AN ANALYSIS OF HOME-STATE OBLIGATIONS TO INTERNATIONAL MIGRANTS

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Central Recommendation of this Report

This Report argues for greater co-ordinated action within international human rights institutions to encourage diplomatic protection as a supplementary mode of human rights implementation and enforcement. This report underlines that diplomatic protection involves more than basic consular assistance, but rather can be broadly defined as any action taken by a State in response to internationally wrongful acts against its nationals while abroad. This includes a traditional category of action - underappreciated within international human rights law – the espousal of claims, whereby a home state can take action for redress, political, administrative or legal, on behalf of its citizen. While the international bill of human rights, in protecting the individual rather than the citizen, purports to offer migrants equal rights as nationals, it is simply a reality that migrants continue to lack accessible and effective mechanism for remediating violations of their rights at international level. Diplomatic Protection represents one of the ways in which states can ensure the effective implementation of Treaty commitments they are parties to, in particular it bears upon the obligation to co-operate with other States to prevent violations and the individual’s right to an effective remedy. This Report considers whether the long established discretion of home state governments to take action can, in certain circumstances, be construed as an obligation to take action.

While there has been reflection on the scope of diplomatic protection within public international law institutions such as the International Court of Justice and the International Law Commission, international human rights institutions have failed to identify the synergies that exist between Human Rights Treaties and the existing international practice of diplomatic protection. While a direct right to diplomatic protection and in particular the obligation to espouse claims on behalf of its nationals before has not yet evolved fully in international law, efforts should be made to encourage state practice in this area, including, inter alia, through the amendment of
national laws relating to diplomatic protection. Where a State government is required under its domestic laws to provide diplomatic protection, plaintiffs will continue to invoke an unfair denial of diplomatic protection ground within their litigation. A failure of the ‘Home’ State to provide diplomatic protection both before and after the human rights violation could be construed as a breach of the right to an effective remedy of the victim.

At the international level, renewed efforts must be made to concretise migrants’ rights to include diplomatic protection as an aspect of their implementation. International human rights law has so far been overly passive in accepting that once a citizen departs their home state, obligations transfer to their host state. In short, there has been little reflection on the continuum of obligations that may exist between rigid territorial jurisdiction and exceptional cases where the home state enjoys full extraterritorial jurisdiction due to effective control. In this report we identify a number of key gateways for enhancing so called ‘sending’ states obligations under international human rights law. Firstly, the obligation to co-operate, bilaterally and multilaterally, in the protection of migrants, which is rooted both in the UN Charter and across each specific UN human rights treaty. Secondly, we argue that taken together, the right to non-discrimination and the right of access to an effective remedy can be interpreted as providing an obligation for the ‘home’ State to take action, political, administrative and legal where, a host State, through culpable commission or omission, has engaged in an internationally wrongful act. Thirdly, recent international co-operation in specific migration areas – the protection of domestic workers and anti-trafficking initiatives – have relied heavily on requiring co-operation between sending and host States. Fourthly, it is submitted that Article 23 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter CMW), underlines the potential centrality of diplomatic protection to the effective enforcement of migrants’ rights:

“Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.”

Beyond the mere value of this single provision (which is undermined by the fact that the CNW does not, as yet, enjoy widespread ratification), we argue that this provision reinforces the broader possibility for evolving obligations to provide diplomatic protection within more high profile UN Conventions in accordance with the principles of non-discrimination and the right to an effective remedy.
SUMMARY OF FINDINGS

1. Lack of Reflection on Home State Obligations

Whilst the right of migrants are widely recognized, the obligations of home-states to their migrants abroad is a severely under researched area, which has gained little direct attention within academic or international institutions. Even the most specific legal convention in the area of migrants’ rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) places few specific obligations on states of origin. This instrument has furthered struggled to establish itself as of equal standing within the corpus of the international human rights treaties – the Convention is sparsely implemented, having only forty five parties.\(^1\) The level of ratification amongst developed nations is far below that of developing countries and a number of parties have made substantial reservations.\(^2\) This political resistance to the obligations of the CMW has limited transition from the pre-existing International Labour Organization (ILO) Conventions, which equally suffer from low levels of ratification in comparison to the main UN human rights treaties.\(^3\)

2. Indivisibility: Migrants Rights as Human Rights

While the specification of legal norms relating to rights of migrants has been obstructed by the low status of the CMW, it is important to stress migrants’ rights nevertheless enjoy an unquestioned, formally equal status across the catalogue of international human rights treaties. They have been the victim of dispersed focus and a lack of implementation rather than a lack of legal standing. Given the vulnerability of migrant rights in accessing remedies following deportation and related human rights violations, enhanced reflection on access to justice is required. An analysis of each of these Conventions and relevant case law has highlighted the content, as well as the potential for further development, of home-state obligations. Even where it may appear that the home state is not directly addressed, such obligations clearly emanate from ongoing state obligations to cooperate and promote the enjoyment of rights internationally, and the obligation to prevent, investigate and punish rights violations.

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\(^2\) Ibid.

\(^3\) See for example, C105 Abolition of Forced Labour Convention, (1957); C29 Forced Labour Convention, (1930); C97 Migration for Employment Convention (Revised), (1949); C143 Migrant Workers (Supplementary Provisions) Convention, (1975).
3. The Obligation to Protect of States of Origin: Diplomatic Protection and Jurisdiction

Articles 55 and 56 of the UN Charter also generally mandate international cooperation in promoting human rights and fundamental freedoms. As such, home-states are under a direct obligation to enforce principles of non-discrimination abroad and prevent mistreatment of migrant workers. Under this obligation, homes-states remain under an obligation to prevent, investigate and punish codified rights violations of conventions they are a party to. The key question is how the jurisdiction of the host state affects this obligation – whether it hollows it out, or there is a principle of complementarity and co-operation that can be codified. The corpus of international human rights law includes a number of direct obligations State parties to the CMW are under an obligation to inform and advise nationals of potential risks and best practices prior to migration pursuant to Article 37. Under Article 23, nationals have ‘the right to recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin’. There is also the long-standing obligation of a host-state to inform the home-state of the detention or arrest of its nationals under Article 36 of the Vienna Convention on Consular Relations. This has been reaffirmed within the cases of Avena and LaGrand. These cases have a broader significance, however, as they indicated the possible developments within the corpus of general international law for broader obligations to take action on behalf its nationals.

4. Increasing State of Origin Involvement in Specific Areas: Anti-Trafficking and Domestic Workers

Our search for increasing practice in support of complementarity of obligations between host and home states largely fell upon two discrete areas. The Palermo Protocols require State parties to criminalize acts of trafficking and smuggling via a framework of international cooperation. By establishing an environment inhibiting international labour trafficking, these Protocols place specific state obligations to limit labour trafficking. Significantly the scope of these instruments pertain not merely to victims of trafficking but rather to those populations potentially at risk of trafficking – thus the broad scope category of migrants is engaged by these developments. The International Labour Organisation Conventions have regularly attempted to impose obligations on home states – with marginal success.

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Section 1: Specific Obligations directed at Sending States under International Human Rights Law

1. Home State Obligation to Promote Rights Externally

Home-states have an obligation to cooperate with and influence host-states in respecting rights, and prevent rights violations as required by Articles 55 and 56 of the UN Charter. Article 55 outlines the obligation to promote:

“…higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Further, Article 56 sees UN Members “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

These broad obligations are further specified by the provisions of the core United Nations human rights conventions. It is important however, to take notice of the default orientation towards territorial jurisdiction within the United Nations system. For instance, Article 2(1) of the International Covenant on Civil and Political Rights states:

‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…’

This obligation is however, interrelated with Article 2(3), which requires each state to ‘ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity’. It is significant that Article 2(3) having stated the right to have to have a claim determined by ‘competent judicial, administrative authorities, or by any other competent authority provided for by the legal system of the State’ also obliges each state to “develop the possibilities of
judicial remedy’. The latter obligation, it is submitted can refer to international remedies.

The ICCPR, however, is clearly the most conservative in relation to the need for states to complement each other and co-operate in the implementation of rights. It is also clear that its provisions must be interpreted in the light of the requirement to co-operate to secure human rights under the UN Charter – particularly where there has been a failure on the part of the host state to provide a remedy.

This was reflected by the Human Rights Committee’s General Comment 31, which provides arguably the most cogent justification of the interrelatedness of State Parties obligations under the Covenant (at paragraph 2):

“While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.”

Significantly the Committee calls for greater support for the Covenant’s inter-state complaint mechanism, viewing inter-State action as required, and not disruptive to rights protection.

“However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States Parties that have made the declaration under article 41 does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties’ interest in each others’ discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them

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5 UN Doc. CCPR/C/21/Rev.1/Add.13 at paragraph 2.
to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.”\(^6\)

The International Covenant on Economic, Social and Cultural Rights, directly requires international co-operation in the fulfillment of state commitments. Article 2(1) provides:

> “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means”

The Economic, Social and Cultural Rights Committee built upon this article in its General Comment 14, *On the Right to the Highest Attainable Standard of Health*, in 2000. At paragraph 39, the Committee stated:

> “To comply with their international obligations in relation to Article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.”

It is submitted that this provision is of great significance and should be mirrored across the broad catalogue of international human rights law. States are required to regulate the activities of businesses, and to prevent the violation of rights. The only constraint on this is the UN Charter and the applicable international law. We therefore have devoted a large proportion of this report to considering how international law facilitates, and certainly does not prohibit, the exercise of diplomatic protection, including the espousal of claims on behalf of citizens. Furthermore, the general obligations of Article 55 and 56 of the United Charter would require bilateral action of some kind where a host State fails to provide a remedy for a flagrant human rights violation. The ESC Committee’s commitment is underlined by its reporting guidelines to states which require information on:

\(^6\) *Ibid.*
“Mechanisms in place to ensure that a State party’s obligations under the Covenant are fully taken into account in its actions as a member of international organizations and international financial institutions, as well as when negotiating and ratifying international agreements, in order to ensure that economic, social and cultural rights, particularly of the most disadvantaged and marginalized groups, are not undermined.”

Under the European Convention on Human Rights, A statement of principle that has lain somewhat dormant and is relevant to this report occurred in the case of *Treska v Albania and Italy*. Here two Albanian men claimed that the Albanian authorities had illegally appropriated their family villa in 1950, with the Italian government buying it in 1991 for its embassy. While the Court held that the applicants were not within Italian jurisdiction, it made a statement of general principle:

> “Even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention”

Later in this report we will consider what steps ‘are in accordance with international law’, and will show there are few formal barriers to diplomatic protection of migrants where their rights are violated by host states, in particular the espousal of their cases before domestic and international fora. Without these, there emerging obligations to take ‘diplomatic, economic, judicial or other measures’ on behalf of migrants.

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8 ECtHR 29 June 2006, *Treska v Albania and Italy*, no. 26937/04.
(ii) Home State Obligation to Refrain from National Measures and Legislation Which Adversely Affect Overseas Migrants

Both the United Nations institutions and the European Court on Human Rights have regularly accepted cases in instances where the direct acts of national governments, officials or legislature affected or violated overseas migrants. The Human Rights Committee has repeatedly affirmed that ‘it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory’. In reference to a number of other complaints, the Committee ruled that the refusal by Uruguayan authorities to renew the passports of Uruguayan citizens living abroad was ‘clearly a matter within the jurisdiction of Uruguayan authorities’, and was subject to the jurisdiction of the ICCPR. A similar rationale drove the result in the complaint of Ibrahima Gueye, where the applicant challenged the fact that retired Senegalese soldiers of the French Army residing in Senegal should be treated equally with French nationas in the enjoyment of their pension rights. The Committee ruled that the authors were ‘not generally subject to French ‘jurisdiction’, except that they were entitled to rely on French legislation in relation to the provision of pension rights. This brought them within the ambit of the Covenant protections. This complaint supports the position that where a migrant is entitled to a right within a domestic system, absent a public policy justification, this must be extended in a non discriminatory manner, regardless of their residence. In General Comment 31, the Committee has stated that ‘a State party must respect and ensure the rights laid down in the Covenant to anyone within the power of effective control of that State Party, even if not situated within the

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territory of the State Party.”

The ECtHR, has, in several cases, mirrored the Human Rights Committee in accepting that the Convention applied to executive or administrative acts, which were specifically directed at person resident abroad. In *Minasyan and Semerjyan v Armenia*, the Court found a violation of Article 1, Protocol No 1, the right to peaceful enjoyment of property, where Armenian authorities expropriated and demolished a flat in Yerevan, whose owners were at the time resident in the United States. In a similar case, *Zouboulidis v Greece*, another violation of the right was found where Greek authorities failed to pay supplements to the expat allowance of a Greek diplomat living in abroad.

The most expressive case in relation to extraterritorial impact of national actions was *Kovačić and others v Slovenia*, where the ECtHR found a violation of the Convention where several Croatian citizens were unable to withdraw currency from accounts at a Slovenian bank, largely due to amendments adopted by the Slovenian National Assembly. The Court commented that:

“‘[t]he applicants’ position as regards their foreign-currency savings deposited with the Zagreb Main Branch was and continues to be affected by that legislative measure. This being so, the Court finds that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia’s responsibility under the Convention could be engaged.’”

As a general principle therefore, measures taken by a home State within its own territory which produce adverse effects/violations of rights in respect of persons abroad, especially its own emigrant migrants, are open to challenge in internationally for a, and such acts must be pre-emptively avoided, absent compelling justification, by states, for example, through the equal provision of identity documents and relevant benefits. An example from the migrant context is, *Mayeka and Mitunga v Belgium*, where the Court found violations of Article 3 (inhuman and degrading treatment) and Article 8 (right to family life), where Belgian authorities failed to inform and consult with a Canadian-resident mother regarding the deportation of her child to the

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12 HRC 26 May 2004, General Comment 31, CCPR/C/21/Rev.1/Add.13, para. 10.
14 ECtHR 25 June 2009, *Zouboulidis v Greece* (No. 2), no. 36963/06.
15 ECtHR 9 October 2003, *Kovočić a.o. v Slovenia*, nos. 44574/98, 45133/98, 48316/99 at
Specific Obligations on Home States

The next section of this report will concentrate on the most prominent examples of direct (rather than implied) obligations being expressly placed upon home states. We underline that based on the right to non-discrimination and the obligation to cooperate, outlined in the previous section, the full catalogue of migrants’ rights, spanning from civil and political rights through to social and economic rights, require specific action appropriate to their specific vulnerabilities and sensitivities on the part of both home states and host states.

(i) Obligation to Inform Voluntary Migrants Prior to Departure

For State parties to the CMW, there is the obligation for home-states to fully inform migrants before departure. Under Article 37, migrant workers and their family must be fully informed by home-states or host-states of “all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.” Per the Office of the United Nations High Commissioner for Human Rights, “ideally, migrant workers should be able to acquire a basic understanding of the language, culture, and legal, social and political structures of the States to which they are going.”

Given the low levels of implementation of the CNW, the notable migration program of The Philippines appears to be one of the few co-ordinated efforts to conform with this legal duty.

Under the program, all Overseas Filipino Workers attend a Pre-Departure Orientation Seminar regarding requisite documentation, travel procedures, how to remit earnings, ensuring health and safety and where to go in times of need. The Article 37 obligation must also be implemented in a non-discriminatory manner, with a requirement for training to be gender sensitive, particularly in the light of the often increased vulnerability of female migrants. This training programme should also connect with the sending state’s obligation to provide consular assistance – such training should therefore be focused in particular upon grievance mechanisms and access to justice for migrant workers following departure. States should also launch

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16 ECHR 12 October 2006, Mayeka and Mitunga v Belgium, no. 13178/03
18 CMW/C/PHL/1, 67.
national awareness campaigns on the importance of safe migration and giving information where additional information is available.

(ii) International Labour Organisation Conventions: Private Agencies and Domestic Workers

The International Labour Organisation Private Employment Agencies Convention 181 (1997) represents a rare effort to create legal obligations relating to the supervision of private recruitment agencies and brokers which often operate in a transborder context, and on the ground in sending states. This Convention has so far been ratified by twenty three States. Article 3 requires that all labour recruitment companies operating from a national territory are to be licensed and subject to regular financial audits. Furthermore, the right of workers recruited by such companies to collectively bargain and freely associate are to be protected by all Parties to the Convention. A Member must all ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, or any other form of discrimination covered by national law and practice, such as age or disability. The Agency may only charge workers’ a fee in exceptional circumstances with Government (‘competent authority’) authorization – (article 6(2)), and there must be adequate protection against abuse for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies (Article 10). Article 8 requires cooperation between states:

“1. A Member shall, after consulting the most representative organizations of employers and workers, adopt all necessary and appropriate measures, both within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses.

2. Where workers are recruited in one country for work in another, the Members concerned shall consider concluding bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment.”

The International Labour Organisation has recently sought to reinvigorate its body of treaties relating to migrants through the passage last year of its Convention on
Domestic Workers 2011 (Convention No 189). Of greatest relevance for our current research is obligation of sending states described in Article 8:

“National laws and regulations shall require that migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment…prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies.”

Similarly in Article 15(c) States are obliged:

“adopt all necessary and appropriate measures, within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of domestic workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations that specify the respective obligations of the private employment agency and the household towards the domestic worker and provide for penalties, including prohibition of those private employment agencies that engage in fraudulent practices and abuses”

The Convention is about to receive its first batch of ratifications, and will ground further directed support to inter-State collaboration in the protection of migrants’ rights. The ILO Conventions endorse the involvement of sending States in the protection of its nationals abroad as well as reinforcing the obligation to collaborate across borders in the protection of migrants. The Conventions can also be interpreted as a method for concretising the more abstract obligations within the central United Nations Conventions – with the opportunities for greater synergy between the UN supervisory machinery and the ILO standards.

**Consular Obligations: Basic Rights**

The right to information is reaffirmed by Article 65(1) of CNW where “States Parties shall maintain appropriate services to deal with questions concerning international migration of workers and members of their families.” However, regarding consular obligations these are not a ‘duty owed’ but rather a ‘right to be informed’ of the state of their nationals abroad. Per the Vienna Convention on
Consular Relations Article 36, there are a number of rights afforded to the sending state, including an obligation to inform the sending State of an arrest, imprisonment or detention in custody of one of its nations. The seminal *LaGrand Case* described Article 36(1) Vienna Convention on Consular Relations (VCCR) as “an interrelated regime designed to facilitate the implementation of the system of consular protection.”\(^{19}\)

The case of *Avena and Other Mexican Nationals* is also relevant.\(^{20}\) In this instance, 52 Mexican nationals were arrested and sentenced to be executed in circumstances where Mexico not informed pursuant to VCCR Article 36(1). The Court held that in 51 of those cases the U.S. had violated their obligations under the Convention by not informing those individuals of their rights under the VCCR without delay upon their detention. Further, 49 of the cases violated obligations by not notifying the appropriate Mexican consular post without delay of their detention. Another 49 violated Mexico’s right to communicate with the nationals, and 34 violated Mexico’s right to arrange for legal representation of those nationals.

Further, Article 5 consular functions consist in helping and assisting nationals, both individuals and bodies corporate, of the sending State; safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State; and subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests. Finally, Article 65(2) of the ICRMW dictates that States Parties shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.

Home States and the Rights of Migrants upon their return

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\(^{19}\) (Germany v United States), Judgment ICJ Reports 2001, 466 at 74.

\(^{20}\) (Mexico v United States), Judgment ICJ Reports 2004, 12.
There is little information on the home-state obligations to migrants returning home. Regarding trafficked migrants, the Palermo Protocols does outline victim assistance as a home-state obligation. Particularly, State parties must ensure that domestic or legal administrative systems provide victims with the possibility of obtaining damages, information relevant to judicial or administrative proceedings, and consider implementing measures for the physical, psychological and social recovery of victims. This includes the provisions of appropriate housing, counseling, medical assistance and employment and educational opportunities. Further, State parties endeavor to ensure the physical safety of trafficking victims whilst within their territory.

22 Ibid, Articles 6 (2)(a-b); 3.
23 Ibid, Article 6(3)(a-d).
24 Ibid, Article 6(6).
2. The Diplomatic Protection of Migrants

International Law permits States to protect their nationals. As the formative international lawyer, Emmerich de Vatel claimed in his 1758 work *The Law of Nations*, ‘whoever uses a citizen ill indirectly offends the States, which is bound to protect this citizen’. In 1996, the International Law Commission identified diplomatic protection as an area requiring codification and progressive development. This process was carried out through the creation and adoption in 2004 of the Draft Articles on Diplomatic Protection. As early as 1998, the Working Group of the ILC declared that the

‘work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights’

This mandate thus meant that the Special Rapporteur on the project, Professor John Dugard was challenged to reconcile the evolution of international human rights law, with its focus on the individual with the traditional, long established State-centric institution of diplomatic protection. For some, the institution of diplomatic protection is obsolete, outmoded by the growth of international human rights law, which have granted clear legal subjecthood to the individual, and have, increasingly, attempted to make international quasi-judicial for a directly accessible to him or her. This view was however, rejected, by Rapporteur Dugard who argued that the time was ripe to readjust its functioning on the basis of developments in the human rights arena and employ it “as a means to advance the protection of human rights in accordance with the values of the contemporary legal order”. This section of our report seeks to outline the traditional rules governing the exercise of diplomatic protection, the growing movement to harmonise and expand these traditional rules to include an obligation to protect. Please note that, after this section, we will move to consider how diplomatic protection can be exercised (through consular access, legal aid etc).

Diplomatic Protection: A Traditional Discretion, A Growing Obligation?

Defining Protection

A state’s entitlement to exercise such protection is indisputable. In the Mavrommatis Palestine Concessions case, the Permanent Court of International Justice held that ‘a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.’\(^{27}\) This is reflective, the Court found, of any State’s ‘…right to ensure, in the person of its subjects, respect for the rules of international law’. While diplomatic protection, under conventional public understandings, appears a rather formulaic and procedural exercise, it involves far more extensive modalities of intervention than is commonly perceived. This report will be distill this analysis into two broad streams:

(i) **Consular Access** – this is the more literal dimension of diplomatic protection, regulated by the Vienna Convention on Diplomatic Relations

(ii) **Espousal of Claims** – Diplomatic protection beyond consular access simpliciter. This can include:

> “an international proceeding, constituting “an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties”

As will be discussed the Internaitonal Law Commission’s Special Rapporteur on Diplomatic Protection, recently reinvigorated the concept of protection through a broad definition of the concept:

> “[Diplomatic Protection is] an 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”

The ILC Special Rapporteur included many possible responses in his definition of action, but crucially in our case, included, judicial or arbitral proceedings. This form of protection, known as *espousal of claims*,

\(^{27}\) Mavrommatis Palestine Concessions (Greece v UK), 1924 PCIJ (ser. B) No. 3 (August 30).
involves the state ‘stepping into the shoes of the national whose rights have been violated to prosecute a complaint against the violating country’.

**Formal Prerequisites to Exercising Diplomatic Protection**

In order to exercise diplomatic protection, and in particular, the following elements must be satisfied:

1. An International Wrong
2. Exhaustion of Local Remedies
3. Link of Nationality

1. Migrant Abuses as International Wrongful Acts (IWAs)

Any number of migrant abuses may be classed as an IWA. Pursuant to Article 2, a state commits an IWA when conduct consisting of an act or omission is attributable to the state under international Law and constitutes a breach of international state obligations. Per *Tehran Hostages* both elements must be satisfied. Per the ILCC, states cannot plead that conduct conforms with internal law and escape the characterisation of an IWA. An act will be characterised as an IWA even if it is in accordance with domestic law, or if the state was bound to act that way. An assessment of IWAs affecting individuals is as follows.

Mistreatment of foreign nationals is clearly an IWA. Per the seminal *Roberts Claim*, the minimal standard of treatment test is outlined. As such, “facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilisation.” Failure to protect will also give rise to liability per *Youmans Claim*. Further, damage to foreign nationals property is also a clear IWA per Article 9(1) of the Draft Harvard Convention and Article 38(1)(d) of the ICJ statute allows reference to this draft convention as a source of international law. Expulsion without sufficient notice is also an IWA per the cases of *Yeager v Iran* and *Caire Claim*. Failure to punish for breaches of the

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28 Draft Articles on State Responsibility, Article 2(a).
29 Ibid, Article 2(b).
31 International Law Commission Commentaries on State Responsibility, page 36.
32 Harry Roberts (U.S.A.) v. United Mexican States. 2 November 1926. IV pp. 77-81. para 60-61.
33 Harry Roberts (U.S.A.) v. United Mexican States. 2 November 1926. IV pp. 77-81. para 60-61.
34 Thomas H. Youmans (U.S.A.) v. United Mexican States 23 November 1926 VOLUME IV pp. 110-117
36 Caire Claim (France v. Mexico) (1929) 5 R.I.A.A. 516
above will also give rise to liability per the *Massey Claim*, and per *Janes Case* failure to take proper steps to try, apprehend and punish will also amount to an IWA. Finally, failure to provide a fair trial for foreign nationals under all provisions outlined within ICCPR Article 14 will also amount to an IWA.

2. Attribution

Per *Yeager*, “in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State.” Attribution to State organs, be it legislative, executive or judicial is governed by Draft Article 4(1). Per Draft Article 4(2), An ‘organ’ is any person or entity which has that status in accordance with internal state law. No distinction is drawn between superior and subordinate officials. Legislation opposing international law will also incur attribution per *German Interests in Polish Upper Silesia*. Regarding the increasingly relevant attribution to Non-State Organs, Article 5 ensures conduct of non-organs will be attributed to states where the entity is empowered by the law of the state, exercises a public function normally exercised by the government and the conduct relates to governmental authority. As per *Nicaragua*, “the conduct of a person or entity which is not an organ of the state under Article 4 but which is empowered by the law of that state to exercise elements of the governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance.” Regarding *Ultra vires* acts, Article 7 ensures the conduct of state organs or otherwise is a state act even if the act exceeds its authority or contravenes instruction. Per *Caire Claim*, official capacity is contingent upon people holding out as performing official functions; or using powers, methods or means placed at their disposal by virtue of an official capacity. Lack of due diligence will also give rise to attribution where the state fails to prevent wrongful conduct, per *Youman’s Claim*. The case of *AAPL v Sri Lanka* is also relevant, where the Government failed to provide standard or protection required under treaty, customary international law or contextually.

The conduct of purely private persons or corporations is also relevant as generally, states are not liable for acts of private persons or corporations. Per the

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38 Janes case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925) at 649.
40 Certain German Interests in Polish Upper Silesia, Merits, Judg- ment No. 7, 1926, P.C.I.J., Series A, No. 7.
42 Caire Claim (France v. Mexico) (1929) 5 R.I.A.A. 516.
ILCC, responsibility will usually arise when private entities provide auxiliary functions to the state. Pursuant to Article 8, state responsibility will rise when private entities are acting under the direction of control of the state. Per Nicaragua, there was a high evidentiary threshold to demonstrate U.S. control of contra rebels. Further, under Article 9 revolutionaries acting in the absence of official government authority will also amount to state responsibility. Per Yeager v Iran, the Tribunal found sufficient evidence to establish a presumption that Revolutionary Guards were acting on behalf the new government, or at least exercising elements of government authority in the absence of official authorities. Further, if the state adopts the conduct of private persons or corporations, this too may be attributable. Per Article 11, conduct which is not attributable to a State will be considered a state act if the state “acknowledges and adopts” the conduct, as explored in Diplomatic & Consular Staff Case (US v Iran).45

3. Exhaustion of National Remedies
Secondly, all local remedies must be exhausted per Draft Article 44(b), now a customary provision.46 However, per the International Law Commission Commentaries (ILCC), “only those local remedies which are available and effective have to be exhausted before invoking the responsibility of the state” unless otherwise agreed.47 There is no requirement to use remedies which offer no possibility of redressing the situation, as explored in the Interhandel Case.48 Even though over 10 years had seen the case fail to progress, local remedies had not been exhausted as leave for appeal had been granted. The onus is on the defendant to show that local remedies have not been exhausted, though note however that special claims tribunals do not have this requirement.

4. Examples of State Liability before the ICJ
When these claims are made against a host-state, any number of defences may be made. These include Consent under Article 20, self-defence in conformity with the UN Charter under Article 21, the taking of countermeasures under Article 22, Force majeure such as the impossibility of performance under Article 23, distress under Article 24 and necessity under Article 25. Note that none of the these defence apply to jus cogens pursuant to Article 26 and it is unlikely that these defences will be viable regarding the mistreatment of migrants.

45 Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran); Order, 12 V 81, International Court of Justice (ICJ), 12 May 1981.
47 As the Court observed in the case of De Wilde, Ooms and Versyp v. Belgium, judgment of 18 June 1971, Series A no. 12, the State may waive the requirement of exhaustion.
48 Interhandel, Preliminary Objections, I.C.J. Reports 1959.
Should these defence fail, the home-state will be the sole claimant per Mavrommatis. Under older cases if damages awarded the state has complete discretion whether to award those damages to the relevant national per Socobelt. However, as will be discussed later, recent domestic cases have indicated that damages would have to be shared with the individual. Remedies available would also include an obligation to cease the act under Article 30 and make appropriate assurances that the act will not reoccur. Reparations are also relevant. Under Article 31(1), the host-state could be under an obligation to make full reparations for the injury cause by the IWA. Under Article 31(2), this injury can include material or moral damage, and the reparations “must, as far as possible, wipe out all consequences of the illegal act & re-establish the situation which would, in all probability, have existed if that act had not been committed” per the Chorzów Factory Case. Restitution is traditionally the primary form of reparation per Chorzów Factory. Under Article 35 States responsible for an IWA are under an obligation “to re-establish the situation which existed before the wrongful act was committed.” Per Article 35(a)-(b), if restitution is unavailable or, per the Temple of Preah Vihear Case, is insufficient, compensation becomes relevant. Per Article 36(1), liable States are obliged to compensate for damage caused insofar as such damage is not made good by restitution, covering any financially assessable damage incurred. Further, per Article 37(1), the State responsible for an IWA is obliged to give satisfaction for the injury caused by the act insofar as it cannot be made good by restitution or compensation. As in Preah, satisfaction may consist of acknowledgement, a formal apology or other appropriate modalities that are not disproportionate or humiliate the State responsible as outlined in the Rainbow Warrior Case.

2. The International Law Commission Draft Articles and the Obligation to Protect and Intervene

There is no doubt that it is the rule of effectiveness of international legal obligation that undergirds many expansive interpretations of diplomatic protection. Referring to the growing importance of human rights and the underdevelopment of enforcement

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49 Mavrommatis Palestine Concessions (Greece v UK), 1924 PCIJ (ser. B) No. 3 (August 30).
51 Case Concerning the Factory at Chorzow (Indemnity) (Merits) (Germany v Poland), PCIJ Rep (1928) Series A No. 17.
52 Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) Preliminary Objections, ICJ Rep (1961) 17, 13.
54 Case Concerning the Difference between New Zealand and France concerning the Interpretation or Application of Two Agreements, concluded on 9 July 1986 between the Two States and which related to the Problems arising from the Rainbow Warrior Affairs (New Zealand v France) (1990) 20 RIAA 217, 251.
mechanisms for individual complainants, arguments are growing 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. There are express appeals to the gaps and injustices generated by the discretionary nature of diplomatic protection. This reflects a commitment to teleological interpretation of human rights instruments and public international law generally. This method of interpretation has been used widely by human rights lawyers within the United Nations mechanisms, but has generated much criticism from more strictly positivist commentators. These positivists would regard the exercise of diplomatic protection as being the States prerogative. Nevertheless Professor Dugard concluded that ‘the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights.\(^55\)

In exploring the linkages between diplomatic protection and international human rights treaties, one significant starting point is the possibility for inter-State complaints which is provided for in some prominent human rights conventions. Traces of such interlinkages can be seen within the European Convention on Human Rights schema, where there is both an inter-State Mechanism whereby states can initiate claims against each other, but also an existing tendency on the part of States to intervene in individual applications in support of the individuals’ claim. Some recent examples of such interventions include, those of Cyprus in the *Loizidou v Turkey* case\(^56\) and that of Romania in the *Ilascu and Others v Moldova and Russia* case.\(^57\)

The attempt to link these inter-State litigation practices with diplomatic protection is resisted by some authors however, who argue that they actually are rooted in the idea of human rights as a common concern for states rather than the special relationship of nationals with their Home State. In support of this they cite the obiter dictum of the ICJ in the Barcelona Traction case, where the Court observed that:

“an essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising *vis a vis* another State in the field of diplomatic protection.”

Amongst the more controversial methods employed by Special Rapporteur Dugard in constructing an obligation to intervene and an expansive reinvigoration of diplomatic protection, was his reliance upon the work of two compensation institutions, the Iran-United States Claims Tribunal (I-USCT) and the United Nations Compensation Commission (UNCC). The latter was set up as a subsidiary organ of the United Nations

\(^{55}\) Above, note 9 at page 10.
\(^{57}\) Application No. 48787/99 ECHR Ser. A decision of 8 July 2004 or 40 EHRR (2005) 1030.
Security Council, with a mandate to process claims and pay compensation for losses and damage suffered as a direct result of Iraq’s invasion and occupation of Kuwait in the First Gulf War. The former was an international arbitral tribunal established under the Algiers Accord of January 19, 1981, agreed between Iran and the United States. Do these tribunals qualify as examples of espousal of claims under diplomatic protection? They depart from the traditional rules on diplomatic protection, while keeping others, for instance the fact that claims were gathered and presented primarily by governments. Some argue that the mechanisms were replacements for domestic courts – that the Claims Tribunal was a stand in for the US courts. This was supported by the conclusions of the Tribunal in the A/18 and A/21 cases, where it held that ‘the object and purpose of the Algiers Declarations was to resolve a crisis in the relations between Iran and the United States, not to extend diplomatic protection in the normal sense’ and underlined that “Tribunal awards uniformly recognize that no espousal of claims by the United States is involved in the case before it.”

Whose Claim is enforced? Whose Rights is Asserted?

For Professor Dugar, the State of nationality acts on its own behalf and asserts its own rights since an injury to a national is an injury to the state itself. For Justice Bennouna diplomatic protection reflects the reality that ‘if this individual is unable to internationalise the dispute…his State of nationality, by contrast, can espouse his claim by having him, and the dispute, undergo a veritable ‘transformation’…the espousal of the claim enables the claimant to claim respect for his own right on the basis of the nationality link’. There are many other possible ways of conceive the espousing of a claim: as the State functioning as an agent of an individual claim or as the State enjoying a procedural right to enforce the claim, with the material right being vested in the individual.

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59 Above note 8, at page 7.

60 At page 5.

61 For academic support for these viewpoints see Chittaranjan F Amerashinghe, Local Remedies in International Law, Cambridge 2004, at 55 or Wilhelm K geck, Diplomatic Protection, in Rudolf Bernhardt (ed.) Encyclopaedia of Public International Law (EPIL), Vol. I, Amsterdam, 1992 1045-1067, at 1058.
In the seminal *LaGrand* case, the ICJ restated the traditional view that, where Article 36 VCCR were violated by the United States, the action which Germany was based on (i) the right of a State, since an injury to a national is an injury to the state itself but crucially, the ICJ also recognized that the individual rights created by the VCCR ‘may be invoked by this Court by the State of the detained person’. The Court stated again at paragraph 42 that the case was a ‘dispute as to whether paragraph 1 (b) creates individual rights and whether Germany has standing to assert those rights on behalf of its nationals’. In according such prominence to the rights of individuals, the Court was departing from the traditional *Mavrommatis* understanding of diplomatic protection as rooted in injury to States. Authors such as Tinta Feria have attempted to argue that the case represented a decisive step towards an individual oriented concept of international law. However, the court’s brief judgment was not clear enough to be free from ambiguity.

In the *Avena* case, the substance of which is discussed later, the ICJ acknowledged again it was hearing a mixed claim, whereby a State suffered both directly and through the violation of individual rights conferred on Mexican nationals’. Enrico Milano notes that the nature of the remedies ordered, which are based on the idea of due process guarantees for the individual accused. Overall, these two cases involved a change to diplomatic protection, but it was a change which was left implicit, undefined and has led to conflict amongst academics. But, for the purposes of this report, there is no doubt that the cases reflect a growing reorientation of diplomatic protection as not merely grounded in protecting the interests of a State but in protecting the individuals’ rights in a direct way.

However, while such a debate is interesting, can a shift in the justifications for diplomatic protection lead to a requirement that the home State of a national provide such protection? Under old approaches, such an obligation to protect was ruled out. This occurred most explicitly in the Barcelona Traction case, where the ICJ noted:

‘[s]hould the national or legal person on whose behalf it is acting consider their rights are not adequately protected, they have no remedy in international law…The

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62 Germany v United States, Judgment ICJ Reports 2001, 466 Paragraph 77.
State must be viewed as the sole judge to decide whether its protection will be granted, and to what extent it is granted and when it will cease.\footnote{Barcelona Traction Case, at 44.}

However, Special Rapporteur Dugard working on behalf of the International Law Commission attempted to directly challenge this position as a matter of customary international law, based on state practice since the Barcelona Traction judgment. In particular, he appealed to the recent State practice providing in constitutional texts for a right of the individual to receive diplomatic assistance. Based on this, customary international law had evolved to such an extent that he proposed a draft article imposing an obligation on State of nationality to exercise diplomatic protection in the case of a “grave breach of a jus cogens norm”.

Special Rapporteur Dugard’s proposal was heavily criticized for being both too interventionist but also too limited in its scope.\footnote{For the discussion within the ILC, see Marjoleine Zieck, \textit{Codification of the Law on Diplomatic Protection: The First Eight Draft Articles}, 14 LJIL (2001), 209-232, at 219-221.} He attempted to justify this draft Article 4 by claiming that it “seeks to give effect to developments of this kind [constitutional and human rights developments]…care is taken to limit the proposed duty on States to particularly serious cases, to give States a wide margin of appreciation…”\footnote{Above note 8 at page 33.} In the event, his Article was downgraded slightly, with the Draft Articles containing a hortatory provision (termed a Recommended Practice):

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 has occurred;

(b) Take into account, wherever feasible, the views of injured persons with regard 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.”\footnote{International Law Commission, \textit{Draft Articles on Diplomatic Protections, adopted by the International Law Commission at its fifty-eighth session}, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session. The report, which}
Nevertheless academic appeals human right to diplomatic protection persist, centering on the judgments of the ICJ in LaGrand. There is no answer to the fact that the ICJ ‘accepted Germany’s ability to present a mixed claim asserting simultaneously its right and the rights of its nationals’. If the right to consulate communication can ground an action against a host state, the argument runs, then surely it can ground one against the detainee’s own ‘home’ State, resulting in the individual being entitled to demand his national State exercise diplomatic protection.

Amerasinghe notes that while human rights protection and diplomatic protection may be two different mechanism there needs to be increasing acceptance of the reality 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.’

Domestic Developments: Obligation to provide Diplomatic Protection
The relevance of national constitutional provisions to the existence of a requirement to protection at international level is dependent on the interpretive methodology with which one approaches international law. Dugard used such domestic laws as indicative of state practice having an impact on the creation of relevant international law norms.

At domestic level, early attempts to by emigrant nationals to judicial review a failure to provide diplomatic protection were largely unsuccessful. This reflected judicial unwillingness to intervene in the foreign relations policy of the executive on separation of powers grounds. The United Kingdom had to confront a request to oblige the British government to take specific diplomatic steps in the 2002 Abbasi case, where the Court of Appeal had to consider whether to complete the Foreign Office to make representations to US authorities on behalf of a British National detained in Guantanamo Bay. The Court of Appeal found that there was no duty to exercise diplomatic protection under customary international law or the ECHR. Under domestic British law, there was only an obligation on the Government to consider

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69 Rudolf Hess Case, Judgment of the German Constitutional Court 90 ILR (1992) 386-400.
making representations. However, since the *Abbasi* judgment it is perhaps important to note the argument advanced by the British government itself in the *Al Adsani v UK* case before the ECtHR. In response to claims the applicant was deprived of any effective remedy for fundamental human rights violations counsel steed that ‘there were other, traditional means of redress for wrongs of this kind available to the applicant, namely diplomatic representations or an inter-State claim’.\(^{71}\) The *Abbasi* decision did include an examination by the Court of other options open to the applicant for claiming violations of his international rights and emphasized the importance of the protection of human rights. It does represent the first step, in finding that the right to diplomatic protection is not solely and exclusively conferred on the state, and 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.

It is also worth noting that in judgments regarding extraterritoriality ECHR jurisprudence has centered on the requirement of effective control. In order to be held responsible a human rights violation must have occurred on the territory of a State Party or in an area under the effective control of a State Party. These dicta have so far crowded out the issue of diplomatic protection. In the *Bankovic* case, the Court signaled some openness to the possible extension of positive obligations by noting that ‘cases involving the activities of its diplomatic or consular agents abroad’ were within the jurisdiction of the Convention.\(^{72}\) However, absent evidence of directly culpable conduct on the part of State agents abroad, there is remains little evidence of a positive obligation to protect nationals from the acts of third party states.

In the South African context, the Constitutional Court adopted a slightly more interventionist approach. In *Kaunda*, it found unanimously that there was a right for a South African citizen to request diplomatic protection with a corresponding obligation of the Government ‘to consider the request and deal with it consistently with the Constitution’. The Court held that this obligation was accompanied with a wide margin of appreciation due to political sensitivity, but judicial review could succeed ‘if it can be shown that the decision was irrational or contrary to legitimate expectations’. The applicants were South African nationals, detained in Zimbabwe on

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\(^{71}\) *Al adsani v UK* 34 EHRR 2002 at paragraph 50.

conspiracy charges, allegedly relating to a coup to overthrow the government of Equatorial Guinea, they feared extradition, unfair trials and ultimately, a death sentence. The Constitutional Court expressly considered whether diplomatic protection should be considered a human right under international law that:

‘should be developed to recognize 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’. 73

While noting the ILC debate, the Court found that customary international law had not evolved to that point. Significantly, the Court considered, whether, even if diplomatic protection was not a freestanding enforceable right, it might be an aspect of other enforceable right. It ultimately rejected this, but on unpersuasive grounds, by arguing that a right to diplomatic protection through other rights would be an interference with the sovereignty of other states. There are already procedural requirements outlined above to protect the host State’s interests (internationally wrongful act, local remedies have not been exhausted and the nationality requirement). Furthermore where state’s directly sign up to obligations like Article 23 of the Migrant Workers Convention, and commit to international co-operation on human rights implementation, such a rigid invocation of state sovereignty seems inappropriate. There were two dissents in the case, in particular Judge Ngcobo found:

‘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’

He appealed in particular to the insufficiency of existing human rights enforcement mechanisms. Judge O’Regan found that there was an obligation to protect in the South African Constitution based on the idea that the Constitution should be interpreted ‘in a way to promote rather than hinder the achievement of the protection of human rights’. However, a later decision of the High Court attempted to restrict

73 Kaunda, paragraph 28
Kaunda to cases of gross abuses of international human rights of individuals. Overall, the current South African position appears to be that courts will scrutinize refusals to extend diplomatic protection under administrative law indicia such as bad faith and irrationality.

In Spain, the case of Commercial F SA v Council of Ministers, which concerned a claim by a group of Spanish individuals and companies with interests in Equatorial Guinea that the Spanish Government had failed to offer diplomatic protection against violations of international law by the Equatorial Guinea government’s arbitrary actions, including deprivation of property. In the event, the Spanish Supreme Court, while accepting its right to review found that the group had not complained within the one year time limit required by Spanish law.75

Progress was evident in the Dutch courts in the case of M.K. v The Netherlands, a Dutch national who 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. The claimant had requested that the Dutch Embassy in Thailand should issue a statement, in order to facilitate habeas corpus, guaranteeing that the claimant would not leave Thailand and should do everything to obtain redress from the Thai Government for the violation of fundamental human rights. The Court found that the government was unable to dictate to the Thai government how to treat its prisoners, and ruled that the claimant’s request had to be dismissed as ‘too farfetched and unsubstantiated’. However, the Court 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’

The most prominent recent case in the area of diplomatic protection obligations was the Canadian Federal Court case of Khadr v Canada. This involved a Canadian citizen captured by US forces in Afghanistan and detained at Guantanamo Bay, who

75 Commercial F SA v Council of Ministers (Case No. 516), Spain, Supreme Court (Third Chamber), 6 February 1987. 88 ILR at 691-697.
sought a court order compelling the government to provide consular services. In the Court of Appeal, Khadr succeeded in obtaining an order that the Canadian government request his immediate repatriation by the US. This was the first time, that the obligation on a government to exercise diplomatic protection to safeguard nationals from ill-treatment at the hands of a foreign state. The fact that Canadian officials had participated in interrogation of Mr Khadr at Guantanamo bay represented a unique fact matrix however, with the court refusing to resolve the question of whether there was a duty to protect citizens absent such direct state involvement in ill-treatment. The Supreme Court judgment in the case, found that while Mr Khadr’s rights had been violated, a court order binding the government to request repatriation was inappropriate as it interfered with the executive’s jurisdiction over foreign affairs.

Special Rapporteur Dugard’s attempt to represent such rulings as state practice indicative of an evolution of a right to diplomatic protection appeared overambitious at the time. Discussion in the Sixth Committee at the sixty-second session of the General Assembly 2007 raised the prospect of imposing a positive obligation on states to protect their nationals abroad. It may be that direct support and norm development by international human rights bodies will yield short term progress in this area.
Conclusion: Summary of Obligations Identified

Direct Obligations of Home States

- Obligations to inform prior to departure, and to ensure those with particular vulnerability are targeted for information campaigns, particularly regarding the accessibility of consular and diplomatic protections.
- Obligations to prevent the trafficking of populations, to co-operate in their investigate within the home and/or host country.
- Obligations to regulate and monitor the activities of private or agency recruitment firms.
- Obligation to at least respond to claims for consular and diplomatic assistance.
- Obligation to avoid all national administrative, executive and legislative actions that may violate migrants rights in absentia e.g. to social welfare allowances or travel documents.

Centrality of Diplomatic Protection

- Diplomatic Protection includes all actions which the State takes to redress the violation of an emigrant national in a third country.
- Within International Human Rights Treaties at United Nations and European level, there is an acknowledgment that States must co-operate to protect human rights.
- Where there is a failure to protect on the part of hosts States, bodies such as the ECtHR and UN Committee on Economic and Social Rights have acknowledged the general principle that an obligation to intervene being placed on Home States.
- Public International Law has traditionally accorded the right of a state to espouse claims on behalf of its subjects, upon satisfaction of conditions such as the exhaustion of domestic remedies and the committing of an international wrongful act. The transformation of this right into obligation is underway within the international human rights system, and we recommend all advocacy actions reinforce this process.
- Within domestic legal systems, there is increasing willingness to review decisions not to intervene diplomatically on behalf of the applicant. A decision to refuse will be subject to general administrative law principles, such as irrationality and/or bias.
- A further consolidation of relevant practice within international human rights institutions, together with co-ordinated and selective litigation, will lead to an obligation to provide diplomatic protection in the near future.

END