The Company One Keeps: The *Khadr II* Litigation in its International and Comparative Legal Context

by

Robert Leslie Desmond Smith

A thesis submitted in conformity with the requirements for the degree of Masters of Law

Faculty of Law
University of Toronto

© Copyright by Robert Leslie Desmond Smith 2011
Abstract

This thesis examines the extent to which the judiciary can intervene into the executive branch’s power over foreign affairs. This thesis focuses on the Supreme Court of Canada’s decision in Canada (Prime Minister) v. Omar Khadr, 2010 SCC 3 where Omar Khadr requested the judiciary to order the executive branch to request his release from American custody in Guantanamo Bay, Cuba. The Supreme Court refused Khadr’s request, but issued a declaratory order stating that Khadr’s rights had been violated by the Canadian government. This thesis places this decision, and its follow-on litigation, in its international and comparative context by examining the international law of diplomatic protection as well as three cases, one from the United Kingdom, one from South Africa and one from West Germany. After examining the context, this thesis concludes that the Supreme Court’s decision, although flawed, was reasonable.
Acknowledgments

I would like to thank Professor Kent Roach of the University of Toronto, Professor Bruce Ryder of Osgoode Hall Law School, my SJD advisor Mr. Umut Osuz, David Quayat of Lenczner Slaght Royce Smith Griffin LLP, Justice Michel Shore of the Federal Court of Canada, Mireille Legault, Ms. Justine Wai and my parents for all their help, encouragement and support.

This thesis is dedicated to the memory of Desmond Maurice Smith.
# Table of Contents

Acknowledgments................................................................................................................. iii

Table of Contents.................................................................................................................. iv

1 Introduction............................................................................................................................. 1

2 International Law .................................................................................................................. 3
   2.1 The Importance of International Law to Domestic Requests for Diplomatic Protection . 14

3 Abbasi: Foreign Affairs and Administrative Law................................................................. 16

4 Kaunda .................................................................................................................................. 20

5 Hess ...................................................................................................................................... 35

6 Khadr II ................................................................................................................................. 39

7 Criticism of an Interventionist Remedy............................................................................. 54
   7.1 United States v. Burns .................................................................................................... 59

8 Conclusion............................................................................................................................... 61

Bibliography ............................................................................................................................ 66
1 Introduction

This thesis examines the problem of judicial intervention into the executive’s foreign affairs power. Specifically, this thesis seeks to comment on the extent to which the judiciary can place a duty on the executive branch to use its foreign affairs power to make diplomatic representations to a foreign government in order to protect a national who is suffering violations of his or her human rights in that foreign state. The primary focus of this thesis is the Supreme Court of Canada’s decision in Canada (Prime Minister) v. Khadr\(^1\) where the Court held that Mr. Khadr’s rights under the Charter of Rights and Freedoms\(^2\) were violated by the Canadian government when Canadian agents questioned him early in his detention in Guantanamo Bay, Cuba and that those violations were ongoing for as long as he was imprisoned there. In spite of this finding, the Supreme Court decided that it would be “prudent” to not grant a mandatory remedy requiring the government of Canada to request Khadr’s repatriation. Instead, the Court merely declared that Khadr’s rights were violated and left any remedial action up to the executive branch’s discretion.\(^3\) Several months after the release of Khadr II Justice Zinn\(^4\) of the Federal Court of Canada issued a judgment in which he interpreted the Supreme Court’s holding and contemplated imposing a more interventionist remedy. Justice Zinn retained jurisdiction to ensure that action was taken by the executive branch.\(^5\) Although the Supreme Court’s remedy

---

\(^1\) *Canada (Prime Minister) v. Omar Khadr*, 2010 SCC 3. (“Khadr II”).


\(^3\) Supra note 1 at para 47.


\(^5\) Ibid at page 36.
has been criticized from a strictly domestic law point of view, its decision is reasonable if the international and comparative law on the topic of judicial intervention into the conduct of foreign affairs is taken into account. The same analysis shows that Justice Zinn’s proposed interventionist remedy may overstep the proper bounds of judicial power due to functional concerns about the proper role of the judiciary and the limits of its institutional competency.

This thesis examines the decision in *Khadr II* in light of the foreign precedents of *Abbasi*\(^6\), *Kaunda*\(^7\) and *Hess*\(^8\). Each of these cases approaches the question of judicial intervention into the executive’s power over foreign affairs in a different manner. For instance, *Abbasi* and the majority’s judgment in *Kaunda* examine the manner in which executive discretion can be limited through administrative law, whereas the minority judgments in *Kaunda* and the judgment in *Hess* examine the question through constitutional limitations. However, as will be shown, each of these cases recognize the importance of executive discretion. In addition to these cases, the international law of diplomatic protection places diplomatic representations in favour of persons detained abroad at the discretion of the national’s state of nationality.

In order to understand the remedies in *Khadr II* and *Khadr III* one must begin by understanding the legal context of the cases. The legal context of the requested repatriation remedy is the international law of diplomatic protection. Although the Supreme Court of Canada did not explicitly refer to the international law of diplomatic protection it forms part of the


context of *Khadr II* and of other cases on this topic because of the link between the requested remedy and international relations.

## 2 International Law

The question often asked in cases such as *Khadr II* is whether there is a domestic legal obligation on the government to use its foreign affairs powers in a certain manner in this particular case. Phrasing the question in this manner ignores its important international law dimension. As a result of the inherently international nature of *Khadr II*, international law must be taken into account by a court seeking to determine how tightly the executive’s foreign affairs powers can or should be controlled. This section will establish the discretionary nature of international relations, which forms part of the legal background of this thesis and of any case with facts similar to *Khadr II*.

The first point to be made is that international law is formulated differently than domestic legal systems. Ernst-Ulrich Petersmann states that while domestic constitutions may be intended to protect human rights within a state, international law is “power-oriented.” Gerhard Erasmus and Lyle Davidson argue that in the context of domestic law “the rule of law and constitutionalism may prevail”, but in the context of international law “states (with their claim to sovereign equality) rule.”

---


Under international law states are entitled to protect their nationals who are detained abroad by exercising the right of diplomatic protection. Diplomatic protection is a doctrine of international law stretching back to 1758 when Emmerich de Vattel stated that “whoever uses a citizen ill indirectly offends the State, which is bound to protect the citizen.” Natalie Klein and Lise Barry state “[t]he right of diplomatic protection involves a state asserting the claim of its national against another state as if the claim were its own.” The International Law Commission’s special rapporteur on the topic (whose work will be detailed below) defines diplomatic protection as an “action taken by the 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.” Since states, not individuals, are the subjects of international law diplomatic protection is a discretionary right held by states. As a result, an individual has no guarantee that his or her state will exercise diplomatic protection for his or her benefit.

As will be shown throughout this thesis, the international law position is mirrored by the discretion given to the executive branch of government under the Canadian constitution and most

12 Ibid. E. de Vattel, Law of Nations (1833), at 161.
14 (“ILC”)
17 Ibid.
other constitutions around the world. Erasmus and Davidson argue that “[t]his restrained domestic approach seems to be the result of the same thinking which dominates the international debate, namely that the world of sovereign states requires almost complete deference to the state and a strict distinction between national (municipal) and international (foreign) affairs.”

A number of voices have called for reform of the law of diplomatic protection to make it less of a discretionary political act and more a predictable tool to be used to vindicate the human rights of individuals who are outside of their state of nationality. The ILC began studying the possibility of codifying and reforming the law of diplomatic protection in 1996. Professor John Dugard, the ILC’s second special rapporteur on the topic, was of the opinion that the law of diplomatic protection ought to be reformed in favour of individuals and proposed, in his first report on diplomatic protection, the following article be adopted by the General Assembly:

Article 4

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State.

2. The State of nationality is relieved of this obligation if:

(a) The exercise of diplomatic protection would seriously endanger

---

18 Supra note 9 at page 117.
the overriding interests of the State and/or its people;

(b) Another State exercises diplomatic protection on behalf of the injured person;

(c) The injured person does not have the effective and dominant nationality of the State.

3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.20

In his commentary to Article 4, Dugard wrote that “[w]hile the instrument of diplomatic protection may be seen as an instrument for the furtherance of the international protection of human rights, it is not possible to describe diplomatic protection as an individual human right”21 at the time he drafted the article. Therefore, he proposed this Draft Article de lege ferenda (“with a view to the future law”).22

David Bederman writes that the traditional “postulates of diplomatic protection seem to conflict outright with some of the fundamental premises of human rights claims, notably the autonomy of the individual to seek redress for injury irrespective of the position of his state of nationality.”23 This sentiment is echoed by Dugard who wrote “[a]liens are still in need of protection. Human rights instruments do not grant them effective remedies except in a minority

20 Supra note 13 at para 74.
21 Ibid at para 77
22 Supra note 5 at para 31.
of cases. Diplomatic protection remains an effective institution for the protection of a state’s nationals abroad.”  

24 Individuals, such as Mr. Khadr, possess human rights pursuant to international law, but in some cases depend on the discretionary action of their states to enforce those rights. Erasmus and Davidson argue that the tension between the domestic rule of law approach and the state-bound international law approach has “no logical explanation other than the claim that sovereignty is the building block of the international order.”  

25 Although the authors may have a point about the questionable foundation of the international doctrine of diplomatic protection, that basis is a fact which this thesis accepts, as it is important to the approach taken by domestic courts in this area. 

Dugard writes that “[t]he greatest weakness of diplomatic protection is that it is left entirely to the state of nationality to decide whether or not to exercise diplomatic protection on behalf of its national.”  

26 Dugard cites the International Court of Justice (“ICJ”) in Barcelona Traction  where the ICJ held “[t]he State must be viewed as the sole judge to decide whether its protection will be granted, and to what extent it is granted, and when it will cease. 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.”  

28 Dugard enunciated his vision for reforming the law of diplomatic protection in the following terms:

24 Supra note 13 at para 79.
25 Supra note 9 at page 117.
26 Ibid at page 80.
The right of a state to protect a national when it pleases and whether it pleases has no place in contemporary international law. 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.²⁹

Unfortunately for Dugard and other champions of law reform, only 19 of his 27 proposed draft articles were approved by the participants of the International Law Commission.³⁰ Draft Article 4 was among those rejected.³¹ United Nations press releases from 2000 show that a majority of states participating in the Sixth Committee (Legal), which reviewed the ILC’s Draft Articles did not support the idea that there should be a duty placed on states to exercise diplomatic protection. Instead, the record shows that states preferred the traditional position that diplomatic protection is discretionary.³²

Vasileios Pergantis argues that reformers such as Dugard fail to capture the “political essence” of diplomatic protection.³³ Pergantis argues that any attempt to change diplomatic protection from a discretionary state power to a state obligation to be used for the furtherance of

---

²⁹ Dugard, ibid.

³⁰ Supra note 10 at page 111.

³¹ Dugard, supra note 28 at page 79.


³³ Supra note 19 at page 354.
human rights “represents a utopian vision of international law inspired by humanistic ideals, which are not directly transposable into the institution of diplomatic protection.”

Pergantis also notes that Draft Article 4 was criticized as being potentially ineffective because of the inclusion of paragraph (2)(a). Recall that paragraph 4(2)(a) would have allowed states to refuse the otherwise mandatory exercise of diplomatic protection if such an exercise could “seriously endanger the overriding interests of the State and/or its people”. Pergantis argues that the inclusion of this paragraph “rendered the application of the Article dependent on the political considerations Professor Dugard had tried to circumvent.” Thus, the political, discretionary nature of international law must be reckoned with, even in the context of international law reform.

Pergantis concludes with the following warning against innovation in the area of diplomatic protection:

Generally speaking, even if some of the novel constructions analyzed in this chapter stand the test of time, we wonder whether the recognition of an obligation to exercise diplomatic protection can be considered as a triumph of effectiveness. As eminent scholars have stressed, such an evolution could either create serious frictions between States, as there would probably be a flood of requests for the exercise of diplomatic protection that States would be obliged to take into account, or the constant invocation thereof could lead to its weakening and trivialization. In our view, the reality is that diplomatic protection remains a highly political institution that cannot be turned into a

34 Supra note 19 at page 353.
36 Supra note 19 at 378.
duty for the State on the basis of a misconceived idea of effectiveness because ultimately it will become a completely inoperative mechanism. 37

The rejection of Draft Article 4 has already influenced foreign case law related to the exercise of diplomatic protection. 38 The appellant in Abbasi referred to Dugard’s First Report on Diplomatic Protection 39 as evidence that national governments should be under a duty to exercise diplomatic protection in favour of a national whose international human rights are at risk abroad if the national is unable to bring a claim before an international court or tribunal. 40 However, the appellant also recognized that Dugard’s proposal was de lege ferenda (“with a view to the future law”) and had not been accepted by all state parties to the ILC. 41

The case of Kaunda contains a more thorough reference to international law. In that case, Chaskalson C.J., writing for the majority, noted the discretionary nature of diplomatic protection. 42 The government of South Africa submitted that it would consider the request of the 69 individuals, but also submitted that the executive branch, not the judiciary is “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.” 43 Chaskalson C.J. noted the work of Dugard and the ILC and held that:

37 Ibid at page 393.
38 See Dugard, supra note 28, at page 82.
39 Supra note 15.
40 Supra note 5 at para 40.
41 Ibid at para 41.
42 Supra note 6 at para 23.
43 Ibid at para 24.
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.\(^44\)

Examining the South African constitution, the majority noted that section 233 provides that legislation is to be reasonably interpreted consistently with international law.\(^45\) However, as has been noted, the majority held that no right to diplomatic protection exists in international law.\(^46\) The majority noted that “[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.”\(^47\)

Writing a separate judgment\(^48\) Ngcobo J. also recognized the lack of a legal duty _per se_ under international law and instead focused on the influence of international law on the constitution of South Africa. Ngcobo J. held that the constitution of South Africa “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

\(^44\) Ibid at para 29.
\(^45\) Ibid at para 33.
\(^46\) Ibid at para 34.
\(^47\) Ibid at para 35.
\(^48\) Ibid at para 146.
freedoms.” Ngcobo J. went on to hold “[o]ur democratic state is therefore committed to the advancement and protection of fundamental human rights.” Ngcobo J. also noted that South Africa’s commitment to human rights is “also apparent in the ratification of the African Charter on Human and Peoples’ Rights … and the International Convention on Civil and Political Rights”. Ngcobo J. laid out his approach to the question of whether there exists a duty on the executive branch to use its right to diplomatically protect its nationals in the following manner:

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.” 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. (Footnotes omitted).

Ngcobo J. then scrutinized the *African Charter on Human and Peoples’ Rights* and the *International Convention on Civil and Political Rights* and held that “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.

---

49 Ibid at para 156.
50 Ibid at para 156.
51 Ibid at para 158.
52 Ibid at para 159.
These international instruments should therefore inform the government’s foreign policy.”

Ngcobo J. went on to hold that these international instruments mean that the South African government cannot stay silent when other member states to these instruments violate human rights.

Ngcobo J. noted that the rights enshrined in the two instruments mentioned above sometimes lack effective remedies. Continuing with this point, Ngcobo J. cited Dugard for the proposition that diplomatic protection is a potentially effective remedy for the vindication of the international human rights possessed by persons outside of their state of nationality. Ngcobo J. held that “[d]iplomatic 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.” Ngcobo J. concluded in the following manner:

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.

55 Ibid at para 162.
56 Ibid at para 163.
57 Ibid at para 166.
58 Ibid at para 167.
59 Ibid at para 169.
In spite of his earlier statements, Ngcobo J. went on to hold that the exercise of diplomatic protection is in the purview of the executive branch and that the executive deserves a wide measure of discretion in the use of this power because “it is a better judge of whether, when and how to intervene.”

2.1 The Importance of International Law to Requests for Diplomatic Protection

One can adopt different views of the appropriateness of the Supreme Court’s remedy depending on how one views the interaction between international law and domestic law. The two classic approaches to this interaction are dualism and monism. Dualism “posits that international and domestic legal systems exist in complete legal isolation from one another.” Any conception of the problem in Khadr II as one which turns solely on the existence of a domestic constitutional obligation (whether it be positive or remedial in nature) is dualist because it treats the domestic remedy as existing independently of the dictates of international law. Such dualism is misplaced in cases like Khadr II.

In contrast to dualism, monism does not dictate a strict separation between international and domestic law. Instead, monism tends “to view law as an organic whole governing a continuum of subjects and subject matter.” When a court makes orders which seek to remedy a situation which is entirely in the hands of another sovereign state, international law is necessarily implicated and ought to be taken into account.

60 Ibid at para 172.
61 Supra note 14 at page 220.
62 Ibid at page 221.
For example, in *Khadr II* the applicant sought to order the Canadian government to use diplomatic measures to get the government of the United States to agree to, in effect, waive its sovereignty over Mr. Khadr and return him to Canada (or to take some other action). John Currie states that “[d]ualism … treats international and domestic law as operating in completely different spheres.”63 Such a distinction is impossible in cases where the only way that a rights violation can be remedied lies with the cooperation of a foreign state.

Dualists may argue that the international law of diplomatic protection is irrelevant to *Khadr II* because the case centered on the existence of an obligation for the executive to take action based on the demands of the domestic constitution. This criticism does not recognize the important context that international law provides. A judicial order requiring the executive to make representations on behalf of an injured person is automatically thrust into the chaos of international relations with its characteristic uncertainty and secrecy caused by the sovereign equality of states. Any such domestic legal obligation does not exist in a vacuum because, in the Canadian context at least, such an obligation is not explicitly provided for in the constitution (even in states where such an obligation is explicitly provided for in the constitution, the justiciability of such provisions is unknown64). As a result, the remedy requested in *Khadr II* requires the interpretation of a court, the members of which may be apprehensive about pronouncing on the wisdom of the foreign policy of the executive branch. Law does not flourish when there is uncertainty and secrecy. Also, as Pergantis argues, diplomatic protection is essentially a political institution. It is possible that judicial orders requiring the government to

63 Ibid.
64 See Forcese, supra note 10, at page 112.
take steps that it does not otherwise want to take will weaken the impact of any representations. As Erasmus and Davidson conclude, “as far as diplomatic protection of the individual is concerned, the positivist, state-bound view of international law still rules.”

International law, with its focus on states and not individuals, places barriers against courts making mandatory orders on the executive which impact the international realm. One can see that international law’s focus on sovereign equality is such an obstacle because it prevents the certainty and effectiveness which would allow a court to make an order confident that its dictates could be fulfilled. The non-adoption of Dugard’s Draft Article 4 reinforces this reality because it shows an unwillingness to change the institution of diplomatic protection.

3 Abbasi: Foreign Affairs and Administrative Law

In the case of Abbasi, the Court of Appeal of England and Wales examined how the judiciary can control the executive in this area of law through non-constitutional means. The facts of Abbasi are similar to Khadr II. Feroz Ali Abbasi is a British national who was captured by US forces in Afghanistan and was sent to Guantanamo Bay in January 2002. At the time of the hearing before the UKCA, Mr. Abbasi had been detained for eight months without access to any legal process or to a lawyer. Mr. Abbasi’s mother brought this claim on his behalf arguing that his right against arbitrary detention was being infringed.

65 Supra note 9 at 117.
66 Supra note 5.
67 (“UKCA”)
68 Supra note 5 at para 1.
The UKCA held that the essence of Mr. Abbasi’s claim was that he “was subject to a violation by the United States of one of his fundamental human rights and that, in these circumstances, the Foreign Secretary owed him a duty under UK public law to take positive steps to redress the position, or at least to give a reasoned response to his request for assistance.”\(^{69}\) Specifically, according to the applicants’ claim, Mr. Abbasi requested that the UKCA declare that the government of the United Kingdom was “under a duty to take all reasonable steps within their jurisdiction to cause, seek or require the government of the United States” to perform some action with regard to Mr. Abbasi.\(^{70}\)

The UKCA held that it could provide “no direct remedy” to Mr. Abbasi because he was under the control of the United States.\(^{71}\) This fact forms the crucial component of all the cases studied in this paper: the court cannot order the release of the litigant applying for assistance. The court can make no order that will directly improve the situation of the applicant. The only enforcement mechanism for the court’s order is the political action of the executive branch.

Another question the UKCA answered was whether the conduct of the Secretary of State in making his/her decision to make or not make diplomatic representations was justiciable and therefore reviewable by the court.\(^{72}\) The UKCA cited the House of Lords’ decision in *Council of Civil Service Unions v. Minister for the Civil Service*\(^{73}\), where the Lords held that the mere fact

\(^{69}\) Ibid at para 25.  
\(^{70}\) Ibid at para 23.  
\(^{71}\) Ibid at para 67.  
\(^{72}\) Ibid at para 80.  
that a power came from the royal prerogative did not make it immune from judicial review.74 Instead, the Lords held that what made government action justiciable was “not its source but its subject matter.”75 The UKCA distilled these statements and held that they “indicate that the issue of justiciability depends, not on general principles, but on subject matter and suitability in the particular case.”76

Although the subject matter was found to be justiciable, the UKCA held that the executive branch should be given a wide measure of discretion. Specifically, the court held that it was sufficient for the UK government to consider a request for diplomatic protection and that the court would not review the executive’s decision unless it was either irrational or contrary to the legitimate expectation of the applicant.77 The UKCA cited Hess, discussed below, for the proposition that the government has wide discretion in deciding whether and how to make diplomatic representations.78

The UKCA laid out the limits of the judiciary’s deference by holding:

The extreme case where judicial review would lie in relation to diplomatic protection would be if the Foreign and Commonwealth Office were, contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated. In such, unlikely, circumstances

74 Supra note 5 at para 83.
75 Ibid at para 84, supra note 73 at page 407.
76 Ibid at para 85.
77 Supra note 12 at page 16.
78 Supra note 5 at para 102.
we consider that it would be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant’s case.\textsuperscript{79}

This “duty to consider” is repeated by the majority’s judgment in the South African case of \textit{Kaunda}, discussed below.

The UKCA noted representations and policy made by the Foreign and Commonwealth Office which was capable of giving rise to a legitimate expectation.\textsuperscript{80} The policy provided that the government of the UK would consider making diplomatic representations if the applicant had exhausted local remedies and could provide evidence of a miscarriage of justice.\textsuperscript{81} The UKCA then turned to the nature of the expectation and held that “[t]he policy statements … underline the very limited nature of the expectation.”\textsuperscript{82} The UKCA held that the citizen’s legitimate expectation is that his or her request will be considered and that all relevant factors, including foreign policy considerations, will be examined by the relevant officials when making their decision.\textsuperscript{83}

The UKCA concluded that, while the judiciary has the power to judicially review decisions made by the government about when and how to protect British citizens abroad, the

\textsuperscript{79} Ibid at para 104.
\textsuperscript{80} Ibid at para 87.
\textsuperscript{81} Ibid at para 90.
\textsuperscript{82} Ibid at para 99.
\textsuperscript{83} Ibid at para 99.
court may not enter into the “forbidden areas”, such as decisions concerning foreign policy.\(^{84}\) As such, the UKCA held:

> On no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time.\(^{85}\)

## 4 Kaunda

In the case of *Kaunda v. President of the Republic of South Africa*,\(^ {86}\) the South African Constitutional Court had to determine whether 69 South African citizens arrested in Zimbabwe had the right to receive diplomatic protection in the form of diplomatic representations from the South African government.\(^ {87}\) The applicants were held in Zimbabwe on charges of being mercenaries headed to Equatorial Guinea to participate in a coup of the Equatorial Guinean government.\(^ {88}\) The applicants brought their application out of fear that they would be transported to Equatorial Guinea to be put on trial. If that happened, the applicants contended that they would not get a fair trial and, if convicted, they would face the death penalty.\(^ {89}\) The applicants requested that the Constitutional Court direct the government “to take all reasonable and necessary steps … to seek the release and/or extradition of the applicants from the

\(^{84}\) Ibid at para 106.

\(^{85}\) Ibid at para 107.

\(^{86}\) Supra note 6.

\(^{87}\) Ibid at para 3.

\(^{88}\) Ibid at para 2.

\(^{89}\) Ibid at para 2.
Governments of Zimbabwe and/or Equatorial Guinea”.  

One can see that this request goes beyond the duty to consider enunciated by the UKCA in Abbasi and edges closer to a request for the executive branch to make specific representations.

There are three aspects to the judgments in Kaunda that are relevant to this thesis. First, the majority judgment, penned by Chief Justice Chaskalson, supports Abbasi by echoing the existence of an administrative law “duty to consider” on the executive branch. Second, the separate judgments of Ngcobo J. and O’Regan J. demonstrate the need for deference to the executive even in cases where a positive constitutional duty is found. Third, the judgment of O’Regan J. demonstrates the suitability of the Supreme Court’s chosen remedy by providing a precedent for the issuance of declaratory orders to advise the executive of its obligations in using its foreign affairs power.

The majority judgment, written by Chaskalson J. noted that “[t]he relief [the applicants] claim is in effect a mandamus ordering the government to take action at a diplomatic level to ensure that the rights they claim under the South African Constitution are respected by the two foreign governments.”

Professor Craig Forcese argues that this search for extraterritoriality is a “red herring”, because “the heart of the matter concerned the South African government’s own compliance with constitutional rules, not the extraterritorial imposition of South African Constitutional rules on a foreign state.”

Stephen Peté and Max du Plessis note that the applicants relied on both sections 3 and 7 of the Constitution of the Republic of South Africa,

90 Ibid at para 4.
91 Ibid at para 21.
92 Supra note 10 at page 114.
1996 and argued that citizens of South Africa have the constitutional right to diplomatic protection “arising from the Government’s duty to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights.”

Chaskalson J. began the majority’s judgment by analyzing the international law relating to diplomatic protection. This part of the judgment is discussed in the section of this paper dealing with international law.

The majority then determined whether a right to diplomatic protection was one of the “rights, privileges and benefits of citizenship” guaranteed in section 3 of the South African constitution. Following its finding that the South African Constitution did not have extraterritorial effect, the majority held that it also did not compel the government to offer protection to the detainees. While the majority held that citizens have no enforceable right to diplomatic protection, such that they cannot apply to the court to force the government to take diplomatic action, they do possess a right to request the South African government for protection against the wrongful acts of a foreign state.

The majority noted that there may be a moral, if not a legal, obligation on the South African government to take action where certain risks are faced by South African nationals. The majority held that “[w]hen the request is directed to a material infringement of a human right that

94 Supra note 6 at para 58.
95 Supra note 10 at page 113.
96 Supra note 6 at para 60.
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. 97

The majority continued this line of reasoning and held:

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.98

The majority continued by holding “[i]f … 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.”99 The majority also stated that the executive is under a duty to act rationally and to deal with the request in good faith.100 However, in a critical passage that is reminiscent of Abbasi and Khadr II, the court held that “courts must exercise discretion and recognise that government is better placed than they are to deal with such matters.”101

97 Ibid at para 64.
98 Ibid at para 66.
99 Ibid at para 67.
100 Supra note 93 at page 448.
101 Supra note 6 at para 67.
After laying out the importance of judicial deference, the majority placed an equivocal limit on the power of the executive by stating:

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.102

Although the above quote places a theoretical duty on the executive, it is unknown how such a duty would dwell with the majority’s emphasis on deference.103 Peté and du Plessis note that the majority’s holding means that “while the court may order the government to consider providing diplomatic protection, it is the government and not the court which must decide whether or not to provide diplomatic protection and, if such protection is to be provided, the manner in which this is to be done”.104 Peté and du Plessis cite the following quote to show the deference which the court shows to the executive:

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

102 Ibid at para 69.
103 Supra note 93 at page 448.
104 Ibid.
judges, and which could be harmed by court proceedings and the attendant publicity.  

Peté and du Plessis argue that holdings such as those noted above seem to “imply that there is a duty on the government to act positively in response to a request for protection” when it is faced with gross abuses of international human rights norms. The authors argue that while the majority’s ruling may theoretically place a positive duty on the government to intervene to stop gross human rights abuses, the majority’s focus on deference means that, practically speaking, “it is largely for the government to decide how to discharge the duty.”

In a separate judgment, Ngcobo J. disagreed with the majority’s decision that there was no constitutional duty on the executive to provide diplomatic protection to the detainees. Specifically, Ngcobo J. held that section 3(2)(a) of the South African Constitution, which provides that all South African citizens are “equally entitled to the rights, privileges and benefits of citizenship”, He then turned to the question of whether diplomatic protection was a right, privilege or benefit of citizenship and held:

The right of citizenship is constitutionally guaranteed. 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

105 Supra note 6 at para 77.
106 Supra note 93 at page 447.
107 Ibid at page 448.
108 Supra note 6 at para 175.
violation, whether the citizen is in South Africa or abroad. This right should vest in all citizens by virtue of their South African citizenship.

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.109 (Footnotes omitted).

Ngcobo J. went on to hold that “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.”110 Ngcobo J. concluded that “sections 3(2)(a) and 7(2) [which places a duty on the government to “respect, protect, promote and fulfill the rights in the Bill of Rights”] 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.”111

Ngcobo J. then determined the scope of the executive’s duty. In doing this he held “[i]n determining the scope of this duty it is necessary to bear in mind that the exercise of diplomatic

109 Ibid at paras 185, 186.
110 Ibid at para 187.
111 Ibid at para 188.
protection has an impact on the conduct of foreign relations."\textsuperscript{112} He also noted that the power over foreign relations is within the executive’s domain.\textsuperscript{113} Ngcobo J. formulated the case for executive discretion in the following terms:

\begin{quote}
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.\textsuperscript{114} (Emphasis added).
\end{quote}

Ngcobo J. then noted the cases of Hess and Abbasi and held that they exemplify the breadth of the executive’s discretion in foreign affairs.\textsuperscript{115}

Ngcobo J. held that although the executive has wide discretion regarding the timing and manner of diplomatic representations, “that does not mean that the whole process is immune from judicial scrutiny.”\textsuperscript{116} In the view of Ngcobo J., “the duty of the government entails a duty to properly consider the request for diplomatic protection.”\textsuperscript{117} This duty involves the government carefully applying its mind to the request and responding rationally to it, as well as following a fair procedure in processing the request and, possibly, providing reasons for its

\begin{flushleft}
\textsuperscript{112} Ibid at para 189.
\textsuperscript{113} Ibid.
\textsuperscript{114} Ibid at para 189.
\textsuperscript{115} Ibid at para 190.
\textsuperscript{116} Ibid at para 191.
\textsuperscript{117} Ibid at para 192.
\end{flushleft}
decision.\textsuperscript{118} Ngcobo J. concluded by stating that the court may make a mandatory order compelling the government to consider a request for diplomatic protection, if it was clear that the government was not fulfilling its constitutional duty to do so.\textsuperscript{119}

Executive discretion is further supported by the separate judgment of O’Regan J. O’Regan J. wrote a separate judgment because, although she agreed with the majority’s interpretation of section 3 of the Constitution, she disagreed on the question of whether the Constitution obliges the government to take steps to protect the applicants against the conduct of foreign states.\textsuperscript{120}

Although O’Regan J. accepted the fact that international law does not require states to provide diplomatic protection to their nationals, she asked whether such an obligation exists under the South African Constitution.\textsuperscript{121} O’Regan held all government power is delineated by the Constitution and that the conduct of all three branches of government must be consistent with its terms and values.\textsuperscript{122} O’Regan J. also held that the Constitution “not only sets a boundary within which the three arms of government must operate, but it also requires that the state must

\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid at para 193.
\textsuperscript{120} Ibid at para 212.
\textsuperscript{121} Ibid at para 217.
\textsuperscript{122} Ibid at para 218.
‘promote and fulfill the rights in the Bill of Rights’.” 123 O’Regan J. held that “[t]he leitmotif of our Constitution is thus the promotion and protection of fundamental human rights.” 124

In light of her holdings mentioned above, O’Regan formulated the issue as follows:

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. 125

O’Regan J. held that one of the “privileges and benefits” guaranteed by section 3 of the Constitution is the provision of diplomatic protection by the South African government. 126 In O’Regan J.’s opinion, this is so because when the state makes diplomatic representations on behalf of nationals, it confers a privilege or benefit upon them. 127 O’Regan J. concluded on this point by holding:

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. 128

123 Ibid at para 219.
124 Ibid at para 220.
125 Ibid at para 230.
126 Ibid at para 236.
127 Ibid.
128 Ibid at para 238.
Like Ngcobo J. before her, O’Regan J. had to determine the justiciability of this obligation. O’Regan J. began by explaining that the Constitution gives primary responsibility for the conduct of foreign affairs to the executive and that “the executive is the arm of government best placed to conduct foreign affairs.”\(^{129}\) As a result, O’Regan J. held that, although all exercises of government power are justiciable “to some extent”, the executive must be given “considerable latitude” in determining how its duty to provide diplomatic protection should be carried out.\(^{130}\) O’Regan J. held that the executive’s foreign affairs power “must be exercised lawfully and rationally”, but that the court will “be careful not to attribute to itself superior wisdom” in relation to the exercise of such power.\(^{131}\) In this regard, O’Regan J. referenced the approach taken by the court in *Hess*, detailed below, and held:

> 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.\(^{132}\)

O’Regan J. concluded her judgment by stating that the appropriate relief would be a declaratory order laying out the obligations of the government. She held that a declaratory order was appropriate because it “would assist government by delineating the constitutional obligation

\(^{129}\) Ibid at para 243.

\(^{130}\) Ibid at para 244.

\(^{131}\) Ibid at para 245.

\(^{132}\) Ibid at para 247.
that exists.”133 O’Regan J. qualified her decision by stating “[i]t 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.”134

The reader should note that O’Regan J. appears to reserve the right to make a mandatory order if the government does not take steps to protect the applicants. However, given Justice O’Regan’s earlier discussion of the importance of executive discretion it is unclear what exact circumstances would give rise to the issuance of a mandatory order and it is also unclear what such a mandatory order would entail. Also, it is important to note that the Supreme Court of Canada held that “[t]he prudent course at this point” would be to issue a declaration and leave it to the government to decide how to exercise its functions.135 Thus, the Supreme Court of Canada’s order appears to have the same qualification as Justice O’Regan’s. Given that the government of Canada acted upon the Supreme Court’s declaration (albeit, in a limited manner) it is reasonable to question whether the Supreme Court would ever issue a mandatory remedy.

The majority judgment in Kaunda supports the Abbasi line of reasoning because of its rejection of a constitutional obligation on the executive to provide diplomatic protection to nationals abroad. Absent the finding of a constitutional obligation, the majority’s judgment, with its emphasis on the executive’s duty to rationally respond to a request to diplomatic protection, is similar to the administrative law approach taken in Abbasi.

133 Ibid at para 269.
134 Ibid.
135 Supra note 1 at para 47.
More interesting are the holdings of Ngcobo J. and O'Regan J. As was noted above, both of these judgments held that the government of South Africa is under a constitutional obligation to provide diplomatic protection to South African nationals abroad, but both held that the executive branch has near-sacrosanct discretion in determining how to fulfill that obligation. Ngcobo J. was willing to intervene into the executive’s discretion only to the extent of issuing a mandatory order to consider a request (itself not far from the majority’s holding). O’Regan J. held that the executive’s actions are subject to judicial review for rationality and lawfulness, but that the courts must recognize the superior wisdom of the executive in the field of diplomatic relations.\textsuperscript{136}

It is also interesting that O’Regan J.’s choice of remedy, a declaration delineating the government’s constitutional obligation, is similar to the Supreme Court of Canada’s choice in \textit{Khadr II}. Peté and du Plessis, in criticizing the majority’s approach as being unduly deferential to the executive, argue that the majority should have issued a declaratory order “confirming that the government was under a constitutional duty to assist the applicants”.\textsuperscript{137}

The majority and Justice O’Regan distinguished \textit{Kaunda} from the earlier case of \textit{Mohamed v. President of the Republic of South Africa}.\textsuperscript{138} In \textit{Mohamed} the South African government worked with the United States to remove Mr. Mohamed from South Africa to face

\textsuperscript{136} See footnotes 129 and 130 and accompanying text, above.

\textsuperscript{137} Supra note 93 at page 469.

\textsuperscript{138} 2001 (3) SA 893 (CC). (”\textit{Mohamed”}).
The issues in the case were whether the actions of the South African government in removing Mr. Mohamed were legal and whether the government of South Africa was under a constitutional obligation to seek assurances from the United States that the death sentence would not be imposed on Mohamed. The applicants requested that the Constitutional Court issue a mandatory order “[d]irecting the Government of the Republic of South Africa to submit a written request through diplomatic channels to the Government of the United States of America, that the death penalty not be sought, imposed nor carried out” against Mr. Mohamed.

The Court found that the government was under a duty to secure assurances from the United States that the death penalty would not be imposed before removing Mr. Mohamed from South Africa. In this vein the Court held that:

If the South African authorities had sought an assurance from the United States against the death sentence being imposed on Mohamed before handing him over to the FBI, there is no reason to believe that such an assurance would not have been given. … The fact that Mohamed is now facing the possibility of a death sentence is the direct result of the failure by the South African authorities to secure such an undertaking. The causal connection is clear between the handing over of Mohamed to the FBI for removal to the United States for trial without securing an assurance against the imposition of the death sentence and the threat of such a sentence now being imposed on Mohamed.

---

139 Supra note 93 at page 466.
140 Ibid.
141 Supra note 138 at para 5.
142 Ibid at para 38.
143 Ibid at para 54.
At the High Court, the government argued that the granting of mandatory relief against the executive “would infringe the separation of powers between the judiciary and the executive” and that “it was not for this Court, or any other, to give instructions to the executive.” The Court rejected this argument and held that it would not necessarily 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. To stigmatize such an order as a breach of the separation of state power as between the executive and the judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.

The majority in Kaunda distinguished Mohamed on the ground that in Mohamed government agents had worked with the United States to secure Mr. Mohamed’s removal from South Africa in breach of his rights under the Constitution. In contrast, the arrest and detention of applicants in Kaunda “[were] not the result of any unlawful conduct on the part of the government or of the breach of any duty it owed to them.”

At first glance Mohamed, especially when coupled with the majority’s distinguishing of it in Kaunda, appears to support the idea that the courts are competent to issue mandatory orders to

---

144 Ibid at para 70.
145 Ibid at para 72.
146 Supra note 6 at para 47.
147 Ibid at para 50.
the executive to make representations to foreign governments when the government in question (in *Mohamed* the South African government) infringed the rights of its nationals. However, *Mohamed* is not an answer to the question of whether mandatory orders are advisable. It must be noted that the Constitutional Court did not issue a mandatory remedy in *Mohamed* and instead issued a declaration because of the particular facts of the case and the “advanced state of the proceedings in New York”.148

The *Mohamed* judgment also sits uneasily with the judgments of Justice Ngcobo and Justice O’Regan in *Kaunda*. In both *Mohamed* and in those two judgments it was found that the Constitution of South Africa requires that action be taken by the executive branch. The only difference is that in *Kaunda* it is required in the absence of malfeasance and in *Mohamed* it is required to remedy malfeasance. It is unknown whether there is a principled basis for distinguishing between these two and speaking at length of the importance of deference in the former case while speaking of the importance of remedies in the latter. It is likely that the two precedents should be interpreted together to the extent that a general mandatory order may be issued, but the details will be left up to the executive.

5 Hess

In the West German case of *Hess*, Rudolph Hess, deputy to Adolf Hitler from 1933 until 1941 was serving out his sentence for crimes against peace imposed by the Nuremberg Tribunal at the end of the Second World War.149 Hess had been imprisoned in Spandau prison since July

---

148 Ibid at para 72.
149 Supra note 8 at page 390.
1947 and, since 1966, was its only remaining inmate.\textsuperscript{150} It is important to note that Hess was a prisoner of the United States, the United Kingdom, France and the Soviet Union in their capacities as the Occupying Powers of West Germany, not a prisoner of the West German government.

Beginning in 1967 there were a number of unsuccessful applications to the West German authorities to obtain Hess’ release.\textsuperscript{151} In 1977 Hess instituted proceedings before the Administrative Court against the government of West Germany wherein he sought a ruling “with regard to the duty of the Federal Republic of Germany to take specific diplomatic steps to obtain his immediate release.”\textsuperscript{152} In his complaint to the Constitutional Court, Hess requested an order requiring the President, Chancellor, Minister for Foreign Affairs and Minister of Justice of West Germany to “clarify and publicize the fact that the continued detention of the claimant … violates the binding rules of international law and fundamental human rights law”, as well as “[t]o take all possible initiative to persuade the Four Occupying Powers to grant his immediate release…” and “[t]o apply immediately to the United Nations in order to obtain” a resolution from the General Assembly condemning his continued detention and “an instruction from the General Assembly to the Occupying Powers to release the Complainant immediately”.\textsuperscript{153} In

\textsuperscript{150} Ibid at page 391.
\textsuperscript{151} Ibid at page 391.
\textsuperscript{152} Ibid at page 392.
\textsuperscript{153} Ibid at page 393.
addition, Hess requested that the Constitutional Court order the Federal government to apply to the European Court of Human Rights and the International Court of Justice on his behalf.\textsuperscript{154}

The Constitutional Court held that the “organs of the Federal Republic, and in particular the Federal Government, have a constitutional duty to provide protection for German nationals and their interests in relation to foreign States”.\textsuperscript{155} However, the Constitutional Court tempered this duty by holding that the Federal Government “enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States.”\textsuperscript{156} In a familiar holding the Constitutional Court wrote:

\begin{quote}
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 … 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.\textsuperscript{157}
\end{quote}

Later on the Court held “[i]t 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.”\textsuperscript{158}

The Court also rejected Hess’ request for an order requiring the Federal Government to apply to

\begin{flushright}
\textcopyright\textsuperscript{154} Ibid at page 393.
\textcopyright\textsuperscript{155} Ibid at page 395.
\textcopyright\textsuperscript{156} Ibid at page 395.
\textcopyright\textsuperscript{157} Ibid at page 396.
\textcopyright\textsuperscript{158} Ibid at page 396.
\end{flushright}
the United Nations for assistance and instead upheld the government’s assessment that such steps were unlikely to succeed.\textsuperscript{159}

\textit{Hess} is often cited as a precedent for judicial deference in the face of the executive’s discretion\textsuperscript{160}, but it is more complex than that. It is important to note that the West German government was actively trying to get Hess out of prison. This is in contrast to \textit{Khadr II} where it was the government’s policy not to request Khadr’s repatriation.\textsuperscript{161} The Constitutional Court noted that the Federal Government argued that it had already undertaken the necessary steps to get Hess out of prison and would continue to do so in the future. The Court noted that the Federal Government was “clearly aware of the Complainant’s personal situation and the nature of his constitutional rights which are at issue.”\textsuperscript{162} The Court noted that “[t]he 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.”\textsuperscript{163}

\textit{Hess} is more complex than a mere iteration of the importance of the executive’s discretion because the West German government was actively trying to get Hess out of prison. It is unclear what the Constitutional Court would have done had a situation like \textit{Khadr II} arisen where the government is stonewalling requests for assistance and is actually contributing to the

\textsuperscript{159} Ibid at page 397.
\textsuperscript{160} See Pergantis, supra note 19, at page 380, and Forcense, supra note 10, at page 112.
\textsuperscript{161} Supra note 3 at para 36.
\textsuperscript{162} Supra note 7 at page 396.
\textsuperscript{163} Ibid at page 396.
violation of the rights of one of its citizens. It is therefore unclear how enforceable the duty to provide diplomatic protection is against the (now) German government.

6 Khadr II

The story behind *Khadr II* is familiar to Canadians due to the length of Mr. Khadr’s detention. Mr. Khadr, a Canadian citizen, was captured by the United States Army at the age of 15 after a battle in Afghanistan in July 2002. During the battle Mr. Khadr threw a grenade which killed US Army Sgt. Christopher Speer. After his arrest, Khadr was sent to Guantanamo Bay, Cuba where he was detained while facing charges of murder in violation of the laws of war and other terrorism-related charges. During this time Mr. Khadr was submitted to enhanced interrogation techniques. In 2003 two agents from the Canadian Security Intelligence Service interrogated Mr. Khadr and turned over the information acquired to the US government without getting assurances that its use would be restricted. During Mr. Khadr’s captivity several developed nations successfully lobbied the US for return of their nationals from Guantanamo Bay.

Due to the unusual circumstances of his detention, Mr. Khadr has a long history of making unique requests to Canadian courts. His litigation began in 2004 when he brought an


165 *Khadr v. Canada (Prime Minister)*, 2009 FC 405, 341 F.T.R. 300 at para 22.

166 See *Khadr II*, supra note 1, at paras 3 to 5 for the details of his mistreatment by his American captors.

167 (“CSIS”)

168 Supra note 1 (Factum of the Respondent at para. 53).
application before the Federal Court seeking an order compelling the government to provide consular and diplomatic services to him.\(^{169}\)

In 2008 the Supreme Court of Canada, in what is commonly referred to as “\textit{Khadr I}”, ruled that Khadr was entitled to disclosure of the records of the interviews and of the information given to US authorities as a result of the interrogation conducted by CSIS agents.\(^{170}\) Specifically, the Court ruled that “Canada has an obligation under s. 7 to provide disclosure to Mr. Khadr to mitigate the effect of Canada’s participation by passing on the results of the interviews to U.S. authorities.”\(^{171}\) However, the Court went on to hold that the evidentiary record was incomplete and that it was unclear at that time what information was given to U.S. authorities.\(^{172}\) Accordingly, the Supreme Court of Canada remanded the case back to a designated judge of the Federal Court who would determine the extent of Canada’s disclosure obligations.\(^{173}\)

The \textit{Khadr II} litigation began in 2009 when Justice James O’Reilly of the Federal Court heard Mr. Khadr’s application for judicial review challenging the refusal of the Canadian government to seek his repatriation from Guantanamo Bay.\(^{174}\)

\footnotesize

\(^{169}\) \textit{Khadr v. Canada (Minister of Foreign Affairs)}, 2004 FC 1145 (CanLii) at paragraph 3.


\(^{171}\) Ibid.

\(^{172}\) Ibid at paragraph 35.

\(^{173}\) Ibid at paragraph 40.

\(^{174}\) Supra note 165 at paragraph 2.
In determining that the government’s decision was reviewable by the Federal Court, Justice O’Reilly held that although decisions about diplomacy are within the purview of the executive, not the judiciary, the executive’s prerogative power over foreign affairs is reviewable under the Charter.\(^{175}\) Justice O’Reilly noted that foreign jurisprudence, primarily UK cases dealing with claims made by Guantanamo detainees for diplomatic assistance and disclosure of information, indicates that there is no clear duty for a government to protect its citizens abroad.\(^{176}\) However, Justice O’Reilly also held that those precedents “do not help decide what duties Canada owes to citizens whose constitutional rights under the Charter are engaged. Further, they do not address the special circumstances that present themselves in this case – in particular, Mr. Khadr’s youth and the direct involvement of Canadian authorities in his mistreatment at Guantánamo Bay.”\(^{177}\) This holding is an excellent summation of the problem in *Khadr II*: the interaction between the highly political power over diplomacy and the judiciary’s duty to enforce the rights guaranteed under the Charter.

With respect to the requested remedy of repatriation, Justice O’Reilly held that “no other remedy would appear to be capable of mitigating the effect of the *Charter* violations”.\(^{178}\) Justice O’Reilly rejected the government’s characterization of an order to repatriate as forcing positive

\(^{175}\) Ibid at paragraph 40.

\(^{176}\) Ibid at paragraph 47.

\(^{177}\) Ibid.

\(^{178}\) Ibid at paragraph 78.
steps to be taken and held that it is not uncommon for courts to order that affirmative steps be taken when such actions are necessitated by the principles of fundamental justice. ¹⁷⁹

Justice O’Reilly explicitly rejected an argument that would resurface at the Supreme Court’s judgment, namely, that ordering the government to request Khadr’s repatriation would harm Canada-US relations. Justice O’Reilly dealt with this argument by stating that government lawyers were only arguing about potential harm for which they could not provide any evidence or specifics. ¹⁸⁰ In addition, as was noted above, Justice O’Reilly held that many other countries had successfully sought the return of their citizens and that an order seeking the repatriation of a Canadian citizen would be minimally intrusive on the executive’s foreign affairs prerogative power. ¹⁸¹

The government of Canada appealed Justice O’Reilly’s decision. On appeal, two members of the Federal Court of Appeal upheld Justice O’Reilly’s decision. In their majority judgment, Justice John Evans and Justice Karen Sharlow upheld Justice O’Reilly’s finding that the actions of the CSIS agents breached Khadr’s section 7 rights. The majority carefully limited its ruling by making a preliminary observation that:

Justice O’Reilly did not decide that Canada is obliged to request the repatriation of any Canadian citizen detained abroad. He did not decide that Canada is obliged to request Mr. Khadr’s repatriation because the conditions of his imprisonment breach international human rights norms. He did not decide that Canada must provide a remedy for anything done by the United States. These issues do not arise in this

¹⁷⁹ Ibid at paragraph 82.
¹⁸⁰ Ibid at paragraph 86.
¹⁸¹ Ibid at paragraphs 87 and 89.
case and it would not be appropriate for this Court to express any opinion on them.\textsuperscript{182}

The majority also rejected the government’s argument that Khadr’s mistreatment was at the hands of US, not Canadian, officials. In doing this, the majority reiterated that its decision was founded in the misconduct of the CSIS agents in question.\textsuperscript{183} The majority held that the Canadian officials knew that Khadr was being subjected to sleep deprivation when they interviewed him and that their conduct amounted to “knowing participation” in Khadr’s mistreatment.\textsuperscript{184}

With respect to the government’s argument that Justice O’Reilly’s order was an unjustified intrusion into a matter of Crown prerogative, the majority held that such a position “is not consistent with the principle that in Canada the rule of law means that all government action is potentially subject to the Charter”.\textsuperscript{185} The majority also noted that the foreign affairs power was held to be subject to the Charter in the case of \textit{United States v. Burns}\textsuperscript{186} 187.

Finally, the majority noted that the government’s arguments against the court ordering the government to request Khadr’s repatriation had “no factual basis”.\textsuperscript{188} Specifically, the majority held that the “Crown adduced no evidence that requiring it to request Mr. Khadr’s

\begin{thebibliography}{100}

\bibitem{182} \emph{Canada (Prime Minister) v. Omar Ahmed Khadr}, 2009 FCA 246 at paragraph 34.
\bibitem{183} Ibid at paragraph 49.
\bibitem{184} Ibid.
\bibitem{185} Ibid at paragraph 57.
\bibitem{187} Supra note 182 at paragraph 58.
\bibitem{188} Ibid at paragraph 59.

\end{thebibliography}
return would damage Canada’s relations with the United States” and that “when pressed in oral argument, counsel for the Crown conceded that the Crown was not alleging that requiring Canada to make such a request would damage its relations with the United States.”189

The above is therefore the conceptual foundation of the majority’s decision to uphold Justice O’Reilly’s remedy. The majority held that Justice O’Reilly did not err in his assessment of the effectiveness of the remedy. In doing this, the majority remained firm in its evidence-based line of reasoning when it held that “[t]he assertion of the Crown in oral argument that there is ‘one chance in a million’ that the United States will comply with a request … for the return of Mr. Khadr is not supported by any evidence. It is also contradicted by the fact that the United States has complied with requests from all other western countries for the return of their nationals from detention in the prison at Guantánamo Bay.”190

The above reasoning was built on when the majority held that Justice O’Reilly did not err in considering whether the remedy would unduly prejudice Canada’s foreign relations.191 Again, the majority held that the lack of evidence of potential harm was fatal to the government’s case.192 The majority also held that Justice O’Reilly did not err by finding that his remedy would not exceed the competency of the judiciary.193

189 Ibid.
190 Ibid at paragraph 69.
191 Ibid at paragraph 71.
192 Ibid.
193 Ibid at paragraph 72.
The majority’s affirmation of Justice O’Reilly’s remedy was followed by dissent of Justice Nadon. The crux of Justice Nadon’s reasoning was that Canada had already made sufficient attempts to protect Khadr during his detention and did not have to request his repatriation. Justice Nadon was of the opinion that Justice O’Reilly’s decision placed a positive “duty to protect” citizens abroad on the Canadian government and that, in the circumstances, Canada had fulfilled this duty, which Justice Nadon doubted exists. This reasoning is interesting because it cuts against the characterization espoused by the majority in its preliminary comments; namely, that this case was coloured by its peculiar circumstances.

Justice Nadon held that Justice O’Reilly’s choice of remedy exceeded the role of the Federal Court and constituted “direct interference into Canada’s conduct of its foreign affairs.” Justice Nadon’s approach to the remedy is a combination of a re-evaluation of the evidence in the case as well as a statement of the separation of powers. The latter is best shown in the following holding:

Why Canada has taken that position is, in my respectful view, not for us to criticize or inquire into. Whether Canada should seek Mr. Khadr’s repatriation at the present is a matter best left to the Executive. In other words, how Canada should conduct its foreign affairs, including the management of its relationship with the US and the determination of the means by which it should advance its position in regard to the protection of Canada’s national interest and its fight against terrorism, should be left to


195 Supra note 182 at paragraph 86.

196 Ibid at paragraphs 86, 96.

197 Ibid at paragraph 106.
the judgment of those who have been entrusted by the democratic process to manage
these matters on behalf of the Canadian people. 198

Justice Nadon cited Abbasi in support of his view that the making of diplomatic representations
is an executive power that should not be directed by the courts. In doing so, Justice Nadon
emphasized the UKCA’s holding that it would be improper to interfere with decisions affecting
foreign policy and further held that:

The fact that Canadian officials conducted interviews which ought not to have been
conducted does not allow us, in my respectful view, to enter what the English Court of
Appeal has characterized as constituting ‘the forbidden areas’. The existence of
circumstances much more exceptional that [sic] those of this case would be required for
us to consider intruding into matters of foreign policy and national interest. 199

Justice Nadon continued by stating the limited role of the judiciary in the following terms:
“Canada has considered the question of whether repatriation should be requested and it has
decided that it should not. That, in my view, should end the matter.” 200

Errol Mendes argues that the lack of a general duty to provide diplomatic protection was
no reason not to order repatriation due to the exigencies of Khadr II. 201 Mendes criticizes Justice
Nadon for ignoring the crux of the case, which is whether there is a specific, not a general, duty
on Canada towards Khadr in light of its actions in violation of his constitutional rights. 202 These
criticisms can be partially carried over to the Supreme Court of Canada’s decision, detailed

198 Ibid.
199 Ibid at paragraph 109.
200 Ibid at paragraph 113.
201 Supra note 194 at page 3.
202 Ibid at page 9.
below, but, as will be shown, the Supreme Court of Canada interpreted the actions of the Canadian government in light of the nature of diplomatic relations, the nature of executive discretion and the role of the judiciary.

As was done in the earlier judgments, the Supreme Court held that Canada violated Khadr’s rights under section 7 of the Charter because of the actions of its agents in Guantanamo Bay.203 The court then turned to whether the remedy granted by the lower courts was “appropriate and just in all the circumstances”.204 The Supreme Court approached this issue by asking two questions: “(1) Is the remedy sought sufficiently connected to the breach? And (2) Is the remedy sought precluded by the fact that it touches on the Crown prerogative power over foreign affairs?”205

The court quoted its earlier decision of Doucet-Boudreau206 and held that an appropriate and just remedy is “one that meaningfully vindicates the rights and freedoms of the claimants.” The court answered the first question in the affirmative. Specifically, the court held that the remedy is sufficiently connected to the claim because of the continuing effect of the breaches of Mr. Khadr’s rights. Therefore, the court held that “the breach of Mr. Khadr’s s. 7 Charter rights remains ongoing and that the remedy sought could potentially vindicate those rights”.207 In a

________________________

203 Supra note 1 at para. 26.
204 Ibid.
205 Ibid at para 27.
207 Supra note 1 at para 30.
statement that gave hope for the imposition of a mandatory remedy, the court held that “[w]hen past acts violate present liberties, a present remedy may be required.”

The court withdrew from this potentially interventionist line of reasoning during its answer to the pivotal second question. The court began to answer this question by stating that “[a] connection between the remedy and the breach is not the only consideration.” The court cited *Doucet-Boudreau* and held that an appropriate and just remedy “must employ means that are legitimate within the framework of our constitutional democracy” and must be a “judicial one which vindicates the right while invoking the function and powers of a court.”

The government argued that courts have no power to require the executive branch to take action in the area of foreign policy. The court rejected this argument, holding that the executive’s power over foreign affairs is a part of the crown prerogative and is therefore subject to constitutional scrutiny. The SCC held that the courts have a “limited power” to review exercise of the foreign affairs prerogative power on the grounds that all government power must be exercised in accordance with the constitution. The SCC explained the limited nature of this form of judicial review is due to concerns about the respective competencies of the courts and the executive, with the executive being better placed “to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under

208 Ibid at para 31.
209 Ibid at para 33.
210 Ibid, see *Doucet-Boudreau*, supra note 206 at paras 56, 57.
212 Ibid at para 37.
the power are to be discharged.”  However, the court held that the courts determine the “legal and constitutional limits within which such decisions are to be taken” and that if a government refuses to abide by those limits, then “courts are empowered to make orders ensuring that the government’s foreign affairs prerogative is exercised in accordance with the constitution”.

After laying down the above analytical prism, the SCC reviewed the remedy chosen by the Federal Court and the majority of the Federal Court of Appeal. The SCC concluded that the remedy was inappropriate for two reasons: (1) it gave too little weight to the executive’s foreign affairs power and (2) the record before the SCC was inadequate to make such an order.

With respect to the first reason, the SCC held that the executive has the “constitutional responsibility… to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada’s broader national interests.” The SCC decided to proceed cautiously by issuing a declaration that Canada infringed Mr. Khadr’s section 7 rights and to “leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the Charter.”

214 Ibid at para 37, see United States v. Burns, supra note 186.
215 Ibid at paras 39, 44.
216 Ibid at para 39.
217 Ibid.
The court cited its earlier case of *Burns* where it held that “it would offend s. 7 to extradite a fugitive from Canada without seeking and obtaining assurances from the requesting state that the death penalty would not be imposed.”\(^{218}\) This requirement that Canada obtain assurances from the US is an example of a judicial remedy touching on foreign policy. The court rejected that Mr. Khadr’s situation was analogous to *Burns*. The court noted that in *Burns* the prisoners were under the control of Canadian officials and Canada could therefore provide effective protection against possible execution.\(^{219}\) The court also held that in *Burns* “no public purpose would be served by extradition without assurances that would not be substantially served by extradition with assurances, and that there was nothing to suggest that seeking such assurances would undermine Canada’s good relations with other states”.\(^{220}\) In contrast, Mr. Khadr’s situation found him in the control of the US government, which meant “the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.”\(^{221}\)

The court then turned to the second reason for its decision, the incomplete record before it. The court cited the majority judgment in *Kaunda* where it was held that “[t]he 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

\(^{218}\) Ibid at para 41.

\(^{219}\) Ibid at para 42.

\(^{220}\) Ibid at para 42.

\(^{221}\) Ibid at para 43.
courts are ill-equipped to deal.” The court concluded that “in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr’s Charter rights.”

The court therefore decided, in light of “the evidentiary uncertainties, the limitations of the Court’s institutional competence, and the need to respect the prerogative powers of the executive” to issue a declaration that Canada violated Mr. Khadr’s rights and to leave the specifics of any action taken to remedy this situation up to the executive.

The Canadian government responded to the ruling in *Khadr II* by sending a diplomatic note to the government of the United States requesting that the information obtained by the Canadian interviews not be used against Mr. Khadr during his trial. Professor Kent Roach categorizes the Canadian government’s diplomatic note as the “minimum possible remedy that responded to the violation as conceived by the [Supreme] Court.” Lorna McGregor appears to agree with this characterization, arguing that the breach of Mr. Khadr’s rights required the Canadian government to at the very least make “formal requests to ensure that the information provided was not used as a basis for detention or trial.” It appears Mr. Khadr’s lawyers were

222 Ibid at para 44, see *Kaunda*, supra note 6, at para 77.
223 Ibid.
224 Ibid at para 46.
226 Ibid.
of the same opinion as Professor Roach and brought a fresh application before the Federal Court arguing that their client was entitled to procedural fairness from the executive when it made its decision to send the diplomatic note.\(^\text{228}\)

Justice Zinn noted that the level of procedural fairness which applies to a given situation can be affected by the legitimate expectations of a party and that Mr. Khadr had a legitimate expectation that the government of Canada would either cure or ameliorate its violation of his section 7 rights.\(^\text{229}\) In the following terms, Justice Zinn held that the Canadian government violated its obligation to provide Mr. Khadr with procedural fairness:

> When the Supreme Court provided the executive with an opportunity to fashion a remedy and after the executive decided that it would not seek Mr. Khadr’s return as he had requested, the executive then had a duty to inform Mr. Khadr of that decision, the remedy it was considering, and the action it would be taking. It also had a duty to give Mr. Khadr an opportunity to make written submissions as to remedial action(s) that would be appropriate before it unilaterally imposed its purported remedy.\(^\text{230}\)

Justice Zinn’s solution to this breach of procedural fairness was first to note that “[a] court will not grant a remedy for a breach of procedural fairness if it will have no effect on the result. If the same decision would have been reached even if natural justice had been provided then this Court will not quash the decision.”\(^\text{231}\) Justice Zinn held that the breach of Mr. Khadr’s rights had not been cured, as the US did not accede to the Canadian request not to use the

\(^{228}\) Supra note 3 at para 1.

\(^{229}\) Supra note 3 at paras 64, 65.

\(^{230}\) Ibid at para 75.

\(^{231}\) Ibid at para 81.
information against Mr. Khadr. Justice Zinn characterized the duty on the executive as follows:

The *Charter* and the rule of law require that government breaches of *Charter* rights be remedied. In the usual case, a remedy that cures a breach caused by the government is available because the remedy is within the complete control of the government. Mr. Khadr’s situation differs because the remedy is not within the complete control of Canada. Canada can propose, but the U.S. must consent. Nonetheless, in my view, the breaching party remains required to attempt to cure the breach. It is only if a cure is not possible that a remedy that merely ameliorates the breach is warranted and must be attempted.

Justice Zinn continued by holding that “if there is only one available remedy that potentially cures the breach of one person’s *Charter* rights, then that remedy must be ordered by the Court, even if the order involves the exercise of the royal prerogative.” As a result, Justice Zinn ordered that the parties determine a list of potentially curative and ameliorative remedies which might be taken by the Canadian government and retained jurisdiction in order to accomplish two goals: first, to determine whether a proposed remedy is potentially curative and second, to impose a remedy if Canada has not implemented an effective remedy within a reasonable period of time.

The Canadian government appealed Justice Zinn’s judgment. Chief Justice Peter Blais of the Federal Court of Appeal granted the government a stay of Justice Zinn’s decision pending a

---

232 Ibid at para 85.
233 Ibid at para 90.
234 Ibid at para 91.
235 Ibid at page 36.
Professor Roach writes that Blais C.J. “expressed deep scepticism that [Zinn J.] had the power to supervise the government’s diplomatic responses or order a repatriation remedy in light of the Supreme Court’s decision in Khadr II.”237 Blais C.J. concluded that:

… for a member of the judiciary to give himself the power to ‘supervise’ the exercise of the Crown’s prerogative in a context where the Supreme Court has recognized its limited role could be seen, in itself, as an affront to the division of powers that would cause irreparable harm. This is especially so when we consider that any action that could possible cure the Charter breach would require the Appellants to take some kind of diplomatic action.238

7 Criticism of an Interventionist Remedy

The precedents cited in this thesis show that Justice Zinn’s remedy is unique in this area of law. Accordingly, one criticism of Justice Zinn’s remedy is simply that such a thing has never been tried before. One should recall from the discussion of Kaunda, above, that Ngcobo J.’s concurring judgment found that diplomatic protection is a constitutional benefit owed by the executive to the citizens of South Africa.239 However, in a telling passage, Ngcobo J. outlines the contours of this benefit:

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

---

236 Khadr v. Canada (Prime Minister), 2010 CarswellNat 3554, 2010 CarswellNat 2482 (F.C.A.). The FCA has since declared the appeal moot.
237 Supra note 225 at page 150.
238 Supra note 236 at para 19.
239 Supra note 6 at para 188.
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.

It is within this context that sections 3(2) and 7(2) of our Constitution must be construed and understood.\textsuperscript{240} Ngcobo J. concluded his discussion of the legal contours of the executive’s discretion in the following two paragraphs:

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.

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. If this amounts to an intrusion into the conduct of foreign policy, it is an intrusion mandated by the Constitution itself.\textsuperscript{241}

Thus, it is clear that, in Ngcobo J.’s opinion, the judiciary must tread lightly on the executive’s discretion regarding foreign affairs.

\textsuperscript{240} Ibid at paras 172, 173.

\textsuperscript{241} Ibid at paras 192, 193.
Professor Roach argues that it is unclear “what would have happened had the government [of Canada] maintained its initial stance that the [Supreme] Court’s decision did not require the government to take any action.”\textsuperscript{242} It is also open to argument what would have happened had Justice Zinn’s remedy been implemented. How would Justice Zinn have determined which options are reasonably open to the government? How would he factor in the US refusal to the Canadian diplomatic note? Would Justice Zinn’s choice of remedy been quick and easy or long and counterproductive? What would have happened had all reasonable remedies been exhausted without success? What would have happened if the government made a decision not to pursue a course of action based on classified evidence that it did not want to bring out in open court? One of the obstacles to this sort of judicial intervention is, as the Supreme Court noted, the sensitive nature of the case. In situations such as \textit{Khadr II}, the government may be of the opinion that disclosure of information may harm national security and may seek to use section 38 of the \textit{Canada Evidence Act}\textsuperscript{243}, which allows the Crown to claim privilege over evidence which it deems sensitive. These claims are then reviewed by a designated judge of the Federal Court.\textsuperscript{244} While this process has the advantage of subjecting government claims to a proper check, it has the downside of dragging out a process which the Supreme Court in \textit{Khadr II} described as complex and ever-changing.\textsuperscript{245}

\begin{flushleft}
\textsuperscript{242} Supra note 225 at page 148.
\textsuperscript{243} R.S.C., 1985, c. C-5.
\textsuperscript{245} See footnote 216, supra.
\end{flushleft}
When thinking about Justice Zinn’s planned retention of jurisdiction one should note the words of Lord Wilberforce who held that an issue is non-justiciable if there are “no judicial or manageable standards by which to judge [the] issues”. In the context of foreign affairs and negotiations with another state, courts must recognize that they are equipped to identify rights violations, but are not so well equipped to choose between the various options which might remedy those violations.

These questions go to the core of the division of responsibilities between the executive and the judiciary. Recall the criticism levelled by Vasileios Pergantis against the proponents of reforming the international law institution of diplomatic protection. Pergantis argues that courts have been wary of intervening in this area because of the “highly political nature of governmental decisions and the inappropriateness of the judicial function for assessing the correctness of the measures taken.” Pergantis also argues that “diplomatic protection remains a highly political institution that cannot be turned into a duty for the State on the basis of a misconceived idea of effectiveness because ultimately it will become a completely inoperative mechanism.”

Lorna McGregor takes issue with the association of Khadr II with the law of diplomatic protection. McGregor argues that “[i]n a diplomatic protection case, the national does not allege wrongdoing by the Executive but requests the Executive to espouse his or her claim

246 Supra note 5 at para 51.
247 Supra note 17 at page 383.
248 Supra note 17 at page 393.
249 Supra note 227 at page 494.
against a foreign state”.\textsuperscript{250} McGregor contrasts this situation with that of \textit{Khadr II}, where “the use of diplomatic offices was sought as the remedy to the violation of section 7 by the Executive.”\textsuperscript{251} Instead of diplomatic protection, McGregor characterizes \textit{Khadr II} as being controlled by the international law of state responsibility, with its requirements that any breach of international law be stopped (cessation) and that the injured party be placed back in the position he was in before the violation took place (restitution).\textsuperscript{252} According to McGregor, the law of state responsibility precluded the Supreme Court from issuing an “open-ended declaratory judgment” and required it to “limit the remedies available to those which could meet the obligations of cessation and restitution.”\textsuperscript{253} Instead, McGregor argues that the court should have limited the actions available to the executive branch in remedying the violation of section 7.\textsuperscript{254}

McGregor’s approach to the international law aspect of \textit{Khadr II} focuses on remedies, rather than on the sovereignty of the United States. Although the court must have a remedial outlook on any case where a rights violation has been found, McGregor’s approach does not deal with the diplomatic nature of any action taken to remedy Mr. Khadr’s situation. Discretion is a key aspect of diplomacy because the reaction of the foreign state is unknown and the executive branch needs the freedom to change its approach as it deems fit. As the approach taken in \textit{Hess} demonstrates, not every conceivable remedial option can be reasonably pursued when one is

\begin{flushright}
\textsuperscript{250} Ibid.
\textsuperscript{251} Ibid.
\textsuperscript{252} Ibid at page 490.
\textsuperscript{253} Ibid at page 494.
\textsuperscript{254} Ibid.
\end{flushright}
dealing with diplomatic relations with a foreign power which holds sovereignty over the individual in question. It is not unreasonable for a court to take such considerations into cognizance when determining the appropriate remedy in cases such as *Khadr II*.

Professor Roach criticizes the Supreme Court’s approach in *Khadr II* as creating a “mini political questions doctrine” whereby courts would be precluded from issuing remedies that directly interfere with foreign affairs. While it is true that *Khadr II* is troubling when viewed from a strictly domestic law standpoint, the Supreme Court’s reasoning becomes clearer when one examines the international and comparative legal context of the decision. One criticism of *Khadr II* is that the Supreme Court did not reference the three cases examined above (except for a brief quote from the majority decision in *Kaunda*), nor did it directly reference the international law of diplomatic protection.

### 7.1 United States v. Burns

The Supreme Court of Canada distinguished the situation in *Burns* from that in *Khadr II* on the grounds that in *Burns* the applicants were under the control of Canadian officials and therefore Canada had the power to protect them against possible execution. This concern over the effectiveness of the proposed remedy goes to the crux of the issue when one is dealing with cases where the power to remedy a breach of an individual’s rights lies in the hands of another state, namely that “no direct remedy” can come from the court.

---

255 Supra note 225 at page 148.

256 Supra note 1 at para 42.

257 Supra note 5 at para 67.
Another factor distinguishing *Burns* from *Khadr II* is the clarity of the action required by law. In *Burns* it was clear that section 7 required assurances be gained before the applicants were extradited. The same kind of situation was faced in the South African case of *Mohamed* where it was clear that the executive had to make one specific request in order to remedy the wrong that had occurred to the applicant. In contrast to *Burns* and *Mohamed*, two cases where the necessary representations were reasonably dictated by the text of the two constitutions, in *Khadr II* it was unclear what specific type of action was required in order to remedy the violation of Mr. Khadr’s rights. McGregor notes that

> At a minimum … the Supreme Court decision establishes that the provision of information to the US authorities which could be used in the trial of Mr Khadr constitutes a continuing violation. In order to comply with the duty of cession, the only choice Canada has is to bring the violation to an end by ensuring that the information given to the US is not used as a basis for Mr Khadr’s present or future detention or for any future legal proceedings against him.  

If one agrees with McGregor’s view that there is a minimum remedial actions required by the executive branch, one must accept that there is a spectrum of acceptable remedial choices available.

> In short, if the court cannot reasonably divine what the constitution specifically demands in a particular situation, and if this is combined with the uncertain effectiveness of any of the available options, then it ought to defer to the judgment of the executive which is better placed to choose between several different remedial options.

---

258 Supra note 227 at 496.
8 Conclusion

What this thesis has shown is that the Supreme Court of Canada’s remedial decision in *Khadr II* is reasonable when it is placed in context. That context includes the international law of diplomatic protection, which recognizes the discretionary nature of foreign relations, as well as foreign precedents, which place a premium on executive discretion. In the administrative law context the cases of *Abbasi* and the majority judgment of *Kaunda* show that the executive must merely deal with a request for diplomatic protection lawfully and rationally for it to pass judicial muster. In instances where the constitution demands that action be taken, as was held in the minority judgments from *Kaunda* and from the West German case of *Hess*, courts have been satisfied to declare that the executive is under a duty to provide diplomatic protection and leave the details of how to fulfill that duty up to the executive.

It is therefore this author’s opinion that mandatory orders are unadvisable when the applicant is abroad. This opinion is informed by the reasons set out throughout this thesis as well as by concerns about the proper role of the judiciary. If one accepts what Pergantis calls the “political essence”\(^{259}\) of diplomatic protection, with its discretion and uncertainty, then it is unclear how a judge could craft a mandatory order that would operate effectively. A broad mandatory order, of the kind implemented by Justice O’Reilly and contemplated by Justice Zinn runs the risk of being so broad as to be unenforceable. If one accepts that may take years to negotiate the return of a foreign national imprisoned abroad, then the ability of a court to properly supervise the progress of its order is in doubt.

\(^{259}\) Supra note 17 at page 354.
Similarly, if a mandatory order of a general nature is issued, the court should recognize that the executive requires a broad measure of discretion about what steps to take, because the executive branch is best equipped to make such decision. This kind of discretion may give rise to the kind of situation found in *Hess* where the government was trying to fulfill its constitutional duty to provide diplomatic protection, but Hess was displeased with the results and felt the government was not doing all it could do to help him. As was seen in *Hess*, the court deferred to the executive about particular diplomatic steps because the circumstances of Hess’ detention were not under the control of the West German government. In his article detailing the law of diplomatic protection in Canada, Craig Forcese echoed these sentiments when he wrote that there “is peril in grafting too much law onto the uncertainties of life, especially in the area of foreign relations.”

In *Kaunda* Chaskalson C.J. made the following holding that should warn against too much judicial intervention in foreign affairs:

> 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.

Similarly, O’Regan J. held:

> 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.

---

260 Supra note 10 at page 133.
261 Supra note 6 at para 132.
262 Supra note 6 at para 247.
Specific mandatory orders of the kind attempted by Justice Zinn are also unadvisable because their efficacy is doubtful for a number of reasons. The first unknown is how Justice Zinn would determine what options are reasonably available to the government. However, nowhere is it explained how such decisions would be made by a court. In an area of so much uncertainty as foreign relations, it may be too hasty for a judge to retain jurisdiction and supervise what may be a futile endeavour. In addition, if one accepts that negotiations of this type may be time-consuming, secretive and sensitive, a time-limited mandatory order of the type contemplated by Justice Zinn might not respect the nature of foreign affairs.

One additional criticism of mandatory orders is their controversial nature. This thesis has explained the legal context behind the administrative and constitutional review of executive action in the field of diplomatic protection. As has been shown, the law on this topic heavily supports judicial deference. Therefore, the law on this topic is, in the main, settled. As a result, any litigant seeking to get a mandatory order is going to have an uphill battle. A litigant will probably have to climb the hierarchy of the Canadian justice system at least once before his or her mandatory order is granted, if it is granted at all, which is unlikely because of the law detailed above.\(^{263}\) The gist of this argument is that using the court system to force the executive branch to take action will most likely remain an arthritic method of getting at-risk people out of trouble abroad.

Beyond making an order for the government to consider a request, a court may be able to issue somewhat specific directions to the executive branch about what remedial action the

\(^{263}\) Note that Khadr II was heard at the Federal Court on October 28, 2008. The Supreme Court of Canada’s order was not released until November 13, 2010.
constitution requires in a given situation. Lorna Mcgregor criticizes the Supreme Court’s remedy as “providing no direction on the context of the remedy required.” McGregor is correct that the Supreme Court’s declaration was vague, perhaps unduly so.

In situations like Khadr II the court may be justified in laying out what actions the law requires, if those actions can be determined with reasonable accuracy. This course of action was taken by the Supreme Court of Canada in Burns and by the Constitutional Court of South Africa in Mohamed. A similar approach, as is advocated for by McGregor, could have been taken in Khadr II in order to clarify what courses of action may have remedied Mr. Khadr’s rights. Providing a list of potential remedies could have avoided the initial confusion about whether the executive branch could have not taken any action. Suggesting potential remedies is not inconsistent with the research detailed in this thesis as long as the issuing court is respectful of the executive’s expertise, the international law aspects of diplomatic representations and the limitations on enforcement of such remedies. Such respect harkens back to the approach taken in Hess where the Constitutional Court affirmed that the executive had to do something to help Hess, but gave the executive discretion to decide how best to espouse Hess’ case.

McGregor criticizes the Supreme Court’s holding that requiring the executive branch to seek Mr. Khadr’s repatriation did not have a guarantee of success. McGregor argues that requests for repatriation of citizens from Guantanamo Bay had a “proven track-record” and that

264 Supra note 227 at page 502.
265 See the Canadian government’s initial position after the Supreme Court’s decision: supra note 3 at para 36.
266 Supra note 227 at page 501.
the order could have been enforceable as a result.\textsuperscript{267} Although other states had successfully lobbied for the return of their nationals, the refusal of the United States to accede to the far less onerous request of not using the evidence provided by Canadian agents against Mr. Khadr brings McGregor’s statement into doubt. It is possible that the United States may have agreed to limit the use of evidence had the Canadian government made Mr. Khadr’s situation a central tenet of its relationship with the government of the United States, but this possibility is nothing more than speculation. In any event, it is unknown whether a court would feel justified in making such a wide-ranging order where its efficacy was in doubt.

\textsuperscript{267} Ibid.
Bibliography

**Legislation and Constitutional Documents**


**International Treaties**


**Cases**


*Canada (Prime Minister) v. Omar Ahmed Khadr*, 2009 FCA 246.

*Canada (Prime Minister) v. Omar Khadr*, 2010 SCC 3.


*Khadr v. Canada (Minister of Foreign Affairs)*, 2004 FC 1145 (CanLii).

*Khadr v. Canada (Prime Minister)*, 2009 FC 405, 341 F.T.R. 300.

*Mohamed and another v President of Republic of South Africa and others*, 2001 (3) SA 893 (CCSA).

*Omar Ahmed Khadr v. Canada (Prime Minister)*, 2010 F.C. 715.


**Secondary Sources – Articles**


Secondary Sources – Books

Emmerich de Vattel, Law of Nations (1833).


United Nations Documents

