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KAUNDA V. PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA. Case CCT 23/04. 2004 (10) BCLR 1009, reprinted in 44 ILM 173 (2005), at . Constitutional Court of South Africa, August 4, 2004.

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Ecuador also is trying to pass legislation to exclude oil companies from receiving VAT refunds and has instructed its agents to initiate proceedings to terminate its contractual relationships with OEPC.[49] The flip side of Ecuador's efforts is that the United States is exerting pressure upon Ecuador to retreat from its current position in the VAT dispute,[50] and U.S. financial aid to Ecuador may be cut from $210 million to $37 million.[51] Cases such as *Occidental* are useful, however, in the sense that they enable states to obtain more information about the scope and potential interpretation of rights that they may be granting investors. Armed with this extra information as to how they might inadvertently cede their sovereignty, states can make more informed decisions about the rights that they grant to investors in the future. By scrutinizing treaty rights in this manner during treaty negotiations, a state can form more realistic expectations, thereby preventing post hoc dissatisfaction with awards and also, more generally, giving states enhanced confidence about the areas in which they can legislate and regulate, and with what consequences.

Ultimately, *Occidental* asks more questions than it answers about the rights in investment treaties. It serves as a vital reminder that tribunals should be mindful of the need both to articulate those considerations that form the *ratio decidendi* of their awards and to consider with great care whether to extend an analysis of one case to another case where the facts or the legal context are substantially dissimilar. Perhaps more importantly, *Occidental* moves to center stage the question of how a state may and may not respond when attempting to address unfavorable awards. Although investment-treaty arbitration may have been created, in part, to privatize the development of international investment law, the hybrid nature of the mechanism and the state of current jurisprudence suggest that such arbitration is now, for better or worse, part of a larger foreign relations dialogue.

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Duty to provide diplomatic protection—extraterritorial effect of constitutional rights—intelligence sharing—death penalty under international law

KAUNDA V. PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA. Case CCT 23/04. 2004 (10) BCLR 1009, *reprinted in* 44 ILM 173 (2005), *at* <http://www.concourt.gov.za>.
Constitutional Court of South Africa, August 4, 2004.

In *Kaunda v. President of the Republic of South Africa*, the Constitutional Court of South Africa found that the state's Constitution obligates the government to consider requests for diplomatic protection from citizens who are facing actions by other states that may violate international law, and to deal with those requests appropriately. Although the government has wide discretion in how to respond, its decisions are subject to constitutional control and judicial scrutiny.[1]

Samuel Kaunda and sixty-eight other South Africans were arrested in Zimbabwe. They faced potential extradition to Equatorial Guinea, where they would be charged with participating in an attempted coup against that state's government. Fearing that they would be mistreated in

[49] *See Oxy Faces Ecuador Trouble*, INT'L OIL DAILY, Aug. 24, 2004, *available in* LEXIS, News Library, Allnws File; Juliette Kerr, *Petroecuador Files Complaint Against Occidental for Breach of Contract*, WORLD MARKETS ANALYSIS, Sept. 17, 2004, *available in* LEXIS, News Library, Allnws File.

[50] Kintto Luca, *America's Social Reform: Debate Grows over Trade Tribunal Rulings*, IPS-Inter Press Service/Global Information Network, July 29, 2004 , *available in* LEXIS, News Library, Allnws File; *Investment Disputes Jeopardize Free Trade Deal*, BUS. NEWS AM., Oct. 7, 2004, *available in* LEXIS, News Library, Allnws File.

[51] U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, ECUADOR: USAID PROGRAM PROFILE, *at* <http://www.usaid.gov/locations/latin_america_caribbean/country/ecuador/>; *see also* Gareth Chetwynd, *Oxy Rows with Quito, Upstream*, Oct. 1, 2004, *available in* Westlaw, ALLNEWS database.

[1] Kaunda v. President of the Republic of South Africa (CC Aug. 4, 2004). The South African Constitution and the judgments of the Constitutional Court are available at <http://www.concourt.gov.za>.

Zimbabwe and be sent to Equatorial Guinea, where they would face mistreatment, an unfair trial, and a death sentence, they brought suit in the High Court in Pretoria to compel the South African government to take steps to ensure that their rights under the South African Constitution were not violated. The applicants requested, among other things, that the government submit weekly reports to the court on the actions taken to secure those rights in Zimbabwe and Equatorial Guinea. The High Court denied the application.[2]

The Constitutional Court allowed a direct appeal. It agreed with the applicants that they had a cognizable constitutional right, but disagreed with them about both its source and its scope, and held that the actions of the South African government had not violated that right.

The applicants based their claim on the South African Constitution's Bill of Rights in conjunction with section 7(2) of the Constitution, which requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." In effect, they argued that the South African government had an obligation "to act at a diplomatic level to ensure that the rights they claim[ed] under the South African Constitution [were] respected" by Zimbabwe and Equatorial Guinea.[3] The Court rejected this claim. The rights in the Bill of Rights belong to people in South Africa and ordinarily have no extraterritorial effect. Furthermore, international law is enshrined in the South African Constitution.[4] Since it would be an infringement of the sovereignty of other states for South Africa to insist that they act consistently with its Bill of Rights, "section 7(2) should not be construed as imposing a positive obligation on government to do this."[5]

The Court then distinguished its earlier decision in *Mohamed*.[6] In that case, the applicant had been transferred to the United States as a result of a wrongful act by the South African government, which violated his statutory and constitutional rights. The remedy for that violation was for the government to seek assurances from the United States that Mohamed would not be subjected to the death penalty.[7] By contrast, the South African government's only relevant act in *Kaunda* was to share information about the applicants' plans with other governments, which did not violate the applicant's rights. "On the contrary, a failure to pass on the intelligence to the authorities in Zimbabwe and Equatorial Guinea would have been a breach of the duties that South Africa owed to those countries."[8]

The Court then recharacterized the applicants' claim as one for diplomatic protection, which it defined as "action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State."[9] It acknowledged that current international law recognized a state's right to exercise diplomatic protection, but not an obligation to its nationals that it do so.[10] Although the Court noted that some commentators had urged recognizing such a duty where the underlying act breached a *jus cogens* norm, it concluded that "diplomatic protection is not recognised by international law as a human right and cannot be enforced as such."[11]

Nevertheless, states can provide such a right as a matter of municipal law. Thus, the Court turned to the question of whether South Africa does so. The relevant portion of the South African Constitution is section 3(2)(a), which states that "all citizens are equally entitled to the rights, privileges and benefits of citizenship." The Court's majority opinion, written by Chief Justice Chaskalson, held that citizens, who will almost always be nationals, are entitled to the

[2] *Id.*, paras. 2–5.

[3] *Id.*, para. 21.

[4] CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, sec. 233.

[5] *Kaunda*, para. 44.

[6] Mohamed v. President of the Republic of South Africa, 2001 (3) SALR 893 (CC).

[7] *Kaunda*, paras. 44–49.

[8] *Id.*, para. 52.

[9] *Id.*, para. 26 (citing special rapporteur's First Report [to the International Law Commission] on Diplomatic Protection, draft Art. 1(1), UN Doc. A/CN.4/506, at 11 (2000)).

[10] *Id.*, para. 23 (citing Barcelona Traction Light & Power Co. (Belg. v. Spain), Second Phase, 1970 ICJ REP. 3, paras. 78–79 (Feb. 5)).

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privilege or benefit of requesting "the protection of South Africa in a foreign country in case of need" and of "hav[ing] the request considered and responded to appropriately."[12] The three other opinions agreed that there is such a right but differed, in part, on its source.[13]

All of the opinions acknowledged that actions taken in furtherance of diplomatic protection involve foreign policy and thus call for a significant degree of deference to the choices made by the government in response to a request for such protection.

> A decision as to whether, and if so, what protections should be given is an aspect of foreign policy which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal.[14]

The opinions refer to two leading prior decisions by the courts of other countries interpreting the scope of a municipal right of diplomatic protection—*Hess*[15] and *Abbasi*[16]—which each had stressed executive discretion in finding that the government had done all that was legally required.[17]

Nonetheless, the *Kaunda* Court made clear that there is a role for judicial oversight. The government must respond appropriately to a request for diplomatic protection,[18] and if the response was irrational or in bad faith, the court could intervene by requiring the government to "deal with the matter properly."[19] If it was clear that the citizen was subject to a "gross abuse of international human rights norms," and the government failed to act, the court could order it to "take appropriate action."[20]

The concurring opinions would also impose both a procedural duty in all cases and a judicially enforceable substantive duty to provide some form of diplomatic protection in the most compelling cases. Justice Ngcobo saw the state as "obliged to take some steps when an egregious violation . . . is being committed," and Justice O'Regan would impose a duty not "to ignore" the request for diplomatic protection by "a citizen who is threatened with or has experienced an egregious violation of human rights norms." In his short concurrence, Justice Sachs—asserting that all the opinions were compatible—stated that the government has a duty "to do whatever is reasonably within its power to prevent South Africans abroad . . . from being subjected to torture, grossly unfair trials and capital punishment."[21]

In applying this approach to the facts, the Court first rejected the applicants' plea that the government seek to have them extradited back to South Africa. They had not been charged with a crime in South Africa; even if the decision not to charge them were reviewable, the Court accepted the government's submission that there was insufficient evidence that they had committed a crime subject to the South Africa–Zimbabwe extradition treaty.[22] Although there was

[12] *Id.*, paras. 62–63.

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[14] *Id.*, para. 77; *see also id.*, paras. 175 (Ngcobo, J.), 244 (O'Regan, J.).

[15] BverfGE 55, 349 (1980), *available in English translation at* 90 ILR 387.

[16] R. v. Sec'y of State for Foreign & Commonwealth Aff., [2002] All ER (D) 70 (C.A.).

[17] *See, e.g., Kaunda*, paras. 73–74 (discussion of *Hess*), 75 (discussion of *Abbasi*).

[18] *Id.*, para. 63.

[19] *Id.*, paras. 79–80.

[20] *Id.*, para. 69.

[21] *Id.*, paras. 164 & 188 (Ngcobo, J.), 238 (O'Regan, J.), 275 (Sachs, J.). Neither Ngcobo nor O'Regan defined "egregious."

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reason for serious concern about possible human rights violations in Equatorial Guinea,[23] the Court deferred to the government's judgment that it was not required to respond to such concerns while the applicants were still in Zimbabwe, just as it could defer seeking assurances relative to the death penalty until such time, if any, as they were convicted of a capital crime.[24] It specifically rejected the argument that the government had a duty to protect the applicants against the imposition of the death penalty, since rights under the South African Constitution do not apply to the acts of other states, and international law does not forbid capital punishment.[25] Recognizing that government officials had publicly stated their commitment to providing diplomatic protections, including specific actions already taken in this case,[26] the Court pointedly noted that the ongoing discussions between counsel for the applicants and the government "will no doubt be conducted in the light of what is said in this judgment."[27]

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In finding that there is no individual right to diplomatic protection under international law, the *Kaunda* Court acknowledged, but rejected, the arguments of certain scholars[28] that such a right should be found to exist, at least in part, as a needed additional enforcement mechanism for those international human rights that belong to individuals. It thus refused to further the call for such a customary international law right as *lex ferenda*.[29]

The Court also distinguished carefully between rights recognized under international law, as to which states could exercise their right to offer diplomatic protection, and rights that exist only under municipal law.[30] The latter rights do not apply as such to the actions of other states within their own territory (and thus do not trigger claims for diplomatic protection).[31] Those rights may, however, bind a state when it acts abroad, so that, for example, the South African government would be bound to act in conformity with the rights set out in its own Constitution when dealing with its citizens outside its territory. The scope of such extraterritorial effect is not entirely clear.[32] Furthermore, the duty of a state to protect its citizens' constitutional rights

[23] *Id.*, paras. 116–21 (citing reports by Amnesty International, the International Bar Association, and the UN Commission on Human Rights).

[24] In fact, the applicants were all released by Zimbabwe and turned over to South Africa in May 2005. Tawanda Kanhem, *Mercenaries' Release Marks End of an Era*, HERALD ONLINE (Zimbabwe) (May 24, 2005), *at* <http://www.zimupdates.co.zw/archives/archives.html>. One may assume, though there is no public report, that diplomatic efforts by the South African government helped achieve this outcome. While most of the applicants were subsequently freed, eight are facing charges in South Africa. *Eight 'Mercenaries' Face Charges in South Africa*, Agence France-Presse English Wire (June 3, 2005).

[25] "Although the abolitionist movement is growing stronger at an international level, capital punishment is not prohibited by the African Charter on Human and Peoples' Rights or the International Covenant on Civil and Political Rights, and is still not impermissible under international law." *Kaunda*, para. 98.

[26] *Id.*, para. 142.

[27] *Id.*, para. 133.

[28] *See, e.g.*, Gerhard Erasmus & Lyle Davidson, *Do South Africans Have a Right to Diplomatic Protection?* 2000 S. AFR Y.B. INT'L L. 113. The existence of such an obligation by a state toward its citizens had been suggested as early as Vattel in *The Law of Nations*, bk. II., ch. VI, §71 (Berry & Rogers 1787) (1758) ("Whoever uses a citizen ill, indirectly offends the state, which ought to protect this citizen, and his sovereign should revenge the injuries, punish the aggressor, and, if possible, oblige him to make entire satisfaction; since otherwise the citizen would not obtain the great end of the civil association, which is safety.").

[29] John Dugard, the distinguished South African jurist, had pressed this position as the International Law Commission's special rapporteur on diplomatic protection, *see* First Report on Diplomatic Protection, paras. 28–31, UN Doc. A/CN.4/506 (2000), but the Commission rejected his proposal, *id.*, para. 87.

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when they are outside its territory is limited by the state's duty to respect the sovereignty of foreign states.[33]

In terms of substantive human rights law, the Court found that there would be no violation of international law if another state imposed the death penalty.[34] It also recognized that the South African government had indicated that its practice, consistent with the affirmative obligations to promote rights embedded in the South African Constitution, was to make diplomatic representations as and when necessary relating to the death penalty, and the Court indicated its expectation that that practice would apply in the case before it.[35] These representations relating to the death penalty would not involve the exercise of diplomatic protection, however, since they would not be a response to an "internationally wrongful act."

More generally, the opinions embody, in several places, a kind of "jawboning." Although the Court refused to order the government to do anything more than it was doing, it indicated its expectations that the government would continue to act consistent with the spirit, as well as the letter, of the doctrine articulated by the Court.[36] Such an approach, particularly in a state committed to constitutional democracy and the rule of law, can be effective in encouraging the desired behavior by the government, without requiring the Court to articulate with precision the obligations that it might—at some future time, and as a matter of law—impose upon the government.

The most difficult question raised by the *Kaunda* opinions is the proper scope of the right to diplomatic protection. While the opinions acknowledge the deference due the government's decisions, the overall tenor is one of significant judicial oversight.[37] This rule poses a potential problem where the government concludes that quiet, nonpublic diplomacy would be the most effective means for securing the requisite protection of its nationals.[38] The other state may be more willing to change course or to correct the actions of a rogue agent if it can do so without losing face. The expectation that the government must report to a court on what it has done in response to a request for diplomatic protection,[39] even if the court would almost always find the government's actions within its margin of appreciation, may have the perverse effect of rendering diplomatic protection less effective.

The Court seems to be significantly influenced by the arguments of scholars who assume that there is no cost to requiring the state to give reasons and to justify its decisions in a judicial forum.[40] The earlier decisions of German and British courts on the scope of diplomatic protection, *Hess* and *Abbasi*, were more cognizant of these concerns and provided a narrower right. *Hess*, recognizing the political context and the need that the state be seen as speaking with a single voice, concluded that judicial intervention is appropriate only if the government's position results "in the arbitrary treatment of a national which is totally incomprehensible from any reasonable standpoint including considerations of foreign policy."[41] *Abbasi* noted that prior cases had held that "courts should act with a high degree of circumspection" and that it "can rarely, if ever, be for judges to intervene where diplomats fear to tread."[42] In considering the situation of Mr.

[33] *Kaunda*, paras. 40, 44 (Chaskalon, C.J.), 229 (O'Regan, J.).

[34] *See supra* note 25.

[35] *Kaunda*, para. 99.

[36] *See, e.g., id.*, paras. 65, 69, 127, 133, 202.

[37] The opinions suggest that the need for such oversight is especially pronounced in the context of undefined "gross" or "egregious" abuses. *See id.*, paras. 70, 163–64, 210, 238, 275.

[38] See the list of means of diplomatic protection in Dugard's first report to the International Law Commission, *supra* note 29, para. 43 (quoted in *Kaunda*, para. 27).

[39] *See Kaunda*, paras. 79–80, 192–93.

[40] Erasmus & Davidson, *supra* note 28, at 120; Kevin Hopkins, *Diplomatic Protection and the South African Constitution: Does a South African Citizen Have an Enforceable Constitutional Claim Against the Government?* 16 S. AFR. J. PUB. L. 387, 394–95 (2001).

[41] BverfGE 55, 349 (1980), *available in English translation at* 90 ILR 387, 398.

[42] R. v. Sec'y of State for Foreign & Commonwealth Aff., [2002] All ER (D) 70, para. 37 (C.A.) (quoting R. v. Sec'y of State for Foreign & Commonwealth Aff. *ex parte* Pirbhai, 107 ILR 462, 479 (C.A. 1985)).

when they are outside its territory is limited by the state's duty to respect the sovereignty of foreign states.[33]

In terms of substantive human rights law, the Court found that there would be no violation of international law if another state imposed the death penalty.[34] It also recognized that the South African government had indicated that its practice, consistent with the affirmative obligations to promote rights embedded in the South African Constitution, was to make diplomatic representations as and when necessary relating to the death penalty, and the Court indicated its expectation that that practice would apply in the case before it.[35] These representations relating to the death penalty would not involve the exercise of diplomatic protection, however, since they would not be a response to an "internationally wrongful act."

More generally, the opinions embody, in several places, a kind of "jawboning." Although the Court refused to order the government to do anything more than it was doing, it indicated its expectations that the government would continue to act consistent with the spirit, as well as the letter, of the doctrine articulated by the Court.[36] Such an approach, particularly in a state committed to constitutional democracy and the rule of law, can be effective in encouraging the desired behavior by the government, without requiring the Court to articulate with precision the obligations that it might—at some future time, and as a matter of law—impose upon the government.

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Abbasi, detained by the United States at Guantánamo Bay, the court refused to intervene, accepting that "if the Foreign and Commonwealth Office were to make any statement as to its view of the legality of the detention of the British prisoners, or any statement as to the nature of the discussions held with United States officials, this might well undermine those discussions."[43] Such circumspection—combined, perhaps, with the availability of an *in camera* procedure for reviewing the government's submissions where appropriate—might effectuate the right to have one's request for diplomatic protection considered without risking prejudice to the effectiveness of such protection.

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International criminal law—torture—1984 Convention Against Torture—universal jurisdiction

PROSECUTOR V. N. Case No. AO7178. *At* <http://www.rechtspraak.nl>, *translated at* 51 NETHERLANDS INT'L L. REV. 439, 444–49 (2004).
Rotterdam District Court, April 7, 2004.

On April 7, 2004, the Rotterdam District Court (Arrondissementsrechtbank) (Court) convicted Sebastien Nzapali[1] in *Prosecutor v. N*[2] for one count of torture committed in the Democratic Republic of Congo (then Zaire) in 1996. The Court found that the defendant, while serving as colonel of the Garde Civile in the province of Bas-Zaire, had assaulted and threatened a prisoner in a manner that amounted to co-perpetration (*medeplegen*) of torture. The Court acquitted Nzapali for lack of proof on two additional counts of torture—one concerning another assault and the other concerning rape. Nzapali received a prison sentence of two-and-a-half years, which was half that which the prosecutor had requested. In determining the length of the punishment, the Court took into account that the defendant had been convicted in his home country in 1997 for abuse of authority and other relevant crimes. Also, his reputation in the Garde Civile had earned him the nickname *Roi des bêtes*, "king of beasts." According to the Court, these circumstances "would seem to indicate that the facts that are now proved were not isolated facts."[3] Since neither side has appealed, the judgment is final.

The Dutch Torture Convention Implementation Act[4] constituted the legal basis of the prosecution. That act gave the Dutch courts unqualified universal jurisdiction over acts of torture. In 2001, however, the Dutch Supreme Court (Hoge Raad) held that this jurisdiction could be exercised only in cases with a link to the Netherlands, such as the presence of the suspect.[5] (In 2003, the legislature followed the approach of the Supreme Court and provided universal jurisdiction over genocide, crimes against humanity, war crimes, and torture in a new act concerning international crimes,[6] with jurisdiction dependent upon the presence of the accused in the

[43] *Id.*, para. 107.

[1] [Editor's Note: Though not identified in the Court's decision, the defendant is known to be Sebastien Nzapali, whose name will be used in this case report. *See* Marlise Simons, *Dutch Court Puts Former Congo Officer on Trial in Torture Case*, NY TIMES, Mar. 25, 2004, at A13.]

[2] Case No. A07178 (Rotterdam Dist. Ct. Apr. 7, 2004) [hereinafter Judgment], *at* <http://www.rechtspraak.nl>. An official translation, which is the version cited in this case report, can be found in 51 NETH. INT'L L. REV. 439, 444–49 (2004). An unofficial translation is available online at <http://www.trial-ch.org/twdoc/Nzapali_judgement.pdf>.

[3] *Id.* at 448.

[4] Uitvoeringswet folteringsverdrag [Law for the Implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment], Stb. 1988, No. 478.

[5] *See In re* Bouterse, HR, Sept. 18, 2001, para. 8.5, NJ 559, *Eng. trans. at* 2001 NETH. Y.B. INT'L L. 282–96 (2001).

[6] As of October 1, 2003, the Wet Internationale Misdrijven [Law Containing Rules Concerning Serious Violations of International Humanitarian Law], Stb. 2003, No. 270, replaced both the Torture Convention Implementation Act, *supra* note 4, and the Law for the Implementation of the Genocide Convention [Uitvoeringswet Genocideverdrag], Stb. 1964, No. 243.