Kaunda and others v President of the Republic of South Africa (CCT 23/04) [2004] ZACC 5 (4 August 2004)

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/04

SAMUEL KAUNDA AND OTHERS Applicants

versus

THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA First Respondent

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT Second Respondent

THE MINISTER OF SAFETY AND SECURITY Third Respondent

THE MINISTER OF INTELLIGENCE Fourth Respondent

THE MINISTER OF HOME AFFAIRS Fifth Respondent

THE MINISTER OF FOREIGN AFFAIRS Sixth Respondent

THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS Seventh Respondent

Together with

SOCIETY FOR THE ABOLITION OF THE
DEATH PENALTY IN SOUTH AFRICA Amicus Curiae

Heard on : 19 and 20 July 2004

Decided on : 4 August 2004

JUDGMENT

CHASKALSON CJ:

[1] The applicants in this matter are 69 South African citizens presently held in Zimbabwe on a variety of charges.[1] The first six respondents are the President of the Republic of South Africa and various Cabinet Ministers who are cited as representatives of the South African government (the government). The National Director of Public Prosecutions is cited as the seventh respondent.

[2] The applicants were arrested in Zimbabwe on 7 March 2004. On 9 March 2004, a group of 15 men were arrested in Malabo, the capital of Equatorial Guinea, and accused of being mercenaries and plotting a coup against the President of Equatorial Guinea. The majority of the detainees are South African nationals. The applicants fear that they may be extradited from Zimbabwe to Equatorial Guinea and put on trial with those who have been arrested there. They contend that if this happens they will not get a fair trial and, if convicted, that they stand the risk of being sentenced to death.

[3] The applicants initially approached the High Court in Pretoria (the High Court) seeking orders aimed at compelling the government to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, and to take steps to ensure that their rights to dignity, freedom and security of the person and fair conditions of detention and trial are at all times respected and protected in Zimbabwe and Equatorial Guinea.

[4] The substantive relief claimed was in the following terms:

"2. Directing and ordering the Government of the Republic of South Africa (the Government) to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

3. Declaring that the Government is, as a matter of law, entitled to request the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

4. Directing and ordering the Government to seek an assurance as a matter of extreme urgency from the Zimbabwean Government that the applicants will not be released or extradited to Equatorial Guinea.

5. Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean and Equatorial Guinean Governments, as the case may be, to not impose the death penalty on the applicants.

6. Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa (the Constitution) are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

7. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants' right to freedom and security of person including the rights not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

8. Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

9. Directing and ordering the Government to, through the office of the second respondent, report in writing to the Registrar of this Honourable Court on a weekly basis as to the issues set out above where applicable."

[5] The application which was heard in the High Court by Ngoepe JP was dismissed. The Judge President delivered his judgment on 9 June 2004. On 21 June 2004 the applicants lodged an urgent application with the registrar of this Court for leave to appeal directly to it against the decision of the High Court. On 29 June the government lodged an affidavit opposing the application. This Court was then in recess and not due to convene again until 15 August. Because of the seriousness of the allegations made it was decided to convene the Court during the recess. On 30 June directions were given that the application for leave to appeal would be heard on 19 and 20 July 2004. The parties were put on terms to lodge their arguments expeditiously and to deal with the merits of the application to ensure that if leave to appeal was granted the matter could be disposed of without hearing further argument.

[6] The Society for the Abolition of the Death Penalty in South Africa was admitted as an amicus curiae in the High Court proceedings and provided argument supporting the applicants' application. It has sought leave to participate as an amicus in the application for leave to appeal. That was granted and we have had the benefit of written and oral argument from the amicus as well as the applicants and the government.

The application to the High Court

[7] The proceedings against the government were commenced in the High Court over two months ago as a matter of urgency. The application was foreshadowed by a newspaper report published on 5 May 2004 saying that the applicants were expected to lodge an application in the High Court to force the government to step in. The report which is attached to the applicants' founding affidavit is based largely on statements attributed to the applicants' attorney and counsel in this matter. No demand was, however, made on the government at that time. Some twelve days later, on 17 May 2004, the government was given twenty four hours' notice to comply with the demands made in a letter from the applicants' attorney. The demands made were those which are now the claims referred to above. Their application to the High Court for this relief was lodged the following day with an affidavit of over 100 pages signed by the applicants' attorney, to which were attached 34 annexures running to over 200 pages.

[8] There is no justification for the peremptory manner in which the proceedings were commenced, nor satisfactory explanation for the failure to make the demand at the time the media was informed that court proceedings were to be launched. It must have been obvious to the applicants' attorneys that the demands could not reasonably have been responded to within twenty four hours. Not surprisingly there was no response and the following day the application was lodged requiring the government to respond within a week. The answering affidavits draw attention to the short time within which the government has had to deal with the allegations made in the founding affidavit. They place most of the material allegations in issue but do so at times baldly, and without providing an account of all that they intend to do in the circumstances of the case. A consequence of the way that the papers have been drafted by the applicants and the respondents is that some of the issues that have been the subject of argument were not clearly formulated in the founding affidavit or the government's answer. The picture which emerges from the record and on which the application must be decided is dealt with more fully when the various claims are addressed. The background is as follows.

The arrest of the applicants in Zimbabwe

[9] The applicants say that they were employed to act as security guards in the Democratic Republic of the Congo (DRC) for a company which conducts mining operations there. Their services were required because mines in the DRC are subject to attacks by rebel armies and need protection. The rebel armies are equipped with modern weapons and the security guards need weapons suitable to enable them to resist such attacks. The applicants allege that a company known as Military Technical Services (MTS), which is a licensed arms dealer in South Africa, entered into an agreement earlier this year with a state owned company in Zimbabwe called Zimbabwe Defence Industries (ZDI) to supply the arms that would be required for this purpose.

[10] On 7 March 2004 the applicants boarded a plane at Wonderboom Airport in South Africa from where they allege they were to commence their journey to the DRC to fulfil their contract to act as security guards. The plane took off and landed at the Polokwane International Airport where the applicants' papers were cleared. The plane took off again and finally landed at Harare International Airport. According to the applicants, they were to refuel at Harare, pick up cargo there and then fly to Burundi, with their final destination being the DRC. They were arrested at Harare airport before the cargo had been loaded.

[11] According to the charges they face in Harare the cargo was to consist of

"61 AK rifles – 150 offensive hand grenades
45 000 AK ammunition
20 PKM Light machine guns
30 000 PKM ammunition
100 RPG 7 anti tank launchers
2 X 60mm mortar tubes

5080 X 60mm mortar bombs
150 offensive hand grenades
20 icarus flairs
500 boxes 7.62 X 54mm ammunition
1 000 boxes 7.62 X 39mm ammunition
1 000 rounds RPG anti tank H.E ammunition
50 PRM machine guns."

[12] After the applicants had been arrested they were moved to Chikurubi Maximum Security Prison (Chikurubi Prison). They make serious allegations concerning the conditions in which they have been held since then and the difficulties they have had in instructing their attorneys and preparing for their trial in Zimbabwe. These allegations will be dealt with more fully later. For the moment it is sufficient to say that they face the following charges in Zimbabwe:

"Contravening section 13(1) of the Public Order and Security Act –
Count 1 – Conspiracy to possess dangerous weapons;
Count 2 – Attempt to possess dangerous weapons.

Contravening section 4(2)(b) of the Firearms Act –
Count 1 – Conspiracy to purchase firearms without a firearms certificate;

Contravening section 4(4)(a) of the Firearms Act –
Count 2 – Conspiracy to purchase ammunition without a firearms certificate.

Contravening section 36(1)(a)(i) and section 36(1)(c) or alternatively section 36(1)(e) of the Immigration Act – enter or assist any person to enter, remain or depart from Zimbabwe and making a false statement.

Contravening section 89(2)(b) of Statutory Instrument 79/88 of Aviation (air navigation) Regulations – make a false statement or declaration to an official of the Civil Aviation Authority of Zimbabwe."

The applicants' trial in Zimbabwe was due to commence on the first day of the hearing of this application. It was, however, postponed for two days to enable the counsel and attorneys who represent them in this application to appear on their behalf in Zimbabwe.

The allegations made by the applicants in the High Court proceedings

[13] The founding affidavit on which the application is based was made by the applicants' attorney, Mr Griebenow (Griebenow). He explains in great detail the difficulty he has experienced in consulting with the applicants in Chikurubi Prison and the practical difficulty he would have had in attempting to get them to make the affidavit. The government disputed various allegations made by Griebenow, but did not make an issue of the fact that there were no affidavits from the applicants confirming what he said. The High Court accepted Griebenow's explanation for making the founding affidavit himself. I will therefore deal with the matter as if the applicants had confirmed the allegations made by Griebenow.

[14] The applicants have nine separate claims that are set out in their notice of motion. These are claims of extraordinary breadth. I will deal with each of the claims in turn. But before doing so it is necessary to deal with two procedural issues raised during argument.

Is the application urgent and are the applicants entitled to appeal directly to this Court?

[15] The procedural issues are related and can be dealt with together. They are whether the application for leave to appeal is sufficiently urgent to warrant the failure to comply with the normal rules of procedure and to entitle the applicants to bypass the Supreme Court of Appeal or the Full Bench of the High Court, and appeal directly to this Court.

[16] This Court has held on various occasions that the granting of leave to appeal directly to it depends on various factors:

"Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the SCA is bypassed."[2]

[17] The applicants primarily aim to avoid being extradited to Equatorial Guinea and being tried in Zimbabwe or Equatorial Guinea. To that end their first claim is to require the South African government to take steps to have them extradited to South Africa so that any trial they may have to face can be conducted here. The other claims are directed to their conditions of detention, and to trial procedures should they be put on trial in Zimbabwe or Equatorial Guinea.

[18] If the applicants are extradited to Equatorial Guinea or put on trial in Zimbabwe, the relief claimed by them seeking to prevent this will become academic. The claims relating to their conditions of detention are immediate and if they are entitled to the relief claimed, are pressing. It is desirable that finality be reached on these issues without delay.

[19] The constitutional issues raise the question whether the Constitution binds the state to take steps to protect the applicants in relation to the complaints they have concerning their conditions of detention in Zimbabwe and the prosecution they face there, as well as the possibility of their being extradited to Equatorial Guinea to face charges which could result, if they were to be convicted, in their being sentenced to death. These issues involve the reach of the Constitution, and the relationship between the judiciary and the executive and the separation of powers between them. They are issues of great moment, and if their claims have substance, of great importance to the applicants.

[20] The merits of the constitutional claim are relevant to the application for leave to appeal directly to this Court and the alleged urgency of the matter. The procedure followed by this Court in setting the application down for hearing and requiring the parties to deal with the merits enables the Court to consider the merits of the claim and, if so advised, to bring this dispute to finality. It also avoids a situation in which delays may result in the relief claimed becoming academic.

[21] A theme that runs through all the claims is a demand that the government should seek assurances from foreign governments concerning prosecutions or contemplated prosecutions in those countries. The applicants assert that they have rights under the Constitution entitling them to make such demands, that the government has failed to comply with their demands and that in failing to do so it has breached their constitutional rights. The relief they claim is in effect a mandamus ordering the government to take action at a diplomatic level to ensure that the rights they claim to have under the South African Constitution are respected by the two foreign governments.

[22] The issues raised by the applicants and the amicus curiae involve, on the one hand, the relationship at an international level between South Africa and foreign states, in this case Zimbabwe and Equatorial Guinea, and on the other, the nature and extent of its obligations to citizens beyond its borders. To answer the questions raised it is necessary to deal both with international law and domestic law. As the setting is international, I begin with international law.

International law

[23] Section 232 of the Constitution provides that:

"Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

Traditionally, international law has acknowledged that states have the right to protect their nationals beyond their borders but are under no obligation to do so. Counsel for the government, citing the Barcelona Traction case,[3] relied on this principle to support the government's contention that the applicants' claims are misconceived. They referred to the following passages from the judgment of the International Court of Justice (ICJ) in that case:

"The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress . . .

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that."[4]

[24] Their argument comes down to this. The applicants' remedy is to approach the government for assistance and not the courts. If this is done the government will consider their requests. It is, however, the sole judge of what should be done in any given case and when and in what manner assistance that is given should be provided.

[25] The nature and scope of diplomatic protection has been the subject of investigations by the International Law Commission. It was requested in 1996 by the General Assembly of the United Nations to undertake this task. Special Rapporteurs and working groups were involved in the investigations the outcome of which is referred to in reports of the International Law Commission. The report dealing with issues relevant to the present matter is the report published in 2000 (the ILC report). This report contains summaries by the Special Rapporteur, Professor Dugard, of the relevant debates.[5]

[26] The term diplomatic protection is not a precise term of art. It is defined in the Special Rapporteur's report 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."[6]

It is also used by some commentators to refer to

"preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained."[7]

It appears from the ILC report, however, that there are differences on this and that some commentators take the view that diplomatic protection applies only to actions taken to secure redress for injuries actually caused.[8]

[27] According to the Special Rapporteur's report, diplomatic protection includes, in a broad sense, "consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, [and] economic pressures".[9] Some authorities distinguish between diplomatic action taken by a state to secure redress for an injury to a national, and judicial proceedings taken to that end. The distinction is not relevant for the purposes of this case.

[28] It had been suggested that the traditional approach to diplomatic protection, such as that set out in the Barcelona Traction case,[10] should be developed to recognise that in certain circumstances where injury is the result of a grave breach of a jus cogens norm, the state whose national has been injured, should have a legal duty to exercise diplomatic protection on behalf of the injured person. As a corollary to that, states would be obliged to make provision in their municipal law for the enforcement of this right before a competent court or other independent national authority.

[29] It appears from the ILC report that although there was some support for this development, and some recent national constitutions made provision for such an obligation, presently this is not the general practice of states. Currently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such. To do so may give rise to more problems than it would solve. Diplomatic protection remains the prerogative of the state to be exercised at its discretion. It must be accepted, therefore, that the applicants cannot base their claims on customary international law. No contention to the contrary was addressed to us in argument.

South African law

[30] Against this background of international law and practice I turn to consider the question whether according to our municipal law the applicants have a right to diplomatic protection from the state, and can require it to come to their assistance in Zimbabwe or Equatorial Guinea if they are extradited to that country.

[31] Counsel for the applicants contended that the applicants' rights to dignity, life, freedom and security of the person, including the right not to be treated or punished in a cruel, inhuman or degrading way, and also the right to a fair trial entrenched in sections 10, 11, 12 and 35 of the Constitution, are being infringed in Zimbabwe and are likely to be infringed if they are extradited to Equatorial Guinea. Relying on section 7(2) of the Constitution, which requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights", he contended that the state is obliged to protect these rights of the applicants, and the only way it can do so in the circumstances of this case is to provide them with diplomatic protection. Counsel for the amicus adopted a similar but more nuanced approach directing himself to the issue of capital punishment and the state's duties to its citizens if that risk arises in a foreign country.

[32] The argument based on section 7(2) is built on the proposition that the state has a positive obligation to comply with its provisions. [11] I accept that this is so. But that does not mean that the rights nationals have under our Constitution attach to them when they are outside of South Africa,[12] or that the state has an obligation under section 7(2) to "respect, protect, promote, and fulfil" the rights in the Bill of Rights which extends beyond its borders. Those are different issues which depend, in the first instance, on whether the Constitution can be construed as having extraterritorial effect.

[33] Section 233 of the Constitution provides:

"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

This must apply equally to the provisions of the Bill of Rights and the Constitution as a whole. Consistently with this, section 39(1)(b) of the Constitution requires courts, when interpreting the Bill of Rights, to consider international law.

[34] A right to diplomatic protection is not referred to in the Universal Declaration of Human Rights, nor is it a right contained in any international agreement of which I am aware, including the international human rights' treaties to which South Africa is a party, such as the African Charter on Human and Peoples' Rights[13] or the International Covenant on Civil and Political Rights.[14] Our Constitution shows respect

for international law, and although it includes rights which go beyond those recognised by international law and major human rights instruments, when it does so, it spells out the rights expressly.

[35] As Ackermann J pointed out in Bernstein and Others v Bester and Others NNO,[15] "[t]he internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights".[16] The Bill of Rights is extensive and covers conventional and less conventional rights in detail. A right to diplomatic protection is a most unusual right, which one would expect to be spelt out expressly rather than being left to implication.[17]

Extraterritoriality: the constitutional text

[36] The starting point of the enquiry into extraterritoriality is to determine the ambit of the rights that are the subject matter of section 7(2). To begin with two observations are called for. First, the Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African state to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders. Does section 7(2) contemplate that the state's obligation to South Africans under that section is more extensive than its obligation to foreigners, and attaches to them when they are in foreign countries?

[37] Section 7(1) refers to the Bill of Rights as the

"cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders.

Extraterritoriality: international law

[38] It is a general rule of international law that the laws of a state ordinarily apply only within its own territory.[18] It is recognised, however, that a state is also entitled, in certain circumstances, to make laws binding on nationals wherever they may be. This can give rise to a tension if laws binding on nationals conflict with laws of a foreign sovereign state in which the national is. As Dugard points out,[19] sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of all other states.[20] In most instances, the exercise of jurisdiction beyond a state's territorial limits would under international law constitute an interference with the exclusive territorial jurisdiction of another state. In The Case of the S.S. Lotus,[21] the Permanent Court of International Justice described this principle as follows:

"Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention . . . all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[22]

[39] As Brownlie[23] and Shaw[24] point out, the passage of which this forms a part has been criticised by a substantial number of authorities. The criticism emanates from a reading of the passage which appears to regard states as possessing very wide powers of jurisdiction which could only be restricted by proof of a rule of international law prohibiting the action concerned. As Shaw notes, however, two later judgments of the ICJ indicate that "the emphasis lies the other way around."[25]

[40] It is not necessary to enter this controversy. What seems to be clear is that when the application of a national law would infringe the sovereignty of another state, that would ordinarily be inconsistent with and not sanctioned by international law.

[41] In the case of R v Cook,[26] the majority of the Supreme Court of Canada endorsed this understanding of the international law position holding that "the principle of the sovereign equality of states generally prohibits extraterritorial application of domestic law".[27] In dealing with the application of the Charter beyond the borders of Canada, they said

"on the jurisdictional basis of nationality, the Charter applies to the actions of Canadian law enforcement authorities on foreign territory (which satisfies s. 32(1)), provided that the application of Charter standards would not interfere with the sovereign authority of the foreign state."[28]

[42] I agree with this approach which, on issues relevant to the application of the Bill of Rights to foreign states and their functionaries, does not seem to me to be inconsistent with the views of the other judges in that case. L'Heureux-Dube and McLachlin JJ expressed themselves as follows:

"[F]or the protection of the Charter to apply, the action alleged to have violated the claimant's Charter rights must have been carried out by one of the governmental actors enumerated in s. 32. Under no circumstances can the actions of officials of another jurisdiction, acting outside Canada, be considered to violate the Charter. Officials of other jurisdictions will not be considered agents of Canadian authorities. This emerges from the need to respect the sovereignty and laws of countries where Canadian officials work, by not expecting foreign officials to comply with Canadian law or modify their procedures to respect Canadian law."[29]

[43] Bastarache and Gonthier JJ said:

"By its terms, s. 32(1) dictates that the Charter applies to the Canadian police by virtue of their identity as part of the Canadian government. By those same terms, however, the Charter may not be applied to a person who is neither within the authority of the various Canadian legislatures, nor a Canadian official."[30]

[44] There may be special circumstances where the laws of a state are applicable to nationals beyond the state's borders, but only if the application of the law does not interfere with the sovereignty of other states.[31] For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty. Section 7(2) should not be construed as imposing a positive obligation on government to do this.

[45] During argument hypothetical questions were raised relating to South African officials abroad, to South African companies doing business beyond our borders, to the government itself engaging in commercial ventures through state owned companies with bases in foreign countries, and to what the state's obligations might be in such circumstances. There is a difference between an extraterritorial infringement of a constitutional right by an organ of state bound under section 8(1) of the Constitution, or by persons bound under section 8(2) of the Constitution, in circumstances which do not infringe the sovereignty of a foreign state, and an obligation on our government to take action in a foreign state that interferes directly or indirectly with the sovereignty of that state. Claims that fall in the former category raise problems with which it is not necessary to deal now.[32] They may, however, be justiciable in our courts, and nothing in this judgment should be construed as excluding that possibility.

The decision in Mohamed and Another v President of the Republic of South Africa and Others

[46] The applicants contend that because the state provided intelligence to Zimbabwe and Equatorial Guinea which was the cause of their being arrested in Zimbabwe, where they face the possibility of being extradited to Equatorial Guinea, the state has a particular duty to protect them in the situation in which they now find themselves. In support of this submission they placed considerable reliance on the decision of this Court in Mohamed and Another v President of the Republic of South Africa and Others.[33]

[47] Mohamed's case dealt with an entirely different situation to that which exists in the present case. In that case certain state functionaries had colluded with the FBI to secure the removal of Mohamed from South Africa to the USA. In doing so they had acted illegally and in breach of Mohamed's rights under the Constitution. The Court held that in doing so

"they infringed Mohamed's rights under the Constitution and acted contrary to their obligations to uphold and promote the rights entrenched in the Bill of Rights."[34]

[48] It was this that led this Court to say:

"It would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case"[35]

and that it would not

"be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him."[36]

On the facts of the case, however, and despite the fact that it made a declaration that the government had acted unlawfully in handing Mohamed over to the FBI, it declined to make an order requiring the government to take positive action to ameliorate the prejudice resulting from the unlawful act.

[49] O'Regan J refers to the fact that Mohamed was in the USA at the time. But the relevant events in that case all took place in South Africa. His rights were infringed in South Africa by government officials and not in the USA where he found himself as a result of their having violated his rights. This Court therefore had no difficulty in finding that his constitutional rights had been breached. The state argued that Mohamed had consented to being taken to the USA and had accordingly waived his rights under the Bill of Rights. That was denied by Mohamed. In dealing with the question of waiver this Court held:

"We did not have the benefit of full argument on this issue and it would accordingly be unwise to express a view on it. We will, without deciding, assume in favour of the respondents, that a proper consent of such a nature would be enforceable against Mohamed. To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent."[37]

It then examined the evidence and concluded:

"[I]t has not been established that any agreement which Mohamed might have expressed to his being delivered to the United States constitutes valid consent on which the government can place any reliance. Its contention in this regard is accordingly rejected. The handing over of Mohamed to the United States government agents for removal by them to the United States was unlawful."[38]

[50] The facts of the present case are entirely different. The applicants were not removed from South Africa by the government, or with the government's assistance. They left South Africa voluntarily and now find themselves in difficulty in Zimbabwe and at risk of being extradited to Equatorial Guinea. Their arrest in Zimbabwe, the criminal charges brought against them there, and the possibility of their being extradited

from Zimbabwe to Equatorial Guinea are not the result of any unlawful conduct on the part of the government or of the breach of any duty it owed to them.

[51] Police who receive information that a bank robbery is being planned do not commit a wrong by failing to advise the would be robbers of the information that they have, nor do they act illegally by lying in wait at the site of the proposed robbery in order to apprehend the robbers when they arrive at the scene. For a court to hold otherwise would undermine legitimate methods of policing and law enforcement.

[52] The applicants characterise what happened as a trap. But this too is wrong. There is nothing to suggest that the South African authorities encouraged the applicants in any way to embark upon the venture in which they were engaged or induced them to do so. At best for the applicants the South African authorities failed to warn them of the intelligence that they had received or of the fact that it would be passed on to Zimbabwe and Equatorial Guinea. But that was not a breach of any duty owed by the South African government to the applicants. 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.[39]

[53] Even if the intelligence passed on by South Africa to Zimbabwe and Equatorial Guinea led to the arrests in Zimbabwe, the passing on of the intelligence was not a wrongful act. In the times in which we live it is essential that this be done, and comity between nations would be harmed by a failure to do so. No wrong has been done to the applicants by the South African government that has to be remedied, nor is there a consequence of unlawful conduct that has to be ameliorated.

[54] The Bill of Rights binds the South African government, but does not bind other governments. As the Canadian Supreme Court has said with regard to the application of its own constitution in respect of appeals by Canadian nationals to be protected against the application of inconsistent foreign law,

"individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents."[40]

[55] There too, a distinction is drawn between extradition proceedings in Canada, which are subject to constitutional scrutiny, and the non-retention of constitutional rights if extradition takes place, or if the national is out of the country.[41] The same rule is applicable in the United States.[42]

[56] Subject to an important qualification that I raise later in this judgment concerning law, procedure and punishment inconsistent with international human rights norms, I would adopt that principle for the purpose of South African law.

[57] In the present case the actors responsible for the action against which the applicants demand protection from the South African government are all actors in the employ of sovereign states over whom our government has no control. The laws to which objection is taken are the laws of foreign states who are entitled to demand that they be respected by everyone within their territorial jurisdiction, and also by other states. The applicants have no right to demand that the government take action to prevent those laws being applied to them. Mohamed's case is not authority for the contrary submission advanced by the applicants.

Section 3 of the Constitution

[58] This does not mean that our Constitution is silent on this issue. Section 3 of the Constitution provides:

"(1) There is a common South African citizenship.
(2) All citizens are —
(a) equally entitled to the rights, privileges and benefits of citizenship; and
(b) equally subject to the duties and responsibilities of citizenship.
(3) National legislation must provide for the acquisition, loss and restoration of citizenship."

[59] The relevance of these provisions to diplomatic protection is discussed by Erasmus and Davidson in an article in the South African Yearbook of International Law.[43] Although I take a somewhat different view as to the content to be given to the benefits and privileges of citizens guaranteed by section 3, I agree with much of what they say, and to a large extent with the conclusions that they reach.

[60] As a nation we have committed ourselves to uphold and protect fundamental rights which are the cornerstone of our democracy. We recognise a common citizenship and that all citizens are equally entitled to the rights, privileges and benefits of citizenship. Whilst I have held that there is no enforceable right to diplomatic protection, South African citizens are entitled to request South Africa for protection under international law against wrongful acts of a foreign state.

[61] They are not in a position to invoke international law themselves and are obliged to seek protection through the state of which they are nationals. Whilst the state is entitled but not obliged under international law to take such action, it invariably acts only if requested by the national to do so.[44]

[62] South African citizenship requirements[45] are such that citizens invariably, if not always, will be nationals of South Africa. They are entitled, as such, to request the protection of South Africa in a foreign country in case of need.

[63] Nationality is an incident of their citizenship which entitles them to the privilege or benefit of making such a request. Should there ever be an exceptional case where the citizen's connection with South Africa is too remote to justify a claim of nationality, it would be a legitimate response to such a request to say that South Africa is not entitled to demand diplomatic protection for that person.[46] But apart from that, the citizen is entitled to have the request considered and responded to appropriately.

[64] When the request is directed to a material infringement of a human right that forms part of customary international law, one would not expect our government to be passive. Whatever theoretical disputes may still exist about the basis for diplomatic protection, it cannot be doubted that in substance the true beneficiary of the right that is asserted is the individual.[47]

[65] The founding values of our Constitution include human dignity, equality and the advancement of human rights and freedoms. Equality is reflected in the principle of equal citizenship demanded by section 3.

[66] The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution and informs the manner in which government is required to exercise its powers. To this extent, the provisions of section 7(2) are relevant, not as giving our Constitution extraterritorial effect, but as showing that our Constitution contemplates that government will act positively to protect its citizens against human rights abuses.

[67] The entitlement to request diplomatic protection which is part of the constitutional guarantee given by section 3 has certain consequences. If, as I have held, citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution.[48] I mention later that there may even be a duty in extreme cases for the government to act on its own initiative.[49] This, however, is a terrain in which courts must exercise discretion and recognise that government is better placed than they are to deal with such matters.

[68] According to the government's answering affidavit its policy in regard to such matters was correctly stated by Deputy Minister of Foreign Affairs Mr Aziz Pahad in an interview with the media, a transcript of which was annexed by the applicants to their founding affidavit. The transcript is in the following terms:

"[A]s their government, we have to ensure that all South African citizens, whatever offence they have carried out or are charged with, must receive a fair trial, they must have access to their lawyers, they must

be tried within the framework of the Geneva Convention, they must be held in prison within the framework of the Geneva Convention and International law and we will always, it is our constitutional duty to ensure that this is getting out within the framework of the Geneva Convention and that there is a fair trial."

[69] There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action.

[70] There may even be a duty on government in extreme cases to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstances, on becoming aware of the breaches, the government may well be obliged to take an initiative itself.

[71] The difficulty of dealing with legal claims for diplomatic protection is exemplified by the approach of courts confronted with such claims. The Special Rapporteur draws attention to cases in British, Dutch, Spanish, Austrian, Belgian, and French courts in which claims by individuals against their governments for diplomatic protection were dismissed.[50] He refers to these cases as demonstrating an expectation that courts should come to the assistance of nationals injured by foreign states. The fact that the claims were dismissed shows, however, how difficult it is to do so.

[72] Even in those countries where the constitution recognises that the state has an obligation to afford such protection, the ILC report suggests that there is some doubt as to whether that obligation is justiciable under municipal law.[51]

[73] A court cannot tell the government how to make diplomatic interventions for the protection of its nationals. Germany, which has a long tradition of recognising a state obligation to provide diplomatic assistance to nationals injured by foreign states recognises this, and leaves much to the discretion of the government.[52]

[74] Although the exercise of the discretion can be tested for compliance with the constitution,

"[t]he scope of discretion in the foreign policy sphere is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control. In order to enable current political objectives of the Federal Republic of Germany to be achieved within the framework of what is permissible under international and constitutional law, the Federal Basic Law grants the organs of foreign affairs wide room for manoeuvre in the assessment of foreign policy issues as well as the consideration of the necessity for possible courses of action."[53]

[75] The Court of Appeal in England recently had occasion to consider in the Abbasi case whether claims for diplomatic protection are justiciable.[54] After a careful review of the relevant authorities it came to the conclusion that although there is no enforceable duty under English law to protect citizens injured by breaches of their fundamental rights, the discretion that the Foreign Office has to provide such protection is not beyond a court's powers of review if it can be shown that the decision was irrational or contrary to legitimate expectation. According to this judgment:

"It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.

The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case."[55]

[76] We were not referred to decisions of other national courts which suggest a higher intensity of review than that evinced by the German and English decisions. None are referred to by the Special Rapporteur, and I am not aware of any other decisions that may be relevant to evaluating international practice.

[77] A decision as to whether, and if so, what protection 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. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.

[78] This does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection. The exercise of all public power is subject to constitutional control. Thus even decisions by the President to grant a pardon[56] or to appoint a commission of inquiry[57] are justiciable. This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection.

[79] For instance if the decision were to be irrational, a court could intervene. This does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection.

"Rationality . . . is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."[58]

[80] If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list.

[81] What needs to be stressed, however, in the light of some of the submissions made to us in this case, is that government has a broad discretion in such matters which must be respected by our courts. With this in mind, I proceed now to deal with the specific claims made by the applicants. I will deal with each of the claims in turn, though not in the same order as they appear in the notice of motion.

The claim to be extradited from Zimbabwe to South Africa

[82] The relief claimed by the applicants in this regard is as follows:

"Directing and ordering the government . . . to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa."

[83] In terms of the Constitution the prosecuting authority, headed by the National Director of Public Prosecutions, has the power to institute criminal proceedings on behalf of the state and to carry out any

necessary functions incidental to the instituting of criminal proceedings.[59] This would include applying for extradition where this is necessary. The powers of the prosecuting authority, for which the Minister of Justice and Constitutional Affairs assumes final responsibility,[60] must be exercised by the prosecuting authority without fear, favour, or prejudice.[61] Decisions to institute prosecutions may raise policy issues which are far from easy to determine where, as in the present case, the events are already the subject matter of criminal proceedings in another country.

[84] In terms of the Promotion of Administrative Justice Act[62] a decision to institute a prosecution is not subject to review.[63] The Act does not, however, deal specifically with a decision not to prosecute. I am prepared to assume in favour of the applicants that different considerations apply to such decisions, and that there may possibly be circumstances in which a decision not to prosecute could be reviewed by a court.[64] But even if this assumption is made in favour of the applicants, they have failed to establish that this is a case in which such a power should be exercised.

[85] It is not disputed that the prosecuting authority in South Africa opened an investigation into the possibility of charging the applicants under the Regulation of Foreign Military Assistance Act[65] with being party to a planned coup in Equatorial Guinea. Section 3(b) of this Act makes it an offence to

"render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in section 5."

Foreign military assistance includes

"any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state".[66]

It is not suggested that the applicants had approval under section 5 to provide "foreign military assistance".

[86] If there is substance in the suggestion that a coup was being planned, there would be a basis for the South African government to put the applicants on trial here and to apply for their extradition for that purpose. To do so, however, they would have to meet the requirements of the Zimbabwean law regulating extradition from that country to South Africa. The relevant law is the Revised Edition of the Extradition Act of 1996 (the Zimbabwe Extradition Act). South Africa is a designated country in terms of that Act.

[87] Section 16 of the Zimbabwe Extradition Act requires requests for extradition by a designated country to be accompanied by a warrant of arrest giving particulars of the offence in respect of which the extradition is sought and such evidence as would establish a prima facie case in a court of law in Zimbabwe that the person concerned has committed the offence concerned in the designated country.[67]

[88] Mr J P Pretorius (Pretorius), the Deputy Director of Public Prosecutions in the Priority Crimes Litigation Unit of the prosecuting authority is in charge of the investigations against the applicants. An affidavit by him forms part of the record in the High Court proceedings. It says:

"At present there is not sufficient evidence to make a decision whether to institute a prosecution against the persons concerned in connection with this matter. This situation may change in the near future."

[89] Griebenow says that he was told on 17 May by Pretorius that he would be drawing up an indictment that evening. Pretorius denies this and says that he told Griebenow that he would start working on the indictment on the 17th. He goes on to say that the docket is not complete and further investigations are necessary. The allegation by Pretorius that there was insufficient evidence to make a decision about a prosecution is not denied. Counsel for the applicants conceded that he could not dispute this allegation. He suggested that a charge could be framed on the basis of the applicants' own evidence that they were going to the DRC to provide security services. This he says is covered by the definition of foreign military assistance which includes:

"[S]ecurity services for the protection of individuals involved in armed conflict or their property".[68]

[90] But even if this be so, there is a vast difference between defending a mine owner against unlawful assaults on its property, and planning a coup against the head of a state with which South Africa enjoys diplomatic relations. South Africa and Equatorial Guinea have also entered into a joint security agreement entitled "Agreement between the Government of the Republic of South Africa and the Government of the Republic of Equatorial Guinea Concerning Cooperation on Defence and Security". Article 3 of the Agreement provides the functions of the South Africa–Equatorial Guinea Joint Commission on Defence and Security. These include: promoting cooperation at all levels in the fields of defence and security; exchanging security information on the activities and movement of elements threatening the security and stability of the two countries; establishing effective channels of communication between the defence and security forces of the two countries; dealing with matters of cross-border crimes and illegal immigration; briefing members on the security situation prevailing in each country generally and exchanging ideas and acting jointly on how the attendant problems may be addressed; and dealing with any other matters which in the opinion of the parties will enhance better mutual understanding and strengthen relations of solidarity between the two countries.

[91] An application for extradition must provide particulars of the offence and prima facie evidence to support the charge. If the prosecuting authority's investigations are directed to the possibility of putting the applicants on trial for planning a coup in Equatorial Guinea it must have evidence to support that allegation. Secondly, the offence for which the extradition is sought must be an offence for which the accused person could have been charged and prosecuted in Zimbabwe if the offence had been committed there.[69] Neither of these propositions has been established by the applicants. Zimbabwe does not have legislation comparable to the Regulation of Foreign Military Assistance Act.

[92] The applicants seek to overcome this difficulty by saying that they will consent to being extradited to South Africa should such an application be made. But that is no answer. If the government lacks evidence to establish a prima facie case against the applicants it is not entitled to put them on trial. Nor would a Zimbabwean court be entitled to order that they be extradited to South Africa rather than Equatorial Guinea. An extradition by consent in such circumstances would be no more than a device to remove the applicants from Zimbabwe and bring them back to South Africa, where they would then have to be put on trial for a lesser offence than participating in plans for a coup, or be released because of the lack of evidence of their having committed any crime. To pursue a request for extradition in such circumstances would be contrary to South African law and Zimbabwean law and inconsistent with the government's duty to conduct its foreign relations in good faith.

[93] The government says that the prosecuting authority's investigations have not been completed and there is not yet sufficient evidence to take a decision to institute a prosecution. This is not denied by the applicants, who themselves deny that they were party to plans to stage a coup. That being so, it must be accepted that when these proceedings were initiated the government lacked the evidence necessary to apply for the extradition of the applicants. On that ground alone the first claim must fail. Counsel for the applicants was constrained to concede that this was so and did not persist in the claim.

[94] In the circumstances it is not necessary to deal with the question whether, if there were a legitimate basis for seeking the extradition of the applicants, this Court would have had the power in the circumstances of this case to order the government to do so.

The claim that steps be taken to secure the release of the applicants from custody in Zimbabwe

[95] There is no evidence to suggest that the charges that the applicants face in Zimbabwe are not offences according to Zimbabwean law, or that there is no evidence to justify the bringing of such charges against them. That being so, there is no basis on which South Africa would be entitled to exert diplomatic pressure on Zimbabwe for them to be released, let alone for a court to order that this be done.

The risk of capital punishment

[96] The claim is formulated as follows:

"Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean and Equatorial Guinean Governments not to impose the death penalty on the applicants."

[97] There is nothing to suggest that the applicants are at risk of being charged with an offence in Zimbabwe for which capital punishment would be a competent sentence. That possibility need not, therefore, be considered. There is, however, evidence to suggest that the applicants may possibly be charged with capital offences in Equatorial Guinea.

[98] There can be no doubt that capital punishment is inconsistent with the provisions of our Bill of Rights.[70] But the question whether South African citizens can require our government to take action to protect them against conduct in a foreign country, which would be lawful there, but would infringe their rights if committed in South Africa, raises entirely different issues. Although the abolitionist movement is growing stronger at an international level,[71] 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. The execution of the sentence, if imposed, would be by the state of Equatorial Guinea, which means that attempts to mitigate the sentence would necessarily engage the foreign relations between the two countries.

[99] The government's policy on this issue is that it makes representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen. The government's answering affidavit goes on to say:

"It is a concern of the South African government that there are South Africans who are indicted or incarcerated in foreign countries where the death sentence is a competent sentence. It is a continuing effort where appropriate to make representations regarding the death sentence as a form of punishment."

The applicants are entitled to the benefit of this policy, and if capital punishment were to be imposed on them, then consistently with its policy, government would have to make representations on their behalf. There is no evidence to suggest that this would not happen.

[100] Counsel for the amicus curiae submitted that it is cruel treatment to put a person on trial in a foreign country to face a possible death sentence if convicted. However, as long as the proceedings and prescribed punishments are consistent with international law, South Africans who commit offences in foreign countries are liable to be dealt with in accordance with the laws of those countries, and not the requirements of our Constitution, and are subject to the penalties prescribed by such laws.[72]

[101] The question whether representations should be made now or later is a matter of judgment and a question of timing. There may in fact prove to be no need for representations to be made at all. The applicants may not be convicted, or if convicted, may not be sentenced to death. Counsel for the applicants submitted that if a death sentence were to result, there might be insufficient time between sentence and execution for representations to be made. There is, however, nothing to show that if the applicants were to be convicted and sentenced to death in Equatorial Guinea, there would not be sufficient time to make effective representations.

[102] Bearing in mind the deference to which the government is entitled in such matters it cannot be said that its response to the applicants' demand that it make the representations now, is inconsistent with the Constitution. The claim that the government be directed as a matter of extreme urgency to seek an assurance that the death penalty will not be imposed must therefore be dismissed.

Extradition to Equatorial Guinea

[103] According to Griebenow, Equatorial Guinea has made a request to Zimbabwe for the extradition of the applicants. He bases this averment on submissions made to the court in Zimbabwe by a representative of the Attorney-General in opposing an application by the applicants to be released from custody. He also refers to the fact that the applicants' legal representatives in Zimbabwe were told by the Attorney-General's representative in Zimbabwe that a request for extradition had been made by Equatorial Guinea, and were shown pages from a document from the Zimbabwean Ministry of Foreign Affairs directed to the Attorney-General of Zimbabwe in which it is recommended that the application for extradition be considered favourably. Reference is also made to the fact that several people, including a number of South African citizens, have already been arrested in Equatorial Guinea in connection with the alleged coup.

[104] On 28 April 2004, the Government of Zimbabwe passed a statutory instrument in terms of which Equatorial Guinea was added to the list of countries to which Zimbabwe may extradite persons. The applicants also refer to news reports in Zimbabwe that President Nguema of Equatorial Guinea recently visited Zimbabwe for Independence-day celebrations, and on that occasion had a five hour meeting with President Mugabe of Zimbabwe at which the subject of the extradition of the applicants to Equatorial Guinea was discussed. This was referred to in comments made by the President of Equatorial Guinea after the meeting. The respondents offered no evidence to counter these allegations. I am satisfied that in the circumstances the applicants have established that there is a real risk that they are likely to be faced with proceedings in Zimbabwe for their extradition to Equatorial Guinea.

[105] This does not mean, however, that they will in fact be extradited. The applicants deny the allegation that they were party to a plan to stage a coup in Equatorial Guinea. There is no reference to the precise nature of the charge on which the request for extradition is said to have been made, nor to the evidence that Equatorial Guinea has to support a claim for extradition under the Zimbabwe Extradition Act. In terms of the Zimbabwe Extradition Act an enquiry has to be conducted by a magistrate to establish whether or not there are grounds on which an extradition order can legitimately be made. The applicants will be entitled to resist such an order at the hearing. If the evidence against them is insufficient to justify extradition, the magistrate will not be entitled to grant an order. If an order is made, it would be subject to appeal.

[106] The applicants argue that there is a risk that Zimbabwe will act illegally and hand them over to Equatorial Guinea without an order being made for their extradition. They have, however, produced no evidence to support this allegation. The applicants have been in custody for over three months during which the court proceedings against them have been pending. If the Zimbabwean authorities contemplate handing them over to Equatorial Guinea without an extradition order sanctioning such a procedure, it is unlikely that they would not have done so immediately after their arrest, or as soon as they received the request for extradition.

[107] The applicants rely on media reports that the President of Zimbabwe had entered into an agreement with the President of Equatorial Guinea to extradite the applicants to Equatorial Guinea in exchange for the supply of oil. No attempt has been made to verify the accuracy of these reports. Apart from the reference to the media report, all that is said in support of the allegation is that there have been instances in the past in which the Zimbabwean government has ignored orders of court, and that the Zimbabwean authorities have in fact failed to comply with certain orders relating to the conditions in which they are kept in custody. But this does not mean that Zimbabwe is likely to act illegally, in breach of the duty that it owes to South Africa under international law, and hand South African citizens over to Equatorial Guinea contrary to orders made by courts dealing with the extradition application. The South African government cannot reasonably be expected to conduct its diplomatic relations with Zimbabwe on the assumption that this might happen, and to make demands on the Zimbabwean government on the assumption that they will act illegally and contrary to South Africa's rights under international law.

[108] The question of extradition to Equatorial Guinea has, however, been debated in the High Court and this Court and no purpose would be served by declining to deal with that question on the grounds that the demand is premature.

[109] The claim relating to the risk of extradition to Equatorial Guinea was originally formulated in general terms but during argument counsel for the applicants limited the claim and formulated it as follows:

"Directing and ordering the Government to seek an assurance as a matter of extreme urgency from the Zimbabwean Government that the applicants will not be released or extradited to Equatorial Guinea without a prior assurance being obtained from Equatorial Guinea to the effect that the death sentence will not be imposed, and if imposed, will not be carried out."

[110] There were two strands to the applicants' argument. The first was based on the decision in Mohamed's case.[73] I have already dealt with that argument.[74] It has no substance and must be rejected. The second relates to an allegation still to be considered, and that is that if extradited the applicants will be subjected to a trial that is not fair. I deal later with this aspect of their claim.

[111] The claim for extradition has not yet been lodged in the Magistrates' Court and although there may be reasonable grounds to anticipate what the charges may be, the details of the evidence and the charges are unknown. Without that information it is not possible to say whether or not there is a real risk that the applicants will be extradited to Equatorial Guinea to face a capital charge.

[112] No request was made for this relief prior to the institution of these proceedings. Moreover, according to the ILC report there is general agreement that diplomatic protection "is concerned with injury under international law, and not injury under domestic law."[75] Capital punishment is permissible both in Zimbabwe and Equatorial Guinea. Capital punishment is also not impermissible under international law. If the applicants are extradited lawfully from Zimbabwe to Equatorial Guinea they cannot complain that they have suffered an injury according to international law solely on the grounds that they will face a capital charge in Zimbabwe. In the light of government's stated policy concerning capital punishment in foreign countries, its response in its answering affidavit that it would seek an assurance only if capital punishment is imposed, is not a response with which a court can interfere.

[113] The claim as formulated in the prayer and as amended by counsel must therefore be dismissed.

Fair detention and trial

[114] The claim concerning fair detention and fair trial is formulated as follows:

"Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be."

[115] As far as the fair trial claim is concerned, the prayer that is directed to section 35 of our Constitution is misconceived. For reasons that I have already given the claim as formulated cannot succeed.

[116] Serious allegations have, however, been made about the criminal justice system in Equatorial Guinea. The applicants allege that if they are put on trial there and charged with being party to the alleged coup, they will be exposed to the risk of being convicted and put to death as a result of an unfair trial. That is a grave allegation which calls for close scrutiny and careful consideration by this Court. The incorrect formulation of the applicants' claim should not stand in the way of this being done.

[117] The allegations made about the justice system in Equatorial Guinea are based on reports of Amnesty International, the International Bar Association and a Special Rapporteur of the United Nations Commission on Human Rights. They cover a period from January 1999 to March 2004.

[118] The Special Rapporteur reported in January 1999. His report refers to lawlessness, torture, the beating of prisoners, overcrowded prison conditions with a complete lack of hygiene and inadequate food, impunity enjoyed by agents of the state, and the lack of due process within the justice system.

[119] Amnesty International sent a mission to observe a trial of 144 persons alleged to have infringed state security between 23 May and 9 June 2002. The observer concluded that the trial was characterised by serious human rights violations and countless procedural irregularities. Despite overt evidence of broken limbs and obvious injuries, complaints of torture were not investigated. Defence lawyers were allowed only one day to consult with their clients before the trial started. The trial was also condemned by the European Parliament which called for the guilty verdict to be annulled and the release of the convicted persons. In its report, Amnesty International mentions that it has on numerous occasions submitted its concerns about human rights violations to the Equatorial Guinean authorities and has urged them to approve and implement safeguards to prevent arbitrary detention, torture, ill-treatment and trials which do not comply with due process of law. These are requirements of the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights, which were ratified by the government of Equatorial Guinea in 1986 and 1987 respectively.

[120] In March 2004 Amnesty International issued a press release drawing attention to the torture of foreign nationals then in custody and alleged to be mercenaries, and the deplorable conditions in which they were being detained. It questioned whether they would receive a fair trial.

[121] In July 2003 the International Bar Association sent a fact finding mission to Equatorial Guinea. The mission conducted wide ranging interviews with government ministers, politicians, judges, and the legal profession. In a lengthy report, including recommendations as to what needs to be done to secure compliance with the rule of law and an independent judiciary, the findings and conclusions of the mission included the following:

• The executive exercises considerable control over both the legislature and the judiciary.
• There is no separation of powers and very little or no respect for the rule of law. Torture, failure to guarantee the right to a fair trial, lack of freedom of expression and association, poor prison conditions and the failure of the judiciary to act independently are some of the examples of human rights abuses that occur with impunity.
• The lack of independence of the judiciary, the expectation that judges will be loyal to the government, and the use of military judges in civilian courts are cause for concern.

[122] The South African government says that it is not its policy to comment on the justice systems of foreign countries and it has declined to do so. It takes the attitude that the reports are not admissible in evidence and that the court cannot make a finding on the efficacy and fairness of the legal and judicial systems of Equatorial Guinea without the benefit of expert evidence.

[123] Its attitude, as expressed in the answering affidavit, is that a decision as to whether or not to intervene is one that will be taken by a responsible authority in South Africa should the applicants be extradited to Equatorial Guinea. Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case.[76]

[124] If the reports are accurate and reflect the present position in Equatorial Guinea, and if the applicants are extradited to Equatorial Guinea to stand trial there, there would be serious concern about the fairness of the trial that they would face. A concern that goes beyond the differences in legal procedure referred to in cases such as Canada v Schmidt[77] and Neely v Henkel.[78] What are the obligations of the government to the applicants in such a situation?

[125] The history of coups and counter coups in Africa has undermined democracy on the continent. Such practices are the antithesis of the foreign policy principles of the South African government. These principles and the priorities of the Ministry of Foreign Affairs are referred to in the evidence. They include a commitment to justice and international law in the conduct of relations between nations, a commitment to interact with African partners as equals, and a commitment to the promotion of the New Partnership for Africa's Development, described as "a continental instrument to advance people-centred development based on democratic values and principles." It would be a breach of South Africa's duty to Equatorial Guinea, and its international obligations, in particular to other African states, to frustrate a criminal prosecution instituted there simply because the accused persons are South African nationals.

[126] On the other hand, if the allegations by the applicants that they will not get a fair trial in Equatorial Guinea prove to be correct, and they are convicted and sentenced to death, there will have been a grave breach of international law harmful to our government's foreign policy and its aspirations for a democratic Africa. As far as the applicants are concerned the consequences would be catastrophic, and they will have suffered irreparable harm.[79]

[127] The applicants are not in Equatorial Guinea and they have not been put on trial there. No injury has been done to them by that country and no injury will be done unless they are put on trial there; nor will any wrong be done if they are put on trial and the proceedings are conducted fairly. To this extent the claim for protection is premature. It cannot, however, be said that there is not a risk that the consequences that the applicants fear will happen. Should that risk become a reality the government would be obliged to respond positively. Given its stated foreign policy, there is no reason to believe that this will not be done.

[128] This matter has been complicated by the excessive and precipitate demands that the applicants have made, and the form in which their claims for relief were couched. They relied directly on the Bill of Rights and not on the privileges and benefits to which they are entitled under section 3 of the Constitution. One of the results of this is that we may not have all the evidence that would be relevant to a section 3 claim.

[129] The situation is evolving and it is not known how it will develop. It is complicated by the fact that other South African citizens are already facing the likelihood of being tried in Equatorial Guinea, having been arrested there on allegations that they were party to the attempted coup. The government has to deal with that situation as well, and it appears from the record it is doing so. What happens in that regard may have a bearing on how the government will deal with the applicants' request for diplomatic protection.

[130] It is also relevant to have regard to the limited power that the government has under international law to affect decisions of a foreign state. It is essentially a power of persuasion, and it is for this reason that courts everywhere are reluctant to intervene in such matters, even if, as in Germany, they have the power to do so. Thus in the Hess case[80] the Federal Constitutional Court was at pains to point out that

"the Federal Government enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States."[81]

[131] The situation which exists in the present case is one which calls for delicate negotiations to ensure that if reasonably possible the fears that the applicants entertain can be put to rest, and that the trial, if one takes place, is conducted in a way that meets internationally accepted standards. The assessment of the risk, the best way of avoiding it and the timing of action are essentially matters within the domain of government.

[132] The situation that presently exists calls for skilled diplomacy the outcome of which could be harmed by any order that this Court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow. If the situation on the ground changes, the government may have to adapt its approach to address the developments that take place. In the circumstances it must be left to government, aware of its responsibilities, to decide what can best be done.

[133] We were told by counsel for the applicants that there have been ongoing sensitive discussions between the legal representatives of the applicants and representatives of government. If those discussions are continued they will no doubt be conducted in the light of what is said in this judgment. The applicants have not established that the government breached or threatened to breach any duty it has under the Constitution or international law. In the circumstances the applicants are not entitled to relief in this regard.

Claims relating to conditions of detention

[134] The claims dealing with detention are formulated as follows:

"Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa (the Constitution) are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants' right to freedom and security of person including the rights not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

Directing and ordering the Government to, through the office of the second respondent, report in writing to the Registrar of this Honourable Court on a weekly basis as to the issues set out above where applicable."

[135] The applicants are presently in custody in Zimbabwe, and the claim in so far as it relates to what might happen if they were to be held in Equatorial Guinea is premature. I will confine myself, therefore, to the allegations made concerning Zimbabwe.

[136] The claim concerning detention in Zimbabwe arises out of the conditions in which the applicants have been detained and treated in Chikurubi Prison. I consider it desirable to deal with these allegations notwithstanding the inappropriate form in which their claim has been formulated, and to consider whether there is any other relief to which they may be entitled.

[137] In the founding affidavit the following allegations are made. It is said that the applicants were assaulted and abused at the time of their arrest on 7 March 2004. They were initially denied access to legal advisers, and some were tortured and forced to make untruthful statements against their will. When they were ultimately allowed access to legal advisers a number of obstacles were placed in the way of the advisers. They had difficulty in gaining access to the prison. When they did, they were not allowed to consult with the applicants in private, and members of the investigating team insisted on being present during consultations. The court proceedings are being held in hospital wards in the prison, and the public, including journalists and members of the applicants' families, have difficulty in gaining access to the venue because of obstructions placed in their way. Members of the Central Intelligence Organisation (CIO) interrogate them in the absence of their legal representatives despite being asked not to do so. The applicants are shackled with leg irons and hand cuffs when they attend court, and court orders requiring the shackles to be removed have been ignored. The explanation given was that this was "on instructions from above".

[138] The conditions in which the applicants are being held in Chikurubi Prison are described in the founding affidavit as follows. There are no beds. The applicants are issued with lice ridden blankets under which they have to sleep. Most are being held in overcrowded cells, but four are being held in solitary confinement. All receive inadequate food, less than the minimum standards prescribed for prisoners. They are required to wear tunics and short trousers which provide inadequate protection against the cold of an approaching winter. They have been refused permission to accept jerseys which were knitted for them and which comply with prison regulations. On one occasion eighteen of the applicants were badly assaulted by

prison warders using batons, and after that salt was thrown on the wounds. Criminal charges were laid and a number of warders have been arrested and charged.

[139] If these allegations are correct, and there is no evidence to contradict them, the applicants have been held in deplorable conditions. They have been humiliated, assaulted, abused and denied proper access to their lawyers. The persons alleged to be responsible for these abuses are officers of the Zimbabwean government. The applicants apparently attempted to address these complaints through court proceedings. In the founding affidavit reference is made to various court applications brought in connection with these matters. The outcome of the applications is not always referred to, though it is said that 13 favourable court orders have been obtained. It appears, however, that there have been occasions on which orders given in favour of the applicants were ignored by the authorities in control of them. Having failed to secure relief through the courts, the applicants have turned peremptorily to the South African government and demanded that it secure relief for them. The first time that this seems to have been raised is in the peremptory demand made the day before the proceedings were launched.

[140] In the founding affidavit it is said that despite various requests the government has been slow, unhelpful and ineffective in protecting the constitutional rights of the applicants. A bald allegation is then made that the "government's response to the plight of the applicants has been most disappointing". The affidavit goes on to say that "except for a few isolated consular services provided by [the] government recently, it has been most unresponsive to the violation of the applicants' constitutional rights." No specific allegations are made in the founding affidavit that the applicants requested assistance from the South African High Commission to address their complaints, and that this was refused.

[141] It appears from a letter dated 24 March 2004 written by an attorney acting for the applicants to the South African National Director of Public Prosecutions, that attorneys for the applicants met the South African Minister of Justice and Constitutional Development and the National Director of Public Prosecutions and others on 23 March 2004. This was the date on which the applicants were charged in Zimbabwe. There is no evidence as to what took place at this meeting. In the letter written the following day, the National Director of Public Prosecutions is requested to intervene to ensure that the applicants have proper access to lawyers of their choice and that full consular services be rendered to them. It is conceded in the founding affidavit that the High Commission did provide assistance to the applicants to get access to their lawyers. The letter also requests that consideration be given to applying for the extradition of the applicants to South Africa. No reference is made in the letter to the assaults or the conditions in which the applicants were being detained, and no request is made for assistance by the government to alleviate those conditions. What contact there was after that is not clear. The founding affidavit mentions that there have been various discussions with the Deputy National Director of Public Prosecutions, Mr Henning SC. It seems that they were concerned with the request to be extradited to South Africa, but no details are given about what took place. We were also informed by counsel for the applicants that there have been confidential discussions with the government, but we do not know when they commenced or what they addressed.

[142] The government disputes the allegation that it has been unhelpful, and says in its answering affidavit that it and its agencies continue to do what, in law and its foreign policy, they are entitled to do regarding the conditions of the applicants in Zimbabwe. A supporting affidavit from the Director General of the Department of Foreign Affairs made on 23 May gives details of the assistance that has been given, including, on occasions, formal interventions with the Zimbabwean government, on 10 March, 11 March, 12 March, 13 March, 4 April, 15 April, 19 April, 26 April, 11 May, 13 May and 14 May 2004. The Director General then summarises the averments made saying:

"From the above it is thus clear that when the family members, the applicants themselves and their legal representatives requested assistance of the officials of the South African Embassy in Zimbabwe, in regard to food, clothing, stationery and access by the legal representatives to the applicants, the South African Embassy addressed official requests to the Zimbabwean authorities in order to provide the necessary assistance to the applicants. At times, the requests were approved immediately by the Zimbabwean authorities and other times the requests were not approved immediately. In cases of delays the South African Embassy addressed appropriate complaints to the Zimbabwean authorities and thereafter the

approvals were given. I am not aware of any request for assistance made by the applicants and which was not taken up by the South African Embassy. To the extent that the applicants allege that the South African Embassy and its diplomats did not provide assistance to them, I deny those allegations."

[143] In their reply the applicants do not deny this. They say that they do not contend that there was a failure on the part of the South African Embassy to provide assistance. Their complaint is that the Embassy did not act pro-actively. The claim as formulated by the applicants is misconceived. There is moreover nothing to show that the government has not provided assistance to the applicants in Zimbabwe when it was requested to do so. The claims made in this regard must be dismissed.

Conclusion

[144] To sum up, therefore, the findings I make in the light of the evidence on record, the provisions of the Constitution and South Africa's obligations under international law, are:

1. The application raises complex questions of law, of vital importance not only to the applicants but to our society as a whole. In the circumstances the application for leave to appeal directly to the Constitutional Court should be granted.

2. South Africa had an obligation to cooperate with Zimbabwe and Equatorial Guinea in the prevention and combating of crime, including, in particular, the duty to share information on suspected coup attempts or mercenary activity.

3. South Africa is under no obligation to apply for the extradition of the applicants from Zimbabwe.

4. The applicants' claims as formulated in the notice of motion that the court direct and order the government to ensure that the rights that the applicants have in terms of the South African Bill of Rights are at all times respected and protected in Zimbabwe, and if extradited to Equatorial Guinea, that they be respected and protected there have no basis in law and cannot be granted.

5. South African nationals facing adverse state action in a foreign country are, however, entitled to request the South African government to provide protection against acts which violate accepted norms of international law. The government is obliged to consider such requests and deal with them appropriately.

6. Decisions made by the government in these matters are subject to constitutional control. Courts required to deal with such matters will, however, give particular weight to the government's special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters.

7. Stated government policy concerning nationals in foreign countries, who are required to stand trial there on charges for which capital punishment is competent, is to make representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen. This policy adopted by South Africa in its relations with foreign states is not inconsistent with international law or any obligation that the government has under the Constitution.

8. Stated government policy concerning the conditions of detention and the conduct of trials of nationals in foreign countries is to ensure that all South African citizens are detained in accordance with international law standards, have access to their lawyers and receive a fair trial. This policy adopted by South Africa in its relations with foreign states is not inconsistent with international law or any obligation that the government has under the Constitution.

9. The applicants' uncontradicted evidence is that whilst in detention in Zimbabwe some of them have been assaulted, all of them have been held in deplorable conditions, and at times humiliated, abused, and denied proper access to their lawyers. Criminal charges have been brought against the warders alleged to have committed the assaults. It is not disputed that all requests for assistance by the applicants to the South

African High Commission have been taken up, and that the South African High Commission made representations to the Zimbabwean authorities about these matters.

10. How to respond to the events which have taken place requires great sensitivity, calling for government evaluation and expertise. It would not be appropriate in the circumstances of this case for a Court to require or propose any approach with regard to timing or modalities different to that adopted by government.

11. The applicants have failed to establish that the government's response to requests for assistance is inconsistent with international law or the South African Constitution.

12. In the circumstances the appeal must be dismissed. Because of the importance of the case and the complexity of the issues raised this is not a case in which a costs order should be made in respect of the application for leave to appeal, or the appeal.

[145] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed and the order made by Ngoepe JP in the High Court is confirmed.
3. No order as to costs is made concerning the application for leave to appeal and the appeal.

Langa DCJ, Moseneke J, Skweyiya J, van der Westhuizen J and Yacoob J concur in the judgment of Chaskalson CJ.

NGCOBO J:

Introduction

[146] I have read the judgment prepared by the Chief Justice. I am in substantial agreement with the broad theme of the judgment and therefore concur in the order he proposes. However, my approach to the issues confronting us differs to that of the Chief Justice. In particular, my approach to and treatment of section 3(2), including the emphasis I place on its proper approach, differ to that adopted by the Chief Justice.

[147] The central question presented in this case is whether, under international law or our Constitution, the government has a legal duty to provide diplomatic protection to South African nationals who are arrested and imprisoned in a foreign country.

International law

[148] One of the greatest ironies of customary international law is that its recognition is dependent upon the practice of states evincing it. Yet at times states refuse to recognise the existence of a rule of customary international law on the basis that state practice is insufficient for a particular practice to ripen into a rule of customary international law. In so doing, the states deny the practice from ripening into a rule of customary international law.

[149] The practice of imposing a legal duty to exercise diplomatic protection[82] for an injured national or a national threatened by an injury by a foreign state, upon the national's request, is a victim of this irony. Despite numerous countries which impose this legal duty in their constitutions, there is still a reluctance to

recognise this practice as a rule of customary international law.[83] It remains a matter of an exercise in the progressive development of international law.

[150] The position in international law is summed up by the International Court of Justice in the following passage in the Barcelona Traction case:

"The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress . . .

The state must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that."[84]

[151] It is true that customary international law is part of our law, but it can be altered by our law and, in particular, by our Constitution. Section 232 of the Constitution says that customary international law is the law in South Africa, "unless it is inconsistent with the Constitution or an Act of Parliament." It follows therefore that the next inquiry is whether a duty exists under our Constitution.

Is there a duty under our Constitution?

[152] Both the applicants and the amicus contended that such a duty exists and that it derives from the Constitution. In support of this contention, reliance was placed upon section 7(2) of the Constitution. In addition the amicus also relied on section 3(2).[85]

[153] For its part, the government contended that no such duty exists under our Constitution.

[154] The question whether there is a constitutional duty contended for is essentially one of a proper construction of the relevant provisions of the Constitution, in particular, sections 3(1), 3(2) and 7(2). These provisions must be construed in the light of, amongst other things, the Constitution as a whole and international and regional human rights instruments to which the government is a party. Before construing these constitutional provisions, it is necessary to discuss some of the considerations that are relevant in determining whether there is a constitutional duty to provide diplomatic protection to nationals abroad. These considerations provide the context in which the applicable constitutional provisions must be construed and understood.

Relevant considerations
(a) The constitutional context

[155] The question whether the government has a constitutional duty to provide diplomatic protection in this case must be determined in the light of our Constitution, and, in particular, the provisions of the Bill of Rights. To paraphrase Mohamed J in S v Makwanyane,[86] our Constitution articulates our shared aspirations; the values which bind us, and which discipline our government and its national institutions; the basic premises upon which all arms of government, and at all levels, are to exercise power; the national ethos that defines and regulates the exercise of that power; and the moral and ethical direction which our nation has identified for itself. The founding values upon which our constitutional democracy is founded are especially relevant in this context.

[156] As a nation, we have committed ourselves to establishing "a society based on democratic values, social justice and fundamental human rights".[87] The very first provision of the Constitution sets out the founding values upon which our constitutional democracy is founded. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.[88] Our democratic state is therefore committed to the advancement and protection of fundamental human rights. This commitment is immediately apparent in the Bill of Rights, which is the cornerstone of our constitutional democracy and which affirms democratic values of human dignity, equality and freedom.[89]

[157] In this sense our Constitution must be seen as a promissory note. Indeed, in peremptory terms, section 7(2) provides that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[158] The commitment to the advancement and protection of fundamental human rights is also apparent in the ratification of the African Charter on Human and Peoples' Rights[90] (African Charter) and the International Convention on Civil and Political Rights[91] (ICCPR). These international instruments enshrine the fundamental human rights that are generally to be found in our Constitution.

[159] It is this commitment to the promotion and protection of fundamental human rights that binds us and defines us as a nation and which must discipline our government and inform the duty which it owes to its nationals. This commitment "must be demonstrated by the State in everything that it does."[92] It must inform its foreign relations policy. Indeed the principles that underpin the government's foreign policy include a commitment to the promotion of human rights, democracy, justice and international law in the conduct of relations between nations.[93]

(b) International human rights instruments

[160] In construing the provisions of the Constitution we are enjoined to consider, amongst other things, international law. International law consists, inter alia, of the international human rights instruments to which the government is a party.[94] These instruments are also relevant to the question whether there is a constitutional duty to provide diplomatic protection to nationals who are abroad. By ratifying the African Charter, the government "recognises the rights, duties and freedoms enshrined" in the African Charter,[95] and it assumed the "duty to promote and protect human and peoples' rights and freedoms"[96] enshrined in the African Charter. These rights and freedoms include the right to a fair trial, fair detention and the right against torture. Article 7 provides:

"1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

Article 6 provides:

"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

And article 5 provides:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

[161] Also, by ratifying the ICCPR, the government recognises that:

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[97]
And:
"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[98]

[162] The ratification of the African Charter and the ICCPR are an unequivocal commitment by the government to the promotion and protection of fundamental international human rights and to do so in co-operation with other nations.[99] Indeed ratification of international human rights instruments is a positive statement by the government to the world and to South African nationals that it will act in accordance with these instruments if any of the fundamental human rights enshrined in the international instruments it has ratified are violated. These international instruments should therefore inform the government's foreign policy. They provide the government with a tool to protect the internationally recognised human rights of South African nationals. What is more, these instruments are binding under our Constitution.

[163] These international instruments make provision for steps that member states can take when any of the rights contained therein are violated or threatened with violations.[100] Consistent with its commitment to the protection and promotion of fundamental human rights, the government cannot therefore remain silent when a member state commits the most egregious violations of any of the fundamental human rights enshrined in these instruments.[101]

[164] It is true that these provisions are permissive in that they provide that the state "may" take action. That in my view does not detract from the obligation to promote and protect the rights in these instruments, an obligation which the state has assumed by ratifying these instruments. I would venture to suggest that the state is obliged to take some steps when an egregious violation of the very fundamental human rights, enshrined in the document it has ratified, is being committed by a member state.

[165] Apart from the procedures for the protection of the rights enshrined in these instruments, there may be other effective means available to member states to protect human rights. Diplomatic intervention is another important tool in the protection of international human rights.

Diplomatic protection

[166] International human rights instruments such as the ICCPR and the African Charter are important documents in that they extend protection to both aliens and nationals in the state parties. However, the remedies they provide are said to be somewhat weak and they are at times slow in providing the remedy.[102] An individual may lodge a complaint with the African Commission concerning the violation of a fundamental human right guaranteed in the African Charter. However, in circumstances where urgent action is required, the procedure that has to be followed in processing the complaint may result in delays. What is more, its powers are to make recommendation to the offending state. This points to the urgent need to establish a court of justice to enforce the rights guaranteed in the African Charter.

[167] Having regard to this, Dugard submits that diplomatic protection, albeit only to protect individuals, offers a more effective remedy. According to him, states "will treat a claim of diplomatic protection from another State more seriously than a complaint against its conduct to a human rights monitoring body".[103] Diplomatic protection therefore is an important weapon in the arsenal of human rights protection. In certain circumstances, where urgent action is required, it may prove to be one of the most, if not the most, effective remedy for the protection of human rights.

[168] Therefore, states that are committed to the protection and promotion of international human rights have an important tool at their disposal to fulfil their commitment. Indeed a growing number of states now have provisions in their constitutions that recognise the right of individuals to have diplomatic protection for injuries sustained abroad.[104] This reflects a growing recognition within the international community of the desirability of the need to protect human rights across the globe. Thus although the United Kingdom does not recognise the right of individuals to enforce a duty of diplomatic protection on the crown in the British courts, the recent decision of the Court of Appeals in the Abbasi[105] case demonstrates that British nationals can rely on the doctrine of legitimate expectation to request that they be afforded diplomatic protection if certain conditions are met.

[169] In the light of the above, there is in my view, 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. Those states that have ratified international human rights instruments and are committed to the promotion and protection of international human rights have a special duty in this regard. The Special Rapporteur's Report concludes:

"Today there is general agreement that norms of jus cogens reflect the most fundamental values of the international community and are therefore most deserving of international protection. It is not unreasonable therefore to require a State to react by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of jus cogens. If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad."[106]

[170] This growing trend within the international community of providing diplomatic protection to nationals abroad is not an irrelevant consideration in determining whether such a duty exists under our law. It is particularly relevant for our country given our commitment to the promotion and protection of fundamental international human rights and freedoms as evidenced by our Constitution and our ratification of international instruments embodying such commitments. Diplomatic protection provides the state with a tool to protect the fundamental human rights that we have committed ourselves to promoting and protecting.

[171] But the exercise of diplomatic protection invariably implicates foreign relations.

The conduct of foreign relations

[172] The conduct of foreign relations is a matter which is within the domain of the executive. The exercise of diplomatic protection has an impact on foreign relations. Comity compels states to respect the sovereignty of one another; no state wants to interfere in the domestic affairs of another. The exercise of diplomatic protection is therefore a sensitive area where both the timing and the manner in which the intervention is made are crucial. The state must be left to assess foreign policy considerations and it is a better judge of whether, when and how to intervene. It is therefore generally accepted that this is a province of the executive, the state should generally be afforded a wide discretion in deciding whether and in what manner to grant protection in each case and the judiciary must generally keep away from this area. That is not to say the judiciary has no role in the matter.

[173] It is within this context that sections 3(2) and 7(2) of our Constitution must be construed and understood.

The construction of sections 3(2) and 7(2)

[174] The relevant provisions of section 3 provide:

"(1) There is a common South African citizenship.
(2) All citizens are –
(a) equally entitled to the rights, privileges and benefits of citizenship; and
(b) equally subject to the duties and responsibilities of citizenship."

While the relevant provisions of section 7 provide:

"(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[175] The starting point in the determination of the question whether there is a duty to provide diplomatic protection is section 3(2)(a). This section provides that all South African citizens are "equally entitled to the rights, privileges and benefits of citizenship". This provision is the source of the rights, privileges and benefits of citizenship to which South African citizens are entitled under our Constitution.

[176] What section 7(2) does on the other hand is to bind the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Here it must be borne in mind that the right to citizenship is constitutionally entrenched in the Bill of Rights.[107] It is clear from section 3(2)(a) that, in addition to certain rights, there are benefits and privileges to which South African citizens are entitled. In this sense, sections 3(2) and 7(2) must be read together as defining the obligations of the government in relation to its citizens.

[177] Section 3(2)(a) therefore confers a right upon every citizen to be accorded the rights, privileges and benefits of citizenship. This provision also makes it clear that citizens should be treated equally in the provision of rights, privileges and benefits. This of course does not mean that citizens may not be treated differently where there are compelling reasons to do so. For present purposes, it is not necessary to determine the circumstances under which the government may treat citizens differently. Suffice it to say that any difference in the treatment will have to conform to the Constitution.

[178] Flowing from this, a citizen has the right under section 3(2)(a) to require the government to provide him or her with rights, privileges and benefits of citizenship. The obligation of the government is to consider rationally such request and decide whether to grant such request in relation to that citizen. If the government decides not to grant such request its decision may be subject to judicial review. This is so because such a decision is taken in the exercise of public power and the exercise of public power must conform to the Constitution. The question whether the exercise of public power conforms to the Constitution must be determined by the courts.[108]

[179] The question that must be considered next is whether the rights, privileges and benefits comprehended in section 3(2)(a) include the right, privilege and benefit to request diplomatic protection.

What are the "rights, privileges and benefits" to which citizens are entitled?

[180] Some of the rights to which citizens are entitled are spelt out in the Bill of Rights. These include "the right to enter, to remain in and to reside anywhere in, the Republic",[109] and the "right to a passport".[110]

[181] An important consideration in determining the content of the rights, privileges and benefits of citizens is that, in international law, individuals who are abroad generally have no right to protect themselves against foreign states. Any protection that they enjoy must be found in the municipal law of the foreign state concerned. In the absence of such protection it is only the state of which they are a national that can protect them against violations of fundamental international human rights. Therefore, unless the South African government grants South African nationals abroad diplomatic protection, they are likely to remain without a remedy for violations of their internationally recognised human rights. And if the government cannot protect South African nationals abroad against violations or threatened violations of their international human rights, it may well be asked, what then are the benefits of being a South African citizen? Or to put it differently, what are the obligations of the South African government towards its citizens?

[182] In De Lange v Smuts NO and Others,[111] this Court made the following observations concerning the positive obligation on the government:

"In a constitutional democratic State, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) 'citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors.'"[112]

[183] Although these remarks were made in a different context, in my view, they underscore the positive obligation of the state to protect the rights of South African citizens. The question which arises is, does this obligation cease once a South African citizen leaves our borders? I think not.

[184] Authors Erasmus and Davidson argue that the right to citizenship should be interpreted to include entitlement to diplomatic protection.[113] They contend that the rights, privileges and benefits comprehended in section 3(2) are open to such a construction. They argue that diplomatic protection is a benefit which citizens are equally entitled to and that this may not be denied arbitrarily and without good cause. In support of their thesis they draw attention to the fact that citizenship is a fundamental human right which, in terms of section 7(2), the state "must respect, protect, promote and fulfil". There is much to be said for this view.

[185] The right of citizenship is constitutionally guaranteed.[114] In my view it must be construed purposively so as to give it content and meaning. As a right contained in the Bill of Rights it must be construed, in the light of the object and purpose of the Bill of Rights which is to protect individual human rights. It must therefore be interpreted so as to make its safeguards practical and effective. Thus construed it seems to me that the right of citizenship must comprehend the right of a citizen to request protection from the government when any of his or her human rights are violated or threatened with violation, whether the citizen is in South Africa or abroad. This right should vest in all citizens by virtue of their South African citizenship.

[186] Having regard to the absence of an obligation in international law to grant diplomatic protection; the commitment of our government to promote and protect fundamental human rights; the obligation of the government, in general, to protect South African citizens here and abroad; the fact that citizenship is a

constitutionally entrenched right; the fact that diplomatic protection is one of the tools available to protect human rights; and the fact that there is a growing trend within international law to grant diplomatic protection to nationals abroad, I am satisfied that diplomatic protection is one of the benefits, if not the right, of citizenship. For the purposes of this judgment it is not necessary to decide whether this is a right or a benefit. The effect is the same because whether it is a right or a benefit both are constitutionally guaranteed in section 3(2)(a). This benefit accrues to South African nationals by virtue of their citizenship.

[187] This benefit is constitutionally entrenched in section 3(2)(a). If South Africa is required to ensure that everyone within its borders enjoys the fundamental human rights contained in the African Charter and the ICCPR and has adequate means of redress, there is no reason why South Africa should not be obliged under our Constitution to protect its own nationals when their most basic human rights are violated or threatened with violation abroad.

[188] I conclude therefore that diplomatic protection is a benefit within the meaning of section 3(2)(a). It follows therefore that sections 3(2)(a) and 7(2) must be read together as imposing a constitutional duty on the government to ensure that all South African nationals abroad enjoy the benefits of diplomatic protection.[115] The proposition that the government has no constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the government's own declared policy and acknowledged constitutional duty.[116]

[189] But what is the scope of this constitutional duty? In determining the scope of this duty it is necessary to bear in mind that the exercise of diplomatic protection has an impact on the conduct of foreign relations. As I have pointed out earlier, the conduct of foreign relations is a matter which is within the domain of the executive. When and how to intervene may be crucial to the outcome of the intervention. States are better judges of whether to intervene and if so, the timing and the manner of such intervention. At times there may be compelling reason why there should be no intervention at all or only at a later stage. It is for this reason that states are generally allowed a wide discretion in deciding whether and in what manner to grant diplomatic protection.[117]

[190] The width of the discretion that the state enjoys in the field of diplomatic protection is exemplified by two foreign decisions: the first is the decision of the German Federal Constitutional Court in the case of Rudolph Hess. The court accepted that Germany was under a constitutional duty to provide diplomatic protection but emphasised that the government enjoyed a "wide discretion". The second case is the decision of the English Court of Appeal in the Abbasi case. That court accepted that under a doctrine of legitimate expectation a British national may require diplomatic protection. However, it held that the Foreign and Commonwealth Office has "discretion whether to exercise the right, which it undoubtedly has, to protect British citizens."[118] The discretion enjoyed by the Foreign Office "is a very wide one."[119]

[191] In my view, it must therefore be accepted that the government has discretion in deciding whether to grant diplomatic protection and if so, in what manner to grant such protection in each case. It must be left to the government to assess the foreign policy considerations in making its decision.[120] However, that does not mean that the whole process is immune from judicial scrutiny. This must depend on the scope of the duty.

[192] In my view, the duty of the government entails a duty to properly consider the request for diplomatic protection. The government must carefully apply its mind to the request and respond rationally to it. This would require, amongst other things, the government to follow a fair procedure in processing the request and it may be required to furnish reasons for its decisions. The request for diplomatic protection cannot be arbitrarily refused.

[193] The decision whether to extend diplomatic protection in a given case is the exercise of a public power and as such it must conform to the Constitution, in particular section 33 of the Constitution. Thus where the government were, contrary to its constitutional duty, to refuse to consider whether to exercise diplomatic protection, it would be appropriate for a court to make a mandatory order directing the government to give due consideration to the request.[121] If this amounts to an intrusion into the conduct of foreign policy, it is an intrusion mandated by the Constitution itself.[122]

[194] It now remains to be considered whether on the facts of this case, the applicants are entitled to any relief in relation to the question of a fair trial and the death penalty.

Fair trial

[195] I agree with the Chief Justice that the claim relating to fair detention and fair trial based on section 35 of the Constitution is misconceived and that, as formulated, that claim cannot succeed. But the applicants have presented evidence of reports about the justice system in Equatorial Guinea by reputable international organisations, including Amnesty International, International Bar Association and a Special Rapporteur of the United Nations Commission on Human Rights. These reports raise serious concerns about, amongst other things, torture, fairness of trials, conditions of detention and the independence of the judiciary in Equatorial Guinea.

[196] In response to these reports the government takes the attitude that its policy is not to comment or criticise the legal systems of other countries "in particular, in the circumstances such as the present." No explanation is given for this statement. The statement also seems to suggest that the government has not had adequate time to enable it "to obtain expert opinion relating to the legal status of the Republic of Equatorial Guinea". But the government also states that the decision whether or not to intervene will be made by a responsible authority once the applicants are extradited to Equatorial Guinea.

[197] The right to a fair trial is a basic human right to which all those who are accused of a crime are entitled. The nature of the crime charged is irrelevant. It is a fundamental human right enshrined in both the African Charter and the ICCPR.[123] A South African national who is facing a criminal trial in a foreign country is entitled to this most basic human right. When this right is threatened, the South African national affected has a constitutional right to seek protection from the government against such a threat. This right flows from section 3(2)(a) which confers a right on South African citizens to request diplomatic protection against violations of fundamental human rights. The government has a constitutional duty to grant such protection unless there are compelling reasons for not granting it.

[198] The government has a policy regarding nationals facing criminal trials abroad. Its policy is to ensure that such nationals get a fair trial within the framework of the Geneva Convention and international law. This policy emerges from a statement by the Deputy Minister of Foreign Affairs in an interview, a transcript of which was attached to the papers submitted to this Court. In response to the question whether the Deputy Minister was confident that the applicants would get a fair trial in Zimbabwe and Equatorial Guinea, the Deputy Minister responded as follows:

"Well, as their government, we have to ensure that all South Africans citizens, whatever offence they have carried out or are charged with, must receive fair trial, they must have access to their lawyers, they must be tried within the framework of the Geneva Convention, they must be held in prison within the framework of the Geneva Convention and International Law and we will always, it is our constitutional duty to ensure that this is getting out within the framework of the Geneva Convention and International law and that there is a fair trial."

[199] I should add that in the answering affidavit on behalf of the government, the response is the following:

"Without admitting the correctness of the transcript referred to in this paragraph, I wish to state that what the Honourable Deputy Foreign Affairs Minister is alleged to have stated in the said transcript reflects the policy of the Republic in the conduct of foreign relations with foreign states and confirms what has been stated in the affidavit of Ntsaluba."

[200] Dr Ntsaluba in turn states that:

"On 4 April 2004, the South African Embassy requested permission from the Zimbabwean ministry of foreign affairs to allow its staff to attend the criminal proceedings of the applicants. Permission was given to staff members to attend the court proceedings."

According to him, "all the requests by the South African Embassy to attend court proceedings were granted and the accredited diplomats from the South African Embassy attended each and every court proceedings" in Zimbabwe. The applicants do not seriously dispute these allegations by Dr Ntsaluba. Mr Griebenow who deposed to a replying affidavit on behalf of the applicants stated that it was not necessary for anyone to request permission to attend the trial and that the South African diplomats did not attend all the trials. What Mr Griebenow seems to ignore is that a formal request from one government addressed to another government to attend a criminal trial of a national of the requesting government is one form of diplomatic intervention. It puts the requested government on notice that the requesting state is observing the trial.

[201] The request by the government for permission to attend the trial could only have been done with a view to ensuring that the applicants get a fair trial. What Dr Ntsaluba says is therefore consistent with the government policy as stated by the Deputy Minister of Foreign Affairs. In addition, the attendance of trials by South African diplomats in Zimbabwe is consistent with this policy.

[202] The declared policy of the government to ensure that nationals abroad who face criminal trials get a fair trial within the framework of fundamental international human rights is consistent with the government's constitutional duty under section 3(2). If the applicants are extradited to Equatorial Guinea, the government will be expected to act in accordance with this policy in fulfilment of its constitutional obligation. There is nothing in the papers before this Court to show that the government will not comply with its policy and its constitutional duty. On the contrary the indications are that it will. The main deponent to the affidavit on behalf of the government, Ms Bezuidenhout, states that if the applicants are extradited to Equatorial Guinea, a responsible government authority will take a decision whether or not to intervene.

[203] We are dealing here with events that are rapidly evolving. These papers were prepared in May 2004. We have not been told what has been happening since then. In addition, as pointed out earlier, the government is in a better position to make judgment as to when to make a decision whether or not to intervene. It has a wide discretion in deciding whether, how and when to grant diplomatic protection. The government has not made such a decision. It has taken the attitude that the appropriate time to make that decision is when the applicants are extradited to Equatorial Guinea.

[204] I cannot, on this record, hold that this attitude of the government is in violation of its constitutional duty. More importantly, there is nothing on the papers to show that the applicants had previously requested diplomatic protection against an unfair trial and detention and torture. The government has not refused such protection. It follows therefore that the relief sought in relation to an unfair trial and detention and torture is not only misconceived but is also premature. It must therefore be dismissed.

The claims relating to the death penalty

[205] Different considerations apply to the claims relating to the death penalty. As the Chief Justice holds, the death penalty does not violate international law. This is so notwithstanding a growing number of states which have outlawed the death penalty. However, that does not mean that a South African national who is facing the death penalty abroad cannot request diplomatic protection under section 3(2)(a).[124]

[206] The death penalty is unconstitutional under our Constitution. It infringes the right to life. Our country is committed to a society founded on the recognition of human rights. We must give particular value to the right to life and this must be demonstrated in everything we do. This commitment requires the state to take steps to protect its nationals against the death penalty. A South African who faces the death penalty has a right to request the government for protection against it. This is one of the benefits of being a

South African citizen. The government is obliged to consider such a request properly and to decide whether, how and when to intervene on behalf of such national.

[207] The government has a policy in respect of nationals who face the death penalty. Its policy is to intervene and make representations once the death penalty is imposed. Dr Ntsaluba states in his affidavit that:

"[T]he Republic would make representations to the executive authorities in the country concerned not to implement the sentence of death. The executive authorities in that country would then consider the representations made and decide either to implement the sentence of death or commute it to some other form of punishment."

[208] This policy is consistent with the government's constitutional duty. It was contended on behalf of the applicants and the amicus that to wait until the death penalty is imposed before making representations not to implement the death penalty will be too late. There is nothing on the record to support this contention. Similarly, the heavy reliance on the Mohamed case is misplaced. That case is distinguishable from the present. It follows that the claims relating to the death penalty must also be dismissed.

[209] The fundamental flaw in the applicants' case is that it was premised on the proposition that the government has a constitutional duty to require Zimbabwe and Equatorial Guinea to comply with the rights contained in our Bill of Rights. The rights in the Bill of Rights bind this government and not foreign governments. Our government cannot require foreign governments to act in accordance with our Constitution. The applicants misconceived the nature of their rights and their remedies. I agree that none of the orders sought by the applicants can be granted.

[210] The applicants did not seek a declarator. The question whether they are entitled to a declarator was therefore not debated in this Court. I therefore consider it sufficient in this case to hold that under section 3(2)(a) of the Constitution the government has a constitutional duty to grant diplomatic protection to nationals abroad against violations or threatened violations of fundamental international human rights. This duty entails an obligation to consider properly the request for diplomatic protection with due regard to the provisions of the Constitution. The government has a wide discretion in deciding whether, when and in what manner to grant such protection. The policy of the government is to grant such protection. The government says the appropriate time to consider whether to grant such protection is when the applicants are extradited to Equatorial Guinea. In all the circumstances of this case I have no reason to believe that the government will not do what it says it will do. I therefore consider it unnecessary to issue a declarator.

[211] In the event, I concur in the order proposed by the Chief Justice.

O'REGAN J:

[212] I have had the opportunity of reading the judgment prepared by the Chief Justice in this matter. I agree with his analysis of section 3 of the Constitution to the extent that he holds that it entitles citizens to ask government to make representations and seek diplomatic protection on their behalf. However, I am in respectful disagreement with him in relation to the question whether under our Constitution, and in the circumstances of the present case, the state bears an obligation (independent of a request by its citizens) to take steps to seek to protect the applicants against the conduct of other states that may amount to a fundamental breach of the human rights of the applicants as recognised in customary international law[125] and the African Charter on Human and Peoples' Rights.

[213] The Chief Justice has set out the facts of the case in some detail and they do not need to be restated at length here. Briefly, the applicants were arrested on 7 March 2004 shortly after they had landed at Harare International Airport in Zimbabwe on a chartered flight from South Africa. They have been

charged with a variety of offences relating mainly to the possession of unlawful firearms and are currently being held in a prison near Harare. It is alleged by the applicants that Equatorial Guinea is seeking to extradite them from Zimbabwe to face charges in relation to a coup d'état that, it is alleged, they were going to launch. The applicants further allege that there is a real risk that, if extradited to Equatorial Guinea, their trial will not be fair and that following upon an unfair trial, the death penalty will be imposed upon them by the court there.

[214] That states have the right to provide diplomatic protection to their nationals is a recognised principle of customary international law. The content of the right to provide diplomatic protection is closely related to the customary international law principle of the responsibility of states to avoid acts or omissions in respect of foreign nationals on their territory that would constitute a breach of the state's international law obligations.[126] Diplomatic protection has accordingly been defined as

"the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law."[127]

However, it is also clear that a state has the right to make representations to other states on behalf of its nationals even when there is no established infringement of international law, although this does not constitute diplomatic protection, but merely diplomatic or at times consular representations.[128] The precise content of what may be done pursuant to the right to provide diplomatic protection is the subject of some debate by international lawyers.[129] It is clear that diplomatic protection embraces a range of actions, including consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals and severance of diplomatic relations.[130]

[215] Although international law confers the right upon states to provide diplomatic protection in respect of their citizens, at present, states are not obliged to provide diplomatic protection to their citizens under international law. As the International Court of Justice stated in the Barcelona Traction case in 1970:

"[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. Should the national or legal persons on whose behalf it is acting consider their rights are not adequately protected, they have no remedy in international law. All they can do is resort to international law, if means are available, with a view to furthering their cause or obtaining redress . . .

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case."[131]

[216] However, as Professor Dugard, Special Rapporteur to the International Law Commission on Diplomatic Protection noted in his first report to the Commission in 2000:

"Much has changed in recent years. Standards of justice for individuals at home and foreigners abroad have undergone major changes. Some 150 states are today parties to the International Covenant on Civil and Political rights and/or its regional counterparts in Europe, the Americas and Africa, which prescribe standards of justice to be observed in criminal trials and in the treatment of prisoners. Moreover, in some instances the individual is empowered to bring complaints about the violation of his human rights to the attention of international bodies such as the United Nations Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights or the African Commission on Human and Peoples' Rights."[132]

It is indeed true that since 1945 the growth of international human rights law and principles has been remarkable. But as Professor Dugard also noted, despite the growth in the number of international conventions and treaties, the remedies available at international law to individuals whose human rights are violated or threatened still remain weak.[133] One of the important mechanisms that can be used to protect and promote international human rights thus remains the right of states to make diplomatic representations on behalf of their nationals to other states which are threatening to infringe or have infringed the internationally recognised human rights of the nationals.[134]

[217] There can be no doubt then that at international law, the state is entitled to take diplomatic steps to protect its nationals against the violation of internationally recognised human rights standards. This entitlement in turn gives rise to two more difficult questions: does the state, under our Constitution, bear an obligation to exercise its international law rights in respect of its nationals? And if it does bear such an obligation, in what circumstances is that obligation justiciable in our courts? I shall consider these two questions separately.

Is there a constitutional duty upon the state?

[218] Before considering this question, some preliminary remarks must be made. First, it must be emphasised that South Africa is a constitutional democracy. This has two clear implications: as the preamble to our Constitution asserts, government should be based on the "will of the people"; and secondly, the powers of government are delineated by the terms of the Constitution. So, the powers of all three arms of government arise from and are limited by the Constitution.[135] All law and conduct inconsistent with the Constitution is invalid.[136] Moreover, our Constitution embodies "an objective, normative value system"[137] as is asserted in the opening clause of the Constitution which states that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness."

The conduct of all three arms of government, the legislature, executive and judiciary must thus be consistent with the Constitution.

[219] Secondly, the Constitution not only sets a boundary within which the three arms of government must operate, but it also requires that the state must "promote and fulfil the rights in the Bill of Rights".[138] This constitutional injunction is not surprising in the light of the history of our country and the purpose of our Constitution. As Ngcobo J stated in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others:[139]

> "South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed 'to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms'. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms."[140]

[220] The leitmotif of our Constitution is thus the promotion and protection of fundamental human rights. Again and again, our Constitution restates the foundational importance of human rights to our

constitutional vision. In the Preamble, it speaks of the need to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights"; in section 1, the founding values clause quoted above, the Constitution commits us to the "advancement of human rights and freedoms"; and in section 7(1), the Constitution asserts that the Bill of Rights is a "cornerstone of democracy in South Africa."

[221] Our Constitution thus asserts as a foundational value the need to protect and promote human rights. This value informs all the obligations and powers conferred by the Constitution upon the state. The importance of that foundational value is to be understood in the context of a growing international consensus that the promotion and protection of human rights is part of the responsibility of both the global community and individual states, and that there is a need to take steps to ensure that those fundamental human rights recognised in international law are not infringed or impaired.

[222] Thirdly, our Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law. The Preamble of our Constitution states that the Constitution is adopted as the supreme law of the Republic so as to, amongst other things, "build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations." Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[141] Courts, when interpreting the Bill of Rights, "must consider international law",[142] and, when interpreting legislation, must prefer any reasonable interpretation consistent with international law over alternative interpretations that are not.[143]

[223] In line with this constitutional acknowledgement of the importance of both international law and international human rights, South Africa has, since 1994, signed and ratified a range of international human rights conventions including the International Covenant on Civil and Political Rights (ICCPR),[144] the International Convention on the Elimination of All Forms of Racial Discrimination,[145] the Convention on the Elimination of All Forms of Discrimination Against Women,[146] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[147] the Convention on the Rights of the Child,[148] and the African Charter on Human and Peoples' Rights.[149] In ratifying these international agreements and conventions, our government is promoting the protection of human rights in the international arena.

[224] I turn now to consider the obligations imposed upon government by the Constitution. Counsel for the respondent argued that there could be no duty imposed upon the government to provide diplomatic protection to its nationals against the grave infringement of international human rights norms because this would constitute the extraterritorial application of our Bill of Rights. It is correct that the relief formulated by the applicants in prayers 6, 7, and 8 does suggest that they were seeking the extraterritorial application of the Bill of Rights.[150] However, in argument, counsel for both the applicants and the amicus submitted that the government was under an obligation to provide diplomatic protection to its nationals under the Constitution. Counsel for the applicants conceded that the formulation of the relief in the notice of motion may not have accurately reflected this submission.

[225] The ordinary principle of international law is that jurisdiction of states is territorial.[151] In R v Cook, the Canadian Supreme Court had to consider the question whether an accused could rely on the provisions of the Canadian Charter of Rights and Freedoms in respect of her interrogation by Canadian law enforcement officials in the United States. The majority of the Court concluded (as the Chief Justice notes in his judgment) as follows:

"In our view, the reasoning adopted in both Harrer and Terry can accommodate a finding that on the jurisdictional basis of nationality, the Charter applies to the actions of Canadian law enforcement authorities on foreign territory (which satisfies s. 32(1), provided that the application of Charter standards would not interfere with the sovereign authority of the foreign state."[152]

[226] In his judgment, Bastarache J convincingly explains that there is no threat to the sovereignty of the United States of America where the Canadian Charter is held by a Canadian court in Canadian criminal proceedings to be applicable to the conduct of Canadian law enforcement officers interrogating a suspect in the United States of America.[153] The effect of the Charter, in such circumstances, has no impact whatsoever on the jurisdiction of the United States.

[227] It is obvious that the Bill of Rights in our Constitution binds the executive[154] and that the state is under an obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights."[155] It is also clear that the provisions of our Bill of Rights are not binding on the governments or courts of other countries. So, a South African may not rely on the provisions of our Bill of Rights before other courts in other jurisdictions. To this extent, then, our Bill of Rights has no direct extraterritorial effect.

[228] It does not follow, however, that when our government acts outside of South Africa it does so untrammelled by the provisions of our Bill of Rights. There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and the obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed, the contrary is the case. The executive is bound by the four corners of the Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act. It is not necessary to consider in this case whether the provisions of the Bill of Rights bind the government in its relationships outside of South Africa with people who have no connection with South Africa.

[229] Were the enforcement of the Bill of Rights against the government in any particular case to constitute an infringement of international law, our Constitution would not countenance it. So, the extraterritorial application of the provisions of the Bill of Rights will be limited by the international law principle that the provisions will only be enforceable against the government in circumstances that will not diminish or impede the sovereignty of another state. The enquiry as to whether the enforcement will have this effect will be determined on the facts of each case. As a general principle, however, our Bill of Rights binds the government even when it acts outside South Africa, subject to the consideration that such application must not constitute an infringement of the sovereignty of another state.

[230] This case, however, does not concern a situation where a South African government official has acted outside of South Africa in a manner inconsistent with the provisions of the Bill of Rights. It concerns the question whether the South African government, to the extent that it has the right in international law to make diplomatic representations to another state on behalf of one of its nationals, is under an obligation under our Constitution to make such representations.

[231] It is quite clear that the right to provide diplomatic protection in this way does not involve the extraterritorial application of our Constitution. International law affords South Africa the right to provide diplomatic protection to its nationals in respect of the breach of the provisions of international law, not our Constitution. There will of course be some overlap between the provisions of our Bill of Rights and the principles of customary international human rights law and conventional human rights law. The international law right to take steps to protect nationals relates only to breaches of international law. The question whether a duty exists under our Constitution to take such steps does not raise the question of the extraterritorial effect of our Bill of Rights at all. I turn now to consider the question whether such a duty exists under our Constitution.

[232] As the Chief Justice points out, our Constitution contains no express provision conferring a right to diplomatic protection from the state, unlike some other recently adopted constitutions.[156] Nor is there a right to diplomatic protection asserted in the Universal Declaration of Human Rights, nor in the ICCPR or the African Charter.

[233] However our Constitution does contain an express recognition of the rights of citizenship. Section 3 of the Constitution provides that:

"(1) There is a common South African citizenship.
(2) All citizens are –
(a) equally entitled to the rights, privileges and benefits of citizenship; and
(b) equally subject to the duties and responsibilities of citizenship.
(3) National legislation must provide for the acquisition, loss and restoration of citizenship."

Section 3 thus confers an entitlement to the "rights, privileges and benefits of citizenship" upon South African citizens. What are the rights, privileges and benefits of citizenship? This question needs to be answered in the context of the other provisions of the Constitution.

[234] As to the "rights of citizens", certain provisions of the Bill of Rights expressly confer rights upon citizens. So citizens are given the right to make political choices (which includes the right to form political parties, to participate in the activities of political parties, to free, fair and regular elections and the right to vote and stand for public office);[157] the right not to be deprived of citizenship;[158] the right to enter, remain in and reside anywhere in South Africa;[159] the right to a passport;[160] and the right to choose their trade, occupation or profession freely.[161] These fall within the concept of the rights of citizenship as contemplated in section 3.

[235] There are no explicit provisions in the Constitution that give content to the "privileges and benefits" of citizenship. We must start from an assumption that citizens do enjoy some privileges and benefits in addition to the rights conferred by the Constitution, for otherwise the reference to "privileges and benefits" in section 3 would be meaningless. Moreover, in giving meaning to the words, it is important to bear in mind both the constitutional recognition of the importance of the international sphere and international law, as well as the priority given to the promotion and protection of human rights in our Constitution. We should also bear in mind the importance of the role of the state, under our constitutional democracy, in the protection of human rights. As Ackermann J stated in De Lange v Smuts NO and Others:[162]

"In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights."[163]

[236] The state is entitled to make diplomatic representations on behalf of its nationals under international law, even though at international law it is not obliged to do so. When it does so, the state clearly confers a privilege or benefit upon the person concerned. In my view, when section 3 speaks of the "privileges and benefits" of citizenship it includes within it the right of the state to make diplomatic representations on their behalf to protect them against a breach of international law. It is true that historically international law has taken the view that in making such diplomatic representations, the state acts in defence of its own interests, not in the interests of its nationals, who are not "subjects" of international law.[164] However, it is increasingly being recognised that this is a fiction in the sense that the primary beneficiaries of diplomatic representations made by the state are those nationals in respect of whom the state makes representations.[165] This has recently been acknowledged by the South African government in its representations to the International Court of Justice.[166] Given that it is widely accepted that the right to diplomatic protection does serve the interests of individuals, it seems appropriate to consider the provision of diplomatic protection by the state to fall within the "privileges and benefits" of citizenship as contemplated by section 3.

[237] What then does section 3 mean when it states that a citizen is "equally entitled to the . . . privileges and benefits of citizenship"? It is quite clear that it means in the first place that the state may not act in respect of some citizens and not others, the state must treat citizens equally. However, the question that arises is whether the subsection imposes an obligation upon government to provide diplomatic protection to its citizens when it would be entitled to do so in terms of international law in the light of my conclusion that the provision of diplomatic protection constitutes a privilege or benefit of citizenship. In other words, are citizens entitled to diplomatic protection, in itself, or merely entitled to equal protection of it, which

otherwise may be refused by the state, as long as it refuses it equally? The latter interpretation of course may add little to the protection of the equality clause in section 9 of the Constitution,[167] but that does not seem to me to be the most powerful interpretative concern. The question has to be answered in the light of the normative commitment to human rights emphasised in our Constitution, the importance accorded to international law and human rights in our Constitution and the conception of democratic government that underlies our Constitution. Most importantly, our Constitution must be interpreted in a way that will promote rather than hinder the achievement of the protection of human rights.

[238] In the light of these constitutional imperatives, government would not be constitutionally permitted simply to ignore a citizen who is threatened with or has experienced an egregious violation of human rights norms at the hands of another state. Were government to be entitled to do so, the achievement of human rights would be obstructed and international human rights norms undermined. Accordingly, and in the light of my understanding of the values of our Constitution, I would conclude that it is proper to understand section 3 as imposing upon government an obligation to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms. Where a citizen faces or has experienced a breach of international human rights norms that falls short of the standard of egregiousness, the situation may well be different. Thus, I conclude that to the extent that section 3(2) states then that "citizens are equally entitled to the . . . privileges and benefits" of citizenship, it is not only an entitlement to equal treatment in respect of the privilege and benefit of diplomatic protection, but also an entitlement to diplomatic protection itself.

[239] One final problem needs to be addressed. It might be thought that it would be inappropriate to interpret section 3 in this way given that the state's right to make representations relates to its nationals as contemplated by international law, while section 3 speaks of citizens. The relationship between citizenship and nationality is often confused. Nationality is a term of international law. It is nationals who may be entitled to the protection of their state and to various other benefits under international law.[168] It is generally accepted that there must be a "genuine link" between state and individual if conferral of nationality is to be recognised at international law.[169]

[240] By contrast, citizenship is a concept of municipal law and concerns the rights and the obligations between citizens and the state at a domestic level. Its effect is internal.[170] Problems arise only where the nationality of persons is contested by states on the international plane, at which point, the international law on "nationality" becomes decisive.[171] However, when applying the international law test of "genuine link", it is important to note that there is a presumption of validity of an act of naturalisation, and that the conferment of nationality as a status is not to be invalidated except in very clear cases.[172]

[241] Article I of the 1930 Hague Convention on the Conflict of Nationality Laws provides:

"It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."

In practice, save where a state's claim that persons are its nationals is contested in an international forum, a state's citizens are its nationals, as international law generally leaves it to states to determine who their nationals are.[173] For the purposes of this case, there is nothing to suggest that the applicants, who are all South African citizens, are not also South African nationals.

[242] In my view, therefore, to the extent that section 3 entitles citizens to the privileges and benefits of citizenship, this obliges the state to provide diplomatic protection to citizens at least in circumstances where citizens are threatened with or have experienced the egregious violation of international human rights norms binding on the foreign state that caused or threatened to cause the violation. It is interesting that this conclusion of law is echoed in the statement made by the Deputy Minister of Foreign Affairs in an interview with a journalist on 11 May 2004, a transcript of which was made available to the Court. In response to questions concerning the likelihood that the applicants would receive a fair trial in Zimbabwe and Equatorial Guinea, the Deputy Minister responded as follows:

"As their government, we have to ensure that all South African citizens, whatever offence they have carried out or are charged with, must receive a fair trial, they must have access to their lawyers, they must be tried within the framework of the Geneva Convention and International law and we will always, it is our constitutional duty to ensure that this is getting out within the framework of the Geneva Convention and that there is a fair trial". (own emphasis)

Such a statement, of course, cannot be constitutive of the meaning of the Constitution, which remains a matter for this Court. It must also be noted that in this Court counsel for the respondents firmly resisted the proposition that the respondents bore any constitutional duty that would require them to provide diplomatic protection to the applicants. The legal submissions of counsel must of course be taken to represent the attitude of their clients, the respondents in the case. The question that now needs to be considered is the question of the extent to which that obligation is justiciable.

The justiciability of the duty to make diplomatic representations

[243] The obligation to provide citizens with diplomatic protection conferred by our Constitution is one that must be construed within the terrain in which it is operative. That terrain is the conduct of foreign relations by the South African government. It is clear, though perhaps not explicit, that under our Constitution the conduct of foreign affairs is primarily the responsibility of the executive. That this is so, is signified by a variety of constitutional provisions including those that state that the President is responsible for receiving and recognising foreign diplomatic and consular representatives,[174] appointing ambassadors, plenipotentiaries and diplomatic and consular representatives,[175] and that the national executive is responsible for negotiating and signing international agreements.[176] The conduct of foreign relations is therefore typically an executive power under our Constitution. This is hardly surprising. Under most, if not all constitutional democracies, the power to conduct foreign affairs is one that is appropriately and ordinarily conferred upon the executive,[177] for the executive is the arm of government best placed to conduct foreign affairs.

[244] It is clear from the existing jurisprudence of this Court that all exercise of public power is to some extent justiciable under our Constitution,[178] but the precise scope of the justiciability will depend on a range of factors including the nature of the power being exercised.[179] Given that the duty to provide diplomatic protection can only be fulfilled by government in the conduct of foreign relations, the executive must be afforded considerable latitude to determine how best the duty should be carried out.

[245] Like other powers of the executive, the power must be exercised lawfully and rationally.[180] It may be subject to other requirements as well, but in any proceedings in which the exercise of the power is challenged, a court will bear in mind that foreign relations is a sphere of government reserved by our Constitution for the executive and it will accordingly "be careful not to attribute to itself superior wisdom"[181] in relation to it.

[246] Similar considerations obtain in Germany where the Federal Government is under a constitutional duty to provide diplomatic protection to German nationals and their interests in relation to foreign states. In giving effect to this duty, the Court has been at pains to acknowledge the importance of recognising that the conduct of foreign policy is primarily the constitutional task of the executive. In the leading case of Rudolf Hess, the applicant asked the Court, amongst other things, to compel the Federal Government (a) to take all possible initiatives to persuade the four occupying powers to grant his immediate release; and (b) to refer the complainant's case to the International Court of Justice for an order declaring that his continued imprisonment was in breach of the United Nations Charter. The Constitutional Court, whilst acknowledging that there was a constitutional duty on the government, dismissed his application for relief. The Court held that:

"[I]n the sphere of foreign policy, the Federal government, as all other organs with responsibility for political dealings, generally has more room for political manoeuvre and consequently wider discretion.

The scope of discretion in the foreign policy sphere is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control. In order to enable current political objectives of the Federal Republic of Germany to be achieved within the framework of what is permissible under international and constitutional law, the Federal Basic Law (GG) grants to the organs of foreign affairs wide room for manoeuvre in the assessment of foreign policy issues as well as the consideration of the necessity for possible courses of action."[182]

The Court continued:

"The Federal Government has maintained . . . that it has already undertaken the necessary steps to obtain the release of the Complainant, whose detention is a matter beyond its control. The Federal Government also wishes to continue to undertake further similar initiatives with the Occupying Powers. In so doing it is clearly aware of the Complainant's personal situation and the nature of his constitutional rights which are at issue . . . . The mere fact that the steps hitherto taken by the Federal Government have failed to produce the Complainant's release is certainly not, of itself, sufficient to give rise to a duty under constitutional law for the Federal Government to take specific further measures of possibly greater scope and consequence. It must be left to the Government to assess the foreign policy considerations in order to decide how far other measures are appropriate and necessary, bearing in mind the Complainant's interests as well as the interests of the community as a whole."[183]

[247] The approach adopted by the German Constitutional Court in this regard seems correct. In enforcing the obligation of the state to provide diplomatic representations, a court will pay due regard to the sensitivities of the conduct of foreign affairs and not presume knowledge and expertise that it does not have, nor substitute its opinion for the rational and lawful opinion of the government in respect of how best the obligation should be honoured.

The reliance on Mohamed's case

[248] Before I turn to the facts of this case, I wish to deal with one further issue. The applicants relied upon the judgment of this Court in Mohamed and Another v President of the RSA and Others[184] and argued that the facts of this case were no different to the facts of that case. In Mohamed, South African officials had colluded with officials from the United States of America to remove Mr Mohamed from South Africa and take him to the United States where he was wanted on charges of terrorism. No extradition proceedings were launched, and the court found that Mr Mohamed was not lawfully deported to the United States. After he had arrived in the United States, he launched urgent proceedings in the South African courts seeking a declaratory order that the conduct of the South African officials had been unlawful and in conflict with the Bill of Rights, and mandatory relief requiring the government urgently to intercede on his behalf with the authorities in the United States.

[249] This Court held that the government was ordinarily under an obligation to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country.[185] It also held that the procedure by which Mr Mohamed had been removed from South Africa was unlawful. The Court made a declaratory order to these effects, and instructed that it be brought to the attention of the court in which Mr Mohamed was being tried in the United States.

[250] In this case, the applicants submitted that they had been apprehended in Zimbabwe as a result of information passed to the Zimbabwean authorities by South African law enforcement officials. Although this was disputed on the papers, we were informed from the Bar by the respondents' counsel that it was admitted by them that an exchange of information had occurred between South African and Zimbabwean authorities. Given that the applicants were arrested immediately upon landing it seems likely, and I am prepared to assume in favour of the applicants, that their arrest in Zimbabwe did result from this exchange of information.

[251] The applicants further argued that the conduct of the South African officials in informing the Zimbabwean authorities of the imminent arrival of the applicants was conduct sufficient to give rise to an obligation upon the South African government to seek assurances from the other jurisdictions to which they were proffering information that the death penalty would not be imposed upon the applicants. This obligation, it was submitted, like the obligation in Mohamed, arose from the action of government officials.

[252] The Chief Justice rejects this argument and distinguishes Mohamed on the basis that the action of the state officials in that case had been unlawful and wrongful. He points to the fact that the exchange of information in this case is lawful, and indeed, a failure to pass information of a suspected coup to another state might constitute a breach of South Africa's international law obligations. Accordingly, the Chief Justice concludes that as the state officials had not acted unlawfully or wrongfully, the reasoning in Mohamed was not relevant.

[253] In my respectful opinion, this is not a valid basis upon which to distinguish that case. On my reading of Mohamed, it is clear that the Court would have held that there was an obligation upon the state to seek assurances that the death penalty would not be imposed or, if imposed, not carried out even were the extradition to have been otherwise lawful. This conclusion, it seems to me follows from passages such as the following in the judgment:

"It [The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] makes no distinction between expulsion, return or extradition of a person to another State to face an unacceptable form of punishment. All are prohibited, and the right of a State to deport an illegal alien is subject to that prohibition. That is the standard our Constitution demands from our government in circumstances such as those that existed in the present case."[186]

[254] Nor on my reading of Mohamed, can the facts in that case and this be distinguished on the basis that all the relevant facts took place in South Africa, for as in the case at hand, the application to this Court was only made after Mr Mohamed had arrived in the United States. Nor can the facts be distinguished on the ground that the applicants left voluntarily, for in Mohamed too, the Court was willing to accept that Mr Mohamed had consented to his removal from South Africa.

[255] In my view, there is a ground for distinguishing Mohamed from the present case, but it is not based on the lawfulness or otherwise of the conduct of state officials. It is based on the different types of state conduct in issue. When a state takes steps to deport or extradite a person to another country, it is an appropriate and practical time for the state to seek assurances to prevent the imposition or execution of the death penalty. On the other hand, when law enforcement officials exchange information about potential criminal conduct, it is not an appropriate time to seek such assurances. The need for the exchange of such information in our rapidly globalising world is indisputable. Without the timely exchange of information between different law enforcement agencies, international crime such as terrorism, drug trafficking, money laundering, crimes against humanity and unlawful mercenary activities will flourish. This has been recognised by the international community and a range of conventions and bilateral treaties have been adopted to foster such co-operation.[187] Were an obligation of the sort argued for by the applicants to be imposed upon South African government officials every time they engaged in such co-operative endeavours, the co-operative endeavours themselves might severely be hampered if not stalled entirely. The same cannot be said of imposing such obligations in respect of extradition or deportation. It is not necessary to decide in this case what legal consequences may flow from such co-operation were it to be established that it was undertaken mala fide or for an unconstitutional purpose. There is no suggestion that that was the case here.

[256] In my view, therefore, the facts of this case can be distinguished from the facts in Mohamed and the applicants' submissions in respect of that case must fail.

Application to facts of this case and the prayers for relief sought by the applicants

[257] In this case, I agree with the Chief Justice's reasoning in paragraphs 82-95, that the applicants have not made out a case to compel government at this stage to institute proceedings to extradite them from Zimbabwe to South Africa, or to obtain the release of the applicants by Zimbabwe.[188] Extradition only becomes possible when it is clear that a prima facie case on a criminal charge has been established against those whom the government wishes to extradite. On the papers before us, the prosecuting authority indicates that it has not completed its investigations, and accordingly the prayers of the applicants compelling government to seek to extradite them cannot succeed. Nor is it clear at this stage (particularly given that it is not clear what offences, if any, the applicants would be charged with in South Africa) that the double criminality principle would be met.[189]

[258] Prayers 4 and 5 of the notice of motion read as follows:

"4. Directing and ordering the Government to seek an assurance as a matter of extreme urgency from the Zimbabwean Government that the applicants will not be released or extradited to Equatorial Guinea.
5. Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean and Equatorial Guinea Governments, as the case may be, to not impose the death penalty on the applicants."[190]

It is clear that at international law the state is only entitled to institute diplomatic protection on behalf of its nationals when internationally recognised human rights norms have been infringed.

[259] As the Chief Justice makes clear in his judgment (at para 98), at this stage of the development of international law, capital punishment is not inconsistent with the principles of international law. Accordingly, the applicants cannot make out a claim based on the state's obligation to provide them with diplomatic protection that the South African government should seek assurances from the Zimbabwean and Equatorial Guinean governments in respect of the death penalty. To the extent that the applicants have a right to request government to make diplomatic representations on its behalf under section 3 of our Constitution, short of diplomatic protection, I agree with the reasoning of the Chief Justice (at paras 110-113) that the applicants have not established a basis for the grant of prayers 4 and 5.

[260] I also agree with the Chief Justice that prayers 6, 7 and 8 to the extent that they require the state to take steps to require another state to apply the provisions of our Constitution are not competent prayers. Concluding that the applicants are not entitled to relief on these prayers as formulated, however, is not the end of the enquiry.

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

[262] Article 5 of the African Charter on Human and Peoples' Rights provides that:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

And Article 7 of the same Charter provides:

"1. Every individual shall have the right to have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proven guilty by a competent court or tribunal;
(c) the right to defence, including the right to be defended by counsel of his choice;
(d) the right to be tried within a reasonable time by an impartial court or tribunal."

South Africa, Zimbabwe and Equatorial Guinea have all ratified the African Charter.[191] They are all therefore bound by its provisions.

[263] Article 7 of the International Covenant on Civil and Political Rights provides that:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

And Article 9 provides that:

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

And Article 10 that:

"1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons."

South Africa, Zimbabwe and Equatorial Guinea have also all ratified this convention[192] and all are accordingly also bound by these provisions. Moreover, it is clear that the right of an accused person to a fair trial is a fundamental international human rights norm[193] that forms part of customary international law.

[264] The European Court of Human Rights has recently held that it is a breach of customary international law where accused persons who face the possibility of the imposition of the death penalty are prosecuted in proceedings that fall short of the requirement of a fair trial.[194] As we do not know what charges the applicants will face in Equatorial Guinea, it is not necessarily the case that such a breach of customary international law may arise. It is however a consideration that renders the need for diplomatic protection for the applicants more acute.

[265] The Chief Justice has set out in his judgment in some detail at paras 116-121, the information that has been placed before this Court concerning the criminal justice system in Equatorial Guinea. I agree with him that this information originating as it does from well-respected international agencies concerned with the protection and promotion of human rights raises serious concerns about the criminal justice system in Equatorial Guinea and the question whether the applicants, should they be extradited to Equatorial Guinea, would face a fair trial in that country.

[266] The respondents' response to that evidence is that it constitutes the "opinion" of the agencies concerned, that it is not sufficient to "prove" the inadequacies of the criminal justice system in Equatorial Guinea and further that it is not the government's policy to comment on the criminal justice systems of

other countries. In argument before us the government persisted in this position, and argued that it was under no constitutional obligation to provide diplomatic protection to the applicants either at present, or if they face trial in Equatorial Guinea.

[267] Although it is quite clear that the consideration and assessment of another country's criminal justice system is a sensitive matter for our government, the demands of comity and sensitivity should not mean that government remains blind to the risk of egregious violation of human rights of its nationals by other jurisdictions. It is not only its constitutional obligation to take appropriate steps to provide diplomatic protection to its nationals that requires government to consider this matter, but the developing global and regional commitment to the protection of human rights also requires government to be responsive to these issues. It is not satisfactory therefore for government merely to say that it is not its policy to comment on the criminal justice system of other countries.[195] Counsel for the respondents did make it clear during argument that government was taking some steps in relation to this matter. However, no details of these steps were provided. In argument before this Court, and despite the contrary statement of the Deputy Minister of Foreign Affairs to the media,[196] counsel for the respondents continued to assert that government was under no constitutional obligation to take any steps on behalf of the applicants.

[268] I also do not agree, with respect, that the application is premature in relation to the relief sought in respect of Equatorial Guinea. It is not disputed on the papers that Equatorial Guinea has sought the extradition of the applicants, though the charges that they will face in Equatorial Guinea, if they are extradited there, are not clear at this stage. In my view, the extradition application gives rise to an appreciable risk that the applicants will be extradited to Equatorial Guinea, sufficient to give rise to an obligation upon the state to provide diplomatic protection. In the light of the constitutional obligation imposed upon government, and in the light of the range of evidence put before the Court to suggest that there may be a real risk that the applicants, if extradited to Equatorial Guinea might not receive a fair trial, and may then face the death sentence, there is a clear obligation upon government to take some appropriate steps to provide diplomatic protection to the applicants. It is not for this Court to determine what the appropriate steps should be, that is, at least in the first place, a matter for government.

[269] In my view, the appropriate relief would therefore be that a declaratory order be made by this Court with regard to the obligations of government. I am satisfied that declaratory relief is appropriate as the central issues argued in this Court were the question whether government bore such an obligation; and if it did so, the scope of its obligation and its justiciability. A declaratory order would assist government by delineating the constitutional obligation that exists. It would not, however, be appropriate for mandatory relief to be ordered, at this stage, as government is already taking steps to protect the applicants, and it is best placed to determine what steps should be taken to provide appropriate protection to the applicants in the circumstances.

[270] In conclusion, it should be stated that there can be no doubt that it is important that South African law enforcement agencies co-operate with the law enforcement agencies of other states to prevent the commission of crime and to facilitate the detection and effective prosecution of crime. Included within this injunction must be the obligation upon our government to take steps to minimise the threats that mercenary activity often presents to the independence, sovereignty and security of other governments. Nothing in this judgment suggests otherwise. However, in carrying out these tasks, it is imperative that internationally recognised human rights norms must not suffer. As part of a growing global commitment to the protection and promotion of fundamental human rights, our Constitution requires government to take appropriate steps to protect citizens who face the infringement of such norms. That obligation is an important one that reaffirms the primacy of human rights in our constitutional order, and the principle of constitutional democracy in South Africa.

[271] I would propose therefore that a declaratory order in the following terms be made:

It is declared that the First to Sixth Respondents are under a constitutional obligation to take appropriate steps to provide diplomatic protection to the applicants to seek to prevent the egregious violation of international human rights norms.

Mokgoro J concurs in the judgment of O'Regan J.

SACHS J:

[272] Section 198(b) of the Constitution makes it clear that one of the principles governing national security is:

"The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation."

Mercenary activities aimed at producing regime-change through military coups violate this principle in a most profound way. As the main judgment trenchantly establishes, the government is under a duty to act resolutely to combat them, the more so if they are hatched on South African soil.

[273] At the same time, section 199(5) provides that:

"The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."

This section emphasises that in dealing with even the most serious threats to the state, a noble end does not justify the use of base means. On the contrary, as I stated in S v Basson[197]

"none of the above should be taken as suggesting that because war crimes might be involved, the rights to a fair trial of the respondent as constitutionally protected are in any way attenuated. When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom."[198]

[274] The values of our Constitution and the human rights principles enshrined in international law are mutually reinforcing, interrelated and, where they overlap, indivisible. South Africa owes much of its very existence to the rejection of apartheid by the organised international community and the latter's concern for the upholding of fundamental human rights. It would be a strange interpretation of our Constitution that suggested that adherence by the government in any of its activities to the foundational norms that paved the way to its creation was merely an option and not a duty.

[275] I believe that the main judgment, with which I agree, as well as the two complementary judgments all underline the importance and correctness of the acceptance by the government of its constitutional obligations in the present matter. In my view, in their basic outline the judgments of Ngcobo J and O'Regan J are compatible with and give added texture to the principal judgment of Chaskalson CJ. I do not think that the present matter calls for a definitive position on all the doctrinal nuances of Mohamed.[199] Nor do I believe that a declarator concerning the government's obligations is required. Subject to keeping an open mind on Mohamed, I accordingly concur in the principal judgment, and with the order it makes. I also agree with the additional points of substance made in the two separate judgments. In my opinion, the government has a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair

trials and capital punishment. At the same time, the government must have an extremely wide discretion as to how best to provide what diplomatic protection it can offer.

For the applicants: Z. F. Joubert SC, B. J. Pienaar and T. Price instructed by Griebenow Attorneys.

For the respondents: I. A. M. Semenya SC, I. V. Maleka SC, M. Mphaga and E. Mokutu instructed by the State Attorney (Pretoria).

For the amicus curiae: W. Trengove SC, A. Katz and M. du Plessis instructed by the Society for the Abolition of the Death Penalty.

[1] Details of the charges are referred to in para 12 below. In the High Court there were 70 applicants, but on 5 July 2004, Simon Francis Mann, the sixty-ninth applicant in the High Court, lodged a notice of withdrawal from the proceedings in this Court.

[2] Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

[3] Barcelona Traction Light and Power Company Limited 1970 ICJ Reports 3; 46 ILR 178.

[4] Id at paras 78-9.

[5] Report of the International Law Commission on the work of its fifty-second session, 1 May to 9 June and 10 July to 18 August (2000) A/55/10 (ILC report). The full report of the Special Rapporteur is published as a General Assembly document, A/CN.4/506 (Special Rapporteur's report).

[6] Special Rapporteur's report above n 5 at 11.

[7] Dunn The Protection of Nationals: A Study in the Application of International Law (Johns Hopkins Press, Baltimore 1932) at 18.

[8] ILC report above n 5 at 146.

[9] Special Rapporteur's report above n 5 at 15.

[10] Above n 3.

[11] See Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 44; Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another intervening) 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 37; Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 20; S v Baloyi (Minister of Justice and Another intervening) 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 11.

[12] See para 44 below.

[13] African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity at the 18th Conference of Heads of State and Government on 27 June 1981, Nairobi, Kenya. Entry into force: 21 October 1986.

[14] International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, resolution 2200 (XXI) of 16 December 1966. Entry into force: 23 March 1976.

[15] 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).

[16] Id at para 106.

[17] Cf Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 45.

[18] Brownlie Principles of Public International Law 6 ed (Oxford University Press, Oxford 2003) at 287 and 289.

[19] Dugard International Law: A South African Perspective 2 ed (Juta, Cape Town 2000) at 133.

[20] Island of Palmas Case (Netherlands v United States) 2 RIAA 829 (1928) at 838.

[21] The Case of the S.S. Lotus (France v Turkey) (1927) PCIJ Series A, No. 10.

[22] Id at paras 18-19.

[23] Brownlie above n 18 at 301.

[24] Shaw International Law 4 ed (Cambridge University Press, Cambridge 1997) at 460-1.

[25] Id at 461.

[26] [1998] 2 SCR 597.

[27] Id at para 26.

[28] Id at para 46.

[29] Id at para 91.

[30] Id at para 124.

[31] Where there are formal agreements or informal acts of cooperation between states which sanction the one state's exercise of jurisdiction in the territory of the other, questions of sovereignty do not arise and thus nationals affected by their state's action in a foreign territory may conceivably invoke the protection of their Constitution – See in this regard the case of Reid v Covert 354 US 1 (1957).

[32] The difficulties are illustrated by decisions in a number of Canadian cases in which different approaches have been adopted by the judges dealing with them. See for instance, R v Cook above n 26 and the cases there referred to.

[33] Mohamed above n 11.

[34] Id at para 60.

[35] Id at para 70.

[36] Id at para 71 (footnote omitted).

[37] Id at para 62.

[38] Id at para 67.

[39] See para 90 below.

[40] United States v Burns [2001] 1 SCR 283 at para 72.

[41] "There can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter (s. 32). Equally, though, there cannot be any doubt that the Charter does not govern the actions of a foreign country; see, for example, Spencer v The Queen [1985] 2 SCR 278. In particular the Charter cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted." – Canada v Schmidt [1987] 1 SCR 500 at 518.

[42] "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States." – Neely v Henkel (No. 1) 180 US 109 (1901) at 123 cited with approval in Canada v Schmidt above n 41 at 525.

[43] Erasmus & Davidson "Do South Africans have a right to diplomatic protection?" (2000) 25 SA Yearbook of International Law 113.

[44] Id at 116 where the authors refer to a decision of a mixed claims commission between the United States and Germany where it was pointed out that there would be no action unless the injured national requests the state to act on its behalf – Administrative Decision No 5 (United States v Germany) (1924) 7 RIAA 119 as cited by Harris Cases and Materials on International Law 5 ed (Sweet & Maxwell, London 1998) at 521.

[45] South African Citizenship Act 88 of 1995.

[46] Nottebohm Case (Liechtenstein v Guatemala) 22 ILR 349 at 360.

[47] The Special Rapporteur's report (above n 5 at 12-13) highlights the controversy regarding the question of whose rights are asserted when a state exercises diplomatic protection on behalf of its national. Erasmus & Davidson also discuss this issue in their article (above n 43 at 116-7). In recent proceedings before the ICJ, South Africa adopted the attitude that the true beneficiary of the right asserted is the individual. In its written submissions to the Court, South Africa outlined its position as follows: "the locus of [international] human rights vests in the individual and not the Government" and the individual is "the beneficiary of at least a core of human rights and the protection so afforded". See page 22 of the written submissions submitted by the Government of the Republic of South Africa on 30 January 2004 to the ICJ in the matter of the request by the United Nations General Assembly for an Advisory Opinion on the legal consequences of the wall being built by Israel.

[48] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56.

[49] See para 70 below.

[50] Special Rapporteur's report above n 5 at 32.

[51] ILC report above n 5 at 156.

[52] Hess decision BVerfGE 55, 349; 90 ILR 386 where the Federal Constitutional Court held that "the Federal Government enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States" – at 395.

[53] Id at 396.

[54] Abbasi and Another v Secretary of State for Foreign and Commonwealth Affairs and Another [2002] EWCA Civ 1598.

[55] Id at para 106 iv-v.

[56] President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 13.

[57] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 38.

[58] Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 90.

[59] Section 179(1)(a) read with section 179(2) of the Constitution.

[60] Section 179(6) of the Constitution.

[61] Section 179(4) of the Constitution.

[62] Act 3 of 2000.

[63] Id section 1(b)(ff).

[64] As to the position prior to the Promotion of Administrative Justice Act, see: Gillingham v Attorney-General and Others 1909 TS 572; Wronsky en 'n Ander v Prokureur-Generaal 1971 (3) SA 292 (SWA); Highstead Entertainment (Pty) Ltd v Minister of Law and Order 1994 (1) SA 387 (C) at 394H where it is said that courts would be slow to interfere with such decisions. This is similar to the approach taken in the United Kingdom where courts have held that there is a power to review a decision not to prosecute, but it is a power that has to be "sparingly exercised" - R v Director of Public Prosecutions, ex parte C [1995] 1 Cr. App. R. 136 at 140.

[65] Act 15 of 1998.

[66] Id. As defined in paragraph (c) of the definition of foreign military assistance in section 1.

[67] Section 16 of the Zimbabwe Extradition Act provides:

"(1) Subject to section twenty-four, a request for extradition to a designated country in terms of this Part shall be submitted through channels to the Minister and shall be accompanied by-

(a) a warrant for the arrest of the person concerned specifying and giving particulars of the offence in respect of which his extradition is sought; and

(b) such evidence as would establish a prima facie case in a court of law in Zimbabwe that the person concerned has committed or has been convicted of the offence concerned in the designated country:

Provided that, if the order declaring the country concerned to be a designated country in terms of section thirteen so provides, the request may be accompanied by a record of the case in respect of the offence concerned, containing the particulars and documents referred to in subsection (2), and accompanied by-

(i) an affidavit, sworn statement or affirmation of an officer of the investigating authority of the designated country stating that the record was prepared by him or under his direction and that the evidence referred to therein has been preserved for use in court; and

(ii) a certificate of the Attorney-General of the designated country stating that, in his opinion, the record discloses the existence of evidence under the law of the designated country sufficient to justify a prosecution".

[68] As defined in paragraph (b) of the definition of foreign military assistance in section 1 of Act 15 of 1998.

[69] Section 14 of the Zimbabwe Extradition Act provides:

"(1) Subject to this Act, a person may be arrested, detained and extradited from Zimbabwe to a designated country in the manner provided for in this Part, for an offence in respect of which in the designated country he is accused or has been convicted and is required to be sentenced or to undergo punishment, whether the offence was committed before or after the declaration of the country concerned as a designated country.

(2) This Part shall apply to any offence which-

(a) is punishable in the law of the designated country concerned by imprisonment for a period of twelve months or by any more severe punishment; and

(b) would constitute an offence punishable in Zimbabwe if the act or omission constituting the offence took place in Zimbabwe or, in the case of an extra-territorial offence, in corresponding circumstances outside Zimbabwe."

[70] S v Makwanyane and Another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[71] See the discussion of this in Mohamed above n 11 at para 39 and Burns above n 40 at paras 85-92.

[72] See above para 57.

[73] Above n 11.

[74] See above paras 46-57.

[75] Above n 5 at 147.

[76] See International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd 1953 (3) SA 343 (W) at 346B.

[77] Above n 41.

[78] Above n 42.

[79] In the case of Öcalan v Turkey Application 46221/99, 12 March 2003, the European Court of Human Rights held the following at para 207:

"[T]o impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence".

[80] Above n 52.

[81] Id at 395.

[82] The International Law Commission has described diplomatic protection to mean "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" (see article 1 of the draft articles contained in the "First report on diplomatic protection" by John R Dugard, Special Rapporteur, 7 March 2000, published as a General Assembly document, A/CN.4/506 at 11 (Special Rapporteur's Report)). The Encyclopaedia of Public International Law gives a substantially similar definition of diplomatic protection and defines it as "the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law" (Dugard at 14, citing Geck "Diplomatic Protection" Encyclopaedia of Public International Law (1992) at 1046). For the purpose of this judgment I will use the term diplomatic protection to refer to the diplomatic intervention by a state to protect its nationals against a violation or threatened violation of the internationally recognised human rights of its nationals.

[83] Countries that have constitutionalised the duty to provide diplomatic protection include Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Vietnam and Yugoslavia. The Special Rapporteur's Report above n 1 at 30.

[84] Barcelona Traction Light and Power Company Limited 1970 ICJ Reports 3; 46 ILR 178 at paras 78-9.

[85] See paras 174-179 for further discussion of these sections.

[86] S v Makwanyane and Another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262.

[87] Preamble to the Constitution. See also Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (7) BCLR 687 (CC) at para 73:

"South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed 'to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms.' This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms."

[88] Section 1(a) of the Constitution.

[89] Section 7(1) states: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

[90] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 International Legal Materials 58 (1982), entered into force 21 October 1986.

[91] International Covenant on Civil and Political Rights, G.A.res. 2200A (XXI), 21 U.N.GAOR Supp. (No 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force on 23 March 1976.

[92] Above n 86 at para 144.

[93] See paras 198-202 and 207-208 which discuss state policy.

[94] See para 223 in the judgment of O'Regan J.

[95] Article 1 of the African Charter states that: "The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them." Zimbabwe and Equatorial Guinea have also ratified the African Charter.

[96] Id at Preamble.

[97] Above n 91 article 9.

[98] Id article 7.

[99] Zimbabwe did not ratify the ICCPR but there was an accession on 31 August 1991. Equatorial Guinea also submitted to an accession on 25 December 1987. Zimbabwe ratified the African Charter on 30 May 1986 and Equatorial Guinea ratified it on 7 April 1986.

[100] Thus under the African Charter, the government is entitled to take action against another state party where it has reason to believe that that State has violated a provision of the African Charter. Article 47 provides:

"If a State party to the present Charter has good reasons to believe that another State party to his Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of the State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available."

Article 49 provides:

"Notwithstanding the provisions of 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned."

[101] Written Statement Submitted by the Government of the Republic of South Africa, on 30 January 2004, to the International Court of Justice in the matter of the request by the United Nations General Assembly for an Advisory Opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory.

[102] See the Special Rapporteur's Report above n 1 at 10.

[103] Id (footnote omitted).

[104] Special Rapporteur's Report above n 1 at 30.

[105]Abbasi and Another v Secretary of State for Foreign and Commonwealth Affairs and Another [2002] EWCA Civ 1598.

[106] Above n 1 at 33 (footnotes omitted).

[107] Section 20 provides: "No citizen may be deprived of citizenship."

[108] Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 51.

[109] Section 21(3).

[110] Section 21(4).

[111] 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

[112] Id at para 31.

[113] Erasmus & Davidson "Do South Africans have a right to diplomatic protection?" (2000) 25 SA Yearbook of International Law 113.

[114] See above n 26.

[115] See in general Hopkins "Diplomatic Protection and The South African Constitution: Does a South African citizen have an enforceable constitutional claim against the government?" (2001) 16 SA Journal of Public Law 387.

[116] See paras 198-204.

[117] Hess decision BVerfGE 55, 349; 90 ILR 386 at 395.

[118] Above n 24 at para 106(iii).

[119] Id

[120] Hess above n 36.

[121] Above n 24 at para 104.

[122] Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC); 2002 (10) BCLR 1075 (CC) at para 99.

[123] Above paras 160-161.

[124] Above paras 174-179.

[125] Customary international law constitutes those binding rules of international law which are "evidence of a general practice [of states] accepted as law". (Article 38 of the Statute of the International Court of Justice). See the discussion in Brownlie Principles of Public International Law 6 ed (Oxford University Press, Oxford 2003) at 6-12.

[126] See First Report of the Special Rapporteur on Diplomatic Protection to the International Commission of Jurists, International Law Commission, 52nd Session, 2000 (A/CN.4.506) at paras 33-34.

[127] Geck "Diplomatic Protection" in Encyclopaedia of Public International Law (1992) at 1046, cited in the First Report of the Special Rapporteur on Diplomatic Protection above n 2 at para 38.

[128] See the distinction drawn by Warbrick between diplomatic representations, on the one hand, and diplomatic protection, on the other in "Diplomatic Representations and Diplomatic Protection" (2002) 51 International and Comparative Law Quarterly 723 at 724-5. See also article 5 of the Vienna Convention on Consular Relations which lists consular functions.

[129] See the discussion in the First Report of the Special Rapporteur on Diplomatic Protection, above n 2 at paras 41 ff.

[130] See Dunn The Protection of Nationals: A Study in the Application of International Law (Johns Hopkins Press, Baltimore 1932) at 18-20.

[131] Barcelona Traction, Light and Power Company Limited Case 46 ILR 178 at paras 78-9.

[132] Above n 2 at para 15.

[133] Id at para 31. Perhaps the most effective international law remedies for the protection of international human rights norms are provided by regional human rights courts. A Protocol to the African Charter on Human and Peoples' Rights establishing an African Court on Human and Peoples' Rights entered into force on 25 January 2004 after receiving sufficient ratifications. The Court should, thus, be established shortly.

[134] At least one commentator expressly states that diplomatic protection may be instituted in the face of the threatened infringement of human rights. See Dunn above n 6 at 18 where he states that "[Diplomatic protection] embraces generally all cases of official representation by one government on behalf of its citizens of their property interests within the jurisdiction of another, for the purpose, either of preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained."

[135] See, for example, President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 8-10, in which the Court held that the prerogative powers under previous constitutions were now those enumerated in our new Constitution; Pharmaceutical Manufacturers Association of South Africa: In re Ex parte the President of the RSA 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 19.

[136] Section 2 of the Constitution.

[137] Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54.

[138] Section 7(2) of the Constitution.

[139] 2004 (7) BCLR 687 (CC) at para 73.

[140] See also the judgment of Mahomed J in S v Makwanyane and Another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262.

[141] Section 232 of the Constitution.

[142] Section 39(1)(b) of the Constitution.

[143] Section 233 of the Constitution.

[144] Ratified on 10 December 1998.

[145] Ratified on 10 December 1998.

[146] Ratified on 15 December 1995.

[147] Ratified on 10 December 1998.

[148] Ratified on 16 June 1995.

[149] Ratified on 9 July 1996.

[150] These prayers sought the following:

"6. Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa (the Constitution) are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

7. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants' right to freedom and security of person including the rights not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

8. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants' right to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be."

[151] See, for example, The Case of the S. S. Lotus (1927) PCIJ Ser A, no 10 in which the International Court of Justice stated that:

"Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international customor convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law."

[152] [1998] 2 SCR 597 at para 46.

[153] At paras 142-144 of his judgment.

[154] Section 8(1).

[155] Section 7(2) of the Constitution.

[156] See for example article 69(3) of the Hungarian Constitution which provides that: "Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary, during his/her legal staying abroad", as cited in Lee Consular Law and Practice 2 ed (Oxford University Press, Oxford 1991) at 125. The Special Rapporteur on Diplomatic Protection to the ICJ also mentions the Constitutions of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Turkey, Ukraine, Vietnam and Yugoslavia. See First Report on Diplomatic Protection above n 2 at para 80.

[157] Section 19.

[158] Section 20.

[159] Section 21(3).

[160] Section 21(4).

[161] Section 22.

[162] 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

[163] Id at para 31. See also Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 44.

[164] See, for example, the classic reasoning in the Mavromattis Palestine Concession (Jurisdiction) Case, PCIJ Reports, series A, no 2, at 12 where the International Court of Justice reasoned as follows:

"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."

This traditional view has its origins in the writings of Vattel in the 18th century. See Vattel The Law of Nations (1758) chap VI at 136. However, see the more contemporary reasoning of the Umpire in the Mixed Claims Commission between the US and Germany quoted by Erasmus and Davidson in "Do South Africans have a right to diplomatic protection?" 2000 (25) SA Yearbook of International Law 113 at 119.

[165] See the discussion in the First Report of the Special Rapporteur on Diplomatic Protection above n 2 at paras 18-19.

[166] See the Written Statement submitted by the Government of the Republic of South Africa to the International Court of Justice on 30 January 2004 in respect of the request of the United Nations General Assembly for an advisory opinion on the legal consequences of the construction of a wall by Israel in the occupied Palestinian territory.

[167] Section 9 provides that:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to promote or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[168] Shaw International Law 4 ed (Cambridge University Press, Cambridge 1997) at 462-463.

[169] Brownlie above n 1 at 388. See also the Nottebohm Case (Liechtenstein v. Guatemala) 1955 ICJ 4, which dealt with the issue of fraudulent naturalisation.

[170] Dugard International Law: A South African Perspective 2 ed (Juta, Cape Town 2000) at 209.

[171] Iran-United States Case No. A/18 (1984-1) 5 Iran-USCTR 251, Iran-United States Claims Tribunal discussed in Aldrich The Jurisprudence of the Iran-United States Tribunal (Clarendon Press, Oxford 1996) at 56-7. The issue was whether the Tribunal had jurisdiction over claims against Iran by persons who were, under US law, citizens of the US and who were, under Iranian law, citizens of the Islamic Republic of Iran. The Tribunal held that it did have jurisdiction where the dominant and effective nationality of the claimant during the relevant period was that of the United States. For further discussion of the case, see Dixon & McCorquodale Cases and Materials on International Law 4 ed (Oxford University Press, New York 2003) at 423.

[172] Brownlie above n 1 at 388.

[173] Shaw above n 44 at 463.

[174] Section 84(2)(h).

[175] Section 84(2)(i).

[176] Section 231(1).

[177] See, for example, article 32 of the German Basic Law; article 73(2) of the Constitution of Japan; and article 29.4 of the Irish Constitution. In many countries, the foreign policy power arises from the prerogative and is therefore not expressly set out in the Constitution. This is so in the United Kingdom, see de Smith Constitutional and Administrative Law 5 ed (Penguin Books, Middlesex 1985) at 151.

[178] See Hugo above n 11; President of the Republic of South Africa and Others v South African Rugby Football Union and Others (3) 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC); Pharmaceutical Manufacturers above n 11.

[179] Id SARFU at para 143.

[180] See Pharmaceutical Manufacturers above n 11 at paras 20 and 90.

[181] Bato Star above n 15 at para 48.

[182] See Rudolf Hess case (Case No 2 BvR 419/80) reported in 90 ILR 386 at 395-396.

[183] Id. See also the Cruise Missile case 66BVerfGE 30 (1983).

[184] 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

[185] Id at para 42.

[186] Id at para 59. See also para 63 where the Court reasoned as follows:

"An indispensable component of such consent would be awareness on the part of Mohamed that he could not lawfully be delivered by the South African authorities to the United States without obtaining an undertaking as a condition to such delivery that if convicted the death sentence would not be imposed on him or, if imposed, would not be carried out."

[187] See, for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, article 9(1) of which provides that:

"The Parties shall co-operate closely with one another, consistent with their respective domestic legal and administrative systems, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of offences established in accordance with article 3, paragraph 1. They shall, in particular, on the basis of bilateral or multilateral agreements or arrangements:

a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences established in accordance with article 3, paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities;

b) Co-operate with one another in conducting enquiries, with respect to offences . . . having an international character . . .;

c) In appropriate cases and if not contrary to domestic law, establish joint teams, taking into account the need to protect the security of persons and of operations, to carry out the provisions of this paragraph . . .;

d) Provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;

e) Facilitate effective co-ordination between their competent agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers."

See also article 10 of the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970.

[188] This relief was sought in prayers 2 and 3 of the notice of motion as follows:

"2. Directing and ordering the Government of the Republic of South Africa ("the Government") to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of

the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

3. Declaring that the Government of the Republic of South Africa ("the Government") is, as a matter of law, entitled to request the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa."

[189] Section 14 of the Revised Edition of the Extradition Act of 1996 (Zimbabwe) makes it a requirement that extradition may not take place unless the offence for which the person is extradited is an offence both under Zimbabwean law and under the law of the extraditing country.

[190] At the hearing, applicants' counsel asked for the relief sought in paragraph 4 of the notice of motion to be modified. The reformulated relief is set out in the judgment of the Chief Justice at para 109. The reformulation of the relief does not affect the reasoning in these paragraphs.

[191] South Africa signed and ratified the Charter on 9 July 1996; Zimbabwe signed the Charter on 20 February 1986 and ratified it on 30 May 1986; and Equatorial Guinea signed the Charter on 18 August 1986 and ratified it on 7 April 1986.

[192] Equatorial Guinea ratified the Covenant on 25 December 1987; Zimbabwe ratified it on 13 August 1991 and South Africa ratified it on 10 March 1999.

[193] Article 10 of the Universal Declaration of Human Rights provides that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[194] See, Öcalan v Turkey Application 46221/99, 12 March 2003, in which the European Court on Human Rights held at para 207 that:

"[T]o impose the death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. . ."

[195] It is true that the attitude of the respondents as set out in the answering affidavits is different to the attitude taken by the Deputy Minister of Foreign Affairs in the television interview referred to in para 242 above.

[196] Id

[197] S v Basson 2004 (6) BCLR 620 (CC).

[198] Id at para 128.

[199] Mohamed and Another v President of the Republic of South Africa and Others 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).