 377. See also the discussion presented in H. J. Steiner and P. Alston (eds.), *International Human Rights in Context*, Oxford 2000, at 324 *et seq.*

22 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 13: 'if these rights of a resident alien are violated without proper redress in the state of residence, his home state is warranted by international law in coming to his assistance and interposing diplomatically in this behalf'.

23 *Id.*, at 12 (emphasis added).

24 *Id.*, at 13.

25 See on this point for instance the discussion in Steiner and Alston, *International Human Rights in Context*, Oxford 2000, at 127-30.

The horrors of the Nazi régime changed this attitude and led to awareness that implementation of human rights should not be solely left to the discretion of states. As Steiner has aptly commented on the implementation of human rights,

the assumption above about the good-faith commitment of all States to a human rights regime defies our knowledge of the world and of the human rights movement's history.²⁶

The solution would be to create human *rights* that eventually would become enforceable by the beneficiary of those rights. Some authors have contended that this development would render the mechanism of diplomatic protection futile, as individuals no longer enjoy human rights by virtue of their nationality but by virtue of the fact that states are required to grant enjoyment of human rights to all individuals within their territory irrespective of their nationality.²⁷ Although this view fails to take into account the relative ineffectiveness of existing human rights mechanisms, it does show that human rights are increasingly considered to belong to the individual rather than his or her national state.²⁸ As Higgins pointed out 'a human right is a right held *vis-à-vis* a state, by virtue of being a human being'²⁹ and not *vice versa*.

The conclusion that human rights are increasingly considered as individual rights rather than states rights may not be strikingly revolutionary. Ever since the adoption of the various human right treaties with monitoring bodies we have been accustomed to the individuality of these rights, the European system perhaps being the strongest. The adoption of the 11th Protocol (ETS no. 155) and the subsequent changes to the European Convention on Human Rights form a clear example of this development, as the Convention now obliges all current and future states parties to the Convention to accept individual complaints.³⁰ It is also interesting to note Garcia Amador's views on this matter.

26 H.J. Steiner, 'International Protection of Human Rights', in M.D. Evans (ed.), *International Law*, Oxford 2006, 753-782, at 756.

27 G. Gaja, 'Is a state specially affected when its nationals' human rights are infringed?', in L. Chand Vohrah *e.a.* (ed.), *Man's Inhumanity to Man*, The Hague, 2003, at 382; see also Dugard, First Report, para. 17.

28 See critically on implementation and individual enforcement of human rights, Brownlie, *Principles of Public International Law*, Oxford 2003, at 556-7 and Dugard, First Report, paras. 22-32. See also 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', 70 AJIL 507-510 (1976), at 509.

29 R. Higgins, *Problems and Process*, Oxford 1994, at 98. See on this point also P. C. Jessup, *A Modern Law of Nations*, North Haven 1968, at 90: 'It is inherent in the concept of fundamental rights of man that those rights inhere in the individual and are not derived from the state'.

30 See also L. Reed, 'Great Expectations: where does the proliferation of international dispute resolution tribunals leave international law?', 96 ASIL Proceedings 219-237, at 221-222 (2002)

In 1956 he submitted his First Report on State Responsibility to the ILC, in which he stated that

[t]he traditional view [i.e. that ‘the private person’s status was considered an essential condition of his enjoyment of certain international rights ... [and] that these rights should be thought of as identical with, or at any rate inseparable from the rights of the State of nationality’] is *a fortiori* incompatible with the present international recognition of the fundamental human rights and freedoms.³¹

This development has many implications for diplomatic protection, not all of which can be discussed within the scope of this Chapter, which focuses on the reviewability of executive decisions whether or not to exercise diplomatic protection and the ensuing limitation on the discretionary nature of the right to diplomatic protection. To give just a few examples of other implications, Gaja has indicated that focussing on the individual as the holder of rights has as a consequence both that a state cannot espouse a claim against the wishes of the individual and that the individual has a right to reparation, as this rights flows from the violation of an initial right which also rests with the individual.³² Amerasinghe has also discussed the relation between developments in human rights law and diplomatic protection in his study on the local remedies rule.³³ Although he seems to consider human rights protection and diplomatic protection to be two different mechanisms, he has recognised that ‘while valid differences must be accepted, there is every reason why the experience in one area could inform the development of the law in the other’.³⁴

3 NATIONAL COURT DECISIONS: LIMITING DISCRETION

A. The Rudolf Hess decision

Germany has a long-standing tradition of granting its nationals a right to diplomatic protection under its constitution, which contains an explicit pro-

31 ILC Yearbook 1956, Vol. II, p 194 (para. 111).

32 G. Gaja, ‘Droits des états et droits des individus dans le cadre de la protection diplomatique’, in J.-F. Flauss (ed.), *La Protection Diplomatique, mutations contemporaines et pratiques nationales*, Bruxelles 2003, at 68-69.

33 Amerasinghe, *Local Remedies in International Law*, Cambridge 2004. See for a discussion on the relationship between human rights protection and diplomatic protection for the purpose of the local remedies rule at 64-83 and 430-435.

34 *Ibid.*, at 434.

vision to this effect.³⁵ However, the constitution does not specify a minimum level of protection to be provided by the government or the kind of diplomatic protection to be expected. One of the first cases in which the (non-)exercise of diplomatic protection was challenged was the *Rudolf Hess* case.³⁶ In June 1977 Rudolf Hess, sentenced with life imprisonment and detained in the Berlin-Spandau Prison in 1947 for his role in the Nazi régime, instituted proceedings against the Federal Republic of Germany, arguing that the government was obliged to exercise diplomatic protection on his behalf as the circumstances of his detention were contrary to international law. In December 1980 the *Bundesverfassungsgericht* found that the Federal Government was indeed under a constitutional duty to provide diplomatic protection to nationals but that it had a wide discretion in the exercise of this protection.³⁷ The Court noted that the Federal Government had in fact raised the issue with the governments of the Allied Powers, arguing that 'the frail state of health of the Complainant had ... long justified his release',³⁸ but that it was considered inappropriate to release Mr. Hess as this 'could raise the question of legality of the judgment of the [Nuremberg] Tribunal'.³⁹ The Court also noted the intention by the Federal Government to continue its attempts to improve the situation of the claimant, notwithstanding the apparent legality of his detention.⁴⁰ Despite its finding that assessment of the precise action to be taken in the exercise of diplomatic protection must be left to the government,⁴¹ the Court did investigate the action undertaken by the German government and found that the government had actually made a considerable effort to improve the situation of the claimant. The fact that this did not have the result desired by the claimant is

not, of itself, sufficient to give rise to a duty under constitutional law for the Federal Government to take specific further measures of possibly greater scope and consequence.⁴²

35 K. Doehring *Die Pflicht des Staates zur Gewährung diplomatischen Schutzes*, Cologne 1959, at 25-47. See also G. Ress, 'Mangelhafte diplomatische Protektion und Staatshaftung', 32 *ZaöRV* 421-481, at 450 *et seq.*; D. Blumenwitz, 'Die deutsche Staatsangehörigkeit und die Schutzpflicht in der Bundesrepublik Deutschland', in A. Heldrich *et al.*, *Konflikt und Ordnung, Festschrift für Murad Ferid zum 70. Geburtstag*, München 1978, at 443 *et seq.*

36 BVerfG, Beschl. v. 16.12.1980 – 2 BvR 419/80, 28 *NJW* 1499 (1981) and 90 *ILR* 387-400.

37 90 *ILR* at 388.

38 *Ibid.*, at 392.

39 *Ibid.*, at 392.

40 *Ibid.*, at 396.

41 *Ibid.*

42 *Ibid.*

The *Rudolf Hess* decision has been interpreted as confirming the view that diplomatic protection is a discretionary right of states and not of individuals.⁴³ However, this interpretation is flawed as the Court did not dismiss the case as a non-justiciable *acte de gouvernement*. As we have seen, the Court entered into the merits of the case and found that the actions undertaken by the Federal Government were satisfactory. Two conclusions must be drawn. First, the Court has not excluded a finding that under different circumstances the government could be held to have violated its obligations in respect of diplomatic protection. Secondly, the Court seems to have been satisfied with the actions taken by the Federal Government, which may imply that it required a certain minimum standard of government action, albeit undefined.

B. HMK v. The Netherlands

HMK v. *The Netherlands*, filed in 1983,⁴⁴ concerned a Dutch national who was arrested and detained in Germany after the delivery of narcotics to a German undercover police officer. An agreement preceding the delivery was concluded between the applicant Dutch national and a German undercover agent on Dutch territory, the Dutch authorities having consented to the presence of the German police officer on Dutch territory. The applicant argued that his arrest and detention were the result of abduction with the assistance of the Dutch authorities and that this was contrary to international law. He also argued that the fact that the Dutch authorities had been involved in his abduction should add more weight to the obligation to exercise diplomatic protection on his behalf against Germany. This case was decided in favour of a discretionary right of states to exercise diplomatic protection, the Court stated that under international law the right to exercise diplomatic protection belonged to the state and not to the individual and that the state had a wide discretion in the exercise of this right.⁴⁵ No reference to the earlier *Rudolf Hess* decision was made and the Court was generally of the opinion that an analysis of the protection offered was not necessary.

Although this decision supports the traditional view on diplomatic protection,⁴⁶ and for that reason differs from the other cases presented, one comment should be made. An explanation for the unwillingness of the Court to consider the level of protection offered can perhaps be found in a final remark made by the Court:

43 See for instance E. Klein, 'Anspruch auf diplomatischen Schutz?', in G. Ress and T. Stein (eds.), *Der diplomatische Schutz im Völker- und Europarecht*, Baden 1996, at 128-129.

44 94 ILR at 342-346.

45 *Ibid.*, at 345.

46 The case is referred to in Shaw, *International Law*, Cambridge 2003, at 722, note 193, to support the view that there is no individual right to diplomatic protection under current international law.

K. must be deemed to belong to the large group of Dutch nationals who are detained abroad for drug offences [and] the state cannot be required to accord him preferential treatment. It is, after all, generally known ... that the Netherlands hardly ever co-operates in the extradition of Dutch nationals abroad or in the taking over of the execution of their sentences.⁴⁷

It is submitted that this suggests that another conclusion would have been feasible, had the circumstances been different and not drugs-related. In this case, the Court refrained from entering into a debate on the level of protection that would have been adequate in this case, but perhaps not solely or even not primarily on the ground that diplomatic protection should be considered a discretionary right.⁴⁸ As pointed out, the nature of the offence clearly influenced the Court's approach.

C. *Comercial F SA v. Council of Ministers*

In 1987 a group of Spanish individuals and companies with interests in Equatorial Guinea filed a complaint before the Spanish Supreme Court against the Spanish Council of Ministers for lack of diplomatic protection.⁴⁹ The individuals and companies claimed to have suffered violations of international law during and after the decolonisation of Equatorial Guinea. Spain had granted independence to Equatorial Guinea in 1968 and shortly after Francisco Macias Ngema was appointed as President of the new republic. He failed however to maintain law and order and the situation in Equatorial Guinea deteriorated rapidly, not in the least due to the undemocratic nature of the government. After a military coup in 1979 a new government was installed, with Obian Nguema as President, but this government also failed to ensure safety and security for the residents of Equatorial Guinea.

The Spanish individuals and companies, who 'found themselves exposed to arbitrary action by the organs of the newly independent State',⁵⁰ resulting amongst others in deprivation of property, argued that the Spanish government had not offered sufficient protection. The Attorney General argued on behalf

⁴⁷ 94 ILR at 345-346.

⁴⁸ As will be shown below (section 3.5) individual nationals can often rely on standard policies. For the Dutch government, the standard policy was not to make representations in cases involving drug-related offences and the lack of diplomatic protection was in conformity with these policies in this case. This may have influenced the Court in its decision.

⁴⁹ *Comercial F SA v. Council of Ministers* (Case No. 516), Spain, Supreme Court (Third Chamber), 6 February 1987. 88 ILR at 691-697.

⁵⁰ 88 ILR at 694.

of the Council of Ministers that the claim was inadmissible as diplomatic protection was 'the right of a state and not an individual right' and as

there is no doubt that a State can lawfully decline to grant a request for diplomatic protection, for reasons deriving from the national or international political order.⁵¹

The Spanish Court however entered into the merits of the case:

In this connection ... it is of value to outline the facts which led to the alleged damage inflicted on the claimants, not only in order to understand the nature of the problems raised, but also to evaluate the possible consequences of not granting the appellant's claim for compensation.⁵²

The Court thus did not accept the Attorney General's contention, but instead reviewed the activities of both the Spanish government and the claimant companies, only to conclude that the claimants had not complied with the required time limit – complaints had to be filed within one year after the critical date. The claim therefore was dismissed, though not as a result of diplomatic protection being an *acte de gouvernement*.⁵³

Although this decision is not particularly enlightening with respect to the nature of diplomatic protection, it is significant to note that the course taken by the Court necessitated a review of the facts underlying the claim, while a dismissal on grounds of the discretionary nature of diplomatic protection would have been possible without reference to the particular circumstances.

D. JAAC 61.75 and 68.78

The circumstances of the *JAAC 61.75* decision of 30 October 1996 are rather complicated as the case involved a Swiss company, an Asian society and a subsidiary organ or Specialized Agency of the UN, subsidiary to the General Assembly.⁵⁴ It was thus not a complaint by a company about violations of international law by a foreign state, but a complaint against a UN agency. The UN organ had asked the Asian society to supply certain goods, and the Asian society borrowed money from the Swiss company to provide the goods. However, the UN organ had explicitly laid down in its order that the Asian company was not to involve a third party with the effect of creating rights or claims by that third party with regard to the transaction. When the Swiss company claimed its money it was unable to obtain the money from the Asian

⁵¹ *Ibid.*, at 694.

⁵² *Ibid.*, at 694.

⁵³ *Ibid.*, at 696.

⁵⁴ The facts of the case do not specify the names of the company and the society nor which UN organ was involved.

society and demanded that the UN organ transfer the money directly to the Swiss company. The UN organ refused to do so referring to the provision in the transaction documents. The Swiss company then pursued a claim before a Geneva Court, which decided that the UN organ was required to pay the money to the Swiss company. However, after the judgment was handed down the UN claimed immunity and a higher court reversed the judgment of the Geneva Court granting the UN immunity before local courts. The Swiss company then approached the Swiss Permanent Mission to the International Organisations in Geneva and the Ministry of Foreign Affairs. The government indicated that it could not provide assistance and the Swiss company filed a claim before the *Conseil fédéral*. The Swiss company claimed that it had suffered from denial of justice, prohibited under the Swiss Constitution, due to the fact that the Swiss government refused to exercise diplomatic protection without giving adequate reasons for this decision. It also claimed that it had suffered a denial of justice as the government has violated its obligation to protect the rights of the company abroad.

In the opinion of the *Conseil fédéral*, international law did not provide for an obligation to exercise diplomatic protection and as a consequence the only source for such an obligation could be internal law.⁵⁵ After having subjected the relevant Swiss laws to scrutiny, the *Conseil* concluded that Swiss internal law did not provide for such an obligation. According to the *Conseil*, it had to safeguard not only the interest of its individual nationals, but also the interests of the population as a whole under public international law.⁵⁶ Moreover, the law did not give nationals the right to demand protection.⁵⁷ However, the *Conseil* also found that the Swiss government was not entirely free to act as it pleased as 'la seule limitation imposée à l'Etat dans l'exercice de son pouvoir relatif à la protection diplomatique est l'interdiction de l'arbitraire'.⁵⁸ The government's decision not to exercise diplomatic protection would have been arbitrary if its assessment of the facts had been faulted, if decisions had been taken based on unsupported facts or if its decision had been incompatible with rules of law and equity.⁵⁹ The *Conseil* felt obliged to establish the relevant facts and applicable law and to analyse the behaviour of all parties involved. It concluded, first, that there had been no violation of international law for which the UN and its subsidiary agency could be held responsible under international law (one of the requirements for the exercise of diplomatic protection) and that diplomatic protection therefore would have been inappropriate; and, secondly, that the government had not acted

⁵⁵ JAAC 61.75, para. 2.1, available at <http://www.jaac.admin.ch/franz/doc/61/61.75.html>.

⁵⁶ *Ibid.*, para. 2.2.1.

⁵⁷ *Ibid.*, para. 2.2.3.

⁵⁸ *Ibid.*, para. 2.3.

⁵⁹ *Ibid.*

arbitrarily in refusing to exercise diplomatic protection on behalf of the Swiss Company.⁶⁰

The *Conseil's* conclusion is contradictory. The emphasis on the discretionary nature of the exercise of diplomatic protection is difficult to reconcile with the examination of the actions taken by the respective parties and emphasis on the prohibition on arbitrary decision-making. An *acte de gouvernement* would not normally be considered justiciable and thus entering into the merits of the case would be inappropriate, in particular entering into the question of what measures the government could, and possibly should, have taken to protect its national. As in the *Rudolf Hess* decision, the *Conseil* did not feel restrained to do that. And again, the *a contrario* would be that the government would have breached its obligations had the circumstances been different.

The same approach was taken in JAAC 68.78 in 2004. The facts of this case are very similar to the facts in the earlier decision: it also concerned a claim by a Swiss corporation, referred to as *Groupeement*, against an institution enjoying immunities, in this case the Centre Européen de pour la Recherche Nucléaire (CERN), for non-payment of services rendered by sub-contracted entities. Interestingly, the *Conseil fédéral* did find that the decision by the Swiss government not to exercise diplomatic protection was arbitrary since the claimant corporation had not been privy to the reasons underlying the decision.⁶¹ However, when considering the merits of the case, the *Conseil* was of the opinion that the *Groupeement* failed to show convincingly that a breach of international law had occurred and that a third arbitral procedure would be necessary to address this wrong. According to the *Conseil*, the Swiss government was justified in its decision not to exercise diplomatic protection on behalf of the *Groupeement*.⁶² Similar to the earlier JAAC 61.75 the *Conseil* entered into the merits of the case and found that, while the decision not to exercise diplomatic protection in itself may have been arbitrarily taken, the decision itself was justified considering the facts of the case and the behaviour of the *Groupeement*.

E. Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs

More recently, the Court of Appeal in the United Kingdom considered the issue of diplomatic protection in the *Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs & and the Secretary of State for the*

60 *Ibid.*, para. 5.

61 JAAC 68.78, paras 3.2-3.3. Available at <http://www.jaac.admin.ch/franz/doc/68/68.78.html>.

62 *Ibid.*, para. 9.

Home Department.⁶³ The *Abbasi* decision is not the first British case concerning review of the (non)exercise of diplomatic protection. It thus should be considered in the light of preceding decisions, in particular the *Pirbhai* case⁶⁴ and the *Ferhut Butt* case.⁶⁵

The *Pirbhai* case concerned a claim by British nationals who had lost their property in Uganda after having been expelled from that country by General Amin's government. The decision of the High Court, later confirmed on appeal, firmly stated that the decision by the Secretary of State not to intervene on behalf of the British nationals could not be reviewed by the Court. Despite the fact that concern was expressed over the situation of the applicants, it was concluded on appeal that

[w]hatever the jurisdiction of the court, few would disagree with the proposition that in the context of a situation with serious implications for the conduct of international relations, the court should act with a high degree of circumspection in the interests of all concerned. It can rarely, if ever, be for judges to intervene where diplomats fear to thread.⁶⁶

Diplomatic protection was thus considered to be a discretionary right rather than one to be subjected to judicial review. Although the Court did present its decision as reflecting the general rule, this case, concerning loss of property, must be distinguished from cases involving individual human rights, such as *Abbasi* but also the *Ferhut Butt* case. I shall return to this distinction in the discussion on the *van Zyl* decision (below, section 3.8).

More relevant for the interpretation of the *Abbasi* decision is the *Ferhut Butt* case as the facts of the case bear some resemblance to *Abbasi*. The case was brought by the sister of a British national detained in Yemen on the suspicion of terrorist activities. She claimed that both the trial and the conditions of detention, including allegations of torture and inhuman treatment, were in flagrant violation of international human rights law and that therefore the British government was obliged to exercise diplomatic protection on behalf of her brother and other British nationals detained with him. Although the High Court phrased its concern over the fate of the detained British nationals delicately, it clearly accepted that the situation was the result of 'the most

⁶³ [2002] EWCA Civ 1598, [2002] All ER (D) 70 (Nov) (CA, Civ Div), see also 125 ILR 685-726.

⁶⁴ *Regina v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Kamrudi Pirbhai e.a.*, High Court, Queens Bench Division, 7 September 1984 and Court of Appeal, 15 October 1985, 107 ILR 462-81.

⁶⁵ *Regina v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Ferhut Butt*, High Court, 1 July 1999 and Court of Appeal, 9 July 1999, 116 ILR 607-22.

⁶⁶ 107 ILR at 479.

serious interference with the fundamental human rights of the detainees'.⁶⁷ Despite the fact that both the High Court and the Court of Appeal reproduced the correspondence between the applicant and the Secretary of State, showing the level of engagement of the latter, both courts concluded that it is not for a court to review the measures taken. The Court of Appeal, following the High Court, concluded that

[w]hether and when to seek to interfere or to put pressure on in relation to the legal process, if ever it is a sensible and a right thing to do, must be a matter for the Executive and no one else, with their access to information and to local knowledge. It is clearly not a matter for the courts.⁶⁸

While this conclusion may seem to support the non-justiciability of such claims, it is submitted that the facts of this particular case left the respective judges little room to decide otherwise. The applicant had requested direct interference with the judicial process in Yemen with the view to influencing the course of justice to avoid an adverse verdict. The Court of Appeal dealt with this issue most extensively and found that an order to this effect would constitute an interference with the domestic affairs of a foreign state.⁶⁹ The argument that complying with the request of the applicant would constitute an interference with the domestic affairs of a foreign state is closely connected to the requirement of exhaustion of local remedies. In this case, the local remedies in Yemen were arguably not exhausted, at least in the view of the Court.⁷⁰ It is not necessary to enter into a detailed debate on the local remedies rule; suffice it to say here that the requirement of exhaustion of local remedies prior to the exercise of diplomatic protection is, at least partly, derived from state sovereignty as it 'warrants the local state in demanding for its local courts freedom from interference'.⁷¹ Since the Court was of the opinion that the local remedies were not exhausted, it found that the exercise of diplomatic protection would be premature and the same would apply to a court decision ordering diplomatic protection. It is in this respect that the *Ferhut Butt* case must be distinguished from the *Abbasi* decision. Nevertheless, as will be shown below,

67 116 ILR at 610, starting the assessment of the situation as follows: '[i]t is not for me to examine the truth of these allegations. I shall assume for the purpose of this application that the allegations are true.'

68 116 ILR at 622.

69 116 ILR at 621-2.

70 116 ILR at 614-5 and 620. Obviously, one could question the effectiveness and adequacy of the remedies available in this case, but an assessment of the Yemenite judiciary falls outside the scope of the present discussion. The Court in any case found 'no evidence nor basis for any submission ... that a fair hearing will not be obtained on appeal.' 116 ILR at 615.

71 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 817. See also, Dugard, Second Report and generally Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, (on sovereignty and local remedies: at 62-4).

the Abbasi decision has departed from the non-justiciability of the exercise of diplomatic protection.

Mr. Abbasi, a Guantanamo Bay detainee, argued that the United Kingdom should have exercised diplomatic protection as his detention violated public international law and fundamental human rights, in particular the prohibition on arbitrary detention,⁷² a *jus cogens* norm of international law.⁷³ The Court agreed that Mr Abbasi's treatment was not in conformity with international law:

in apparent contravention of fundamental principles recognized by both jurisdictions [ie the United Kingdom and the United States] and by international law Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'.⁷⁴

The Court was requested to decide whether the exercise of diplomatic protection could be subjected to judicial review and if so whether the British Foreign Ministry could be held to have failed to exercise this right properly. Although the Court did find that international law does not yet recognize a duty to exercise diplomatic protection,⁷⁵ it simultaneously rejected

the position that there is no scope for judicial review of a refusal to render diplomatic assistance to a British subject who is suffering a violation of a fundamental human right.⁷⁶

Constituting a clear departure from the earlier *Ferhut Butt* decision, this may seem slightly incongruous. If there was no duty, why then would the Court allow judicial review? The solution is found in 'legitimate expectation'.⁷⁷ As the Court stated,

the doctrine of 'legitimate expectation' provides a well-established and flexible means for giving legal effect to a settled policy or practice for the exercise of an administrative discretion.⁷⁸

⁷² *Abbasi*, paras. 6 and 22.

⁷³ *Ibid.*, paras. 28-29.

⁷⁴ *Ibid.*, para. 64. See also para. 107.

⁷⁵ *Ibid.*, paras. 69 and 79.

⁷⁶ *Ibid.*, para. 80.

⁷⁷ *Ibid.*, para. 82.

⁷⁸ *Ibid.*

If the government has a more or less consistent policy with respect to the protection of nationals abroad, individual nationals may rely on this policy and expect the government to act accordingly.⁷⁹

In addition, the Court found that the 'mere fact that a power derived from the Royal Prerogative did not necessarily exclude it from judicial review'.⁸⁰ In particular where the government has made an express policy statement with respect to a subject matter that falls within its discretionary powers, it would be subject to judicial review, notwithstanding the discretionary nature of the decision. With respect to diplomatic protection, the British government had issued express statements on its policies.⁸¹ Although these statements only reveal a certain role, a 'commitment 'to consider' making representations',⁸² the Court found that this was sufficient to create a legitimate expectation.⁸³ As the British government had in fact acted and 'the British detainees are the subject of discussions between this country and the United States', the Court decided that, at this stage, it would not be appropriate for the Court to accept the applicant's submissions. It thus decided to dismiss the application.⁸⁴

However, the Court made it very clear that it did not consider the exercise of diplomatic protection to be entirely within the discretion of the executive. Indeed, it would in certain circumstances 'be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant's case'.⁸⁵ Thus the English Court took the matter one step further than the German and Swiss Courts in explicitly referring to the possibility of a decision to the contrary.⁸⁶ It departed from the classification of diplomatic protection as *acte de gouvernement* and further limited the discretion of the executive.

The *Abbasi* decision provides an important and enlightening example of the interpretation of the right to and nature of diplomatic protection. The Court considered other options open to the applicant for claiming violations of his (international) rights and emphasized the importance of the protection of

79 In this respect it is interesting to note that the judgment referred to the First Report on Diplomatic Protection by the ILC Special Rapporteur. The Report was introduced by Mr. Blake QC on behalf of the applicant, stressing the conclusions by the Special Rapporteur concerning the existence of a duty to exercise diplomatic protection in case of violations of a *jus cogens* norm. See *Abbasi*, paras. 36 and 41.

80 *Abbasi*, para. 83.

81 *Ibid.*, paras. 88-91.

82 *Ibid.*, para. 92.

83 *Ibid.*, paras. 92, 98 and 99.

84 *Ibid.*, paras. 107-108.

85 *Ibid.*, para. 104.

86 See on this point also C. Kilroy, 'R. (on the application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs: Reviewing the prerogative', 2 E.H.R.L.R 222-229, at 229 (2003).

human rights. On the other hand it also weighed the political implications of the case and the reality of the possibilities open to the British government, indicating that it would be unrealistic to expect the government to achieve the impossible (i.e. the immediate release of Mr. Abbasi), but simultaneously stressing that a minimum involvement was to be expected. It is submitted that the *Abbasi* decision clearly indicates that the right to diplomatic protection is not solely and exclusively conferred on the state and that the exercise of diplomatic protection is not at the absolute discretion of government officials but that it is subject to human rights standards and rules of legal certainty.⁸⁷

F. M. K. v. The Netherlands

Mr. Kuijt, a Dutch national, instituted summary proceedings against The Netherlands in 2003.⁸⁸ He had been held in pre-trial detention in Bangkok, on suspicion of drug-trafficking, for six years by the time he filed his complaint and he considered this as a violation of his right to a fair trial within a reasonable time and his right to liberty. He complained that the norms violated were part of universal human rights norms entailing *erga omnes* obligations and argued that this implied that the Dutch government had the obligation to take all necessary measures to improve his situation.⁸⁹ In particular, he argued that the Dutch Embassy in Thailand should issue a statement, in order to obtain *habeas corpus*, guaranteeing that Mr. Kuijt would not leave Thailand and should do everything to obtain redress from the Thai government for the violation of fundamental human rights. In addition the Dutch government should try everything possible to secure his release.⁹⁰ The Court analysed the effort taken by the Dutch government on behalf of Mr. Kuijt and came to the conclusion that his complaint could not be upheld. The government was unable to dictate to the Thai government how to treat its prisoners, but in addition, the Dutch government had – contrary to its usual approach of nationals detained on suspicion of drug-related offences – tried to influence

⁸⁷ Mr. Abbasi was returned to the United Kingdom on 25 January 2005, after diplomatic negotiations between the United Kingdom and the United States. He was soon released from custody. The decision in *Abbasi* has recently been confirmed in *Al Rawi v. Secretary of State and Commonwealth Affairs and the Secretary of State for the Home Department*, [2006] EWHC 972 (Admin), Case no. CO/10470/2005, available at <http://www.bailii.org/ew/cases/EWHC/Admin/2006/972.html>. This case also concerned Guantanamo Bay detainees. It is interesting to note that the case was partly brought on behalf of refugees recognised as such by the United Kingdom and thus concerned the question of diplomatic protection for refugees, as provided in Draft Article 8 (see Draft Articles on Diplomatic Protection). A discussion of this topic however is beyond the scope of the present Chapter.

⁸⁸ *M. Kuijt v. The Netherlands*, 18 March 2003, LJN. no. AF5930, Rolno. KG 03/137 (hereinafter *Kuijt*).

⁸⁹ *Ibid.*, para. 2.2.

⁹⁰ *Ibid.*

the treatment of Mr. Kuijt by quiet diplomacy.⁹¹ In the final paragraph of the judgment, the Court decided that, although the situation of Mr. Kuijt was a reason for concern, his claims nevertheless had to be dismissed, as they were both too farfetched and too unsubstantiated. Having said that, the Court however concluded that

it expects the [Dutch government] to continue to take an effort to assist the applicant and to take all possible measures to secure the release of the applicant as soon as possible.⁹²

In addition, 'so far it has not been shown that all possibilities have been sufficiently investigated'.⁹³

This case concerned both consular assistance and diplomatic protection, as the applicant argued that the Dutch government had failed to meet its obligations under both mechanisms. The Court found with regard to consular assistance that individuals have no right to consular assistance under international law with respect to their national state but it failed to distinguish consular assistance from diplomatic protection. The actions undertaken by the Dutch government on behalf of Mr. Kuijt as described in the judgment however do point to diplomatic protection: diplomatic interventions to the Thai authorities, quiet diplomacy and correspondence between the Dutch and Thai Minister of Foreign Affairs. This lack of demarcation between the two kinds of assistance is not unusual in the Court's practice.⁹⁴ As certain activities, in particular those undertaken by an Ambassador or a Minister of Foreign Affairs, should be considered as representing the state rather than the individual, such actions should properly be classified as exercises of diplomatic protection. This includes diplomatic *demarches* and official protests, as described by the ICJ in its *Reparation for Injuries* Advisory Opinion.⁹⁵ Since the Court did investigate the activities undertaken by the Dutch government that could properly be classified as diplomatic protection, and thus entered into the merits of the case, the decision is in line with the decisions discussed above. It

91 *Ibid.*, para. 3.6-3.7.

92 *Ibid.*, para. 3.8. (Translation by the Author).

93 *Ibid.*, para. 3.8. (Translation by the Author).

94 See for instance *Van Dam v. The Netherlands*, 25 November 2004, Rolno. 02/43.

95 *Reparation for Injuries*, at 177. The definition of the term 'action' for the purpose of diplomatic protection is controversial. Some attention was given to it in the First Report on Diplomatic Protection (Dugard, First Report). See also C. Warbrick, 'Diplomatic Representation and Diplomatic Protection', 51 ICLQ 723-744 (2002). See for this issue *supra* Chapter II.

restricted the discretionary powers of the executive, not in the least by ordering the government to continue its attempts to improve the situation of the claimant.⁹⁶

G. Samuel Kaunda and Others *v.* The President of the Republic of South Africa and others

In August 2004 the South African Constitutional Court gave its decision in the *Kaunda* case,⁹⁷ in which the issue of diplomatic protection was discussed extensively, both in the judgment and in the separate opinions. The applicants, who were South African nationals, were detained in Zimbabwe on the charge of conspiracy and the possession of dangerous weapons, allegedly relating to a coup to overthrow the government of Equatorial Guinea. They requested the South African government for diplomatic protection as they claimed that their detention in Zimbabwe violated international norms and they feared extradition by Zimbabwe to Equatorial Guinea and subsequent unfair trials and the death sentence in Equatorial Guinea. They requested the government to

ensure that their rights to dignity, freedom and security of the person and fair conditions of detention and trial are at all times respected and protected in Zimbabwe and Equatorial Guinea.⁹⁸

The Constitutional Court explicitly dealt with the question whether diplomatic protection should be considered as a (human) right under international law that

should be developed to recognise that in certain circumstances where injury is the result of a grave breach of a jus cogens norm, the state whose national has been injured, should have a legal duty to exercise diplomatic protection on behalf of the injured person.⁹⁹

Although it recognized that there had been some support for this position in the International Law Commission's debates on the issue, the Court found that

96 Curiously, this case has taken a different turn as The Netherlands and Thailand have entered into a bilateral agreement on the exchange of prisoners under which Mr. Kuijt was allowed to return to The Netherlands to be detained in a Dutch prison. For the text of this bilateral treaty, see Tractatenblad 2004, p 216.

97 *Samuel Kaunda and Others v. The President of the Republic of South Africa, The Minister of Justice and Constitutional Development and others*, Judgment of 4 August 2004, 2004 (10) BCLR 1009 (CC) 2004 SACLR LEXIS 19. See also 44 ILM 173-233.

98 *Kaunda*, para. 3.

99 *Ibid.*, para. 28.

[c]urrently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such. To do so may give rise to more problems than it would solve ... It must be accepted, therefore, that the applicants cannot base their claims on customary international law.¹⁰⁰

The Court therefore rejected the claim to a right to diplomatic protection under international law.

The Court then investigated the existence of such a right under national law derived from provisions in the South African Constitution and international human rights law. It first turned to the applicable human rights treaties and concluded that a right to diplomatic protection is not explicitly provided for in any of them,¹⁰¹ and that it cannot be inferred either: 'A right to diplomatic protection is a most unusual right, which one would expect to be spelt out expressly rather than being left to implication'.¹⁰² The Court considered whether, even if diplomatic protection was not an enforceable right in itself, it might be so through other enforceable rights. In particular, the Court considered whether section 7(2) of the South African Constitution, requiring the state to respect, protect and promote the rights contained in the Bill of Rights, could be given extra-territorial effect to oblige the government to ensure respect for the Constitution vis-à-vis its nationals, even when they were in a foreign country.¹⁰³

The Court found that it would be an interference with the sovereignty of other states to demand a right to diplomatic protection through the national constitution: 'when the application of a national law would infringe the sovereignty of another state, that would ordinarily be inconsistent with and not sanctioned by international law'.¹⁰⁴ More specifically,

to assume an obligation that entitles [South African] nationals to demand, and obliges [the South African government] to take action to ensure that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own law, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty.¹⁰⁵

This view is however not entirely convincing. The exercise of diplomatic protection is never an interference in state sovereignty, unless it is inappropriate due to the fact that the requirements are not met (when no violation

100 *Ibid.*, para. 29.

101 *Ibid.*, para. 34.

102 *Ibid.*, para. 35.

103 *Ibid.*, para. 36.

104 *Ibid.*, para. 40.

105 *Ibid.*, para. 44.

of international law has occurred, local remedies have not been exhausted or the individual involved does not have the required nationality). The violations complained of by the applicants in *Kaunda* were violations of international human rights law and did not per se require extra-territorial application of South African Constitutional law. They could easily be founded on provisions in the human rights treaties, to which all relevant states, i.e. South Africa, Zimbabwe and Equatorial Guinea, were parties. Thus the extra-territorial application of the South African Constitution could have been avoided. The conclusion that a right to diplomatic protection which arises from the violation of human rights, whether contained in a national constitution or in an international treaty, would violate another state's territorial sovereignty is thus difficult to reconcile with the nature of diplomatic protection.

Having rejected the argument that the government had a 'particular duty to protect' in view of the alleged involvement of the South African government in the arrest and detention in Zimbabwe,¹⁰⁶ the Court turned to consider whether a right to diplomatic protection existed under section 3 of the South African Constitution, which provides that South African citizens are 'equally entitled to the rights, privileges and benefits of citizenship'.¹⁰⁷ Although the Court again rejected the position that there is a right to diplomatic protection, it found that South African nationals 'are entitled to *request* South Africa for protection under international law against wrongful acts of a foreign state'.¹⁰⁸ It continued by stating that '[individual nationals] are not in position to invoke international law themselves and are obliged to seek protection through the state of which they are nationals'¹⁰⁹ and that 'the citizen is entitled to have the request considered and responded to appropriately'.¹¹⁰

In their respective separate opinions, both Judge Ngcobo and Judge O'Regan disagreed with the Court on this point. Although they both concurred with the Court in its conclusion, they held different views with respect to the existence of an individual right to diplomatic protection and the corresponding duty to protect. They were both of the opinion that the Court should have held that the South African Constitution does contain an obligation to provide for diplomatic protection in certain cases.

Judge Ngcobo suggested that

106 *Ibid.*, paras. 45-53. This line of argument was also introduced by the applicant in the *HMHK v. The Netherlands* case, see *supra* section 3.B.

107 Section 3(1) of the South African Constitution, as cited in *Kaunda*, para. 58.

108 *Kaunda*, para. 60 (emphasis added).

109 *Ibid.*, para. 61.

110 *Ibid.*, para. 63.

there is a compelling argument for the proposition that states have, not only a right but, a legal obligation to protect their nationals abroad against an egregious violation of their human rights.¹¹¹

He rejected the idea that existing human rights mechanisms are sufficient for the protection of human rights and found that the South African government had a special commitment in the promotion and protection of human rights which should impose a 'special duty in this regard'.¹¹² In particular, in urgent situations, diplomatic protection 'may prove to be one of the most, if not the most, effective remedy for the protection of human rights',¹¹³ as the injured individual may not have other instruments or remedies at his or her disposal.¹¹⁴ Judge Ngcobo concluded that diplomatic protection is a 'benefit' within the meaning of section 3(2) of the Constitution and that this provision read together with section 7(2) imposes 'a constitutional duty on the government to ensure that all South African nationals abroad enjoy the benefits of diplomatic protection'.¹¹⁵ A request for diplomatic protection may not be 'arbitrarily refused' and must be considered appropriately.¹¹⁶ Referring to the *Abbasi* decision, Judge Ngcobo found that South African nationals benefit from a legitimate expectation based on the government's standard policy.¹¹⁷ However, he agreed with the majority opinion in this case as he found that the government had not failed to consider the request appropriately and that it had not been shown that the government had denied protection.¹¹⁸

In her separate opinion, Judge O'Regan also derived an obligation to protect from the South African Constitution. As the Constitution should be interpreted 'in a way to promote rather than hinder the achievement of the protection of human rights',¹¹⁹ it would thus be appropriate to 'understand section 3 as imposing ... an obligation to provide diplomatic protection ... to prevent or repair egregious breaches of international human rights norms'.¹²⁰ She concluded that

to the extent that section 3(2) [of the Constitution] states then that 'citizens are equally entitled to the ... privileges and benefits' of citizenship, it is not only an

111 *Kaunda*, Separate Opinion Judge Ngcobo, para. 169.

112 *Ibid.*, paras. 169 and 170.

113 *Ibid.*, para. 167.

114 *Ibid.*, para. 181.

115 *Ibid.*, para. 188.

116 *Ibid.*, para. 192.

117 *Ibid.*, paras. 168 and 198 respectively.

118 *Ibid.*, paras. 204 and 208.

119 *Kaunda*, Separate Opinion Judge O'Regan, para. 237.

120 *Ibid.*, para. 238.

entitlement to *equal* treatment in respect of the privilege and benefit of diplomatic protection, but also an entitlement of diplomatic protection itself.¹²¹

Later in her opinion, Judge O'Regan even took a stronger position:

section 3 of the [South African] Constitution read in the light of other provisions of [the] Constitution imposes an obligation upon the government to take appropriate steps to provide diplomatic protection to its citizens who are threatened with or who have experienced egregious violations of international human rights norms by a foreign state upon whom the international rights norms are binding.¹²²

The Court would not go that far. It emphasized that

[w]hen the request [for diplomatic protection] is directed to a material infringement of a human right that forms part of customary international law, one would not expect our government to be passive. Whatever disputes may still exist about the basis for diplomatic protection, it cannot be doubted that in substance the true beneficiary of the rights that is asserted is the individual.¹²³

It also found that

[a] request to the government in such circumstances [i.e. in case of 'gross abuse of international human rights norms'] where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse.¹²⁴

In addition it stressed that in case of refusal by the government 'the decisions would be justiciable, and a court could order the government to take appropriate action'.¹²⁵ The Court therefore held that citizens have a right to request protection and the government has the corresponding duty to duly consider that request. However, it is here that the discretionary nature of diplomatic protection emerges: the government is better suited to the task of assessing whether protection would be necessary than a court.¹²⁶ Or, in the wording

121 *Ibid.*, (emphasis in original).

122 *Ibid.*, para. 261

123 *Kaunda*, para. 64.

124 *Ibid.*, para. 69.

125 *Ibid.*, para. 69.

126 *Ibid.*, para. 67. Judge O'Regan found that the Court should have been more explicit on this point: 'Although it is quite clear that the consideration and assessment of another country's criminal justice system is a sensitive matter for our government, the demands of comity and sensitivity should not mean that government remains blind to the risk of egregious violation of human rights of its nationals by other jurisdictions. It is not only its constitutional obligation to take appropriate steps to provide diplomatic protection ... but the developing global and regional commitment to the protection of human rights also requires government to be responsive to these issues. It is not satisfactory therefore for government

of the Court: 'A court cannot tell the government how to make diplomatic interventions for the protection of its nationals'.¹²⁷ This might seem to contradict the Court's earlier finding, that it might order the government to take action. However, as the Court explained, the Court has jurisdiction over government actions and as this includes 'an allegation that government has failed to respond appropriately to a request for diplomatic protection'¹²⁸ it can thus review whether the decision (not) to take action was taken in good faith and rationally,¹²⁹ but 'this does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of protection'.¹³⁰ After all,

[t]he best way to secure relief for the national on whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.¹³¹

The Court subsequently investigated whether the government had acted appropriately in the present case and found that there was no failure on the part of the South African government to provide diplomatic protection.¹³²

The Court furthermore found that part of the claim should be dismissed for being premature, in particular with respect to claimed violations the applicants might face if Zimbabwe would grant extradition to Equatorial Guinea or if they would be sentenced to death in Equatorial Guinea. In the Court's opinion, there was no evidence to support these claims and that it would be to the government to respond adequately at the appropriate time.¹³³ In addition, diplomatic interventions to secure fair trial and to prevent the death sentence in Equatorial Guinea would require 'delicate negotiations' the assessment of which falls essentially 'within the domain of the government'.¹³⁴ It would thus not be for the Court to make a mandatory order on this part of the claim. However, as in the *Abbasi* case, the *Kaunda* Court held that the applicants had a legitimate expectation to benefit from standard policies. The South African government's public policy was to make representations in case of death sentences against South African nationals. This would imply, in the Court's view, that the government would be obliged to do so.

merely to say that it is not its policy to comment on the criminal justice system of other countries.' para. 267.

127 *Kaunda*, para. 73.

128 *Ibid.*, para. 78.

129 *Ibid.*, paras. 76-80.

130 *Ibid.*, para. 79.

131 *Ibid.*, para. 77.

132 *Ibid.*, paras. 82-143.

133 *Ibid.*, para. 127.

134 *Ibid.*, para. 133.

However, in the present case, the Court found that there 'is no evidence to suggest that this would not happen',¹³⁵ indicating that although the claim was premature, it would not be without merit if the government would fail to provide due protection.

The *Kaunda* decision clearly shows that the exercise of diplomatic protection is a valuable mechanism for the promotion and protection of human rights. Although the Court decided in line with the earlier *Rudolf Hess* decision that the government has a discretion with respect to the specific ways in which the protection might be provided, it simultaneously stressed that the decision (not) to exercise diplomatic protection was subject to judicial review and that such decisions should meet standards of fair proceedings: South African nationals have a right to request diplomatic protection and their request must be duly considered.¹³⁶ The decision whether or not to exercise diplomatic protection must be in accordance with standard policies to meet the individual's legitimate expectation and may not be taken arbitrarily. If the government failed in this respect, it would be for the Court to render a mandatory decision ordering the government to take appropriate steps to protect a national abroad. As pointed out, the Court was satisfied with the actions taken by the government on behalf of the applicants. However, it expressly stated that it would not hesitate to decide otherwise if the government had not taken appropriate measures or would fail to do so in subsequent situations concerning the applicants in the present case.¹³⁷

H. Josias van Zyl and others *v.* The Government of the Republic of South Africa and others

Mr. Josias van Zyl was a major shareholder of various mining companies, collectively referred to as Swissborough, involved in mining diamonds in Lesotho. These companies were all incorporated in Lesotho, as only companies incorporated in Lesotho were granted leases for diamond mining purposes. However, in execution of the Lesotho Highlands Water Projects, which

¹³⁵ *Ibid.*, para. 99.

¹³⁶ See on this point also M. Coombs, 'International Decision: *Kaunda v. President of the Republic of South Africa*', 99 AJIL 681-686, at 681 (2005), who considers that the decision does not differ from the earlier *Abbasi* and *Hess* decisions and that the decision rejects 'the arguments of certain scholars that [the right to diplomatic protection] should be found to exist' (at 684, footnotes omitted). The present author submits that this does no justice to the considerations of the judges and the way in which they have tried to distinguish their decision from the German and British precedents.

¹³⁷ In May 2005, the Zimbabwe authorities released the applicants and most of them have returned to South Africa. Despite South Africa's strict legislation against mercenaries, no charges have been brought against the applicants and they have not been arrested.

involved the building of a major dam in Lesotho, the property rights of the applicant were expropriated. No compensation was paid and litigation in local courts in Lesotho offered no redress.¹³⁸ Mr. van Zyl approached the South African government and requested diplomatic protection on his behalf. He argued that Lesotho had violated the international minimum standard for the treatment of aliens and that his right to property under the South African Constitution and his right to equality had been violated.¹³⁹ Although the President of South Africa did send a *note verbale* to the government of Lesotho asking for due consideration of Mr. van Zyl's situation,¹⁴⁰ further requests for diplomatic protection were rejected.¹⁴¹ Mr. van Zyl then started legal proceedings arguing that this was contrary to both South African and international law, invoking the *Kaunda* decision.

On 20 July 2005 the judgment was handed down by the South African High Court. Mr. Josias van Zyl complained of the failure of the South African government to provide him with diplomatic protection against Lesotho for injury resulting from a deprivation of property. Although the procedures were already in an advanced stage in spring 2004 the High Court decided to defer handing down a decision to a later stage in light of *Kaunda* to allow the parties to the *van Zyl* case to reconsider their submissions and to allow the judge to give due attention to *Kaunda*.

In answering the question of to what extent the principles formulated in *Kaunda* were applicable, the judge found that there were three fundamental differences between *Kaunda* and the instant case. First, *Kaunda* concerned 'gross and flagrant infraction[s] of international human rights such as physical abuse and torture which is different from expropriation'.¹⁴² Secondly, the judge found that unlike in cases concerning human rights, the true beneficiary in this case was a 'juristic person such as companies'.¹⁴³ The judge found that states have an enhanced obligation towards natural persons as opposed to 'juristic persons'. The third difference advanced by the judge is essentially a repetition of the first:

there is indeed a fundamental difference between an infringement of international human rights on the one hand and breaches of international minimum standards

138 *Josias van Zyl and others v. the Government of the Republic of South Africa and others*, judgment of 20 July 2005, High Court of South Africa (Transvaal Provincial Division), Case No: 20320/2002, 2005 (11) BCLR 1106 (t), 2005 SACRL LEXIS 13, para. 11.

139 *van Zyl*, para. 23.

140 *Ibid.*, para. 14.

141 *Ibid.*, paras. 13, 24 and 60-62.

142 *Ibid.*, para. 41.

143 *Ibid.*

in respect to property on the other. The latter essentially constitutes and international delict.¹⁴⁴

In the opinion of the Judge an international *delict* was of a different order than and should be distinguished from infringements of human rights and that due to this distinction a right to diplomatic protection did not exist. The claim to a right to diplomatic protection and the collateral obligation for the government to exercise diplomatic protection on behalf of Mr. van Zyl was therefore rejected.

The judgment is not very progressive and some passages are unclear,¹⁴⁵ but the relevance of this decision is to be found in the references to *Kaunda*: the conclusions reached in *Kaunda* were confirmed, but they were not applied to this particular case due to the differences between the two cases. We may or may not agree with this. The right to property is sometimes considered as a human right¹⁴⁶ and expropriation contrary to international standards may amount to a violation of this right. The court was prepared to accept an obligation for the exercise of diplomatic protection in cases of egregious human rights violations, but would not extend this obligation to situations involving non-natural persons with essentially commercial or economic interests.¹⁴⁷ While reaffirming the existence of an obligation to exercise diplomatic protection, this judgment clearly limits the obligation to situations of serious human rights violations involving individuals.

¹⁴⁴ *Ibid.*

¹⁴⁵ See for instance *van Zyl*, para. 93: '[citizens] are entitled as such to request the protection of South Africa ... However, the same premise cannot be applied to companies who are legal persons, since they are not citizens and enjoy no rights and privileges in terms of section 3 of the Constitution ... However where a company is a national and that company seeks diplomatic protection, then the executive is obliged to consider that request and has to exercise its discretion to afford diplomatic protection.' What the judge intended to explain here is that the obligations towards companies cannot be found in the same section of the constitution as those towards natural persons. However, the formulation here is particularly confusing.

¹⁴⁶ The right to property is provided for in the Universal Declaration on Human Rights (Article 17), but not in the ICCPR. See on this matter for instance Th. van Banning, *The Human Right to Property*, Antwerpen 2002. Also, Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, has mentioned the right to property as a fundamental human right: 'the individual, as a human being, is accorded certain fundamental rights ... These rights, uncertain as they are in content [include] ... the right to personal security, to personal liberty and to private property' at 12 and again similarly at 15.

¹⁴⁷ It is submitted that this may also explain the differences between the *Pirbhai* case and the *Abbasi* case (see section 3.E). In addition, the majority of the cases discussed by Ress (1972), concerned complaints by corporations or individuals deprived of their property or rights related to property, such as concessions. However, his discussion shows no distinction by the French courts between violations of individual human rights and questions related to deprivation of property. The *Sapvin* case, also concerned a claim by a corporation related to loss of property.

4 CONCLUSION

The above analysis of the various national decisions shows that the discretionary nature of diplomatic protection has undergone a change. Contrary to earlier decisions dismissing all claims as falling outside the scope of judicial review as *acte de gouvernement* present day courts have agreed to review claims based on lack of protection. Notwithstanding the possibility of preliminarily dismissing the claims on the ground of non-justiciability, the judges, without exception, have entered into the merits of the various claims and considered carefully the actions taken by the respective governments and the violations of international law.

The German Court in the *Rudolf Hess* decision tentatively put forward the view that, while it found that the German executive had wide discretion in determining the level of protection offered, the government could be expected to take at least some action. The Spanish Court in the *Comercial F SA v. Council of Ministers* case refused to declare the claim inadmissible because of the nature of diplomatic protection but instead entered into the merits and found another ground for inadmissibility. This has been further developed by subsequent decisions. The English Court decided in *Abbasi* that UK nationals could rely on standard policies by virtue of the concept of legitimate expectation, thus limiting the government's discretion explicitly. In addition, the Swiss Court in the *JAAC 61.75* decision further qualified the discretionary nature of diplomatic protection by a prohibition on arbitrary decision-making. In the most recent cases, *Kaunda* and *Van Zyl*, we find these conclusions again, but the *Van Zyl* decision has limited the right to diplomatic protection to violations of human rights.

The concept of legitimate expectation and the prohibition on arbitrary decisions by the executive, as developed in the judgments, have thus been connected to diplomatic protection and have resulted in a more clearly defined field of obligation and discretion. These are the 'signs of support' which would justify the progressive development suggested by the Special Rapporteur and the drafting committee of the ILC.

The decisions show that an obligation to exercise diplomatic protection would, if at all, be found in national legal systems. The German, Swiss and South African Courts derived the potential obligation from their own constitutions, at least partly. The British Court found the principle of legitimate expectation in its national legal system. The limitations created through the concept of legitimate expectation and the prohibition on arbitrary decisions both relate to legal certainty. They confirm the rule of law and the individual

right of due process, as enshrined in most international human rights treaties.¹⁴⁸ The fundamental nature of the human rights violations involved in these cases compelled the judges to investigate whether the respective governments had taken the requests for protection seriously.

In situations where individuals have very little to no means at their disposal to enforce respect for their rights under international (human rights) law, the exercise of diplomatic protection is still, perhaps regrettably, of prime importance. In the international community, states have significantly more influence than individuals and they may be able to obtain redress in cases where individuals are left with empty hands. Diplomatic protection thus provides a useful, and sometimes necessary, instrument for the protection of these rights. By limiting the discretionary nature of diplomatic protection, the national decisions have shown not only the high importance attached to the protection of fundamental human rights but also the acknowledgement of the role diplomatic protection can and should have as such an instrument.

5 EPILOGUE

After publication of the present chapter, more decisions have been rendered by national courts on judicial review of diplomatic protection. One decision deserves special mentioning, since it confirms the above analysis and emphasises the importance of government representations in case of serious human rights violations. On 8 March 2007, the Federal Court of Australia, per Justice Tamberlin, rendered its decision in the case of *Hicks v. Huddock*.¹⁴⁹ Mr. Hicks, a previous detainee on Guantanamo Bay, brought a case against the Australian government, *inter alia* arguing that the latter's decision not to proceed with negotiations on Mr Hicks' behalf to secure release from Guantanamo Bay and repatriation to Australia was based on irrelevant considerations. The Australian Government applied for a 'summary judgment' seeking dismissal of the case for lack of reasonable prospect of success. Although the Court acknowledged that the Ministry of Foreign Affairs generally has a wide discretion in such matter, it rejected the motion for summary judgment and held that

[i]t is clear in the case before me that the deprivation of liberty for over five years without valid charge is an even more fundamental contravention of a fundamental principle and as such an exceptional case as to justify proceeding to hearing by this Court.¹⁵⁰

148 Such as Article 8 of the Universal Declaration on Human Rights; Article 6 of the European Convention for Protection of Human Rights; Article 7 of the African Charter on Human and Peoples' Rights; Article 8 of the Inter-American Convention on Human Rights.

149 *Hicks v Ruddock* [2007] FCA 299.

150 *Ibid.*, at para. 91.

It thereby allowed review of the decision not to proceed with the exercise of protection on Mr. Hicks' behalf. These proceedings have not yet started and it remains to be seen whether there will be a decision on this point, since Mr. Hicks was returned to Australia after entering a guilty plea. He is serving his sentence in Australia.

