THE OBLIGATION TO PROTECT: THE LEGAL CONTEXT FOR DIPLOMATIC PROTECTION OF CANADIANS ABROAD

Craig Forcese*

INTRODUCTION

Repeated instances of detention, torture and, in one case, murder of Canadian citizens by foreign governments have rocked Canada's foreign policy establishment. In October 2003, Maher Arar arrived in Canada after being detained in Syrian military prison for more than a year on unsupported terrorism suspicions. In 2002, Arar – a dual Canadian-Syrian national – had been returning to Canada from a holiday in Tunisia via the United States. He was promptly arrested by U.S. authorities during his stopover in New York on suspicion of terrorist connections, and deported to Jordan. After administering a beating, Jordanian officials then removed Mr. Arar to Syria, the country of his birth. While in Syria, Syrian agents tortured Mr. Arar,[1] sparking an inquiry by the Government of Canada into its role in Mr. Arar's treatment.[2]

Mr. Arar's case, and the similar treatment of several other Arab-Canadians detained in Egypt and Syria in the years following 9/11 have sparked enormous controversy in Canada.[3] These events follow hard on the heels of the arrest and

---

* Assistant Professor, Faculty of Law, University of Ottawa, Canada. B.A. (McGill), M.A. (Carleton), LL.B. (Ottawa), LL.M. (Yale); of the bars of New York, the District of Columbia and Ontario. E-mail: cforcese@uottawa.ca. The author would like to thank the Social Science Humanities and Research Council and the Law Foundation of Ontario for their support of his research. Thanks go also to Koren Marriott, 3rd year LL.B. candidate at University of Ottawa, for her comments on an early draft of this article. I would also like to thank the organizers of the symposium for which this paper was first prepared, particularly Neil Craik, and the editors of the UNBLJ for their careful work finalizing it for publication.

1 For a summary of the events alleged in the Arar matter, see Mr. Arar's statement of claim against the government Syria, filed in Ontario Superior Court of Justice, Court File No. 03-CV-259270CM2, online: <http://www.maherarar.ca/cms/images/uploads/ararclaim_syria_final_Nov21.pdf>. See also Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) [Arar Commission].

2 See Government of Canada, Deputy Prime Minister Issues Terms Of Reference For The Public Inquiry Into The Maher Arar Matter (5 February 2004), online: <http://ww2.psepc-sppcc.gc.ca /publications/news/2004/20040205_e.asp>.

3 For a description of the treatment of Mr. Arar, Mr. Abdullah Almalki, Mr. Ahmad Abou-ELMaati and Mr. Muayyed Nureddin and the conclusions of the Arar Commission's Independent Fact-Finder, Professor Stephen Toope, that these men had been tortured in Syria, see *Report of Professor Stephen J. Toope - Fact Finder* (14 October 2005), online: <http://www.ararcommission.ca /eng/ToopeReport_final.pdf>.

beating death of Zahra Kazemi, a 54-year old photojournalist with dual Canadian-Iranian nationality, by Iranian authorities in June 2003. They also follow in the wake of the detention and torture of Canadian-UK citizen William Sampson for two and one-half years in Saudi Arabia.[4]

Some critics have cited these events as new evidence of Canada's flagging influence in the community of nations, and of the failures of its "soft power" foreign policy.[5] Others have suggested more sinister motives, at least in relation to the treatment of Mr. Arar and other Arab-Canadians; namely, a Canadian policy of extraordinary rendition of terrorist suspects to torturing regimes.[6] Under these circumstances, these instances of maltreatment of Canadian citizens abroad raise more than political and foreign policy issues. They also raise important and complex questions about Canada's legal liability to those injured by foreign abuse. Most obviously, in what circumstance would Canada itself incur responsibility for mistreatment inflicted by a foreign state? Two logical possibilities present themselves: first, responsibility incurred because of complicity in the commission of the harm and second, responsibility flowing from omission; that is, a failure to intervene (or intervene properly) to forestall the abuse.

Acts of complicity in the maltreatment of a state's nationals by another state is arguably the most straight forward of the two prospective sources of responsibility. An active contribution to an injury is readily cognizable as a source of responsibility in international law and liability in domestic law. On the other hand, whether responsibility flows from a failure to intervene and prevent abuse is a more difficult question. Certainly, the notion that states may act to protect their nationals is one of the oldest doctrines of international law, known generally as diplomatic protection. More contentious is whether a state is *obligated* to extend this diplomatic protection to its nationals. A natural corollary question is whether a state that *fails* to extend diplomatic protection to its nationals might be liable for this omission.

---

[4] During his detention, Mr. Sampson was forced to confess, apparently under duress, to a bombing in Saudi Arabia. In fact, Sampson and six other foreigners were widely perceived by Saudi critics as scapegoats from attacks conducted by Islamic militants. "Canada welcomes release of Canadian detained in Saudi Arabia" *Agence France Presse* (8 August 2003), 2003 WL 69499596. During his imprisonment, Sampson was reportedly tortured. Louise Elliott and Alexander Panetta, "Torture claims not revealed; Foreign Affairs feared reprisals" *Hamilton Spectator* (14 August 2003), 2003 WLNR 5991110 (WeC).

[5] See *e.g.* then-opposition member of Parliament Stockwell Day labeling Ms. Kazemi's treatment in Iran as displaying "the utter failure of soft power and soft diplomacy." Stephanie Rubec, "Diplomat Returns To Iran; To Push For Kazemi's Body, Public Trial" *Toronto Sun* (30 September 2003) 18.

[6] See *e.g.* Amnesty International (Canada), "Restoring his rights, addressing his wrongs. Amnesty International's closing submissions to the Committee of Inquiry" (10 September 2005), online: <http://www.amnesty.ca/human_rights_issues/arar_documents/Arar_closing_submission_sept10.pdf> (describing the Arar and other cases as perhaps "tantamount to a Canadian variation of the notorious U.S. practice of extraordinary rendition, whereby individuals are transferred by one government into the hands of police and jailers in another country, outside of the usual framework of legal and human rights safeguards." at 10).

The article that follows does not engage the legal questions raised by possible Canadian complicity in maltreatment. Instead, this paper takes up the broader legal questions raised by the diplomatic protection matter: is the government obligated to intercede and protect its citizens? It does so in three parts. Part I briefly sets the factual stage for this study. Without pronouncing on the merits of these claims, it examines controversies over Canadian diplomatic and consular practices in relation to Canadians detained abroad. Part II then focuses on the extent to which Canada is obliged to extend diplomatic protection to its nationals overseas; that is, whether diplomatic protection is a duty under either international or domestic public law. Finally, Part III considers whether a failure to meet such a putative public law obligation gives rise to liability in Canadian law.

The article concludes that decisions concerning diplomatic protection are amenable to scrutiny in Canadian public law, potentially as a constitutional matter and almost certainly as part of administrative law. In the right circumstances, a failure to extend diplomatic protection could be actionable in private law, although success in such a lawsuit would oblige a plaintiff to overcome important legal and evidentiary hurdles. All told, the legal context for diplomatic protection remains rudimentary. The article urges that this situation be corrected.

I. CONTROVERSIES IN DIPLOMATIC PROTECTION

1. Defining Diplomatic Protection

In international law, "diplomatic protection" is a concept with several guises. In its classic form, it includes "an international proceeding, constituting 'an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties'."[7] In keeping with this broad definition, the United Nations International Law Commission's Special Rapporteur on Diplomatic Protection (ILC Rapporteur) recently defined the concept as an "action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State."[8] While the ILC Rapporteur included many examples of state conduct in his definition of "action", a key component includes the pursuit of judicial or arbitral proceedings. Known as "espousal of claims", diplomatic protection of this sort involves a state prosecuting a complaint against another country, one that has committed an internationally wrongful act against the first state's national. Put simply, espousal of claims is a species of international lawsuit where a state steps into the shoes of its injured national.

---

[7] E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York, The Banks Law Publishing Co.: 1915) at 354.

[8] J. Dugard, *First Report on Diplomatic Protection*, International Law Commission, Fifty-second Session, A/CN.4/506 (2000) at 11.

"Diplomatic protection" is supplemented by "consular protection", a function with a strong treaty base in modern international law. [9] Consular protection is the key preoccupation of this article. Article 3 of the *Vienna Convention on Diplomatic Relations* (*VCCR*) lists, as one of the functions of a diplomatic mission, "protecting in the receiving state the interests of the sending state and its nationals, within the limits permitted by international law."[10] The *VCCR* asserts a similar role for consular officials,[11] and some authorities describe the protection of nationals as a consul's central task.[12]

The *VCCR* also sets out specific responsibilities of "receiving" states in facilitating consular assistance of detained, "sending" state nationals. Thus, Article 36 provides that consular officials are "free to communicate with nationals of the sending State and to have access to them". Nationals of the sending state have a reciprocal freedom to communicate with, and have access to, consular officers of the sending State. Moreover, upon request of that national, the receiving state must inform consular officials that a national is detained. In a provision at issue in two recent International Court of Justice (ICJ) cases,[13] the receiving state must inform "without delay" the detained alien of his or her right to contact consular officials. In *Avena*, the International Court of Justice concluded that this obligation arises immediately upon receiving state officials learning (or suspecting) that the detained individual is a foreign national.[14] Once notified of the detention, consular officials then have a right to visit and converse with their national and arrange for his or her legal representation, unless refused by the national.[15]

---

[9] For the purposes of this article, "diplomatic protection" is used to describe both espousal of claims and consular protection. In so doing, it follows Albrecht Randelzhofer, "Nationality", in Rudolph Bernhardt, ed., *Encyclopedia of Public International Law* (Amsterdam : North-Holland, 1997) 506 ("A State's right of diplomatic protection comprises two aspects: firstly, the helping and protecting of nationals abroad in the pursuance of their rights and other lawful activities by consular or diplomatic organs ...; secondly, the claiming of compensation from a State which has treated the nationals of the protecting State in a manner incompatible with international law" at 506). There is, however, a strongly held few that consular protection is a separate species of law because of its strong treaty base and different focus. See *e.g.* Annemarieke Künzli, "Exercising Diplomatic Protection: The fine line between litigation, demarches and consular assistance," (2006) 66 ZaöRV 321. This article does not take up this issue, if only because the applicable principles discussed in it likely apply to diplomatic protection in all of its manifestations.

[10] 18 April 1961, 500 U.N.T.S. 95 [*VCCR*].

[11] 24 April 1963, 596 U.N.T.S. 261, art. 5.

[12] See discussion in Luke Lee, *Consular Law and Practice*, 2nd ed. (Oxford: Clarendon Press, 1991) at 124 *et seq.*

[13] See *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, [2004] I.C.J. Rep. 128 [*Avena*]; and *LaGrand (Germany v. United States of America)*, Judgment, [2001] I.C.J. Rep. 466.

[14] *Avena*, *ibid.* at para. 63.

[15] *VCCR*, 24 April 1963, Art.36(1)(c).

2. Canadian Practice

Like other states, Canada does extend diplomatic protection to its nationals abroad, most frequently expressed in the form of consular assistance. Konrad Sigurdson, Director General, Consular Affairs Bureau, Department of Foreign Affairs and International Trade (DFAIT), told a parliamentary committee in 2003 that "Canada has one of the best consular assistance programs in the world." In 2002, his office "handled close to 170,000 formal cases, involving but not limited to arrest and detention cases, death abroad, medical assistance, repatriation, well-being and whereabouts investigations, assistance with loss or theft of property and passports, and the processing of citizenship applications." One percent of these cases concerned arrests or detentions, three quarters of which occurred in the United States, usually on drug-related charges.[16]

Most of these consular cases are apparently resolved without controversy. However, several high profile detentions of Canadian citizens by foreign states have prompted criticism that Canada does not do enough to extend diplomatic protection to its nationals.[17] The accusations leveled against Canadian officials vary. In cases such as that of Mr. Arar, Abdullah Almalki, Ahmad Abou-El Maati and Muayyed Nureddin – all detained and tortured in Syria – suspicions have been raised that consular officials were (at best) willfully blind to torture in Syria and inept in their handling of these men's cases.

In its closing submissions to the Arar Commission, for instance, Amnesty International flagged a number of important questions about the action of Canadian officials, raised by the evidence before the inquiry. For example, "[t]he allegations of torture in Syria that were conveyed by Mr. El Maati during a consular visit in Egypt in July 2002 do not appear to have been circulated to all appropriate officials and do not appear to have influenced how subsequent cases such as Mr. Almalki, Mr. Arar and Mr. Nureddin were approached."[18] Subsequently, disagreements and poor communications between government agencies "obstructed the formulation of a unified Canadian government statement to Syrian officials regarding Mr. Arar's case, and may have delayed high-level diplomatic efforts to secure his return to Canada."[19] Moreover, "[t]he actions of various government officials, [including the then-Canadian ambassador] conveyed an impression to Syrian officials that there was

---

[16] House of Commons, Standing Committee on Foreign Affairs and International Trade, *Evidence*, 37th Parl., 2nd Sess. (25 September 2003).

[17] In many of these cases, the citizen in question was a dual nationality, also possessing the nationality of the injuring state. Dual nationality has implications in public international law for diplomatic protection. For a discussion of this issue, see Craig Forcese, "The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror'" (2006) 17 E.J.I.L. 369; and Craig Forcese, "Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law" (2005) 37 Geo. Wash. Int'l L. Rev. 469.

[18] *Ibid.*

[19] *Ibid.*

considerable Canadian interest in the results of interrogations and no Canadian concern about the possibility of torture." [20] Indeed, "Canadian Embassy officials in Syria, including the Ambassador and the consular officer assigned to Mr. Arar's case, failed to take the risk of torture seriously."[21]

These concerns were largely borne out by the findings of the public inquiry into the Arar matter, released in Fall 2006. Thus, "[o]n receiving a summary of a statement made by Mr. Arar while in Syrian custody in early November 2002, DFAIT distributed it to the RCMP and CSIS without informing them that the statement was likely a product of torture. That statement became the basis for heightened suspicion in some minds about Mr. Arar's involvement in terrorism." Further, "CSIS received information about Mr. Arar from the Syrian Military Intelligence (SMI) and did not do an adequate reliability assessment as to whether the information was likely the product of torture. Indeed, its assessment was that it probably was not." Subsequently,

> the RCMP, acting through the Canadian Ambassador, sent the SMI questions for Abdullah Almalki, the subject of the relevant investigation and also in Syrian custody. This action very likely sent a signal to Syrian authorities that the RCMP approved of the imprisonment and interrogation of Mr. Almalki and created a risk that the SMI would conclude that Mr. Arar, a person who had some association with Mr. Almalki, was considered a serious terrorist threat by the RCMP.

Later, "DFAIT failed to take steps to address the statement by Syrian officials that CSIS did not want Mr. Arar returned to Canada." Overall, "[o]n several occasions, there was a lack of communication among the Canadian agencies involved in Mr. Arar's case. There was also a lack of a single, coherent approach to efforts to obtain his release."[22]

These themes recur in other complaints about Canadian consular and diplomatic practices. Omar Khadr, currently on trial before a U.S. military tribunal for the shooting death of a U.S. solider in the Afghan war, has alleged in an on-going proceeding before the Federal Court that Canadian consular officials have not interceded properly with U.S. officials in his case, and indeed that they have collaborated with American intelligence agencies in interrogating him.[23]

For his part, William Sampson has accused Canadian officials of willful blindness or indifference to his treatment at the hands of Saudi Arabia following his

---

[20] *Ibid.*

[21] *Ibid.*

[22] All quotations in the paragraph are drawn from Arar Commission, *supra* note 1 at 14-15.

[23] *Khadr v. Canada*, 2004 F.C. 1145 (F.C.T.D.) [*Khadr*].

incarceration in that country on fabricated charges.[24] In 2003, he told a parliamentary committee:

> Throughout my incarceration I considered that the activities of the [Canadian] embassy officials...fell well short of anything that could be considered supportive. Their behaviour and treatment of my family, of my father in particular when he visited Saudi Arabia, was thoroughly inadequate. ... [I]t would appear that the Department of Foreign Affairs operated from the earliest stages as if I were guilty, long before I even had a trial, a trial that turned out to be nothing more than a farce, a trial at which I was brought before three judges without representation, without witnesses to the event other than those provided by the Saudi Arabian government.[25]

Finally, Zahra Kazemi's son has alleged that the Canadian government has been lukewarm in the enthusiasm with which it has sought answers and reparations from Iran with regards to the beating murder of his mother.[26]

There are two sides to any accusation, and Canadian government officials are constrained in their ability to answer these charges. Some observers have cautioned that Canada's consular assistance often must be conducted behind closed doors, a reality that makes it difficult to dispel impressions of inaction.[27] This author has conversed with government officials about some of the charges listed above, and these public servants reject as spurious the notion that they failed to do everything reasonably in their power to assist their co-nationals. Further, in the case of Mr. Arar, the official inquiry's assessment of Canadian consular (as opposed to police) actions was generally positive. Meanwhile, the Khadr accusations remained unproven. It would be wrong, therefore, to conclude that these claims are established or indeed that all will prove meritorious. It is also important to underscore that these controversial matters are few in number, as compared to the vast number of cases handled by consular officials each year.

Nevertheless, these claims are serious enough to spark concerns about the effectiveness of government practices where Canadians are detained by repressive regimes. The DFAIT itself reacted to these controversies by announcing in 2004 its intent to develop a "clear protocol for managing difficult cases – those involving detention, reports of torture, and disregard for customary consular and diplomatic practices", to increase "awareness training" for consular officers in order "to assist them in recognizing cases where torture or other abuse has occurred", and to review

---

[24] Canadian Press, "Sampson lambastes government, calls for public inquiry" *Halifax Daily News* (7 November 2003) 12.

[25] Testimony of Mr. William Sampson to the House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, 37th Parl., 2nd Sess. (6 November 2003).

[26] Sean Gordon, "Canada has few options to make Iran co-operate in Kazemi case" *Ottawa Citizen* (30 July 2004) A5.

[27] Harry Sterling, "Helping Canadians in foreign jails" *Calgary Herald* (17 November 2003) A9.

"the handling of situations where torture is suspected".[28] There is no doubt that this response is driven by politics and the notoriety of the events described above. The question to which this article now turns is whether such a reaction might also be driven by law. Specifically, is access to adequate diplomatic protection a right that Canadian citizens possess?

II. THE OBLIGATION TO INTERCEDE

1. Diplomatic Protection in International Law

A right existing in international law may be incorporated into domestic constitutional[29] or administrative law,[30] even where it flows from an unimplemented treaty. A right that exists in customary international law is theoretically of direct effect in Canadian common law, unless supplanted by an inconsistent statutory regime.[31] It is less clear that an international right is cognizable as a tort, if only because international law rarely creates an international cause of action. Still, it is conceivable that observance of an international right might have a bearing in domestic tort law as a measure, for example, of the applicable standard of care that should be employed by a government official in exercising governmental functions – a matter raised below. It is instructive, therefore, to commence a discussion of a putative right to diplomatic protection with a brief review of the public international law on the subject.

A state's *entitlement* to exercise diplomatic protection is unquestionable. In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice held that "a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."[32] In extending such

---

[28] Treasury Board of Canada Secretariat, "Report on Plans and Priorities" in *Foreign Affairs Canada*, No. BT31-2/2005-III-52 (24 September 2004).

[29] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (holding that the content of *Charter* s.7 was informed by the *UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, even if the provision of that treaty in question was not transformed into Canadian law by statute of Parliament).

[30] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 194 (holding that the *Convention on the Rights of the Child* informed the scope of reasonable administrative behaviour, even when not transformed into Canadian law by statute of Parliament).

[31] See *e.g. Jose Pereira E Hijos S. A. v. Canada (Attorney General)*, [1997] 2 F.C. 84 (sub nom. *Hijos (Jose Pereira E) S.A. v. Canada (Attorney General)*), 126 F.T.R. 167 ("The principles concerning the application of international law in our courts are well settled ... One may sum those up in the following terms: accepted principles of customary international law are recognized and are applied in Canadian courts, as part of the domestic law unless, of course, they are in conflict with domestic law." at para. 20).

[32] [1924] P.C.I.J., ser. A, No. 2, at 12.

protection, reasoned the Court, a state was merely preserving its own rights; namely, "its right to ensure, in the person of its subjects, respect for the rules of international law."[33]

Other commentators have sometimes gone further. As early as 1758, Emmerich de Vattel claimed, in his treatise *The Law of Nations*, that "whoever uses a citizen ill indirectly offends the State, which is *bound* to protect this citizen."[34] Yet, de Vattel's reference to a state being "bound" was – and is – disputable.[35] In relation to consular access, the language of Article 36 of the *VCCR* bestows upon a sending state a right to controlled access to its nationals detained in the receiving state. It does not impose an obligation to seek that access. Likewise, in discussing customary international law in the *Barcelona Traction Case*, the ICJ observed that "[t]he State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case."[36]

In 2000, the ILC Rapporteur suggested moving away from this discretionary standard. Instead, he proposed the imposition of a duty to extend diplomatic protection in most instances where the injury results from a grave violation of international law; specifically, those transgressing *jus cogens* or peremptory norms.[37] Further, states would be "obliged to provide in their municipal law for the enforcement of this right [to diplomatic protection] before a competent domestic court or other independent national authority."[38]

---

[33] *Ibid.*

[34] Emmerich deVattel, *Law of Nations* ed. by Joseph Chitty (Philadelphia: T. & J. W. Johnson, 1833) at 161 [emphasis added].

[35] See Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester: Manchester University Press, 1984) ("The doctrine as it actually developed was that the State was entitled to protect its citizens abroad if it so chose. However, it was under no duty, domestically or internationally, to do so." at 9).

[36] 1970 I.C.J. 6 at 44.

[37] A *jus cogens* – or peremptory – norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, Art. 53. The ban on torture would likely be listed among these norms. For a discussion of the *jus cogens* nature of the prohibition on torture, see *e.g. Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, U.N. GAOR, 56th Sess., Supp. No. 10, Comment 1, U.N. Doc. A/56/10 (2001) adopted by the International Law Commission at its fifty-third session (2001) ("Although not specifically listed in the Commission's commentary to article 53 of the Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies." at 284) online: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/ 9_6_2001.pdf>.

[38] Dugard, *supra* note 8 at 27 (draft Art. 4).

Yet, the full UN International Law Commission rejected this approach, preferring the classic position in its draft articles on diplomatic protection, adopted in 2004:

> A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation.[39]

National courts have come to similar conclusions. Thus, in *Kaunda v. President of the Republic of South Africa*, the South African Constitutional Court recently considered both the ILC's work and the ICJ's holding in *Barcelona Traction*.[40] The Court concluded that while several nations guarantee diplomatic protection in their domestic law, the weight of state practice continued to demonstrate that "diplomatic protection remains the prerogative of the state to be exercised at its discretion."[41] The courts of other states have reached identical conclusions.[42]

In sum, a right to diplomatic protection does not exist in international law. Canada therefore violates no international obligation if it declines to extend diplomatic protection (of a consular sort or otherwise) to its nationals.

2. Diplomatic Protection in Domestic Law

Whether diplomatic protection is required as part of Canadian domestic law is a more complex question. Before examining this matter, it is worth first canvassing the comparative context: states whose domestic laws *do* mandate diplomatic protection, either constitutionally or through some other means. Comparative law may prove influential in a Canadian context, not least in the administrative law area of "legitimate expectation" where developments in the United Kingdom have had a resounding and lasting impact on Canadian jurisprudence. The existence of a

---

[39] ILC, *Report of the International Law Commission – 56th Session*, Supplement No. 10 (A/59/10) 2004 at 27.

[40] [2004] 10 B. Const. L.R. 1009 (S. Afr. Const. Ct.), CCT 23/04, online: <http://www.constitutionalcourt.org.za> [*Kaunda*].

[41] *Ibid.* at para. 29.

[42] *Lay Kon Tji v. Minister for Immigration and Ethnic Affairs* (1998), 158 A.L.R. 681 (F.C.A.) ("[A] national does not have a right to diplomatic protection from his or her state; that is, it is not a right of nationality. Diplomatic protection is the right of the state to intervene on behalf of its nationals. The state has complete discretion whether to exercise this right and is not in any way bound to protect its nationals" at 693.); and *R (on the application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.C.A. Civ. 1598 (Eng. C.A.) [*Abassi*] ("It is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State." at para. 69). But see *Khadr, supra* note 23 at para. 27 (where the court was apparently persuaded that the *Vienna Convention on Consular Relations* create "individual rights" to consular services potentially enforceable against the sending state, in this case Canada).

putative Canadian public law obligation may in turn have a bearing on whether civil liability attaches to government officials who violate this standard, a matter discussed in the final part of this article.

(A) *Comparative Context*

i. Constitutional Obligations

A number of states extend constitutional guarantees of diplomatic protection to their nationals of varying scope.[43] As summarized by the ILC Rapporteur, most of these provisions specify "the State shall protect the legitimate rights of X nationals abroad" or "nationals of Y shall enjoy protection while residing abroad".[44] Even in some nations without such explicit constitutional rules, courts applying constitutional doctrines have discerned an obligation to provide diplomatic protection. Thus, in Germany, the Constitutional Court has held that the German State has "a constitutional duty to provide protection for German nationals and their interests in relation to foreign States".[45]

Yet, the extent to which these constitutional protections are truly justiciable in these states is uncertain. In his review of the formal constitutional promises of diplomatic protection found in several states, the ILC Rapporteur observed: "It is uncertain whether and to what extent those rights are enforceable under the municipal law of those countries, and whether they go beyond the right of access to consular officials abroad."[46] Even where judicial review is available, it is often tender in its treatment of government action. In the German jurisprudence, the Constitutional Court has underscored that the government "enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States". As the Court observed:

> in the sphere of foreign policy, the Federal Government, as all other organs with responsibility for political dealings, generally has more room for political manoeuvre and consequently wider discretion. ...[This discretion] is based on the fact that shape of foreign relations and the course of their development are not determined solely by the wishes of...Germany and are much more dependent upon circumstances beyond its control.[47]

---

[43] Dugard, *supra* note 8 at 30. The states constitutionalizing this protection include: Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Viet Nam and Yugoslavia.

[44] *Ibid.*

[45] Fed. Constitutional Court, 15 December 1980, *Rudolph Hess Case*, I.L.R. 1992. 387 at 395, 80-2 BvR 419 [*Hess*].

[46] Dugard, *supra* note 8 at 30.

[47] *Hess, supra* note 45 at 395-96.

This emphasis on deference also animates a recent string of notable South African constitutional cases, albeit in a fashion that leaves room for judicial intervention. In *Kaunda*, at issue was whether 69 South Africans accused of planning a coup in Zimbabwe against nearby Equatorial Guinea were constitutionally entitled under South African law to the diplomatic protection of South Africa. These plotters had been charged under Zimbabwe law with various firearms offences and Zimbabwe was contemplating their extradition to Equatorial Guinea, where execution seemed possible.

As noted above, the South African Constitutional Court concluded that international law did not oblige the extension by South Africa of diplomatic protection to its nationals. The balance of the judgment dealt, therefore, with a possible domestic constitutional source for this requirement. In addressing this question, substantial emphasis was placed by the applicants on sub-section 7(2) of the South African Bill of Rights: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights".[48] This provision, applicants urged, obliged South Africa to protect other constitutional rights, such as fair trial guarantees, even outside South Africa. In the circumstances of the case, this obligation would be met by extending diplomatic protection.[49]

On this issue, a majority of the Court concluded that the *Constitution* did not compel the government to offer protection to the South African detainees, in large measure because South African constitutional obligations do not have extraterritorial reach. The Court did acknowledge the extra-South African extension of constitutional law where the agents of the South African state were themselves implicated in alleged wrongdoing.[50] However, the Court held that on the facts in *Kaunda*, the South African government was involved only to the point of providing intelligence about the coup-plotters. Giving notice to a foreign state of the planned illicit conduct of South African nationals did not constitute a constitutional violation. It concluded that:

> the actors responsible for the action against which the applicants demand protection from the South African government are all actors in the employ of sovereign states over whom our government has no control. The laws to which objection is taken are the laws of foreign states who are entitled to demand that they be respected by everyone within their territorial jurisdiction, and also by other states. The applicants have no right to demand that the government take action to prevent those laws being applied to them.[51]

---

[48] Chapter 2 of the *Constitution of the Republic of South Africa, 1996*.

[49] *Kaunda, supra* note 40 at para. 31.

[50] *Ibid.* at para. 57.

[51] *Ibid.* at para. 41 (citing *R. v. Cook*, [1998] 2 SCR 597).

In so finding, the majority conflated a putative domestic legal obligation to provide protection with an extraterritorial assertion of jurisdiction by South Africa. O'Regan J., dissenting on this point, highlighted the difficulty with the majority position: at issue in the case was 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."[52] Put another way, the sole question was whether the South African government itself, under the constitutional apparatus that governed it, was obliged to exercise its acknowledged international right to extend diplomatic protection. Extraterritoriality was a red herring, since 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 some foreign actor.

Perhaps for this very reason, the majority did not completely reject the applicants' constitutional case. In the second half of its decision, it saw past its focus on territoriality to conclude that the South African Constitution is not completely inert on the question of diplomatic protection. Specifically, the majority supplemented its understanding of sub-section 7(2) with an interpretation of section 3 of the Bill of Rights: "All citizens are — (a) equally entitled to the rights, privileges and benefits of citizenship." Read together, these two constitutional provisions entitled citizens to request diplomatic protection and imposed "a corresponding obligation" on the government "to consider the request and deal with it consistently with the Constitution."[53]

"[C]ourts," warned the majority, "must exercise discretion and recognize that government is better placed than they are to deal with such matters."[54] Nevertheless, there may 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. ...There may even be a duty on government in extreme cases to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstances, on becoming aware of the breaches, the government may well be obliged to take an initiative itself.[55]

---

[52] *Kuanda, supra* note 40 at para. 230.

[53] *Ibid.* at para. 67.

[54] *Ibid.*

[55] *Ibid.* at paras. 69-70.

The Court offered up some additional precision on the circumstances that might provoke judicial intervention:

> if the decision [in response to a request for protection] were to be irrational, a court could intervene. This does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection. ... If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly.[56]

The holding *Kuanda* was explored in 2005 by the Transvaal High Court in *Van Zyl v. Government of RSA*.[57] At issue was whether South Africa had infringed the applicant's constitutional rights by failing to extend diplomatic protection after a foreign state's expropriation of the applicant's mineral properties. The High Court distinguished *Kaunda*'s constitutional ruling on the basis that while the latter case had grappled with "gross and flagrant infraction of international human rights such as physical abuse and torture", *Van Zyl* implicated mere expropriation of property.[58] Nevertheless, it concluded that the government's refusal to extend protection was amenable to judicial supervision: "Central to our constitutional order is that both the Legislature and Executive in any sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[59] While the foreign policy context of the government's decision counseled deference,[60] courts could nevertheless conduct a limited form of judicial review[61] on a rule of law theory.[62] Applying the resulting, tender standard of review, the Court concluded that on the facts in *Van Zyl*, the government had not acted improperly:

> the respondents [government officials] were correctly advised and they certainly appreciated their powers and the extent of their discretion. They did not exercise their power on the basis of wrong understanding of the law. The exercise of their powers was certainly not arbitrary as alleged by the applicants.[63]

Read together, the *Kaunda* and *Van Zyl* cases suggest that in South Africa, courts will scrutinize refusals to extend diplomatic protection against a standard of rationality, bad faith, arbitrariness or some other equivalent concept. The

---

[56] *Ibid.* at paras. 79-80.

[57] 2005 (11) BCLR 1106 (T) [*Van Zyl*].

[58] *Ibid.* at para. 42.

[59] *Ibid.* at para. 46.

[60] *Ibid.* at para. 58.

[61] *Ibid.* at para. 56.

[62] *Ibid.* at para. 45 *et seq.*

[63] *Ibid.* at para. 70.

Constitutional Court's reasoning in *Kaunda* implies that a government decision violating one of these standards would transgress South African Bill of Rights provisions. In *Van Zyl*, the Transvaal High Court saw no need to characterize an arbitrary refusal of protection as a specific rights violation, simply suggesting that such an act would be contrary to the rule of law. In so concluding, the *Van Zyl* approach takes on the hue of what Canadian lawyers would call administrative law, a point explored below.

ii. Non-Constitutional Obligations

Administrative law has, in fact, driven analyses of diplomatic protection obligations in other jurisdictions. The most notable case is *R (on the application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs*, a 2002 decision of the English Court of Appeal.[64] At issue in *Abbasi* was the potentially indefinite detention at Guantanamo Bay of a British national captured by American forces in Afghanistan. Mr. Abbasi sought judicial review to compel the United Kingdom to intervene diplomatically with the United States. In concluding that the United Kingdom was under some obligation, the Court of Appeal pointed to the administrative law doctrine of "legitimate expectation":

> the doctrine of "legitimate expectation" provides a well-established and flexible means for giving legal effect to a settled policy or practice for the exercise of an administrative discretion. The expectation may arise from an express promise or "from the existence of a regular practice which the claimant can reasonably expect to continue" ... The expectation is not that the policy or practice will necessarily remain unchanged, or, if unchanged, that it will not be overridden by other policy considerations. However, so long as it remains unchanged, the subject is entitled to have it properly taken into account in considering his individual case.[65]

Canvassing British government public policy assertions on circumstances where it would extend diplomatic protection, the Court concluded that "these statements indicate a clear acceptance by the government of a role in relation to protecting the rights of British citizens abroad, where there is evidence of miscarriage or denial of justice."[66]

As in similar cases discussed above, the Court noted the considerable deference owed to the government in the exercise of foreign policy. Nevertheless, "there is no reason why [the government's] decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation".[67] Surely, "the court cannot enter the forbidden areas, including decisions affecting

---

[64] See *Abassi*, *supra* note 42.

[65] *Ibid.* at para. 82 [citations omitted].

[66] *Ibid.* at para. 92.

[67] *Ibid.* at para. 106.

foreign policy," but "an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area".[68]

Mr. Abbasi succeeded, therefore, in persuading the Court of the justiciability of his claim. However, on the facts in *Abbasi*, the Court of Appeal concluded that the government had complied with its duty: "the Foreign and Commonwealth Office have considered Mr Abbasi's request for assistance. ... [T]he British detainees are the subject of discussions between this country and the United States both at Secretary of State and lower official levels. We do not consider that Mr Abbasi could reasonably expect more than this."[69] The expectation of diplomatic protection accorded Mr. Abbasi was, in other words, quite limited.

(B) *Canadian Prospects*

This comparative legal review is quite suggestive of potential sources of a Canadian legal obligation to provide diplomatic protection. Arguably, Foreign Affairs Canada's legal power to extend diplomatic protection flows from s. 10 of the *Department of Foreign Affairs and International Trade Act* (*DFAIT Act*):[70] "[i]n exercising his powers and carrying out his duties and functions under this Act, the Minister shall ... (a) conduct all diplomatic and consular relations on behalf of Canada". Alternatively, the diplomatic protection power reflects a royal prerogative power over foreign affairs that has not been extinguished and continues to be exercised by the Federal Government.[71]

Yet, neither the *DFAIT Act* nor the royal prerogative specify the manner in which diplomatic and consular functions are to be conducted. More instructive on this point are many readily-available information documents on consular services for Canadians published by Foreign Affairs. For example, the government indicates in its pamphlet, *Travelling Abroad? Assistance for Canadians,* that "consular services of the Department of Foreign Affairs and International Trade provide assistance to Canadian travellers. We are committed to helping Canadians prepare for foreign travel and to providing you with a variety of services once you're abroad." The document continues: "Canada's offices abroad are there to help you in case of an emergency. Consular staff, both in our foreign offices and in Ottawa, can: ... provide assistance in dealing with the criminal justice system; ... see that you are

---

[68] *Ibid.*

[69] *Ibid.* at para. 107.

[70] R.S.C. 1985, c. E-22 at s.10(2).

[71] See *Black v. Canada (Prime Minister),* [2001] 54 O.R. (3d) 215 (C.A.) for a brief discussion of prerogative powers in the context of foreign affairs [*Black*]. In internal documents, the government characterizes consular services as a prerogative function. See *Manual* I-3, cited in Lee, *supra* note 12 at 127.

treated fairly under the country's laws if you are arrested; [and]... help in the location of missing persons ...", among other things.[72]

In a more specific brochure, tellingly entitled *Canadian Consular Services: Providing Assistance to Canadians Abroad*, Foreign Affairs notes that its consular officials "[s]eek to ensure that you are treated fairly under the country's laws if you are arrested or detained."[73] The Department's long-standing brochure "*Bon Voyage, But...*" repeats this passage,[74] and admonishes "[i]f you do find yourself in legal trouble, contact the nearest Canadian government office at once."[75] Notably, "*Bon Voyage, But...*" is a document the Department notes should be taken by Canadians on every foreign trip.[76]

Meanwhile, in its publication, *A Guide to Canadians Imprisoned Abroad*, the Department specifies that "the Government of Canada *will make every effort* to ensure that you receive equitable treatment under the local criminal justice system. It will ensure that you are not penalized for being a foreigner, and that you are neither discriminated against nor denied justice because you are Canadian."[77]

Foreign Affairs' Consular Service also publishes written *Service Standards*. These standards commit the government to "provide to all Canadians effective and efficient service throughout the world. Our commitment is for service characterized at all times by sensitivity, empathy, courtesy, speed, accuracy and fairness. ... Every effort will be made to obtain solutions for specific problems and to provide the required service." Under its schedule of services, the government lists "Contact with Arrested or Detained Persons" as something done within 24 hours, subject to factors "beyond its control".[78]

In sum, the Government of Canada warns in these documents that its capacity to engineer the appropriate treatment of Canadians abroad may be limited, but that it

---

[72] Department of Foreign Affairs and International Trade, *Travelling Abroad? Assistance for Canadians*, online: <http://www.voyage.gc.ca/main/pubs/PDF/travelling_abroad-en.pdf>.

[73] Foreign Affairs Canada, *Canadian Consular Services: Providing Assistance to Canadians Abroad* (Ottawa: Foreign Affairs Canada, 2005) at 2, online: <http://www.voyage.gc.ca/main/pubs/PDF/consular_services-en.pdf>.

[74] Foreign Affairs Canada, *Bon Voyage, But...* (Ottawa: Foreign Affairs Canada, 2006) at 3, online: <http://www.voyage.gc.ca/main/pubs/PDF/BVB_2006-en.pdf>.

[75] *Ibid.* at 24.

[76] Foreign Affairs Canada, *Traveller's Checklist*, online: <http://www.voyage.gc.ca/main/before/pdfs/ENG%20Traveller.pdf>.

[77] Foreign Affairs Canada, *A Guide to Canadians Imprisoned Abroad* (Ottawa: Foreign Affairs Canada, 2005) at 6, online: <http://www.voyage.gc.ca/main/pubs/PDF/imprisoned_abroad-en.pdf> [emphasis added].

[78] Department of Foreign Affairs, Consular Services, *Service Standards*, online: <http://www.voyage.gc.ca/main/about/service_standards-en.asp>.

(quite emphatically) undertakes to do what it can. This impression is affirmed by other government statements. In testimony before parliamentary committees, for instance, government officials have underscored their commitment to protecting the interest of Canadians abroad:

> Clearly the protection of Canadians abroad and the representation of their interest is a vitally important task for the Department of Foreign Affairs and International Trade ... [O]ur success clearly rests on our ability to ensure that authorities in the host country recognize and understand their legal obligations in terms of the treatment of third party nationals and how it is in their best interest to seek a solution that is satisfactory to Canada and to Canadians. That's a given and in the majority of cases, the process works. However, in cases where these obligations are not clearly understood at the outset, we must work doggedly to convey this message to authorities in the host country.[79]

Under these circumstances, Canadians act quite reasonably if they expect the Canadian government to take an interest in their troubles with foreign states. The key question to which this article now turns is whether the government *must* provide assistance to these Canadians, either as a constitutional or administrative law matter.

i. Canadian Constitutional Law and Diplomatic Protection

a) **Khadr** *Case*

The Canadian Constitution includes no explicit guarantee of diplomatic protection. Nor does the *Canadian Charter of Rights and Freedoms* contain language analogous to the sections 3 or 7 of the South African Bill of Rights, invoked in *Kuanda*. Thus, the *Charter* contains no reference to the "rights, privileges and benefits of citizenship". Nor does it specify that "[t]he state must respect, protect, promote and fulfil the rights" in the *Charter*. Any constitutional obligation to provide diplomatic protection must, therefore, stem from the more general language of the *Charter*.

The most obvious locus for such a right is section 7 of the *Charter*: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 7 has been invoked as a basis of constitutionalized diplomatic protection in one case. Thus, in *Khadr v. Canada*,[80] a Canadian citizen captured by U.S. forces in Afghanistan and detained at Guantanamo Bay sought a court order compelling the government to extend to him the consular services described in the Foreign Affairs

---

[79] Mr. John McNee (Assistant Deputy Minister, Africa and Middle East, Department of Foreign Affairs and International Trade), Standing Committee on Foreign Affairs and International Trade, *Evidence*, 37th Parl., 2nd Sess. (25 September 2003). It is also notable that in the Martin government, Member of Parliament Dan McTeague was named by the Prime Minister "Parliamentary Secretary to the Minister of Foreign Affairs with special emphasis on Canadians Abroad", increasing the government's profile on the task of assisting Canadians in difficulty abroad. See P.C. 2003-2032 (2003-12-12).

[80] *Khadr, supra* note 23.

publication, *A Guide to Canadians Imprisoned Abroad*.[81] Among other things, he argued that the government's failure to do so constituted a violation of *Charter* section 7.

The government moved to strike Mr. Khadr's Notice of Application on the basis that it disclosed no cause of action. In allowing the motion in part, the Federal Court rejected Khadr's constitutional argument, concluding that a *Charter* violation arose only where there was a sufficient connection between the Canadian government's actions and the rights deprivation. On the facts, Mr. Kahr had "failed to establish an arguable case that the Minister's decision is a 'necessary precondition' to the current or future treatment of Omar Khadr by the Government of the United States". Specifically, Khadr had not produced evidence that his "circumstances are similar to those of other detainees who have been released from Camp Delta or that diplomatic actions by the Canadian government would lead to the same result as those taken by foreign governments such as that of the United Kingdom, France and Afghanistan."[82]

The Court also concluded that nothing in the *Charter* imposed on the government a *positive* obligation to ensure a person's life, liberty and security of the person. Rather, section 7 barred a government deprivation of these rights. Because Khadr had never been in Canadian government custody, the Canadian government was "not under a 'positive obligation' pursuant to the *Charter* to address possible deprivations of his rights",[83] in this case by a foreign government.

b) Discussion

Mr. Khadr abandoned his appeal of the Federal Court's judgment in 2005. *Kahdr* represents, therefore, the most definitive word on the diplomatic protection question in Canadian law. Read together, the two bases for denying Mr. Khadr a constitutional right to diplomatic protection – "necessary precondition" and "positive obligations" – seem to close firmly the door to a South African-style implied constitutional obligation, however limited. It is worth considering, nevertheless, the merits of the Federal Court's conclusions and any constitutional uncertainty left open by them.

"Necessary connection" amounts to a causal link between the government's behaviour and the impairment of interests protected by section 7. In applying this notion, the Federal Court rested its conclusions on a reading of the Supreme Court of Canada's holding in *Suresh v. Canada (Minister of Citizenship and Immigration)*.[84] In that case, concerning the proposed removal of an alien from Canada to face

---

[81] This document is described above. See *supra* note 77 and accompanying text.

[82] *Khadr, supra* note 23 at para. 16.

[83] *Ibid.* at para. 17.

[84] [2002] 1 S.C.R. 3 at para. 54 [*Suresh*].

potential torture overseas, the Supreme Court concluded that "where Canada's participation is a necessary precondition for the deprivation [of the section 7 right] and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand". Put another way, so long as the government's action has the effect of making the rights violation foreseeably more likely, section 7 is available, even if the right is ultimately violated by someone else. For instance, section 7 is triggered where Canadian law enforcement officers induce the presence of an applicant in a foreign jurisdiction, and there the applicant's section 7 rights are subsequently abused by foreign officials on the strength of evidence supplied by those Canadian officers.[85]

The *Khadr* case represents, however, a slightly different situation. At issue was the effect of Canadian government *inaction* on Mr. Khadr's fate at the hands of foreign officials, not the impact of affirmative governmental *action*. The real issue, therefore, is whether the "necessary precondition" test accommodates omissions. The Supreme Court's reference in *Suresh* to "Canada's *participation* [being] a necessary precondition" connotes action, not omission. Yet, the Federal Court's reasoning in *Khadr* suggests that inaction may qualify as a "necessary precondition", at least so long as it can be shown that the omission actually contributes to the rights violation. Mr. Khadr did not meet this evidentiary burden: he could not show that Canadian intercession would secure his release, as had equivalent interventions by other states concerning their own nationals. Nevertheless, on different facts it is possible to imagine evidence showing that Canadian government intervention would relieve a section 7 violation. For instance, if Canada had a track record of effectively interceding with a particular government, that experience might suitably demonstrate the foreseeable implications of the government's inaction in a particular case.

This discussion of "sufficient connection" leads naturally to the Federal Court's second ground for refusing to apply section 7, drawn from *Gosselin v. Quebec (Attorney General)*:[86] "Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these."[87] The "positive obligation" concept suggests that the government is under no obligation to preserve rights that it has not itself somehow put in jeopardy. Put another way, like "sufficient connect", the positive obligation concept is linked to causality. In fact, it seems likely that in most

---

[85] *Purdy v. Canada*, [2003] B.C.J. 1881. In comparison, section 7 is not engaged on this standard where the Canadian government's impugned action post-dates the rights deprivation. For example, the Ontario Court of Appeal has held that a law precluding recovery in Canadian courts against foreign state torturers does no violence to section 7. In that circumstance, there is no causal connection between the government action and the constitutional injury. *Bouzari v. Iran* (2004), 71 O.R. (3d) 675 at para. 101 (C.A.).

[86] [2002] 4 S.C.R. 429.

[87] *Ibid.* at para. 81.

instances where a "necessary connection" exists *per Suresh*, the "positive obligation" notion is immaterial: in most if not all instances where a necessary connection exists by virtue of government *action*, application of section 7 imposes a negative obligation: it *restricts* the government's ability to *take* that action and deprive (or participate in the deprivation of) life, liberty or security of the person. In *Suresh*, for instance, at issue was the government's participation in a deportation to torture. Section 7 would restrict the act of deportation, linked causally to the subsequent act of torture. No positive obligation is imposed in this scenario.

"Positive obligation" becomes a more substantial hurdle where the "necessary connection" is grounded, not in state action, but in inaction: a failure to intervene to forestall abuses undertaken by an entity other than the Canadian state. As noted, *Khadr* suggests it is possible for an omission to satisfy the "necessary connection" concept. But if the *Khadr* case's read of *Gosselin* is correct, a failure to act positively to stop rights violations that will occur irrespective of any government action could never constitute an infringement of section 7. There are, however, reasons to doubt this conclusion.

First, *Gosselin* is more nuanced than the single quotation reproduced in *Khadr* suggests. The majority in *Gosselin* was content to confine its holding on section 7 to the facts; specifically whether applicants had a constitutional entitlement to certain social welfare benefits.[88] Indeed, the majority expressly left open "the possibility that a positive obligation to sustain life, liberty, or security of person may be made out in special circumstances".[89] In a different situation involving conventional legal interests rather than the economically-oriented social benefits actually at issue in *Gosselin*, the Court might have arrived at a very different conclusion. While the matter is not without doubt, diplomatic protection of citizens detained overseas seems roughly analogous to the conventional legal rights protected by section 7, and a plausible candidate for "special circumstances".

Second, courts have in fact concluded that section 7 is offended by government inaction that *compounds* a risk to life, liberty and security of the person presented by non-government actors. In the famous *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*,[90] the plaintiff alleged that police had used her as "bait" to capture a rapist, thereby placing her security interest in peril. The court agreed:

> defendants deprived the plaintiff of her right to security of the person by subjecting her to the very real risk of attack by a serial rapist–a risk of which they were aware but about which they quite deliberately failed to

---

[88] *Ibid.* ("The question therefore is not whether s. 7 has ever been - or will ever be - recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards." at para. 82).

[89] *Ibid.* at para. 83.

[90] (1998), 39 O.R. (3d) 487 (Ont. Gen. Div.) [*Doe*].

> inform the plaintiff ... and where in the face of that knowledge and their belief that the rapist would certainly attack again, they additionally failed to take any steps to protect the plaintiff or other women like her.[91]

This holding is strong evidence that police, at least, have a *positive* section 7 obligation to minimize the threat to the public posed by a non-governmental actor. Whether this obligation extends to other government officials is uncertain. The police may have a particularly special relationship with the public. As noted in *Doe*, "[t]he police are statutorily obligated to prevent crime and at common law they owe a duty to protect life and property".[92] The existence of a special relationship is not nearly as clear with consular officials, where there is no clear statutory or common law duty to protect.

As noted above, Foreign Affairs Canada does, in its public utterances, promise assistance to Canadians abroad. It seems unlikely that these undertakings suffice to create a special relationship analogous to that in *Doe*, given their non-legal nature. At the very least, however, these public undertakings have a bearing on administrative law remedies that might be available to citizens, a matter to which this article now turns.

ii. Canadian Administrative Law and Diplomatic Protection

a) **Khadr** *Case*

Unsuccessful in his constitutional claims, Mr. Khadr made more headway in Federal Court with his administrative law arguments. His basic argument was that s.10 of *DFAIT Act* imposed an affirmative duty on Foreign Affairs to intercede on his behalf. Certainly, this provision (reproduced above) imposes an obligation on the government to conduct diplomatic and consular relations. It does not, however, specify how these relations are to be conducted or exercised. Put another way, this passage does not itself guarantee diplomatic protection of each and every Canadian.

Nevertheless, in *Khadr*, the Federal Court relied on s.10 and several of the statements made in Foreign Affairs Canada documents cited above to conclude that

> there is a persuasive case that both the DFAITA [DFAIT Act] and the Guide [to Canadians Imprisoned Abroad] create a legitimate and reasonable expectation that a Canadian citizen detained abroad will receive many of the services which Omar Khadr has requested. Indeed, Canadians abroad would be surprised, if not shocked, to learn that the provision of consular services in an individual case is left to the complete and unreviewable discretion of the Minister.[93]

---

[91] *Ibid.* at 521.

[92] *Ibid.* at 519.

[93] *Khadr*, *supra* note 23 at para. 22.

In the result, the Court held that Khadr's application "displays a possible cause of action that the decision of the Minister not to provide the appropriate services (required under the circumstances) set out in the Guide may constitute a breach of his duties under section 10 of the DFAITA", and declined to strike the Notice of Application in full.[94] At the time of this writing in Fall 2006, the application had not been heard on its merits.

b) Discussion

Although a welcome conclusion from the perspective of plain equity, the Federal Court's decision in *Khadr* is nevertheless disputable. As described by the Supreme Court, legitimate expectation "looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants ... a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken".[95] Measured against this language, the *Khadr* holding is suspect for at least one key reason.

Specifically, a uncertainty in Canadian law is whether legitimate expectation extends not just to the procedural conduct of officials, but also to substantive outcomes. The conventional view is that it does not.[96] Binnie J. did acknowledge in his concurring reasons in *Mount Sinai Hospital Center v. Quebec*,[97] that "in some cases it is difficult to distinguish the procedural from the substantive".[98] Partially on the strength of this observation, the Federal Court in *Khadr* asserted that "the expectation in this case is arguably composed of both procedural and substantive elements".[99] However, it is difficult to see an expectation that the government will provide consular services as anything other than substantive. The provision of diplomatic protection is an outcome, not a procedure governing how a particular outcome is arrived at.[100]

---

[94] *Ibid.* at para. 29.

[95] *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at para. 131.

[96] See *e.g. Baker v. Canada*, [1999] 2 S.C.R 817 [*Baker*] ("the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain" at para. 26).

[97] [2001] 2 S.C.R. 281 [*Mount Sinai*].

[98] *Ibid.* at para. 35.

[99] *Khadr, supra* note 23 at para. 23.

[100] An alternative argument – grounded in public law estoppel – might be invoked to capture substantive promises, where there has been actual detrimental reliance on undertakings made by the government. This doctrine remains, however, ill-formed in Canadian law, and in any event, may be defeated where the power exercised by the government official is highly discretionary, involving considerations of high policy. See Binnie J., concurring in *Mount Sinai*, *supra* note 97 at para. 39 *et seq.* Arguably, the conduct of Canada's diplomatic and consular relations is a policy-driven exercise of the sort that might be excluded from public estoppel.

For this reason, it is not clear that the key administrative law holding in the *Khadr* case will be replicated in future cases. Nevertheless, while not discussed in *Khadr*, Canadian administrative law does create duties for consular officials.

First, while Foreign Affairs Canada's various documents describing consular services offered to Canadians may not create a legitimate expectation that those services – a substantive entitlement – will actually be provided, they certainly create a legitimate procedural expectation that Canadians can *request* those services and have that request *considered.*

Second, in considering this request, consular officers – like any other government official – must properly deploy their discretion to exercise (or not) diplomatic protection.[101] This exercise of discretion is itself amenable to judicial scrutiny, albeit inevitably on a gentle standard of review. Specifically, where the decision made by the administrative decision-maker is viewed as "discretionary," reviewing courts in Canada have traditionally been undemanding, intervening only in response to an "abuse of discretion". In practice, such an abuse was demonstrated by evidence of bad faith, reliance on improper purposes or considerations, or discrimination.

As the Supreme Court recently acknowledged in *Baker v. Canada,*[102] this approach sat uncomfortably with the Supreme Court's jurisprudence on deference in relation to so-called "errors of law" – errors made by decision-makers in interpreting statutes they are obliged to apply. With errors of law, for some time, the Supreme Court has extended deference (or not) depending on its assessment of a number of variables. These variables – components of what the Court has called the "pragmatic and functional test" – historically have been marshaled by the court to decide whether the error of law is best viewed as a matter *within* the jurisdiction of the administrative decision-maker (in which case it will be disturbed only if "patently unreasonable") or a matter *circumscribing the scope* of decision-maker's jurisdiction (in which case the court will intervene in response to any error).[103]

---

[101] This would be true even if diplomatic protection is part of the royal prerogative, rather than a function covered by s. 10 of the *DFAIT Act.* The exercise of prerogative powers is justiciable where it affects the rights of individuals. See *Black, supra* note 71 ("the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative." at para. 51).

[102] *Baker, supra* note 96 at para. 54.

[103] See generally *U.E.S., Local 298 v. Bibeault,* [1988] 2 S.C.R. 1048 at para. 123 (setting out the purpose and content of the pragmatic and functional test); *Canadian Broadcasting Corp. v. Canada,* [1995] 1 S.C.R. 157 (discussing the role of the pragmatic and functional test in "distinguishing jurisdictional questions from questions of law within a tribunal's jurisdiction" at para. 30).

After *Pushpantham v. Canada*,[104] this traditional justification of locating the error as within or at the margins of the decision-maker's jurisdiction has eroded and the Court engages in the pragmatic and functional test simply to decide how much deference need be extended to a decision-maker making an alleged error of law. This deference is now measured on a three-point spectrum running from the zero deference standard of "correctness", through the intermediate deference "reasonableness *simpliciter*", to the maximum deference standard of "patently unreasonable".

In *Baker*, the Court acknowledged that the distinction between a decision that is discretionary – thus traditionally reviewable on an abuse of discretion standard – and a decision of law – thus reviewable on a standard determined by the pragmatic and functional test – is often impossible to make.[105] Accordingly, in *Baker*, the Court extended the pragmatic and functional test to both discretionary decisions and decisions interpreting law.

Since one end of the spectrum produced by this test is no deference at all, *Baker* conceivably opened the door to more demanding review of those decisions once only assailable on the grounds of abuse of discretion. [106] Yet, both in practice and doctrinally, the Court has been unwilling to apply the non-deferential standard of "correctness" to discretionary decisions by at least Ministerial-level decision-makers.[107] Instead it has often concluded that such decisions are entitled to a level of deference equivalent, if not identical, to that traditionally applied under the abuse of

---

[104] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 [*Pushpanathan*] (incorporating a three spectrum standard of review into judicial review and noting that "it should be understood that a question which 'goes to jurisdiction' is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown" at para. 28).

[105] *Baker, supra* 96 at para. 54. See also *Suresh, supra* note 84 at paras. 35-36 (noting that *Baker* "confirmed that the pragmatic and functional approach should be applied to all types of administrative decisions in recognition of the fact that a uniform approach to the determination of the proper standard of review is preferable ... The Court specified in *Baker* that a nuanced approach to determining the appropriate standard of review was necessary given the difficulty in rigidly classifying discretionary and non-discretionary decisions" at paras. 54-55 [citations omitted]).

[106] See generally *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 24, citing Binnie J. in *Mount Sinai, supra* note 97 (noting that "under the pragmatic and functional approach, even 'the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness'. The nominate grounds [of abuse of discretion], language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey." at para. 54). For a comprehensive discussion of the implications of *Baker*, see David Dyzenhausm, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004).

[107] See generally *Baker, supra* note 96 ("[i]ncorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature" at para. 56); *Mount Sinai, supra* note 97, *per* Binnie J., concurring in the result ("[d]ecisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness." at para. 58).

discretion approach. Namely, such decisions must typically be patently unreasonable. A patently unreasonable decision has been described as one that is clearly irrational.[108] In the Court's post-*Baker* error of discretion cases, this sort of error has repeatedly been conflated with the classic abuse of discretion requirements of bad faith, reliance on improper considerations or such similar flaws.[109]

On the specifics of a diplomatic protection case, it seems almost certain a court would find in favour of substantial deference, a conclusion consistent with the unwillingness of courts to second-guess government decisions in areas involving complicated policy-weighing on issues where courts have no expertise.[110] The conduct of Canada's foreign relations – something courts do not do – seems a likely candidate for this treatment.

The end result – review on a standard of patent unreasonableness – would produce an outcome essentially identical to that described in the South African jurisprudence on diplomatic protection: review for rationality, bad faith, application of irrelevant considerations or some similar concept. Whether this standard was violated would turn on the facts. It seems plausible, however, that a refusal to extend diplomatic protection premised on, for instance, a desire to facilitate the extraction by foreign officials of intelligence from the detainee could transgress the improper considerations concept.[111]

---

[108] *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-64, *per* Cory J.

[109] *Suresh, supra* note 84 ("the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors." at para. 29); *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72 at para. 16 [*Ahani*]; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 ("In applying the *patent* unreasonableness test, we are not to reweigh the factors. But we are entitled to have regard to the importance of the factors that have been excluded altogether from consideration. Not every relevant factor excluded by the Minister from his consideration will be fatal under the patent unreasonableness standard. The problem here, as stated, is that the Minister expressly excluded factors that were not only relevant but went straight to the heart of the ...legislative scheme" at para. 176). For a comprehensive discussion of *Suresh* and *Baker* and their impact on administrative law doctrines, see David Elliot, "Suresh and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 Sask. L. Rev. 469.

[110] See *Pushpanathan, supra* note 104 at para. 32 *et seq.* (underscoring that the relative expertise of the decision-maker as compared to the court is the most important consideration in deciding the level of deference that will be accorded under the pragmatic and functional test).

[111] There is obviously no precedent on this question. However, in a Federal Court case involving a second Khadr brother, at issue was whether the government acted properly in denying Abdurahman Khadr a passport on national security grounds. At the time the decision was made, issuance of passports was governed by an Order in Council, promulgated under the government's royal prerogative, that did not list national security considerations as a ground for denying a passport. In *Khadr v. Canada* 2004 FC 1719 at para. 13 (FC), the government conceded that the "refusal of a passport application on grounds of national security is not within the authority vested in the Passport Office by the Canadian Passport Order." By analogy, a refusal to extend diplomatic protection on national security grounds – a concept not raised in the *DFAIT Act* – could be conceived as, at minimum, an improper purpose.

iii) Conclusion

In sum, there is a public law context for decisions by the Canadian government on whether to extend diplomatic protection. The case for a constitutional obligation to provide this service is plausible, although not compelling. Meanwhile, a sufficiently unreasonable decision to refuse protection would almost certainly provoke court intervention on administrative law grounds.

The final question to which this article now turns is the extent to which an infraction of these supposed public law obligations would also constitute an actionable wrong; that is, one that gives rise to Canadian government liability.

III. LIABILITY FOR FAILING TO INTERCEDE

Depending on one's assessment of the facts that emerged during testimony before the Arar inquiry, it is possible to imagine any number of sources of potential government liability, especially if government officials were actively complicit in the maltreatment of Canadians at the hands of Syrian and Egyptian torturers. However, for the purposes of this discussion, it is assumed that governmental action was not actually unlawful – such as aiding and abetting torture – and was not motivated by an intent to harm. These presumptions are borne out by the findings of the Arar Commission, which concluded that Canadian officials were not actually complicit in Mr. Arar's mistreatment by Syrian, Jordanian and U.S. officials.

Suspending the supposition of complicity, there is little room to argue misfeasance of public office within the meaning of the Supreme Court's decision in *Odhavji Estate v. Woodhouse*.[112] Rather, this article assumes that the decision declining diplomatic protection is lawful conduct, but undertaken without adequate regard for the impact on the plaintiff. Put another way, the government's actions constituted an actionable omission. Alternatively, the government undertakes diplomatic protection, but in a manner inconsistent with its proposed public duty to do so – for example, diplomatic protection is extended, but is exercised principally as an intelligence gathering function and not to serve the best interests of the citizen.

It is possible that even absent malice, such behaviour could ground a remedy in money damages under section 24 of the *Charter*,[113] assuming an affirmative section 7 entitlement to diplomatic protection exists. This prospect is far from certain,

---

[112] [2003] 3. S.C.R. 263 [*Odhavji*].

[113] For a comprehensive review of the uncertain jurisprudence on constitutional torts and a review of whether malice is a requirement, see *Hawley v. Bapoo* (2005), 76 O.R. (3d) 649 (Ont. S.C.J.) ("The case law has not been consistent about whether or not there should be a fault requirement and, if so, what it should be." at para. 186).

however, given the uncertain nature of constitutional torts,[114] and a full discussion falls beyond the scope of this article. More plausible is a conventional cause of action in negligence. Making out this claim in negligence would require a plaintiff to demonstrate that the government owed him or her a duty of care (one that required action), that the government violated the applicable standard of care (by failing to act or by acting inappropriately) and that he or she suffered an injury as a result.

All told, this would not be an easy case for a plaintiff to establish. Not least, the absence of an emphatic public law duty to extend diplomatic protection may undermine plaintiff's arguments concerning the existence of a duty of care. Moreover, a public authority is generally not liable in negligence law where the alleged tortious actions are an exercise of pure policy-making, rather than stemming from the actual implementation of a policy or from what are called operational decisions. This policy/operation dichotomy may preclude the existence of a duty of care as between the government and the plaintiff.[115] A key issue would, therefore, be whether a failure to extend diplomatic protection constitutes an operational, as opposed to a pure policy decision.

1. Diplomatic Protection and the Duty of Care

As the Supreme Court has recently reiterated, the duty of care analysis has two stages, often called the "*Anns* test":

> (a) Is there a sufficiently close relationship of proximity between the parties such that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff?
>
> (b) If so, are there any considerations which ought to negative or limit: (a) the scope of the duty; (b) the class of persons to whom it is owed; or (c) the damages to which a breach of it may give rise?[116]

The first prong of the *Anns* test depends on more than mere foreseeability of harm; that is, proximity requires something in addition to reasonable foreseeability of

---

[114] See *ibid.* If a denial of diplomatic protection were a violation of section 7, however, this would be a constitutional violation not prescribed by statute, since no such statute exists. This would place the case squarely in the zone where money damages for *Charter* violations, even without malice, may be possible. See *ibid.* at para. 191 *et seq.*

[115] See *Just v. British Columbia*, [1989] 2 S.C.R. 1228 ("As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists, the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may ... arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.").

[116] *Young v. Bella*, 2006 SCC 3 at para. 28. *Anns* refers to *Anns v. Merton London Borough Council*, [1978] A.C. 728 (P.C.).

the harm flowing from the defendant's action.[117] Proximity inures when there is some added quality to the relationship between the parties. These additional considerations include "the expectations of the parties, representations, reliance and the nature of the property or interest involved".[118] In *Odhaviji*, one issue was the liability of a police chief, police services board and province for negligent supervision of police officers. These officers had conducted themselves in a way allegedly causing injury to the plaintiff. The Supreme Court concluded that proximity existed between plaintiff and the police chief, in part, because it was reasonable for members of the public to expect a chief of police "to be mindful of the injuries that might arise as a consequence of police misconduct".[119] This expectation was sensible, given the statutory duty to perform this oversight role imposed on the chief.[120] On the other hand, proximity did not exist for the police services board, in large measure because the causal connection between that board's putatively careless oversight and the actual injury suffered because of police officer conduct was too remote. In addition, there was no statutory duty analogous to that applicable to the chief.[121] The Court arrived at a similar conclusion in relation to the province.[122]

Applying this first prong of the duty test to the diplomatic protection question, it may be reasonably foreseeable that a failure by the government to intervene properly with foreign officials in an abusive state might compound injury to the complainant; specifically, a harm that might otherwise be avoided or alleviated persists. For its part, the proximity requirement might be satisfied by the public expectation created by government pledges of assistance in the event of trouble abroad, as set out in the Foreign Affairs documents described above. On the other hand, the causal link between the injury suffered by the plaintiff at the hand of foreign officials and the government's failure to extend protection may not be robust. Nor is such protection clearly mandated by statute (the Federal Court's conclusions on the *DFAIT Act* in *Khadr* notwithstanding). Consular officials are therefore in a different position than police and firefighters, officials who courts have concluded are in sufficient proximity to the public.[123] This absence of a clear statutory mandate obliging protection may gravely impair a plaintiff's argument.[124]

---

[117] *Odhavji, supra* note 112 at para. 48.

[118] *Ibid.* at para. 50.

[119] *Ibid.* at para. 57.

[120] *Ibid.* at para. 58.

[121] *Ibid.* at paras. 64-65.

[122] *Ibid.* at para. 68 *et seq.*

[123] See *e.g. Doe, supra* note 90 at 519; *Hill v. Hamilton-Wentworth Regional Police Services Board* (2005), 76 O.R. (3d) 481 (Ont. C.A.) (affirming that a duty of care exists such that police can be liable to a wrongfully charged person for negligent investigation); *Gallagher v. Burlington (City)*, [1994] O.J. No. 255 (Ont. Gen. Div.), aff'd [1997] O.J. No. 4195 (Ont. C.A.) ("the defendant [municipality] by establishing and maintaining a fire Department, in the exercise of a statuary power so to do, did place itself in a relationship to members of the public that carried with it a common law duty to take care" at para. 66); *Ennis-Paikin Steel Ltd. v. Hamilton (City)*, [2006] O.J. No. 1262 (Ont. S.C.J.) ("A

Even if the plaintiff passed muster on these issues, consideration would turn to whether the *prima facie* duty established under the first prong would be negated by the second prong of the *Anns* test – countervailing policy reasons. As suggested above, a key inquiry is whether the impugned government decision constitutes policy-making, rather than simply an execution of that policy. Where it amounts to a policy decision, government actors are not liable.[125] Thus, in *Cooper v. Hobert*, the Supreme Court declined to find a duty of care where a decision taken by a government regulator in the performance of its functions required it to "balance public and private interests" and not simply carry out "a pre-determined government policy", instead deciding "as an agent of the executive branch of government, what that policy should be."[126] In the diplomatic protection context, the government could marshal plausible arguments that decisions on diplomatic protection balance competing foreign policy objectives, placing the matter squarely in the zone of policy-making.

2. Diplomatic Protection and Standard of Care

If a duty exists, the next question is whether the defendant breached that duty by violating the applicable standard of care. The applicable standard of care is mutable. In *Ryan v. Victoria (City)*, the Supreme Court specified that

> [t]o avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.[127]

On this second issue of custom and industry practice, there is some useful precedent from the Federal Court. In *Khairy v. Canada* ,[128] the plaintiff sued the government, *inter alia*, in negligence after consular officials assisted his ex-wife in

---

municipal fire department owes a duty of care to the community it was created to protect. That duty of care is to respond to calls for assistance in a reasonable manner, consistent with established policies and procedures, and without negligence" at para. 150).

[124] See *Cooper v. Hobart*, 2001 SCC 79 (examining whether a regulator owed a duty to those who benefited from the regulation and concluding "[i]n this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the [regulator] is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street" at para. 43).

[125] *Ibid.* at para. 38.

[126] *Ibid.* at para. 52.

[127] [1999] 1 S.C.R. 201 at paras. 28-29.

[128] 2004 F.C. 1466.

removing their daughter from one country to another, putatively in violation of a custody order. At the same time, these consular officials refused to provide assistance to the plaintiff himself. In a motion to strike the Statement of Claim, a Federal Court prothonotary suggested that while international treaties like the *Vienna Convention on Consular Relations* created no duty of care for Canadian consular officials, "the treaties and conventions may provide guidance as to the standard of reasonable conduct to be expected of the consular officials in the context of an action in negligence".[129]

On this line of reasoning, a failure to exhaust avenues available under Article 36 of the *VCCR* – permitting consular assistance to detained nationals – would violate the standard of care. A second plausible source for a customary standard of care would be the stated policies and representations made in the Foreign Affairs Canada documents described above.

3. Diplomatic Protection and Causation

The plaintiff's last hurdle would be demonstrating that the injury – presumably his or her detention – is attributable, at least in part, to the government's failure to meet its duty of care. The general test is a "but for" inquiry, questioning whether the injury would have occurred absent the defendant's negligent action. Where there are multiple causes for the injury, this test is relaxed: "[t]he law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm".[130] The defendant's conduct need not, in other words, be the sole cause.

As has been suggested several times already, in a case where the government's failure to extend diplomatic protection (or to perform these functions properly) was at issue, demonstrating causation presents particular challenges. The injury arises at the hands of a foreign government. At best, the Canadian government's inaction (or inept or inappropriate action) would compound the injury by permitting it to persist. However, proving that in the *actual*, individual case of the plaintiff, a failure to intercede properly caused or enhanced injury would be difficult. The plaintiff would have to demonstrate a counterfactual: that proper intercession would have made difference in his or her particular case. In a tort action, a plaintiff would likely only be successful if he or she could demonstrate a clear, past track-record of Canadian government success with such diplomatic and consular interventions with the relevant country. Even the Arar Commission, in its exhaustive review of Canadian behaviour in terms of Mr. Arar's treatment in Syria, was "unable to conclude whether or not Canadian officials could have obtained Mr. Arar's release from Syrian imprisonment at an earlier point in time" and confined itself to remarking on

---

[129] *Ibid.* at para. 16.

[130] *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 19.

Canadian actions "that *could* have had an effect on the time taken to release Mr. Arar."[131]

In sum, a lawsuit alleging negligence in the provision of diplomatic protection presents numerous difficulties. It is not impossible to imagine success, but that success would be hard-won in both law and fact.

CONCLUSION

For the reasons set out in this article, a law of diplomatic protection exists in Canada, but remains quite rudimentary. No clear legal obligation to protect exists in Canadian public law, analogous to the emphatic constitutional provisions found in some other states. Nevertheless, Canada's constitutional and administrative law doctrines do include some provisions potentially limiting the government's ability to ignore citizens at risk abroad. At the very least, in declining diplomatic protection, the government cannot act in a patently unreasonable manner; that is, irrationally, in bad faith or for improper purposes. Meanwhile, a government that is delinquent in providing protection might conceivably be liable in the law of negligence, although this is far from certain.

What then does one make of this situation? The government of Canada provides consular services through "a network of more than 270 offices in over 180 countries".[132] Most of the matters handled by these facilities are banal. Some, however, are quite serious, concerning the detention and possible mistreatment of Canadians by foreign governments. Under these circumstances, reasonable minds might question whether Canadian law should not be more demanding of government. Canadians would likely be distressed to learn that a government decision declining protection that falls just short of clearly irrational could be insulated from effective court review. Canadians might wonder why the various undertakings made in government documents about the scope of consular services are not codified as clear statutory duties. They might also be perplexed by the difficulty a potential plaintiff would have proving a case of negligence if these standards were ignored.

There is peril in grafting too much law onto the uncertainties of life, especially in the area of foreign relations. After all, consular officials may not be able to forestall all – or even any – of the harm that befalls Canadians. In a dangerous world, the government cannot guarantee against every eventuality. Even within Canada, we do not expect such ironclad protections from emergency service providers, such as police and firefighters. We do, however, expect these officials to have clear responsibilities, and be accountable where they fail to be met their obligations. Few objections should be raised to Canada's diplomats and consular officers having a legal duty to at least do their best. Likewise, no objection should be voiced to their being held accountable when they act far short of that standard.

---

[131] Arar Commission, *supra* note 1 at 14-15 [emphasis added].

[132] Online: <http://www.voyage.gc.ca/main/about/who_what-en.asp>.