

THE RIGHT TO DIPLOMATIC PROTECTION, THE *VON ABO* DECISION, AND ONE BIG CAN OF WORMS: ERODING THE CLARITY OF *KAUNDA*

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1 Statement of the issues

On 29 July 2008, Judge Prinsloo of the Pretoria High Court handed down judgement in the case of *Von Abo v Government of the RSA* (hereafter *Von Abo*).¹ The judgment was well received in the South African media, even earning Judge Prinsloo an award as *Legalbrief* Newsmaker of the month.²

Certainly one of the reasons for the attention received by the case was that it concerned the situation in Zimbabwe and, as a consequence, placed South Africa's policy regarding Zimbabwe in the spotlight. It is of particular interest that judgement was handed down in the midst of political talks between the main political parties in Zimbabwe. But, from an international and constitutional law perspective, the case was significant for its treatment of the right to diplomatic protection and more generally, the discretion of states in the conduct of foreign affairs. Can the state be compelled by a court to perform certain international acts impacting on foreign relations and under what circumstances?

For a long time these questions – linked as they were to the act of state doctrine – were cloudier than a British summer. When the Constitutional Court handed down its judgment in *Kaunda v the President of the Republic of South Africa* (hereafter *Kaunda*),³ I felt that the issues had become clearer.⁴

* This paper expresses the personal views of the author. Nothing in this paper is to be attributed to the Department of Foreign Affairs or the Government of the Republic of South Africa

¹ [2008] JOL 22219 (T)

² Leon "Von Abo Ruling exposes empty promises on Zimbabwe" *Business Day* (11-08-2008) <http://www.businessday.co.za/Articles/TarkArticle.aspx?ID=3290752> (accessed 12-11-2008); "Government didn't protect FS farmer" *News24* (29-07-2008) http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2366259,00.html (accessed 30-07-2008); Pretorius "Landmark win for farmer: Court says man who lost land, business in Zim is entitled to SA Government Protection" *Pretoria News* (30-07-2008) <http://www.pretorianews.co.za/index.php?fSectionId=1703&fSearch=1&fQuery=%93Landmark+win+for+farmer%3A+Court+says+man+who+lost+land%2C+business+in+Zim+is+entitled+to+SA+Government+Protection%94> (accessed 08-11-2008)

³ 2005 4 SA 235 (CC) A similar question was raised in *Van Zyl v the Government of the Republic of South Africa* 2008 3 SA 294

⁴ The author's favourable views of *Kaunda* are set out in Tladi & Dlagnekova "The Act of State Doctrine in South Africa: Has *Kaunda* settled a vexing question?" 2007 *SA Public Law* 444. For criticism of *Kaunda* see eg Olivier "Diplomatic Protection – Right or Privilege?" 2005 *SAYIL* 238; Woolman "Application" in Woolman, Roux & Bishop (eds) *Constitutional Law of South Africa* (2006) 31-114 *et seq.* Woolman's critique of *Kaunda* is focused less on the question of diplomatic protection and more on the extraterritorial application of the Bill of Rights

However, in light of *Kaunda* and the progress it represented, it was with some disquiet that I read the *Von Abo* judgement. The decision relies heavily on *Kaunda* and yet reaches conclusions (and gives an order) that is apparently at odds with that judgement. It is this paradox that this paper seeks to explore. Given the sensitivity of the issues involved, it is also appropriate to emphasise that this paper is not about the correctness of the land policies in Zimbabwe or South Africa's policy towards Zimbabwe. The question is simply whether *Von Abo* is consistent with *Kaunda*. Over and above my admiration for the decision in *Kaunda*, this case will be used as a benchmark against which to evaluate *Von Abo* because, as a decision handed down by the Constitutional Court, it constitutes the current law on the matter – this is true especially of the majority judgement. In addition, in the course of the analysis, it is impossible to ignore the (laudable) objectives of those seeking to develop a right to diplomatic protection.

The next section commences with a very brief overview of the facts in *Von Abo* and the order given by the Court. In doing so, a few remarks are made about the adequacy of the government's response to Mr Von Abo's request for diplomatic protection and the presentation of evidence to the Court. This brief overview of the facts and order in *Von Abo* is followed by an exposition of the *Kaunda* judgment in the context of the right to diplomatic protection. Thereafter an analysis is provided of the decision of the High Court in *Von Abo* in the context of the *Kaunda* judgement. A few words about the laudable objectives behind the promotion of a right to diplomatic protection are then followed by some concluding remarks.

2 The facts and order in *Von Abo*

The judgement handed down by Prinsloo J in *Von Abo* is, with respect, incorrect on a number of levels. But it is appropriate to begin by highlighting that the decision was correct in one respect: in light of the facts before him, Prinsloo J had no option but to find against the government. However, the reasoning of the judgment, and especially the order granted, is problematic. It may also be added in passing that the same can be said of the tone of the judgement, which could lead one, rightly or wrongly, to suspect that it was a protest against government policies towards Zimbabwe – policies which are pejoratively termed as “quiet diplomacy”. For example, the Court states that the government's “feeble efforts, if any, amounted to little more than acquiescence in the conduct of their Zimbabwean counterparts and their ‘war veteran’ thugs”.⁵ Elsewhere, again referring to the government, the Court states that they did not show the will “to do anything constructive to bring their northern neighbour to book.”⁶ But this aspect of the judgement is beyond the scope of this comment.

⁵ *Von Abo v Government of the RSA* [2008] JOL 22219 (T) para 112

⁶ Para 143

The facts, briefly, are that Mr Von Abo acquired ownership in land and other property in Zimbabwe over a long period of time.⁷ It also appears from the facts that Mr Von Abo created a number of legal entities including companies and a trust and, for his benefit, registered the properties in the name of the companies. For purposes of brevity, and to borrow the language of the Court, over the years Mr Von Abo was able to build himself a “considerable farming empire in Zimbabwe”.⁸

A large part of the historical (and perhaps current) background of *Von Abo* relates to the political and economic disintegration that can be traced to the late 1990s in Zimbabwe. This political and economic upheaval was accompanied by what can only be described as large scale violations of human rights and infringement of property interests. The Zimbabwean land policy in this time came to be associated with expropriation without compensation of mainly white-owned farms, including Mr Von Abo’s “farming empire”. I pause here to add, lest the issue be racialised, that the reports have shown that while large-scale, white farmers have suffered infringement of property interests, poor black people in Zimbabwe living on the land were not saved from the consequences of the Zimbabwean land policy, whether through violence or through economic hardship.

The facts in the judgement also show that Mr Von Abo tried to protect his legal rights in Zimbabwe, but without success. At this point it is appropriate to mention an important fact noted by the Court – the significance of which is not fully accounted for by it. In restating the facts, the Court points out that Mr Von Abo

“... describes in graphic detail how he attempted, through litigation, to protect his interests with the assistance of the Zimbabwean courts. These efforts failed dismally, there were broken promises, court orders were ignored and eviction notices came flooding back, thick and fast.”⁹

Without a doubt, these events are recounted to show how much Mr Von Abo had tried to enforce his rights and, indeed, that all domestic remedies had been exhausted. But this statement also shows something else, which Prinsloo J does not factor into the judgement, namely the futility of any South African government action with a Zimbabwean government that refuses to listen to its *own* courts. In this regard it must be noted that diplomatic protection would consist mainly of diplomatic communication requesting that the unlawful act be remedied.¹⁰ While stronger action in the form of judicial dispute settlement mechanisms and arbitration remain possible measures of diplomatic

⁷ The facts are reproduced in greater detail in paras 2-17 of the judgement

⁸ Para 6

⁹ Para 13

¹⁰ Draft Art 1 of the Draft Articles on Diplomatic Protection defines diplomatic protection as the “invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State” for an internationally wrongful act injurious to the former state’s national. In its commentary on draft art 1, the International Law Commission (ILC) notes that “diplomatic action” would cover “all lawful procedures employed by a State to *inform* another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at settlement of disputes” (emphasis added) *Draft Articles on Diplomatic Protection with Commentaries 2006* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf 27 (accessed 30-10-2008)

protection,¹¹ these would require the consent of both states under the current system of international law. But this is merely mentioned in passing. This factual question impacts only incidentally on the principles that are relevant to this article.

The facts as recounted in the Court's judgment show that Mr Von Abo began requesting diplomatic protection from the South African government in 2002. In his request for diplomatic protection, Mr Von Abo envisaged that the government would either accede to the International Convention on the Settlement of Investment Disputes (ICSID) so that he could pursue a claim against Zimbabwe under the rules of the ICSID; or would conclude a bilateral investment promotion and protection agreement with Zimbabwe; or would enter into diplomatic discussions with Zimbabwe on his behalf.

From the facts, it appears that the government did not respond to Mr Von Abo's request for diplomatic protection, or at best, did so insufficiently. From the facts, no reasons were ever given to Mr Von Abo to explain the unwillingness or inability to take up his cause with the government of Zimbabwe, to ratify the ICSID or to enter into a bilateral investment promotion and protection agreement with Zimbabwe. The only evidence before the Court regarding what the government had done for Mr Von Abo was an affidavit by a state law adviser which was rightly struck out as hearsay evidence. The facts before the Court, therefore, painted a picture of a government which had simply ignored its citizen's plea for help.

The Court also had on record statements by the Minister of Foreign Affairs to Parliament in response to questions from opposition parties that the government was in the process of negotiating an investment protection agreement with Zimbabwe. With no evidence to support this, Prinsloo J was justified in concluding that the statements of the Minister were untrue. Subsequent to the *Von Abo* decision, evidence indeed appeared of South Africa's efforts, not solely for the benefit of Mr Von Abo but to assist South African landowners generally in Zimbabwe. Specific meetings could now be recalled between South African representatives and Zimbabwean authorities regarding the seizure of South African farms. Supporting documents to that effect were also produced – facts which could have had an effect on the Court's decision.¹² In addition, it appeared that the Minister had not misled Parliament. Indeed, there were on-going negotiations for a bilateral investment protection agreement, which was never signed because the parties could not reach agreement on some significant clauses.¹³ It therefore appeared that the

¹¹ The ILC states that other peaceful means "embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement" *Draft Articles 2006* 27. While the First Report of the Special Rapporteur included such tougher measures as reprisals, retorsions and economic measures, their non-inclusion in the final commentary to the Draft Articles is probably a reflection of the lack of support, or at least uncertainty, about such far-reaching measures in actions of diplomatic protection.

¹² Subsequent to the decision in *Von Abo*, an internal "post mortem" meeting was held to consider what had gone wrong. Several officials produced a number of telexes (communication documents) from the High Commission, informing Head of Office of meetings held between Zimbabwean officials and South African officials in Harare.

¹³ The Department of Trade and Industry, the line function department responsible for investment and trade treaties, has subsequently provided information in this regard.

lack of evidence before the Court was due to poor record-keeping and poor coordination rather than unwillingness on the part of the government to offer diplomatic protection. To be true, all the revelations about what government had done came out in internal discussions which, in a court of law, would still require substantiation. In any event, this is water under the bridge. Judge Prinsloo did not have this information and was, accordingly, justified in concluding that the government had simply ignored Mr Von Abo's request for assistance and had not considered the request rationally and in good faith. If there is a silver lining to the Court's decision, it may be that it will lead to better record-keeping and greater cooperation between government departments in dealing with similar cases.

On the basis of this lack of evidence, the Court made the following order:¹⁴

- (i) The failure of the government to rationally and in good faith decide and deal with Von Abo's request is a violation of the Constitution of the Republic of South Africa, 1996 ("the Constitution");¹⁵
- (ii) Von Abo "[had] a *right to diplomatic protection* from" the government;¹⁶
- (iii) The government has an "*obligation to provide diplomatic protection*";¹⁷ and
- (iv) The government must "*take all necessary steps to have the applicant's violations of his rights by the Government of Zimbabwe remedied.*"¹⁸

Accepting that the government did not deal with Von Abo's request in an appropriate manner and did not manage the court case prudently in terms of the provision of evidence, the question which has to be considered in this article is whether the *Von Abo* decision, and in particular the order, is correct in law. As indicated earlier, it is especially important to determine whether this decision consistent with *Kaunda*.

It is submitted that the decision reached in *Von Abo* is flawed in several respects. First, the order is overbroad and goes beyond what was provided for in *Kaunda*. Second, the judgement is not sufficiently reasoned, particularly in so far as it relates to the order. In other words, it is points (ii)-(iv) of the order as reflected above, and not point (i), that is at issue here. I turn now to briefly describe the decision in *Kaunda*.

3 *Kaunda* and the right to diplomatic protection¹⁹

While the *Kaunda* decision was welcomed, at least by this author, for its clarity, its exposition of the law was not groundbreaking. Rather, *Kaunda* built

¹⁴ *Von Abo v Government of the RSA* [2008] JOL 22219 (T)

¹⁵ Para 161

¹⁶ Para 161 (emphasis added)

¹⁷ Para 161 (emphasis added)

¹⁸ Para 161 (emphasis added)

¹⁹ This brief exposition of the decision in *Kaunda* based is largely on Tladi and Dlagnekova 2007 *SA Public Law* 444 For a more disapproving reading of *Kaunda*, see Olivier 2005 *SAYIL* 252 who describes the decision in *Kaunda* as follows:

"[ironically], the courts' approach seems to be much in line with the executive's style of silent diplomacy and non-prescription when it comes to human rights abuses by one of the foreign states in question"

See also Coombs "*Kaunda v President of the Republic of South Africa*" 2005 *AJIL* 681

on previous decisions and applied the law relating to the justiciability of state conduct in the area of foreign affairs as developed over the years to the question whether individuals have a right to diplomatic protection and whether the state has a corresponding duty to provide such diplomatic protection.²⁰ The approach consistently adopted by the courts leading up to *Kaunda* has been two-pronged. On the one hand, the courts emphasised the discretion of the executive in the conduct of foreign relations. On the other hand, the courts expressed the idea that even in the conduct of foreign relations, the executive is obliged to obey the commands of the Constitution.²¹ Thus, even at the time of *Kaunda*, the need to maintain a balance between the discretion to be afforded to the executive in the conduct of foreign affairs and the imperative to be faithful to the Constitution had been embodied in constitutional jurisprudence.

The majority judgement in *Kaunda* was handed down by Chaskalson CJ, with concurring judgements by Ngcobo J and Sachs J, and a dissenting judgement by O'Regan J.²² The majority judgement began by setting out, with reference to the *Barcelona Traction* case,²³ the customary international law position that the right to diplomatic protection is a right of states and that there is no legal obligation on states to take diplomatic protection measures on behalf of its nationals.²⁴ The Court then considered whether recent developments within the United Nations, in particular the development of the Draft Articles on Diplomatic Protection, 2006, may have given birth to such a duty on governments.²⁵ The Court concludes, correctly, that it has not.²⁶ The Court then asserted, again correctly, that notwithstanding the positive obligation which section 7(2) of the Constitution imposes on the state "to respect, protect, promote and fulfil" the rights in the Bill of Rights, these rights do not attach to nationals outside South Africa.²⁷

In *Kaunda* much was made about extraterritoriality of the South African Constitution, that is that the rights in the Bill of Rights did not apply beyond our borders. However, in light of the fact that the decision in *Von Abo* did not postulate that the state should act to protect Mr Von Abo's property rights under the Constitution, it is unnecessary to evaluate the Court's treatment of

²⁰ See eg *Kolbatschenko v King NO and Another* 2001 4 SA 336 (CC); *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC); *Geuking v President of the Republic of South Africa* 2003 3 SA 34 (CC) See for discussion Tladi & Dlagnekova 2007 *SA Public Law* 444

²¹ This line of reasoning can be traced back to the Constitutional Court's decision in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC)

²² A good summary of all the judgements in *Kaunda* is provided in Coombs 2005 *AJIL* 681 and Olivier 2005 *SAYIL* 238

²³ *Case Concerning Barcelona Traction Light and Power Company, Ltd (Belgium v Spain)* 1970 ICJ Reports 3

²⁴ *Kaunda v the President of the Republic of South Africa* 2005 4 SA 235 (CC) para 23

²⁵ Paras 25-27

²⁶ Para 27 In 2006, during the adoption of the *Draft Articles*, the overwhelming majority of states in the Sixth Committee of the General Assembly questioned the inclusion of a Draft Article on the right (of nationals) to diplomatic protection, even when couched in inspirational rather than prescriptive language. This is an indication of the extent to which states are generally uncomfortable with the notion of a right of individuals to diplomatic protection

²⁷ Para 32

this issue.²⁸ However, it might be worthwhile to reflect briefly – and certainly without engaging in a comprehensive analysis – on criticism levelled at *Kaunda's* treatment of extraterritoriality. Stuart Woolman, who regards the judgement in *Kaunda* to be flawed and “a retreat” from the progress in *Mohamed*,²⁹ opines that the flaw in *Kaunda* (as far as extraterritoriality is concerned) flows from the Court conflating two issues. These are the extraterritorial application of the Bill of Rights to the South African state, and the extraterritorial application of the Bill of Rights to foreign law.³⁰ The critical distinction, as I understand Woolman’s analysis, is that in the former case, it is the South African state which is bound by the Bill of Rights, while the second scenario would seek to subject foreign law (and through it the foreign state) to the South African Constitution.³¹ My reading of *Kaunda* is that the extraterritoriality it rejects is the latter type, that is subjecting foreign law to the South African Constitution. In other words, I do not read *Kaunda* to imply that when in Zimbabwe the South African government can act inconsistently with the Constitution, but rather that in Zimbabwe, it is the Zimbabwean law that applies and therefore one cannot argue that the *Zimbabwean government* has violated a South African national’s rights to life, property or a fair trial *under the South African Constitution*. And it is precisely this fact which makes the right to diplomatic protection different from the application of the Bill of Rights. With diplomatic protection, it is international human rights law (or in any event, wrongful conduct under international law), and not rights contained in the South African Bill of Rights that are at issue. As Olivier correctly observes, the Court’s approach in *Kaunda* shows that there should be

“... conceptual differentiation between the extraterritorial application of the Constitution on the one hand, and the operation of multilateral human rights instrument and obligations ... It is a mistake commonly made in South African human rights jurisprudence for the *raison d’être* for international law to be sought in the South African Constitution.”³²

With respect to the right to diplomatic protection in South African law, the Court first noted that “there is no enforceable right to diplomatic protection”.³³ South African citizens, however, “are entitled to request South Africa for protection under international law against wrongful acts of a foreign state.”³⁴ According to the Court, the entitlement of South African citizens to request diplomatic protection from the government against the actions of another state flows from the rights of citizenship as provided for in section 3 of the Constitution.³⁵ The Chief Justice then stated the crux of his judgement as follows:

²⁸ For an analysis of the treatment of extraterritoriality in *Kaunda*, see Woolman “Application” in *Constitutional Law* 31-117 and especially 31-118

²⁹ *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC)

³⁰ Woolman “Application” in *Constitutional Law* 31-118

³¹ 31-119 *et seq.*

³² Olivier 2005 *SAYIL* 241

³³ *Kaunda v the President of the Republic of South Africa* 2005 4 SA 235 (CC) para 61 (emphasis added)

³⁴ Para 61. By wrongful acts, here, the Court refers to internationally wrongful acts, or acts that are in breach of international law

³⁵ Para 62

“If, as I have held, citizens have a right to request government to provide them with diplomatic protection, then the government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution.”³⁶

The Court then held that a decision to refuse a request to protect a national “against gross abuse of international human rights norms” is justiciable.³⁷ However, in such circumstances courts cannot tell a government how to make diplomatic intervention.³⁸ In particular, the Court stated that a

“decision *as to whether* protection should be given, and if so, what, 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 are to be made, and the sanctions (if any) which are to follow if such representations are rejected are matters with which courts are ill-equipped to deal.”³⁹

That the courts are ill-equipped to deal with such questions does not mean that it has no “jurisdiction to deal with such matters”.⁴⁰ In the view of the Court, irrationality and bad faith would provide grounds for the review of the government’s decision to refuse diplomatic protection. If the government deals with a matter “in bad faith or irrationally, a court may require government *to deal with the matter properly*”.⁴¹ Chaskalson CJ then concluded with the following words of warning (no doubt addressed to over-eager judges):

“What needs to be stressed, however, in the light of some of the submissions made to us in this case, is that government has a broad discretion in such matters which must be respected by our courts.”⁴²

As stated earlier, the decision of the Court in *Kaunda* is coherent and clear. While due regard must be given to Coombs’s implicit warning concerning the “cost” associated with requiring the state to give reasons, it is equally reassuring that the courts strike a fine balance between the executive’s obligation and its wide discretion.

Although the court in *Von Abo* was bound by the majority judgement of Chaskalson CJ, it is worth recalling a few salient points of the other three judgements in *Kaunda*. While it is true that they have a number of important points in common, I would not, as Sachs J does, go as far as to say that all the judgements “are compatible with” the majority judgement.⁴³ The judgements have in common the striking of the balance between the obligation on the executive to comply with the Constitution and the wide discretion that must be afforded to the executive in matters relating to foreign affairs.⁴⁴ While the judgement of Sachs J itself does not mention this point, it appears to be assumed. The judgements also have in common the idea that, based on section 3 of the Constitution, *some* duty exists on the government in relation to diplomatic protection. It is here that the three judgments part ways.

³⁶ Para 67

³⁷ Para 69

³⁸ Para 73

³⁹ Para 77 (emphasis added)

⁴⁰ Para 78

⁴¹ Para 80 (emphasis added)

⁴² Para 81

⁴³ Para 275

⁴⁴ See para 210 per Ngcobo J and para 245 per O’Regan J

As stated above, according to the majority judgment, the duty on the state is to consider a request for diplomatic protection rationally and in good faith. However, the dissenting judgement of O'Regan J provides that there is an obligation on government "to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights law norms."⁴⁵ This goes well beyond what is provided for in the majority judgement. Ngcobo J's judgement, however, falls somewhere between the more subtle duty, imposed by the majority, to consider a request for diplomatic protection rationally and in good faith and 'the duty to provide diplomatic protection' conclusion of O'Regan J. Ngcobo J, to start off with, uses the language of the majority and asserts that in his view, the duty on the government "is to properly consider the request for diplomatic protection."⁴⁶ Elsewhere in the judgement, Ngcobo J states that where a citizen requests diplomatic protection in relation to a right to a fair trial, the government "has a constitutional duty to grant such protection".⁴⁷ The apparent disjuncture between the duty to provide diplomatic protection and the duty to consider a request for diplomatic protection rationally and in good faith is explained at the end of the judgement as follows:

"[Under the Constitution] the government has a *constitutional duty to grant diplomatic protection* to nationals abroad against violations or threatened violations of fundamental international human rights. This *duty entails an obligation to consider* properly the request for diplomatic protection".⁴⁸

4 An analysis of *Von Abo* in the context of *Kaunda*

4.1 General Approach to Sources and Methodology

As mentioned earlier, the *Von Abo* decision is wrong on various levels. Before delving into the substantive aspects of the decision, one general comment needs to be made concerning the reasoning and methodology applied in *Von Abo*. For a decision which is so far-reaching, one would expect a fully reasoned judgement supported by relevant authority. A thorough examination of the law in general, and the *Kaunda* judgment and applicable international law principles in particular, would have made the decision, whatever the outcome, more acceptable. But the examination of the various legal principles is not sufficiently deep, especially taking into account the importance of the question, to warrant the apparent departure from *Kaunda*. The judgement quotes large extracts from the *Kaunda* majority, dissenting and concurring judgements, mixes them together in a *potpourri* approach and then declares an outcome. The congruence between this outcome and *Kaunda* is assumed and therefore never properly examined. The differences, if any, between the majority, the minority and the concurring judgements in *Kaunda* are never explored. The nuances and implications of *Kaunda* are not considered in any

⁴⁵ Para 238

⁴⁶ Para 192 (emphasis added)

⁴⁷ Para 197

⁴⁸ Para 210

meaningful way or in any depth. The issues which are raised in the following paragraphs are not concerned with substance but rather with methodology.

The manner in which the Court refers to the Draft Articles on Diplomatic Protection, 2006 adopted by the International Law Commission (the ILC) is symptomatic of the failure of the Court to consider the sources carefully. In reference to the Draft Articles, the Court states that the “rule [relating to local remedies] has now been *codified* in article 10 of the International Law Commission’s Rules on Exhaustion of Local Remedies”.⁴⁹ This reference is troubling for two reasons. First, the ILC has never worked on the topic of exhaustion of local remedies and certainly never produced any “rules” on it. Secondly, notwithstanding that the ILC mandate is the codification and progressive development of international law, the work of the Commission is not in and of itself codification, at least not in the sense that the product can be regarded as binding law. Again, the point here is not that there is not such a rule in international law, for surely there is, but only that the method of citation is, at best, misleading and does not take into account the basic nature of international law.

Another example of the Court’s failure to examine sufficiently both the law and the legal principles relevant to the resolution of the dispute relates to the manner in which it treats the right to property as a human right under customary international law.⁵⁰ Expropriation without compensation is, without doubt, a violation of international law. However, this does not necessarily mean that the right to property is a *human* right under customary international law.⁵¹ It must be recalled that in *Kaunda* the focus is on violations of customary international human rights law and not rights in the South African Constitution.⁵² It is interesting in this regard that John Dugard, a leading champion of the individual’s right to diplomatic protection, has sought to assert the right to diplomatic protection in the context of *ius cogens* (peremptory norms) and

⁴⁹ *Von Abo v Government of the RSA* [2008] JOL 22219 (T) para 85

⁵⁰ Para 71 *et seq.*

⁵¹ While the Universal Declaration on Human Rights contains such a right, the right is not included in the International Covenant on Civil and Political Rights. For an interesting debate in this regard, see Petersmann “Time for a United Nations ‘Global Compact’ for integrating Human Rights into the Law of the World Wide Organization: Lessons from the European Integration” 2002 *EJIL* 621 and Alston “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann” 2002 *EJIL* 815. In the latter article, Alston, co-author of the renowned standard international human rights law text *International Human Rights in Context: Law, Politics and Morals*, laments Petersmann’s conflation of ‘liberty rights’, ‘contractual freedom’ and ‘property rights’, amongst others, as human rights. It may be added in this regard that Dugard *International Law – A South African Perspective* 3 ed (2005) 299, who is quoted extensively by Prinsloo J and who is a leading proponent of the national’s right to diplomatic protection concept, does not, in his treatment of expropriation, conceptualise property rights as part of international human rights but rather as part of “traditional international law, as formulated by capital exporting countries”.

⁵² *Kaunda v the President of the Republic of South Africa* 2005 4 SA 235 (CC) para 64, where Chaskalson CJ describes those actions for which the government will not be expected to be passive as amounting to the “material infringement of a human right that forms part of customary international law”. While the concurring judgement of Ngcobo J (para 160 *et seq.*) and the dissenting judgement of O’Regan J (which speaks of “egregious violations” of international human rights (para 238)) do not make it clear whether it is human rights found in treaty law or customary international law that are at stake, the majority judgement is clear in this regard. The judgement of Sachs J appears even narrower in this regard, in that he specifically refers to “torture, grossly unfair trials and capital punishment” as the violations to which he is referring (para 275).

not in any violation of international law.⁵³ It must be emphasised that it is not argued here that the right to property is *not* a human right under customary international law, only that it is not a fact to be assumed lightly. It is a right which, if relied upon, needs to be substantiated by proving the elements of customary international law, namely *usus* and *opinio iuris*.⁵⁴ However, if the view of the Court was that an applicant need not rely on customary international human rights law, but on specific human rights treaties such as the African Charter on Human and Peoples' Rights, then we would need to be referred to the specific human rights treaty and an allegation that the conduct in question was a violation of that treaty.⁵⁵

The point above is that the nature of the judgement required significant justification. Instead of deliberative arguments and reasoning to support the far-reaching conclusions, too much time is spent in the *Von Abo* judgement on political facts which, true though they may be, cannot on their own dispose of the complex legal principles at play. However, these are technical issues. The decision in *Von Abo* also raises substantive issues about the nature of the citizen's rights in relation to diplomatic protection. To these issues we will now turn.

4.2 The Right to Diplomatic Protection

As highlighted above, the Court declared in its order that Mr Von Abo has a right to diplomatic protection and that the government has a corresponding obligation to provide diplomatic protection. Moreover, the Court provided that the government must "take *all necessary steps* to have the applicant's *violations of his rights by [Zimbabwe] remedied*".⁵⁶ This is contrary to *Kaunda* in two respects.

First, in *Kaunda* the Court held that a citizen, like Mr Von Abo, has a right to request diplomatic protection and that the government has a duty to consider the request rationally and in good faith. Secondly, the Constitutional Court held that the government, because of the nature of the playing arena, namely foreign relations, has a wide discretion – both in whether to grant diplomatic protection and in the manner of effecting diplomatic protection. On both counts the judgement in *Von Abo* goes beyond these findings with

⁵³ Dugard "The Future of International Law: A Human Rights Perspective – with some Comments on the Leiden School of International Law" 2007 *LJIL* 729 732

⁵⁴ See Dugard *International Law* 29 *et seq.*

⁵⁵ Bearing in mind that my comments at this stage relate only to methodology, it is interesting to contrast the approach adopted by the Pretoria High Court in *Von Abo* with the two judgements that are more sympathetic to the 'right to diplomatic protection project' in *Kaunda*, namely those of Ngcobo J and O'Regan J. While the latter two judgements go to lengths to justify the conclusion that a fundamental human right in international law is at stake in the case before them, the Pretoria High Court does not even begin to engage with this rather complex question. It seems to be assumed. It is this unwillingness to engage in the issue that is the source of the problem.

⁵⁶ *Von Abo v Government of the RSA* [2008] JOL 22219 (T) para 161 (emphasis added). For purposes of comparison, see O'Regan J's judgement in *Kaunda* which, though finding a right to diplomatic protection, nevertheless proposed an order which still leaves much discretion for the state. O'Regan J held that she would order the government "to take appropriate steps to provide diplomatic protection" (para 271), whereas the *Von Abo* judgment requires that government take "*all necessary steps* to have the applicant's violation of his rights by the Government of Zimbabwe" (para 161 emphasis added).

regards to the order provided. There is, in a sense, a leap of logic. The argument that follows hereunder is essentially that the judgement fails to link the right to request (and the corresponding duty to consider) on the one hand, and the right to diplomatic protection (and the duty provide it) on the other.

I pause here to clarify what, in the light of the facts and *Kaunda*, the Court could and probably should have held. The Court should have held that the government had failed, as it was constitutionally obliged to do, to rationally consider the request of Mr Von Abo. Consequently, it should have ordered the government to go back and consider the request rationally and in good faith and to provide to the Court, within 60 days (or even 30 days), its decision, reasons and any steps it had taken or intended to take to remedy *its own* violations and not, as suggested by the Court, the violations perpetrated by the government of Zimbabwe. The taking of property is a violation of international law by Zimbabwe. The South African government cannot remedy this as suggested by the Court in *Von Abo*. What the government can (and should) remedy is its own violation of not considering, rationally and in good faith, the request by Mr Von Abo.

While the Court quotes extensively from *Kaunda*, the apparent conflict between the order made and the majority finding in *Kaunda* is neither explained nor explored. In particular, it is not made clear how the Court arrives at the conclusion that there is a right to diplomatic protection when Chaskalson CJ's judgement in *Kaunda* clearly states the contrary.⁵⁷ The Pretoria High Court does not explain the shift from the right of citizens to request diplomatic protection and the duty of the government to consider such a request rationally and in good faith (*Kaunda*), to the right of citizens to diplomatic protection and the corresponding duty on the government to provide diplomatic protection – both of which are stated in absolute terms (*Von Abo*). This is a big jump which cannot be made without justification. In light of the *Von Abo* judgement, it is also not clear what remains of the wide discretion of the executive to which reference is made in all the judgements in *Kaunda*.

Although it is argued here that the decision in *Von Abo* is in conflict with *Kaunda*, the possibility of some form of reconciliation between these cases cannot be excluded. However, to do this would require more substantiation than the Court has offered. In particular, the shift from a right to request diplomatic protection to a right to diplomatic protection would require substantiation. The Court does not provide any reasons for this leap. It can be speculated that one reason could be that the government had had their opportunity to consider the request rationally and in good faith, but had missed the opportunity to do so, and that the Court consequently was entitled to order it to provide diplomatic protection. The second possibility is that the Court simply did not trust the government to go back and consider the request of Mr Von Abo in good faith. Beyond these two reasons, it is difficult to find any other possible explanation for the Court's apparent departure from *Kaunda*. I turn now to consider both possible explanations in turn.

⁵⁷ *Kaunda v the President of the Republic of South Africa* 2005 4 SA 235 (CC) para 60

The first possible explanation, simply put, implies that the right to request diplomatic protection and the duty to consider such a request automatically transforms into a right to diplomatic protection and a duty to provide diplomatic protection where the government does not rationally consider the request. In essence, if one were to accept this view, *Von Abo* is not a departure from *Kaunda* but simply a reflection of the natural progression of the rights as provided for in *Kaunda* – the logical conclusion of *Kaunda*. This is not an implausible argument, but it is not self-evident, and would require some justification in the light of *Kaunda*. In particular, such an argument would need to overcome an obstacle placed by the express words in the majority judgement in *Kaunda*:

“If the Government refuses to consider a legitimate request or deals with it in bad faith or irrationally, a court can require Government to deal with the matter properly.”⁵⁸

This means that if the government fails to consider a request rationally or deals with it in bad faith, a court can order the government to apply its mind rationally to the decision. In this regard the Court in *Kaunda* emphasises that its judgement “does not mean that courts [can] substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection”⁵⁹ – which is precisely what the Court in *Von Abo* did. Ngcobo J, whose judgement, as suggested earlier, appeared more sympathetic to the right to diplomatic protection than the majority judgement, reaches the following conclusion about the consequences of government’s failure to consider a request for diplomatic protection rationally and in good faith:

“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 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.”⁶⁰

This extract from Ngcobo J’s judgement is clear and unambiguous. Where the government has failed or refused to properly consider a request, the function of a court would not be to order the government to provide diplomatic protection but rather to order the government to go back and consider the request rationally and in good faith. In this regard, the judgement in *Von Abo* appears to affirm O’Regan’s dissenting judgement in *Kaunda*, which holds that there is a right to diplomatic protection, and rejects the majority judgement.

Indeed, even leaving aside the fact that this is a foreign affairs matter where the courts have consistently emphasised a wide discretion, the very nature of the application by Mr Von Abo was an application for the review of the decision of the government. The primary remedy for review is the setting aside of the decision and remitting it to the decision-maker because courts

⁵⁸ Para 80

⁵⁹ Para 79

⁶⁰ Para 193 (emphasis added)

should not easily usurp the powers of the executive.⁶¹ This is not to say that courts can never correct an earlier decision or substitute the decision of the executive with its own decision. However, this can only be done in exceptional circumstances. These exceptional circumstances exist when the end result is a foregone conclusion, where a delay would cause the applicant significant damage, where the original decision-maker exhibited bias or where the court is as well qualified as the original decision-maker to make the particular decision.⁶² It is not clear that any of these factors, developed through case law, would apply to the *Von Abo* case. In any event, at the very least, if Prinsloo J had this in mind, he needed to justify the conclusion that this was an exceptional case necessitating substitution. He did not do so.

The second possible reason to explain the Court's decision could be that it simply did not trust the government to consider the request rationally and in good faith. After all, the Court had already suggested that the South African government was complicit in the wrongful actions of Zimbabwe.⁶³ One certainly hopes that this is not the reason, as it takes us into dangerous terrain that could threaten our constitutional democracy and skew the relationship between the organs of state. Certainly, if having been ordered by a court to consider a request rationally and in good faith within a specified time and the executive fails to comply, a court could find itself in the position where it is compelled to make the kind of order made by the Pretoria High Court – but even here, one hopes that the courts would do so more reluctantly than in *Von Abo*.

4 3 The evil being remedied by an extension of the right to diplomatic protection to South African citizens

Many South Africans praised the High Court's judgement in *Von Abo* as a victory for human rights – hence the award of “Newsmaker of the Month” to Judge Prinsloo. These and other human rights-based arguments for the extension of the right to diplomatic protection appear to be at the heart of Prinsloo J's decision. The learned judge asserted, for example, that “there are no remedies available to the applicant”⁶⁴ and consequently that his government must protect him. Indeed the Constitutional Court itself, in its nuanced judgement in *Kaunda*, appears to have been informed by the same sentiments when it stated the following:

⁶¹ Hoexter *Administrative Law in South Africa* (2007) 585. Although Hoexter's discussion is in the context of administrative action, there is no reason to conclude that the remedies for review are any different when it comes to executive decisions in accordance with the Constitution, particularly in light of Chaskalson CJ's reminder in *Kaunda* that courts are not “to substitute their opinion” (para 79). On the distinction between administrative action proper and executive action, see Hoexter *Administrative Law 26 et seq.* See also, as examples of remedies for breach of constitutional duties, *Matatiele v the President of the Republic of South Africa* 2006 5 SA 47 (CC) para 96; *Executive Council of the Western Cape Legislature v the President of the Republic of South Africa* 1995 4 SA 877 (CC).

⁶² Hoexter *Administrative Law* 490 *et seq.*

⁶³ *Von Abo v Government of the RSA* [2008] JOL 22219 (T) paras 112, 143.

⁶⁴ Para 86.

“[The Applicants] are not in a position to invoke international law themselves and are obliged to seek state protection through the state of which they are nationals.”⁶⁵

Elsewhere, Chaskalson CJ stated that “whatever theoretical disputes”⁶⁶ there may be about diplomatic protection, “it cannot be doubted that in substance the true beneficiary of the right” is the individual.⁶⁷ Ngcobo J is more direct in this regard:

“Therefore, unless the South African government grants South African nationals abroad diplomatic protection, they are likely to remain without a remedy for violations of their internationally protected human rights.”⁶⁸

These arguments, compelling though they may be, need to be carefully scrutinised.

Under international law, the right to diplomatic protection is a right of states, and not of the individual. This can lead to unfortunate circumstances if the state of nationality does not act. But this is precisely why the international human rights system has, over the last five decades, developed so rapidly to include individual complaints mechanisms. At least as a by-product, the human rights complaints mechanisms should reduce the reliance on governments to take up action on behalf of their nationals, particularly when taking up the matter would have foreign policy implications – the exact reason for the executive’s broad discretion when it comes to the conduct of foreign affairs. It has to be emphasised here that the question is not the correctness or not of the foreign policy but rather that the government has a right to make the policy. Indeed, the circumvention of these mechanisms by an over-emphasis of the right of the citizen to diplomatic protection may have the effect of undermining the very international human rights systems designed to protect those who suffer as a result of abuse of state action.

Ngcobo J, in *Kaunda*, is not unaware of this very important alternative and does address it, albeit in a cursory manner. He asserts that the remedies provided for in international human rights law are weak and at times slow.⁶⁹ It is true that the process is slow but it is not necessarily slower than trying to get diplomatic protection from one’s own state of nationality as Mr Von Abo himself can attest. If, when he began his communication with the South African government in 2002, Mr Von Abo had submitted a complaint either to the African Commission on Human and Peoples’ Rights and/or the Human Rights Committee of the United Nations, a decision would already have been handed down.⁷⁰ This approach puts the onus to remedy the wrongful conduct on the state responsible for the violation of the human right – in the

⁶⁵ *Kaunda v the President of the Republic of South Africa* 2005 4 SA 235 (CC) par 61

⁶⁶ Para 64

⁶⁷ Para 64

⁶⁸ Para 181 In para 167, Ngcobo J asserts that “diplomatic protection is an important arsenal of human rights protection”

⁶⁹ Para 166

⁷⁰ Of course he would need to show a violation of the right contained in the respective instruments, ie the African Charter on Human and Peoples’ Rights and International Covenant on Civil and Political Rights (ICCPR) As stated earlier, the ICCPR does not contain a right to property and his claim would therefore be difficult (but not impossible) to substantiate before the Human Rights Committee

case concerning Mr Von Abo's farms, this approach would place the onus to remedy the violation on the government of Zimbabwe as the perpetrator of the internationally wrongful act. If Mr Von Abo were to submit a complaint to the African Commission on Human and Peoples' Rights, he would need to meet the admissibility requirement set out in the Charter.⁷¹ The most significant of these is the requirement to exhaust local remedies. It is clear from the *Von Abo* decision that the local remedies in Zimbabwe had been exhausted or, alternatively, did not exist.⁷²

Second, it is not true that decisions of these bodies are necessarily weaker. The decisions themselves are certainly not legally binding but they are not without legal effect as they would indicate a violation of the instrument being interpreted. Thus, while a decision by the Human Rights Committee may not necessarily be legally binding, it is legally relevant in that it would indicate a violation of a right in the International Covenant on Civil and Political Rights and therefore a breach of an international obligation which must be remedied. The same applies to findings of the African Commission on Human and Peoples' Rights.⁷³ More importantly, the sentiments expressed by Ngcobo J in this regard are worrying in that they reflect pessimism about the international human rights system, and may act as a self-fulfilling prophecy contributing to undermining the international human rights system that so many have worked tirelessly to develop. The international human rights system, whether the African Charter or the International Covenant on Civil and Political Rights, is designed to ensure that individuals are not left up to the mercy of their governments. It is principally to these mechanisms that individuals must turn when their rights have been violated by governments.

5 Conclusion

In terms of the test set by Chaskalson CJ in *Kaunda*, the decision in *Von Abo* is wrong. The Court went beyond its mandate in reviewing the actions of the government. While it was reasonable, under the circumstances, to find against the government, it was unreasonable for the Court to substitute its views for those of the government – especially in light of the sparse reasoning. In the end, this article is not about Mr Von Abo. Indeed, the correctness or not of the decision is unlikely to affect Mr Von Abo because it appears from subsequent internal government discussion that, even before the *Von Abo* decision, the government had taken up the matter of South African farms in Zimbabwe, although it failed to adequately communicate this to Mr Von Abo and certainly failed to prove this fact in court.

⁷¹ The admissibility requirements under the Charter are provided for in Art 56 of the African Charter. These requirements are largely similar to those required for the submission of a complaint to the Human Rights Committee. See Arts 1 and 2 of the Optional Protocol to the International Covenant on Civil and Political Rights.

⁷² *Von Abo v Government of the RSA* [2008] JOL 22219 (T) para 86. The jurisprudence has long held the view that local remedies need not be exhausted where it is "impracticable". See eg *Free Legal Assistance Group v Zaire* (decided in 1995) (2000) African Human Rights Law Report para 37.

⁷³ It is important to explain that, for this author, the question of the legal effect of the decisions of the Human Rights Committee and the African Charter on Human and Peoples' Rights is quite separate from the question of enforcement.

The importance of the decision lies in its potential impact on future cases and ensuring that the wide discretion afforded to the executive in the conduct of foreign affairs is not eroded by overzealousness. The Pretoria High Court's decision in *Von Abo*, as it affects the conduct of the President, will have to be certified by the Constitutional Court.⁷⁴ The Constitutional Court will, more than likely, only have to certify the first order, namely that the President failed in his constitutional duty to deal with Mr Von Abo's request rationally and in good faith – an aspect of the judgment which is correct. If, however, the highest court in the land also has to pronounce on the remedies, it is hoped that the nuance and intellectual rigour reflected in *Kaunda* is maintained.

SUMMARY

Von Abo v Government of the RSA [2008] JOL 22219 (T) contains certain significant findings regarding the right to diplomatic protection and, more generally, the discretion of states in the conduct of foreign affairs. Although the court relied extensively on *Kaunda v the President of the RSA* 2005 4 SA 235 (CC), it reaches conclusions and gives an order that are apparently at odds with that judgement. This paper seeks to explore this paradox.

⁷⁴ S 167(5) of the Constitution The hearing commenced on 29 February 2009