THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT23/04

SAMUEL KAUNDA AND OTHERS Applicants

and

THE PRESIDENT OF THE RSA AND OTHERS Respondents

and

SOCIETY FOR THE ABOLITION OF THE DEATH PENALTY IN SA *Amicus Curiae*

SUBMISSIONS OF THE *AMICUS CURIAE*

CONTENT

INTRODUCTION

1. These submissions are made on behalf of the Society for the Abolition of the Death Penalty in South Africa. It has been admitted as *amicus curiae.* The Chief Justice directed on 30 June 2004 that it may submit written argument but may not present oral argument without the leave of the court. It seeks leave to present oral argument in elaboration of these submissions particularly because its focus differs from that of the applicants in the following respects:

   1.1. It confines itself to the risk that the applicants may be sentenced to death and may be executed. It submits that the state is obliged under the Constitution, to take all steps reasonably open to it to protect the applicants against that risk.

   1.2. It submits that the state is obliged to do so under the positive duties imposed upon it in terms of the Constitution. Its submission is not dependent on a finding that the state unlawfully caused the applicants to be arrested in Zimbabwe without seeking assurances for their protection against the death penalty. The state is obliged to intercede on their behalf even if it had played no unlawful part in their arrest and the risks to which it has exposed them.

2. The scheme of our submissions is as follows:

2.1. We submit that there is an imminent and significant risk that the applicants may be extradited to Equatorial Guinea where they may be sentenced to death and executed without a fair trial. If that should happen, it would be a violation of international law.

2.2. We submit that the state is entitled but not obliged under international law, to afford diplomatic protection to the applicants against the risk that they may be sentenced to death and executed in violation of international law. It may do so *inter alia* by seeking appropriate assurances from the governments of Zimbabwe and Equatorial Guinea.

2.3. Although the state is not obliged under international law to afford diplomatic protection to the applicants, it is obliged to do so under the Constitution and more particularly those of its provisions which impose duties on the state to take positive steps for the protection of the fundamental human rights enshrined in the Bill of Rights.

2.4. We submit that the matter is justiciable despite the fact that it involves the government's conduct of its foreign affairs.

2.5. We submit that the relief afforded to the applicants should include an order that the state is obliged to afford them diplomatic protection and orders obliging it to seek appropriate assurances from the governments of Zimbabwe and Equatorial Guinea.

THE RISK OF A VIOLATION OF INTERNATIONAL LAW

Introduction

3. The evidence makes it clear that there is an imminent and significant risk,
   - that the applicants may be extradited to Equatorial Guinea,[1] and
   - that they may be sentenced to death and executed without a fair trial in Equatorial Guinea.[2]

4. We submit for the reasons that follow, that it would be a violation of international law if the applicants were to be sentenced to death without a fair trial.

The ICCPR

5. South Africa, Zimbabwe and Equatorial Guinea are parties to the International Covenant on Civil and Political Rights.[3]

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1 Founding affidavit 17:18 to 19, 46:92 to 96, 48:99 to 102; Answer 383:18 to 19, 408:55 to 57, 409:60 to 62

2 Founding affidavit 19:21, 48:97 to 98, 55:112 to 134, 90:163 to 166; Answer 386:21, 409:58 to 59, 414:69 to 71, 420:76 to 77

3 South Africa ratified it on 10 March 1999. Zimbabwe acceded to it on 13 August 1991. Equatorial Guinea acceded to it on 25 December 1987.

6. Article 6.1 of the ICCPR provides that every human being "*has the inherent right to life"* which must be "*protected by law*". It does not prohibit the death penalty. That has been done by the Second Optional Protocol to the ICCPR. South Africa is a party to the protocol[4] but Zimbabwe and Equatorial Guinea are not.

7. While the ICCPR does not prohibit the death penalty, it does make it clear that the death penalty may only be imposed by a fair and public trial before a competent, independent and impartial court:

   7.1. Article 6.1 provides that no one may be "*arbitrarily deprived of his life"*.

   7.2. Article 6.2 provides that the death penalty may only be imposed "*for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant"* and may only be carried out "*pursuant to a final judgment rendered by a competent court*".

   7.3. The stipulation of article 6.2 that the death penalty may not be imposed contrary to the provisions of the ICCPR itself, means *inter alia* that it may only be imposed in accordance with the

[4] It acceded to the protocol on 28 November 2002.

provisions of article 14 which guarantees the right to a fair trial. It provides *inter alia* that,

- in the determination of any criminal charge, everyone is entitled "*to a fair and public hearing by a competent, independent and impartial tribunal established by law"*;[5]
- everyone charged with a criminal offence "*shall have the right to be presumed innocent until proved guilty according to law"*;[6]
- in the determination of any criminal charge, everyone is entitled to a range of minimum guarantees of a fair trial,[7] and
- everyone convicted of a crime, has the right to have their conviction and sentence "*reviewed by a higher tribunal according to law"*.[8]

8. The Human Rights Committee established under the ICCPR, *inter alia* commented as follows on article 6 in paragraph 7 of their General Comment 6 of 1982:

> "*The Committee is of the opinion that the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the*

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5 Article 14.1

6 Article 14.2

7 Article 14.3

8 Article 14.5

express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence."[9]

9. This interpretation accords with that of the Economic and Social Council of the United Nations. It adopted "*Safeguards guaranteeing protection of the rights of those facing the death penalty*" on 25 May 1984.[10] They set a series of standards that must be observed by states that retain the death penalty. Article 5 of the Safeguards provides as follows:

"*Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights …"*.

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9 Human Rights Committee, General Comment 6, 30 April 1982

10 Economic and Social Council Resolution 1984/50 of 25 May 1984

10. Professor Schabas describes the jurisprudence of the Human Rights Committee on the requirement of procedural fairness in the imposition of the death penalty in terms of article 6.2 read with article 14 of the ICCPR.[11] It accords with the description of the European Court of Human Rights in the case of Öcalan.[12] The court was in the first place concerned with the illegitimacy of the death penalty under the European Convention and Protocols 6 and 13 to the Convention. It however undertook a review of international developments concerning the death penalty.[13] It noted that the UN Human Rights Committee had observed in a number of cases,

> "*that if the due process guarantees in article 14 of the International Covenant on Civil and Political Rights were violated, a sentence of death which was carried out would not be in conformity with article 6.2 of the Covenant which delineates the circumstances when it is permissible to give effect to the death penalty."*[14]

It also noted that the Inter-American Court of Human Rights had said in an advisory opinion on article 6 of the ICCPR and the corresponding article 4 of the American Convention on Human Rights, that

> "*Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is*

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11 William A Schabas *The Abolition of the Death Penalty in International Law* 2nd edition 108 to 119

12 Öcalan v Turkey, CCHR application 46221/99, 12 March 2003

13 Paras 59 to 64

14 Para 60

required of the state so that those guarantees are not violated and a human life not arbitrarily taken as a result".[15]

11. The court concluded that the imposition of the death penalty pursuant to an unfair trial was unlawful in itself even if the sentence was thereafter commuted and not implemented:

"*In the court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment.*"[16]

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15 Para 63

16 Para 207

12. It follows that it will be a violation of article 6 read with article 14 of the ICCPR if the applicants were to be sentenced to death without a fair trial even if the sentence is thereafter commuted. The violation will be all the more egregious if they are thereafter executed.

The African Charter

13. South Africa, Zimbabwe and Equatorial Guinea are parties to the African Charter on Human and People's Rights.[17]

14. It does not prohibit the death penalty but makes it clear at the very least, that the death penalty may not be imposed other than by a fair trial by an independent and impartial tribunal:

14.1. Article 4 provides that,

> "*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."*

14.2. Article 5 provides that every individual has "*the right to the respect of the dignity inherent in a human being*". It goes on to prohibit all forms of "*degradation of man particularly … torture, cruel, inhuman or degrading punishment and treatment*".

[17] South Africa ratified it on 9 July 1996, Zimbabwe on 30 May 1986 and Equatorial Guinea on 7 April 1986.

14.3. Article 6 guarantees the right of every individual "*to liberty and to the security of his person*" of which no one may be deprived "*except for reasons and conditions previously laid down by law*".

14.4. Article 7 guarantees the right to a fair trial. It provides *inter alia* for "*the right to be presumed innocent until proved guilty by a competent court or tribunal*"[18] and the right to be tried "*by an impartial court or tribunal*".[19]

14.5. Article 26 also imposes a duty on the states parties "*to guarantee the independence of the courts*".

15. These provisions make it clear that, insofar as the death penalty is still permissible at all, it may only be imposed pursuant to a fair trial before an independent and impartial court. These requirements must apply with particular rigour to the imposition of the death penalty because it is extreme and irreversible.

Customary international law

16. Under customary international law, a state may control the entry of foreigners into its territory but, once admitted into its territory, must treat

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18 Article 7.1(b)

19 Article 7.1(d)

them "*in accordance with civilised standards of behaviour"*.[20] This rule was summarised in Nyamakazi[21] as follows:

> "*The international standard relating to the treatment of aliens postulates that if a state admits an alien into its territory, it must conform in its treatment of him to the internationally determined standard. This means that the state should accord treatment to the alien which measures up to the ordinary standards of civilisation. The international standard of treatment of aliens applies in respect of fundamental human rights such as the right to life and integrity of persons but not to political rights, in respect of which an alien can only expect equality of treatment or even less than equality were that accorded to the state's own nationals. …"*

17. This international minimum standard renders it unlawful under international law to treat a foreigner in any manner that amounts,

> "*to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international*

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[20] Dugard *International Law: A South African Perspective* (2000) 219. See also Nyamakazi v President of Bophuthatswana 1992 (4) SA 540 (B) 579C to F; Baloro v University of Bophuthatswana 1995 (4) SA 197 (B) 247E to G; Dawood v Minister of Home Affairs 2000 (1) SA 997 (C) 1044C

[21] Nyamakazi v President of Bophuthatswana 1992 (4) SA 540 (B) 579C to D; Dugard *International Law: A South African Perspective* (2000) 219.

standards that every reasonable and impartial man would readily recognise its insufficiency".[22]

18. Although the precise ambit of the international minimum standard is unclear, Professor Dugard notes that,

> "*it is clear that those provisions of the Universal Declaration of Human Rights which have become part of international customary law are part of the international minimum standard for the treatment of aliens*",

that they include,

> "*the prohibition of torture and of inhuman or degrading treatment or punishment and the right to a fair trial*",

and that they are of particular importance in the administration of criminal justice where aliens must *inter alia*,

> "*be given counsel of their choice, brought to trial within a reasonable period of time, and tried in accordance with fair trial standards*".[23]

19. Akehurst says in similar vein that the conduct that falls below the minimum international standard includes "*punishment without a fair trial*".[24]

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22 Neer Claim (1926) RIAA (iv). 411 cited in Brownlie, *Principles of Public International Law,* 6th edition (2003) 503

23 Dugard *International Law: A South African Perspective* (2000) 221

24 Malanczuk, Akehurst's *Modern International Law*, 7th revised edition (1997) 269

20. It follows that, if the applicants were to be sentenced to death without a fair trial, it would also constitute a violation of customary international law.

THE STATE MAY INTERCEDE UNDER INTERNATIONAL LAW

Introduction

21. We submit in this chapter that under international law, the South African government is entitled to intercede for the protection of the applicants against the risk that they might be sentenced to death in violation of international law. It may do so *inter alia* by diplomatic means,
    - by seeking an assurance from the government of Zimbabwe that it will not extradite the applicants to Equatorial Guinea at all, or
    - by seeking an assurance from the government of Zimbabwe that it will not extradite the applicants to Equatorial Guinea without an assurance that they will not be sentenced to death or, if they are, that they will not be executed, and
    - by seeking an assurance from the government of Equatorial Guinea that the applicants will not be sentenced to death or, if they are, that the sentence will not be executed.

22. These diplomatic interventions may fail to protect the applicants because they may be rebuffed. The South African state may then have further remedies under international law. For the time being however, we confine our submissions to its right to mere diplomatic intervention under international law because it might succeed and avoid the need for further steps to be taken.

23. We do not submit that the South African state is obliged to intervene under international law. We submit merely that it is entitled to do so. International law does not impose a duty on it to do so. We will submit in the next chapter however that, under South African municipal law and particularly under our Constitution, the state is obliged to exercise its rights of intervention under international law for the protection of the applicants.

Diplomatic protection

24. It is an elementary principle of international law that a state is entitled to protect its nationals against wrongs committed by other states contrary to international law. The Permanent Court of International Justice described this principle in the Mavromattis Palestine Concessions case as follows:

> "*It is an elementary principle of international law 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. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights --- its right to ensure, in the person of its subjects, respect for the rules of international law.*"[25]

[25] The Mavromattis Palestine Concessions case (1924) PCIJ Reports Series A(2)12

25. There is a great deal of learning on this subject. The most useful and current sources for present purposes are the following:

- The International Law Commission has for some time been busy codifying the rules of international law on diplomatic protection. It appointed Professor Dugard as special rapporteur for this project. He has rendered reports to the ILC which it has debated at its annual sessions. His reports[26] and the ILC's reports of its annual sessions at which his reports were debated,[27] are rich and useful sources on this subject.
- Dugard *International Law: A South African Perspective* (2000) 205 to 225.
- Brownlie *Principles of Public International Law* 6th edition (2003) pp 497 to 508
- Warbrick *Diplomatic Representations and Diplomatic Protection* (2002) 51 ICLQ 723
- Erasmus and Davidson *Do South Africans have a right to diplomatic protection?* (2001) 25 SAYIL 113

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26 First Report on Diplomatic Protection (March 2000) A/CN.4/506; Second Report on Diplomatic Protection (March 2001) A/CN.4/514; Third Report on Diplomatic Protection (March 2002) A/CN.4/523; Fourth Report on Diplomatic Protection (March 2003) A/CN.4/530

27 ILC report on the work of its 52nd Session (2000) A/55/10 chapter V page 141; ILC report on the work of its 53rd Session (2001) A/56/10 chapter VII page 507; ILC report on the work of its 54th Session (2002) A/57/10 chapter V page 120; ILC report on the work of its 55th Session (2003) A/58/10 chapter V page 50

26. The doctrine of diplomatic protection is closely related to that of state responsibility for injury to foreigners. The idea that internationally wrongful acts or omissions causing injury to foreigners engage the responsibility of the state to which such acts and omissions are attributable, had gained widespread acceptance in the international community by the late 1920s. It was generally accepted that although a state was not obliged to admit foreigners, once it had done so, it was under an obligation towards the foreigner's state of nationality to provide a degree of protection to his or her person or property in accordance with the international minimum standard of treatment for foreigners.[28]

27. The right of diplomatic protection is historically vested in the state of nationality of the injured individual. This right is premised on the fiction that an injury to the individual is an injury to a state of nationality. Although this traditional doctrine of diplomatic protection has given rise to considerable debate, especially with regard to the question of whose rights are asserted when the state exercises diplomatic protection on behalf of its national, it is a widely accepted rule of customary international law that states have the right to protect their nationals abroad. The classical formulation of this rule is the one derived from the Mavromattis Palestine Concessions case quoted above.[29]

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[28] Dugard *First Report on Diplomatic Protection* (March 2000) ILC A/CN.4/506 page 11 para 33

[29] Dugard *First Report on Diplomatic Protection* (March 2000) ILC A/CN.4/506 page 12 para 36

28. Legal scholars commonly use the term "*diplomatic protection*" to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, in the final resort, the use of force.[30] Professor Dugard[31] quotes Dunn who described diplomatic protection as follows:

> "*It embraces generally all cases of official representation by one government on behalf of its citizens or their property interests within the jurisdiction of another, for the purpose, either of preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained …*
>
> *The term 'diplomatic protection' is here used as a generic term covering the general subject of protection of citizens abroad, including those cases in which other than diplomatic means may be resorted to in the enforcement of obligations …*
>
> *It should be noted that we are here concerned only with representations or demands that are made (expressly or impliedly) under a claim of right. Governments often take action on behalf of their citizens abroad which is not based on any assertion of*

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30 Dugard *First Report on Diplomatic Protection* (March 2000) ILC A/CN.4/506 page 15 para 43

31 Dugard *First Report on Diplomatic Protection* (March 2000) ILC A/CN.4/506 page 15 para 43

international obligation and does not fall within the category of protection in a technical sense."[32]

29. The Permanent Court of International Justice and the International Court of Justice have however distinguished between "*diplomatic action"* on the one hand and "*judicial proceedings"* on the other.[33] Professor Warbrick makes a comparable distinction between "*diplomatic representations"* and "*diplomatic protection"*:

> "*(It) is necessary to draw a distinction between diplomatic representations and diplomatic protection. The former is not a legal term of art. Diplomatic representations cover a wide range of communications from one government to another, in which one expresses its disapproval about some action or inaction of the other. They do not necessarily impute unlawful conduct to the other state; the complaining state cannot, therefore, in all cases demand a response; it runs the risk of a brisk retort that the matter complained about lies exclusively and unaccountably within the jurisdiction of the state to which the complaint is addressed. A current example is the representations that are made, within and outside the European Union, to the imposition of the death penalty in the United States. It is by no means always possible to show*

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32 F S Dunn *The Protection of Nationals: A study in the application of international law* (1932) 18 to 20

33 Dugard *First Report on Diplomatic Protection* (March 2000) ILC A/CN.4/506 page 15 para 42

that carrying out the execution would be in breach of any international obligation of the United States --- representations that it be not carried out notwithstanding, are simply attempts to reinforce the calls for clemency. Diplomatic representations may be the prelude to the exercise of diplomatic protection (though they do not appear to be a pre-condition for it, as, for instance, the exhaustion of local remedies would be)."[34]

30. A state may normally not intercede on behalf of a national before the latter has exhausted all the available remedies against the delinquent state.[35] That is however not a universal requirement and does not apply in this case and particularly not for the kind of intervention for which we contend:

30.1. The kind of intervention for which we contend, is in the language of Professor Warbrick referred to above, mere "*diplomatic representations"*. They "*do not necessarily impute unlawful conduct to the other state"* and they are consequently also not premised on the existence of a wrong committed by the state to which the representations are addressed. It follows that there need not be any remedies against the defendant state. It accordingly cannot be a requirement for intervention of this kind,

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34 Warbrick *Diplomatic Representations and Diplomatic Protection* (2002) 51 ICLQ 723 at 724 to 725

35 Dugard *International Law: A South African Perspective* 215 to 217; ILC report on the work of its 53rd Session (2001) A/56/10 chapter VII p 515:185 to 199

that any remedies against the defendant state must first be exhausted.

30.2. We contend for intervention to prevent an impending wrong under international law and not to seek redress for one already committed. In such a case the person at risk of the wrong, obviously does not have the remedy he or she might have once the wrong has been committed.

30.3. If there are no remedies to exhaust or if the existing remedies would be futile, there is also no need to comply with this requirement.[36] In this case, the respondents have not suggested that there is any realistic remedy open to the applicants to avoid the risk of a death penalty after an unfair trial to which they are exposed. But even if there should be such a remedy open to them in theory, it would be futile to pursue. The very essence of their complaint is that Equatorial Guinea will not afford them a fair hearing.

30.4. There is in any event no satisfactory remedy open to the applicants to protect them against the risk of unlawful conviction, sentence and execution. Any delay enhances the risk that they

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[36] Dugard *International Law: A South African Perspective* (2000) 216; ILC report on the work of its 55th Session (2003) A/58/10 page 92 article 10 and Commentary paras 1 to 11

may be executed before they have availed themselves of whatever remedy Equatorial Guinea might afford them.

31. It is accordingly open to the state to intervene by affording the applicants the diplomatic protection for which we contend. We accept that under international law, it is not obliged to do so.[37] We submit in the next chapter however, that the state is obliged to do so under our Constitution.

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37 Dugard *International Law: A South African Perspective* (2000) 213 to 214; Dugard *First Report on Diplomatic Protection* (March 2000) ILC A/CN.4/506 p 27:75 to 93; ILC report on the work of its 52nd Session (2000) A/55/10 p 155:447 to 456.

THE STATE MUST INTERCEDE UNDER THE CONSTITUTION

Introduction

32. Although international law does not impose a duty on the state to afford diplomatic protection to its nationals, it may be under a duty to do so under its own municipal law. Professor Dugard has pointed out that it is not uncommon for states to be obliged to afford diplomatic protection to their nationals under their own municipal law.[38] State practice in this regard has indeed become sufficiently common for it to be suggested that there is an emerging rule of international law that requires states to afford diplomatic protection to their nationals.[39] When the ILC considered this matter at its 52nd Session in 2000, it concluded merely that the codification of such an obligatory rule "*was not yet ripe for the attention of the Commission and that there was a need for more state practice and, particularly, more opinio juris before it could be considered*".[40]

33. Some South African scholars including Professor Gerhard Erasmus, have argued that, whatever the position might be under international law, our Constitution imposes a duty on the state to afford diplomatic protection to

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38 Dugard *First Report on Diplomatic Protection* (March 2000) ILC A/CN.4/506 p 30:80 to 87

39 Dugard *First Report on Diplomatic Protection* (March 2000) ILC A/CN.4/506 p 28:76 to 87

40 ILC report on the work of its 52nd Session (2000) A/55/10 p 158:456

South Africans in distress.[41] We submit for the reasons that follow that our Constitution does indeed impose a duty on the state to afford diplomatic protection to its citizens at least when they are exposed to the risk of being sentenced to death in a foreign country and *a fortiori* when they are exposed to that risk without a fair trial.

There are fundamental human rights at stake

34. This court held in Makwanyane[42] that the death penalty "*is indeed a cruel, inhuman and degrading punishment*"[43] and violated, not only the constitutional prohibition of punishment of that kind, but also the fundamental constitutional rights to life and dignity which it described as follows:

> "*The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others. And this must be demonstrated by the state in everything that it does, including the way it punishes criminals.*"[44]

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41 Erasmus and Davidson *Do South Africans have a right to diplomatic protection?* (2001) 25 SAYIL 113; Hopkins *Diplomatic Protection and The South African Constitution: Does a South African citizen have an enforceable constitutional claim against the government?* (2001) 16 SAPL 387

42 S v Makwanyane 1995 (3) SA 391 (CC)

43 para 95

44 para 144

35. It held in Mohamed[45] that its conclusions in Makwanyane under the Interim Constitution held good under the Final Constitution and that,

> "*The importance of human dignity to which great weight was given in Makwanyane is emphasized in the 1996 Constitution by including it not only as a right, but also as one of the values on which the state is founded."*[46]

36. The death penalty is in other words not only inconsistent with ss 10, 11 and 12(1)(e) of the Constitution, but is also profoundly inimical to the founding value of human dignity that underpins our Constitution.

37. Any unfair criminal trial is moreover inconsistent with the guarantees in s 35(3) of the Constitution and, particularly if it results in the imposition of a death penalty, also incompatible with the rule of law entrenched as a founding value in s 1(c) of the Constitution.

The state's positive duties

38. Our Constitution imposes a duty on the state to take positive steps for the protection of all the fundamental rights entrenched in the Constitution and

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45 Mohamed v President of the RSA 2001 (3) SA 893 (CC)

46 para 38. See also paras 48, 52 and 54

particularly for the protection and advancement of the founding values of dignity, life and the rule of law:

38.1. Section 7(2) obliges the state not only to respect, but also to "*protect, promote and fulfil"* the rights in the Bill of Rights.

38.2. The right to dignity in s 10 includes the right of everyone, not only to have their dignity respected, but also to have their dignity "*protected"*. The state is the primary bearer of the duty to do so.

38.3. Section 33(1) entitles everyone to administrative action that is "*reasonable"*. It also imposes a duty on the state to take positive administrative action whenever it would be reasonable to require it to do so.

38.4. When a court interprets these provisions, it is required in terms of s 39(1)(a), to "*promote the values that underlie an open and democratic society based on human dignity, equality and freedom"*. It suggests that the positive duties imposed on the state should not be restrictively construed because a broader and more generous interpretation would be the one that accords with the injunction of s 39(1)(a).

38.5. This reading of the positive duties imposed on the state is moreover reinforced by s 41(1)(b) which requires the government in all its manifestations to "*secure the well-being of the people of the Republic"* and by the oath of office of the President prescribed by s 87 read with item 1 of schedule 2, to "*protect and promote the rights of all South Africans"*.

39. This court emphasized the positive duties imposed on the state under the Constitution in De Lange when it said that,

> *"In a constitutional democratic state, which ours now certainly is, and under the rule of law … citizens as well as non-citizens are entitled to rely upon the state for the protection and enforcement of their rights. The state therefore assumes the obligation of assisting such persons to enforce their rights …."*.[47]

40. It went on to hold in Carmichele that,

> "*In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."*[48]

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47 De Lange v Smuts NO 1998 (3) SA 785 (CC) para 31

48 Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) para 44

41. The SCA has since then repeatedly affirmed and given effect to this positive duty imposed on the state to protect the lives and bodily integrity of all South Africans.[49]

42. In Mohamed[50] this court again emphasized the positive duties imposed on the state under the Constitution:

- It reiterated the statement in Makwanyane that, by committing ourselves to a society founded on the recognition of human rights, we are required to give particular value to the rights to life and dignity, and that "*this must be demonstrated by the state in everything that it does"*.[51]
- It founded its reasoning *inter alia* on "*the positive obligation that (the Constitution) imposes on the state to protect, promote and fulfil the rights in the Bill of Rights"* and on "*the government's obligation to protect the right to life of everyone in South Africa"*.[52]
- It concluded that the state had in that case infringed Mohamed's rights under the Constitution "*and acted contrary to their*

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49 Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA); Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA); Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA); Minister of Safety and Security v Hamilton 2004 (2) SA 216 (SCA)

50 Mohamed v President of the RSA 2001 (3) SA 893 (CC)

51 para 48

52 para 58

obligations to uphold and promote the rights entrenched in the Bill of Rights".[53]

43. We submit that, when a South African is exposed to the risk of being sentenced to death in a foreign state and it is reasonably open to the South African government to protect him or her against that risk under international law, then it is obliged to do so under the positive duties imposed on it by the Constitution to act in the protection of the dignity, life and bodily integrity of all South Africans.

44. This duty is reinforced by ss 3, 20 and 21 of the Constitution which make it clear,

- that citizenship is a fundamental human right protected in s 20;
- that citizens have a right in terms of s 21, to come and go freely, and
- that citizens always remain equally entitled to "*the rights, privileges and benefits of citizenship"* in terms of s 3(2)(a).[54]

The extra-territoriality argument

45. The government argues[55] that s 7(2) of the Constitution read with s 7(1), means that the obligation of the state to respect, protect, promote and fulfil

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53 para 60

54 See Erasmus and Davidson *Do South Africans have a right to diplomatic protection?* (2001) 25 SAYIL 113 at 125 to 127

the rights in the Bill of Rights, applies only in "*the Republic unless the nature of the right asserted has no territorial limitation"*.

46. The English Court of Appeal upheld a similar argument in Abbasi.[56] It held that the British Government was not obliged under the Human Rights Act read with the European Convention on Human Rights, to afford diplomatic protection to one of its nationals detained by the US at Guantanamo Bay. Its ratio was that article 1 made it clear that the Convention was generally territorially based.[57]

47. We submit with respect that this argument does not avail the government in this case:

47.1. Their interpretation of s 7(2) is untenable or at the very least unduly strained. There is nothing in s 7(2) or for that matter in s 7(1), to suggest that the state operates under the Constitution only when it does so within the boundaries of South Africa. Section 7(2) does not say so. Section 7(1) merely says that the Bill of Rights "*is a cornerstone of democracy in South Africa"*. It emphasizes the foundational and pivotal role of the Bill of Rights and does not confine or even address its territorial operation.

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55 Respondents' submissions 17:24 to 26 and 18:28 to 34

56 R v Abbasi [2002] EWCA Civ 1598 (6 November 2002)

57 paras 70 to 79

47.2. The state is dependent for its very existence and derives all its powers and functions from the Constitution. It has no existence, no powers and no functions beyond the Constitution. It exists and always operates under the Constitution. It can never escape the Constitution because it has no existence and no powers beyond the Constitution.

47.3. It is at this point that the constitutional role played by our Constitution differs markedly from that played by the Human Rights Act in the UK. Our Constitution is the *fons et origo* of the state and all its powers whereas the Human Rights Act is no more than a set of constraints imposed upon the UK government. The latter exists and is vested with powers independently of the Human Rights Act. This constitutional arrangement leaves open the possibility that the UK government may sometimes act free of the constraints imposed by the Human Rights Act. The South African government on the other hand, does not have any existence or any powers independently of the Constitution and can accordingly never act outside it.

47.4. We submit that the South African government always acts subject to the Constitution. It does not only do so when it acts in

the local domain. It also remains subject to the Constitution when it acts in the international domain.

Conclusion

48. We submit that the state is obliged in this case to take such steps as might be reasonably open to it to afford diplomatic protection to the applicants against the risk that they may be sentenced to death and, if they are, that they may be executed.

THE MATTER IS JUSTICIABLE

49. In terms of s 34 of the Constitution, everyone has the right "*to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court …"*. Insofar as the state is as a matter of law obliged under the Constitution to afford diplomatic protection to the applicants, its failure to do so is justiciable.

50. This court made it clear in Hugo[58], Mohamed[59] and TAC[60] that all executive conduct of the state was subject to review under the Constitution.

51. Even under English law, which has traditionally afforded the Crown very considerable latitude in the conduct of its foreign affairs, the decisions taken by the executive in its dealings with foreign states regarding the protection of its citizens abroad, are justiciable.[61] The US Supreme Court has also applied the same principle in the realm of foreign affairs.[62]

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58 President of the RSA v Hugo 1997 (4) SA 1 (CC) paras 28, 29 and 65

59 Mohamed v President of the RSA 2001 (3) SA 893 (CC) para 31

60 Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC) para 99

61 R v Abbasi [2002] EWCA Civ 1598 (6 November 2002) paras 37 to 53

62 S Kadic v Radovan Karadzic United States Court of Appeals for the Second Circuit, 1541, 1544, August Term 1994, decided October 13 1995; Japan Whaling Association v American Cetacean Society 478 US 221 (1986)

REMEDY

52. This court said in TAC[63] that,

> "*Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so."*

53. We submit that it would in this case in the first place be appropriate for this court to make an order declaring that the state is obliged in terms of the Constitution, to take all steps reasonably open to it to protect the applicants against the risk that they may be sentenced to death and, if they are so sentenced, that they may be executed. The state denies that it is under any such obligation. The purpose of the declarator would be to make it clear that it is subject to such an obligation.

54. We do not suggest that it is necessary or appropriate for this court to make an exhaustive determination of all the steps the state is required to take in the performance of its constitutional duty. We do submit however that it

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63 Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC) para 99 and see also paras 101 to 106

should at least be ordered to take the steps we have suggested namely that it should,

- seek an assurance from the government of Zimbabwe that it will not extradite the applicants to Equatorial Guinea at all; or
- seek an assurance from the government of Zimbabwe that it will not extradite the applicants to Equatorial Guinea without an assurance that they will not be sentenced to death or, if they are, that the sentence will not be implemented, and
- seek an assurance from the government of Equatorial Guinea that the applicants will not be sentenced to death or, if they are, that the sentence will not be implemented.

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