HAS THE GOVERNMENT A DUTY TO ACCORD DIPLOMATIC ASSISTANCE AND PROTECTION TO ITS NATIONALS?

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I. DIPLOMATIC AND CONSULAR PROTECTION AND ASSISTANCE

International law is the law governing relations between states and other self-governing communities. It also, however, protects the interests of private individuals, including private juridical persons, in foreign countries. These interests of individuals may be connected directly with their persons, for example in the case of criminal proceedings against them in a foreign country. Or the interests may be connected with their property or other economic interests in the foreign country. However, it is traditionally maintained—and in the present writer's view it is still correct to maintain *de lege lata*—that even in these cases the rights and duties under international law are vested in the states, not in the individuals concerned,[1] except in those few respects where the states have specifically established direct international rights and/or duties for the individuals.[2]

Lecture given in English at Oslo University on 29 October 1966, as revised *inter alia* to take account of the Swedish Foreign Service Instructions of 10 March 1967. The views expressed are the personal views of the writer.

[1] The Permanent Court of International Justice has made repeated statements in this sense. Thus in the Mavrommatis Palestine Concessions:

"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." (*C.P.J.I., Ser. A*, no. 1, p. 12; see also nos. 2, 13–15 and 74, p. 28.)

In this sense also Ræstad in *Nordisk Tidsskrift for international Ret*, IV (1933) pp. 13–18, and Salmon in *Journal des tribunaux* (Brussels), LXXX (1966) p. 718. See also Zellweger in *Schweizerische Juristenzeitung*, XXVIII (1932) pp. 276–80, and Makarov, *loc. cit.* p. 128 below, at pp. 517–18.

[2] Most of those writers who maintain that individuals are subjects of international law *de lege lata* adduce examples from the *internal law of intergovernmental organizations*, which they do not distinguish from international law (see for example Carl Nörgaard, *The Position of the Individual in International Law*, Copenhagen 1962). In fact, the internal law of intergovernmental organizations is, in this as in many other respects, comparable to *municipal*

This means that if a foreign state or an intergovernmental organization[3] violates international law in such a manner that Norwegian nationals, including Norwegian juridical persons, suffer injury or loss—or if there is danger of such a violation—then action on the international plane to avert the violation or to obtain redress for the damage suffered can be taken only by the Norwegian *Government,* through diplomatic channels.[4] This action is referred to as "diplomatic *protection*".[5] It is usually exercised in the form of a note from the diplomatic[6] mission of the

law rather than to international law. In addition to the organization and its members, it is the organs and *officials* of the organization—and, in the case of some organizations, other categories of individuals as well—who are the *normal* subjects of the internal law of intergovernmental organizations.

[3] See for example, on the claims presented by Belgium to the U.N. on behalf of Belgian nationals who had suffered injuries in the Congo and on the agreement which settled these claims, Salmon, "Les accords Spaak—U Thant du 20 février 1965", *Annuaire français de droit international,* XI (1965) at pp. 477–97. See also, more generally, Seyersted, *United Nations Forces* (Leyden 1966) pp. 108–10 and 194–5.

[4] An exception was the claim presented against the U.N. in 1962 by the *Comité international de la Croix-Rouge* on behalf of its representatives who had been killed in Katanga, see *ibid.,* p. 195. However, the *Comité* is itself a limited subject of international law, see *Nordisk Tidsskrift for international Ret og Jus gentium,* XXXIV (1964) p. 57, or *Indian Journal of International Law,* IV (1964) p. 50. — If the Norwegian national has been acting as an international official, as a member of a U.N. Force or in some other capacity on behalf of an intergovernmental organization, the claim may and must be presented by the organization concerned, see *ibid.,* p. 17, and Seyersted, *U.N. Forces,* pp. 112–17. — Refugees may be protected by an intergovernmental (refugee) organization, see Weis in *American Journal of International Law,* XLVIII (1954) pp. 206 ff., especially p. 219. Weis states that it is doubtful whether they have a *right* to such protection by the organization.

[5] Literature is listed in *Wörterbuch des Völkerrechts,* I (Berlin 1960) pp. 386–7. See also Ræstad, "Diplomatisk beskyttelse av landsmenn i utlandet", *Nordisk Tidsskrift for international Ret,* IV (1933) pp. 3–29 and 157–78.

[6] Consular posts can also act. Thus the Treaty of Friendship, Commerce and Consular Rights between Norway and the United States of 5 June 1928 and 25 February 1929 provides in art. XX:

"Consular offices of either High Contracting Party may, within their respective consular districts, address the authorities concerned, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they are appointed in the enjoyment of their rights accruing by treaty or otherwise. Complaint may be made for the infraction of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative, a consul general or the consular officer stationed at the capital may apply directly to the Government of the country."

The consular treaty between Norway and the United Kingdom of 22 February 1951 provides in art. 18(2):

"For the purpose of the protection of nationals of the sending state and their property and interests a consular officer shall be entitled to apply to and correspond with the appropriate authorities within his district and, in the absence of any diplomatic representative of the sending state, with the appropriate departments of the central government of the territory."

state of the person concerned to the Ministry for Foreign Affairs of the other state. The claim may also be raised before an international court, if such court exists and has competence, or if the foreign state agrees to establish a court *ad hoc;* however, it is not usual to do so until diplomatic negotiations have been tried and have failed. In either case the claim may be that the foreign government should perform or refrain from performing a certain act, or, more frequently, that it should make reparation, restitution or other redress for a wrongful act already committed.

However, states also render assistance to their nationals abroad in cases where no violation of international law is involved. Thus Norwegian diplomatic missions frequently appeal to the central authorities of the host country to treat Norwegian nationals or their property or other interests in a certain manner. However, if a state has no *right* under international law to demand such action—or, to be more precise, if the foreign state concerned has no *duty* to act in that manner—then the former state usually does not make a formal request or protest, but confines itself to an informal appeal through a foreign ministry official of the foreign state concerned. This is not diplomatic protection in the narrow sense, but may be termed "diplomatic *assistance*".—Similar assistance to nationals abroad is also—and perhaps more frequently —rendered by *consular* posts, which are the competent organs to approach *local* authorities in foreign states.[7]

An example: A foreign state nationalizes the property of a Norwegian national without compensation. The Norwegian Government will then usually lodge a formal protest with the foreign government through diplomatic channels, demanding prompt, full and effective compensation. This is "diplomatic *protection*".

On the other hand, the foreign state may nationalize foreign property, or consider doing so, while providing for prompt, full and effective compensation. This it is usually entitled to do, in accordance with its own law. Nevertheless, the Norwegian Government, again acting through diplomatic channels, may informally draw the attention of the foreign state to the disadvantages involved in a nationalization of this particular property, and ex-

[7] Art. 38 of the Vienna Convention on Consular Relations of 24 April 1963. Thus the consular treaty between Norway and the U.K. of 22 February 1951 provides in art. 18(1) (c) that a consular officer may assist any national of the sending state "in proceedings before or in relations with the authorities of the territory, arrange for legal assistance for him, where necessary, and act as interpreter on his behalf, or delegate an interpreter so to act, before the said authorities, at their request or with their consent."

press its wish or desire that it be exempted from nationalization. This may be called "diplomatic *assistance*".

Diplomatic protection and assistance comprise only protection and assistance vis-à-vis the foreign *state*. They do not comprise the numerous types of assistance which consular and even diplomatic[8] authorities extend to nationals vis-à-vis *private parties* in the host country—such as seeking representatives, lawyers, customers and other business connections. This may be termed "consular assistance".—Still less could one class as diplomatic protection and assistance the many kinds of *direct* assistance which consular and even diplomatic missions extend to nationals abroad, for example by advising and lending money to stranded sailors and tourists, solemnizing marriages, legalizing documents, etc. These are internal Norwegian functions which do not directly involve foreign authorities. These functions are in fact closer to the functions of consuls as they were originally.[9]

Thus, by diplomatic *protection* of Norwegian nationals the writer understands diplomatic or international judicial action taken vis-à-vis a foreign government in order to prevent, or demand redress for, a violation of international law which the authorities of that government have committed or are about to commit against the person or the interests of a Norwegian national.

By diplomatic *assistance* is understood action vis-à-vis a foreign government in order to support the personal or economic interests of a Norwegian national in cases where no violation of international law has been committed.

II. RIGHT AND DUTY UNDER INTERNATIONAL LAW TO RENDER DIPLOMATIC PROTECTION

Under international law a state has the right to exercise diplomatic protection on behalf of its nationals. However, it may do so only on certain conditions, the most important of which are:

1. The individual to be protected must be a national or a juridical person of the protecting state—both at the time the claim arises and at the time it is taken up at the diplomatic level.

[8] Cf. art. 3(2) of the Vienna Convention on Diplomatic Relations of 18 April 1961.

[9] See, on the origin of consuls, Oppenheim, *International law*, I § 418.

2. The ground for diplomatic intervention must be a violation of international law which the protecting state claims has taken place or which it has grounds to fear may take place.
3. The individual must, with certain exceptions, first *exhaust the local remedies* by appealing to the highest judicial or other competent authorities of the state concerned.

These conditions do not apply to diplomatic *assistance,* except that states usually do not render assistance to persons who are not their nationals at the time assistance is to be rendered.

The question of diplomatic protection has become particularly topical since the second world war in connection with claims arising out of the war and the resulting frontier revisions and the large-scale nationalizations of private or foreign property in the countries of Eastern Europe and in several developing countries. These events have underlined a new aspect of the problem, viz. the *internal* question of whether a state has a legal duty vis-à-vis its own nationals to protect them and their interests in foreign countries.

Although international law confers upon states a *right* to exercise diplomatic protection, it imposes no *obligation* upon them to do so.

This is true even of the *European Convention on Human Rights* of 4 November 1950. This does not list the right to diplomatic protection as a distinct human right. And with regard to the rights it does list, it merely provides for remedies before a *national* authority and before certain specially established authorities of the Council of Europe (the Commission on Human Rights, the Committee of Ministers, the Court of Human Rights). Thus art. 13 merely provides that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". This obviously refers to a national authority of the state where the violation took place, rather than to diplomatic protection, which gives foreign nationals *more* protection than nationals.

Nor do the new Covenants on human rights which were adopted by U.N. General Assembly resolution 2200 (XXII), on 16 December 1966, but which at the time of writing have not been ratified, provide for a right to diplomatic protection. On the contrary, they emphasize that "all persons are equal before the law and are entitled to equal protection of the law" (art. 26 of the Covenant on Civil and Political Rights). It is true that diplo-

matic protection may be a means to obtain just that. But it may also be a means to obtain *more* than the native population enjoys.

The question whether a government has a *duty* to render diplomatic protection and assistance to its nationals is therefore purely a problem of its own *municipal (administrative) law.*

III. FOREIGN AND SCANDINAVIAN WRITERS ON THE CITIZEN'S RIGHT TO CLAIM DIPLOMATIC PROTECTION BY HIS GOVERNMENT

The question of the citizen's right has been discussed in legal literature only in respect of diplomatic *protection.*

Before the turn of the century writers spoke of the *obligation* of the state to render diplomatic protection.[1]

During the first half of the present century a few writers on diplomatic protection discussed the question, but these *denied* the existence *de lege lata,* in their respective countries, of any duty to render diplomatic protection.[2]

In the late fifties the matter was suddenly taken up in greater detail by a number of writers in German-speaking and Scandinavian countries. The most thorough studies are by the Germans Geck and Doehring.[3] The principal Scandinavian studies are by

[1] Vattel, Bluntschli, von Martens and Lomonaco, as cited by Makarov, "Consideraciones sobre el derecho de proteccion diplomatica", *Revista española de derecho internacional,* VIII (1955) at p. 513.

[2] Borchard, *Diplomatic Protection of Citizens Abroad* (New York 1915) p. 356; Zellweger, "Der diplomatische Schutz als Rechtsinstitut" in *Schweizerische Juristenzeitung,* XXVIII (1932) pp. 276 ff.; Schneeberger, "Staatsangehörigheit und diplomatischer Schutz", *ibid.,* XXXIX (1943) at pp. 499–500. See also the two Norwegian writers cited at the following page and a memorandum by the Swiss Département politique in *Schweizerisches Jahrbuch für internationales Recht,* VII (1950) pp. 184–92.

[3] Geck, "Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* XVII (1956/57) pp. 476–545; Doehring, *Die Pflicht des Staates zur Gewährung diplomatischen Schutzes* (Cologne 1959). An even more recent writer is Wiederkehr, *Der Staat und seine Bürger im Ausland* (Zürich 1964) at pp. 16–19. These are all in the same negative sense. More positive in supporting a right for the individual is Katzarov, "Hat der Bürger ein Recht auf diplomatischen Schutz?", *Österreichische Zeitschrift für öffentliches Recht,* VIII (1957/58) pp. 434–48. More negative is Makarov, "Consideraciones sobre

Max Sörensen (Denmark) and Hilding Eek (Sweden).[4] These Germanic and Scandinavian studies—which were all published in the years 1957–59—revert to the proposition that the state has a "*duty*" under its internal law to render diplomatic protection. This is maintained for Danish,[5] Swedish, German and Swiss law. Doehring, but not Sörensen,[6] arrives at the same conclusion even for American, British and French law.

Some of these writers also admit a corresponding *right* for the individual to claim protection.[7] Others, however, maintain—and here they are supported by court practice—that the individual concerned has no such right. The latter view is taken notably by Sörensen (pp. 406–7) and Doehring. The latter states that all states whose law he has examined admit "eine dem objektiven Recht angehörende Pflicht des Staates" but admit no "Anspruch in der Art eines subjektiven öffentlichen Rechts auf Tätigwerden der auswärtigen Verwaltung oder gar auf das Tätigwerden in bestimmter Art".[8] He adds that the individual has either no possibility of, or else no chance of success in, suing his government, even if the latter has abused its discretion. Sörensen (pp. 406–8) states that the individual can sue his government for reparation if he can prove that the authorities took "uvedkommende usaglige hensyn" (*détournement de pouvoir*) when they decided not to grant him diplomatic protection.

The question does not appear to have been discussed by *Norwegian* writers, except for a brief statement by Castberg at the Nordic Jurists' Conference in Stockholm in 1931.[9] He denied any

el derecho de proteccion diplomatica", *Revista española de derecho internacional*, VIII (1955) at pp. 513–18; and the most recent writer, Jean Salmon, "De quelques problèmes posés aux tribunaux belges par les actions de citoyens belges contre l'ONU en raison de faits survenus sur le territoire de la République démocratique du Congo", *Journal des tribunaux* (Brussels), LXXXI (1966) at pp. 718–19, cf. pp. 723–24.

[4] Max Sörensen, "Om retten til diplomatisk beskyttelse", *Festskrift til Poul Andersen* (Copenhagen 1958) pp. 398–412; Hilding Eek, "Svenska medborgares skydd i utlandet, en fråga om förhållandet mellan den enskilde och det allmänna", *Festskrift tillägnad Halvar Sundberg* (Uppsala 1959) pp. 87–105. See also Odevall (Sweden), "Globalersättning för ekonomiska intressen i utlandet" in *Nordisk Tidsskrift for international Ret*, XXIV (1954) at p. 22.

[5] By Poul Andersen, as cited by Sörensen, *loc. cit.*, p. 402, who supports him only as a point of departure.

[6] Nor Borchard, *op. cit.*, p. 536, for American law.

[7] Thus, Katzarov and Poul Andersen, *loc. cit.* Eek, too, leans in this direction, but does not express a definite view. See also Geck, *loc. cit.*, especially pp. 516–18.

[8] Doehring, *op. cit.*, p. 88.

[9] Castberg, *Statens og kommunenes ansvar for sine tjenestemenns handlinger* (Stockholm 1931) p. 64.

legal right for the individual to diplomatic protection. One year earlier, Ræstad made a statement in the same sense in his lectures at the Nobel Institute, but he may have been concerned with the international-law rather than the municipal-law aspect.[10]

In contradistinction to the studies of foreign law referred to above, the following study of Norwegian law will start out from and concentrate upon the question of whether and to what extent there is a *right for the individual* to claim protection and assistance. This appears to be the crucial point in a legal analysis of the question of a *duty of the state,* which will then be reverted to in the end. The discussion will deal first with the written law of Norway, as compared with that of some other Nordic and Continental countries, and then with Norwegian practice and general administrative law.

IV. WRITTEN LAW

The Norwegian Foreign Service Act ("Lov om utenrikstjenesten") of 18 July 1958 provides in § 1:

> Utenrikstjenesten *har til oppgave* å vareta og fremme Norges interesser i forholdet til utlandet og *å yte nordmenn råd, hjelp og beskyttelse overfor utenlandske myndigheter,* personer og institusjoner.

The governmental translation into English reads as follows:

> The Foreign Service *is charged with* preserving and promoting Norway's interests in her relations with foreign countries and *providing advice, aid and protection for Norwegian subjects in their relations with foreign authorities,* persons and institutions.[1]

[10] *Nordisk Tidsskrift for international Ret,* IV (1933) at p. 15.

[1] Italics added. — This and other translations are quoted with the reservation—or rather warning—that no legal text can be properly interpreted by analysing a translation. No two languages are so similar that even the best translation can reproduce the exact meaning in the original language. This is particularly true of translations from and into English. Indeed, it is strange how great are the differences in legal terminology and legal concepts as between Scandinavian and Anglo-Saxon law—despite the common Germanic origin of the law and the languages. Therefore it is frequently difficult to find English counterparts to Scandinavian legal concepts. It is usually easier to find counterparts in continental European law, even if this is Roman and based upon codification ("civil law" countries).

Other European countries whose law I have looked into have no similar *statutory* provision, with the exception of *Finland*. § 8 of the Finnish Foreign Service Act of 6 July 1925 provides that diplomatic and consular representatives "may protect the rights of Finnish nationals" (*äger skydda finska medborgares rättigheter*). *Germany* had more categorical provisions in its *Constitutions* of 1867, 1871 and 1919. The relevant clause in the 1919 Constitution read:

> Dem Auslande gegenüber haben alle Reichsangehörigen inner- und ausserhalb des Reichsgebiets Anspruch auf den Schutz des Reiches.

Thus it was stated specifically that all German nationals, at home and abroad, were *entitled* to diplomatic protection by Germany. The German Constitution of today, however, contains no such provision.

In other countries[2] there are relevant administrative instructions, issued by the Head of State and/or the Ministry for Foreign Affairs. Thus the earlier *Danish* "Udenrigsinstruks" of 21 September 1932 provided in § 32:

> He shall moreover in general protect and assist Danish citizens; when, therefore, requests for assistance are made, he shall be instrumental in safeguarding their interests to such an extent as is compatible with these Instructions and customary in the place as to diplomatic or consular assistance.

Max Sörensen (p. 412)—in contradistinction to Poul Andersen —considered that this was merely an internal instruction which did not prevent the Ministry for Foreign Affairs from refusing protection. The corresponding provision in chapter VII A of the new Danish "Udenrigsinstruks", promulgated by Executive Order of 1 November 1965, is similar, but somewhat looser, at least in the Danish version, which says "*bör söge* at bistå" (official translation: "should do their best to assist").

§ 20 of the earlier *Swedish* Foreign Service Instructions ("Förordning angående beskickningar och konsulat"), promulgated by the King on 3 February 1928, reads:

> A Head of Legation and a Consul *shall,* each in his own sphere, safeguard the interests of Sweden, promote its trade, industry and shipping, and *render assistance to Swedish subjects.* (Italics added.)

[2] Texts in Feller and Hudson, *Diplomatic and Consular Laws and Regulations* (Washington 1933), see list in vol. II, at p. 1898.

This is more categorical. And Hilding Eek assumes that this implies a right which may be invoked by individuals.[3] He refers to Poul Andersen, who, as already mentioned, takes the same view in respect of the less categorical provision in the earlier Danish Foreign Service Instructions. The new Swedish Foreign Service Instructions, promulgated by the King on 10 March 1967, state in § 25 that the head of a diplomatic or consular mission "shall ... protect the rights and interests of Swedish subjects". There are many other relevant provisions in the Swedish Foreign Service Instructions which will be quoted later. In addition the Swedish Ministry for Foreign Affairs has issued some more detailed instructions for the Foreign Service, first on 30 June 1959 and later on 2 May 1967.

The *Swiss* Consular Regulations are even more categorical than the Swedish. They state that all Swiss nationals have an "Anspruch" of assistance. Nevertheless, these have been interpreted, both by Swiss courts and by the Swiss Political Department, as *not* conferring rights upon individuals.[4]

The fact that Norway has a *statutory* provision for protection and assistance might at first sight seem to suggest that the duty to give protection is stronger—or is better founded in law—in Norway than in most other countries. However, the terms of the provision are rather loose: "The Foreign Service *is charged with* (*har til oppgave*) ...". This is very different from the provisions in the earlier German Constitutions, which state that German nationals have an *"Anspruch"* to protection. Moreover, the Norwegian statutory provision contains *no limitations;* it does *not* refer to international law and other conditions which must obviously be taken into account when the Foreign Service decides whether or not to intervene. Without such limitations a legal duty would make no sense—indeed, it would be completely unrealistic. This is all the more so inasmuch as the provision

[3] "It seems justifiable to assume that this statutory instrument, with its instruction for the Foreign Service, expresses a legal rule in the proper sense which can be invoked by private subjects," *loc. cit.* above, note 4, at p. 96.

[4] Schneeberger, *loc. cit.*, pp. 499–500, and *Schweizerisches Jahrbuch für internationales Recht,* VII (1950) pp. 188–92. As stated by Eek, *loc. cit.*, p. 94: "Where foreign writers or even the drafters of statutes make general statements to the effect that the individual has a "right" or a "constitutional right" to diplomatic protection, it is not advisable to draw too far-reaching conclusions from such terminology. It is necessary to find out what the 'right' implies in the light of the legal system of the country concerned as a whole."

This is what will be done in respect of Norwegian law in chapters VI–IX below.

lists "advice" and "assistance" on the same level as protection. It must therefore be assumed that the provision in itself does not confer upon private Norwegian nationals a right to claim diplomatic protection and assistance.[5]

The tasks of the Norwegian Foreign Service have been elaborated in detail in the "Instructions for the Foreign Service", the present version of which was promulgated by Royal Decree of 11 March 1960. These Instructions repeat the words of the Act on this point and add several provisions which elaborate them in certain respects. The provisions *do* contain the necessary limitations, although mostly in a vague form. Thus § 15 of Chapter 7 provides:

> Should a Norwegian subject be prosecuted abroad for a felony or a serious misdemeanour, the Foreign Service official *shall render him such assistance as is warranted by the circumstances.*[6]

This confirms the conclusion above, because, had the *Act* laid down a legal *right* for individuals, then the *King* would hardly have had the authority to limit it.

On the other hand, the Instruction is more specific than the Act in a *positive* sense too, inasmuch as it states that Foreign Service officials *"shall"* render such assistance as is warranted by the circumstances.

Do this and other provisions of the Foreign Service Instructions confer any *right* upon individuals to claim protection and assistance—and to appeal to the courts if none is given? Or are the Instructions simply *internal* instructions of the Service, which merely confer obligations upon the Foreign Service officials vis-à-vis their superiors?

There are a number of decisions by the Norwegian Supreme Court, ranging in date from 1881 to 1960, on the similar question in respect of *other* instructions. Most of these judgments regarded

[5] The *exposé des motifs* of § 1 of the Act provides no guidance on this point, see *Odelstingsproposisjon nr. 48 (1958)* p. 2 and *Innstilling Odelstinget nr. 95 (1958)*, p. 90. Nor do the *exposé des motifs* of the corresponding provisions of the preceding Foreign Service Acts of 12 June 1906 § 5 (*Odelstingproposisjon nr. 19 [1904–5]*, *Indstillinger Odelstinget, VIII,* 1904–8, *Odelstingets forhandlinger, 1904–5,* pp. 422–3, dokument nr. 66, 1904–5, and *Odelstingsproposisjon nr. 4 [1905–6]* p. 3); 7 July 1922 nr. 2 § 7 (*Odelstingsproposisjon nr. 5* [1922] p. 3, *Innstilling Odelstinget* nr. 75 [1922] p. 3); and 13 December 1948 nr. 1 § 1 (*Odelstingsproposisjon nr. 61 [1948]* p. 1, *Innstilling Odelstinget nr. 193* [1948] p. 1).

[6] "Kommer norsk statsborger under straffeforfölgning i utlandet for forbrytelse eller alvorlig forseelse, *skal* utenrikstjenestemann yte ham *den bistand som det etter forholdene måtte være grunn og anledning til.*"—Italics supplied.

the instructions as purely internal, and denied any right for the individuals concerned.[7] The only real exceptions were special cases which involved *undue discrimination* (*in casu* because of earlier membership of the Nazi party).[8]

It might be argued that the Royal Decree promulgating the Foreign Service Instructions was based upon a special authorization in § 2 of the Foreign Service Act, and that it is therefore genuine *delegated legislation*[9]—indeed, an *extension of the Act*. On this point there is a difference between Norwegian law, on the one hand, and Swedish and Danish law on the other. This argument, however, loses much of its force if one accepts the interpretation above that the relevant provision of the Act itself confers no right, because its terms are too loose and too general. The *travaux préparatoires* to the Act and to the Instructions give no guidance, except that the proposal ("Foredrag til statsråd") for the Foreign Service Instructions of 1960 stated that the Instructions would be notified to Parliament.

The question of the legal status of the "Instructions" may be of considerable importance in respect of the "internal" functions of the Foreign Service, that is the assistance rendered *directly* to Norwegian nationals, notably by the consulates.[10] Any question as to the legal status should be answered on the basis of a study of *these* provisions, which will not be undertaken here. The problem of the legal status is hardly significant in respect of diplomatic protection and assistance because—even if, in principle, the Instructions are considered to create individual rights—the provisions concerning the relationship to foreign authorities have such a loose formulation or content—as they must have, for reasons which will be explained below, under VII—that they do not lend themselves to provide a basis for enforceable legal "rights". They really confer a *discretionary power* upon the Foreign Service.

This interpretation of the Act and the Instructions conforms with the interpretation which Max Sörensen—in contradistinction to Poul Andersen—has given of the similar, but somewhat

[7] *N.Rt.* 1881, p. 839, 1919, p. 307, 1932, p. 639, 1937, p. 495, 1953, p. 965, 1955, p. 222.

[8] *N.Rt.* 1950, p. 733 (but see p. 979) and 1960, p. 748 at p. 751. See also Frihagen in *Lov og Rett*, 1964, p. 352, and Castberg, *Innledning till forvaltningsretten*, 3rd ed. (Oslo 1955) pp. 12–14. Castberg feels that the Court has gone too far in some cases in considering the provisions as internal instructions which individuals cannot invoke.

[9] Cf. *Innstilling fra Forvaltningskomitéen*, avgitt 13. mars 1958, p. 331, and Castberg, *loc. cit.*

[10] *Supra*, under I.

tighter, provision in the old Danish "Udenrigsinstruks", and with the interpretation in practice of the much stricter provision in the Swiss Consular Regulations.

V. PRACTICE

The interpretation of the Norwegian Foreign Service Act and Instructions given above is confirmed by practice.

There is a relevant case reported in *Norsk Retstidende* 1944, p. 1. A Norwegian national, *Köpke,* was arrested by the Communist authorities in Helsinki in 1917, and a large sum of money which he was taking to Norway, originally with the consent of the Soviet authorities in Petrograd, was seized. He was soon released, but the money was never returned to him. He sued the Norwegian Government for damages, on the ground that the Norwegian Legation in Petrograd and the Foreign Office had failed to prevent the arrest and the seizure, and that they had subsequently taken no steps to protest and recover the amount from the Soviet authorities. The judgment does not specify *why* the Foreign Service had not taken diplomatic action. But it is clear from the facts that what Köpke had lost, was merely an expected large *profit* from an exchange transaction, which had been made possible only by the exceptional circumstances prevailing during the Russian Revolution.

The City Court of Oslo rejected the claim in a judgment of 1926. It stated:

> ... in international relations, and especially under such extraordinary circumstances as those then prevailing, it is hardly possible for parties other than those belonging to the Foreign Service to evaluate what steps can be usefully taken in a given case. The establishment of liability would require strong proof of omission of an act which would have led to a favourable outcome for the plaintiff. However, this has not been proved.

The judgment is thus no precedent, because the claim was rejected primarily on the grounds that it had not been proved that the loss would have been averted, had the Foreign Service taken action. Nevertheless, it is significant that the Court stated that hardly anybody but the Foreign Service was in a position to evaluate what measures could usefully be taken in a given

case. The judgment was—curiously enough—endorsed by the Nazi Supreme Court 18 years later, in 1944.

Otherwise there does not appear to have been any case before the Norwegian Supreme Court where a Norwegian national sued the Government claiming that it should take diplomatic or international legal action or that it should make reparation for having failed to do so.

Nor is there any other evidence of such a claim or of any assertion by a claimant that he was legally entitled to protection. The most prominent case of diplomatic protection exercised by Norway is probably the *Hannevig case*,[1] which concerned an amount estimated at between fifty and one hundred million dollars. It was only after considerable doubt and discussion in Parliament that the Norwegian Government decided to take up the claim with the U. S. Government. It demanded and obtained a guarantee from Mr. Hannevig, and subsequently from his relatives, for the costs up to 100,000 Norwegian kroner. (This amount, incidentally, covered only a small fraction of the total costs which the Norwegian Government in fact incurred.) An agreement was then concluded with the U.S.A. whereby the case was referred to the Court of Claims, subject to a right of appeal to the United States Supreme Court. However, by the Court of Claims' judgment of April 1959 Norway lost the case. Subsequently, the Norwegian Government refused to make use of its right of appeal to the Supreme Court, despite the fact that Mr. Hannevig's relatives had offered to cover all costs of the appeal. This refusal was strongly attacked by these relatives, who stated in letters and telegrams to the Ministry for Foreign Affairs that they could not understand the Government's decision, and that they considered it as a violation of the terms upon which the Government had undertaken to sponsor the claim and as a breach of the premises for their original guarantee for the costs of the case. However, in these letters and telegrams there is no mention of any duty, based upon general Norwegian law, for the Government to pursue the matter to the highest judicial instance.

Still less are the *Norwegian authorities* known to have discussed or pronounced upon this legal point—admitting or denying a *duty* to afford protection. In practice, before agreeing to present a diplomatic claim for reparation in respect of nationalized property, the Foreign Office requires the claimant to

[1] See *Stortingsmelding nr. 60 (1959–60)*.

accept certain conditions, such as distribution by discretion of the Norwegian authorities of any global reparation obtained among several claimants, waiver of any further claims arising out of the same subject matter, payment of costs, etc.

VI. THE REASONS FOR WHICH PROTECTION MAY BE REFUSED

The conclusion of the above account of the relevant positive provisions in Norwegian law and of Norwegian practice is that it is not possible to find a basis in either of them for any right for the individual to claim protection or assistance.

There now remains the question whether any such right can be derived from *general principles of Norwegian administrative law.* To answer this it is necessary first to consider separately—in the light of the substantive considerations ("de reelle hensyn") and practice—each category of reasons which may lead the Government to refuse to entertain an individual claim, with a view to establishing whether these are legitimate (VI) and whether the individual concerned may contest the Government's evaluation of them (VII).

(1) The Government must obviously refuse to sponsor a claim if it is *not founded in international law,* that is if the act of the foreign government does not constitute—or would not constitute —a violation of international law. Considerations of this nature have been a frequent reason for refusals.

(2) The same is true if the *procedural conditions under international law* for exercising diplomatic protection are not met, for example if the individual is not a Norwegian national, or has not exhausted the local remedies in those cases where this is a condition. The latter may be the most frequent reason for refusals to take up a claim on the diplomatic level.

(3) The Government must also be entitled to refuse to entertain a claim if it is *not sufficiently documented,* or *if it is clear that it will fail for other reasons,* for example because of the political relations between the two countries, or because there is too much prestige involved on the other side, or because of a declared or well-known policy on the part of the state concerned not to entertain claims of that kind and not to accept arbitration. In the

latter case there may often be reason to make a formal presentation of the claim as a kind of reservation, and even to repeat it, but without pressing the matter. This is what has been done in respect of the claims arising out of the Soviet nationalization of Norwegian property after the Revolution in 1917. On 17 October 1958 the Norwegian Foreign Minister made a statement in Parliament, in reply to a question as to what could be done with regard to these claims. He said:

> The Soviet Union has consistently refused to pay any reparation whatever for foreign property which was seized under and immediately after the Revolution, and appears to attach great importance to this position as a matter of principle. As far as I know, no country has received reparation from the Soviet Union in respect of similar claims arising during that period.[2]

(4) The Government must furthermore be entitled to refuse if the claim is so insignificant—and/or the expected costs involved in its documentation, presentation and negotiation or litigation are so high—or the chances of success so poor—that it is *not worth the time and expense involved.* These are also reasons for refusal which occur in practice. It is true that the *direct* expenses —for example fees to outside lawyers—could be charged to the individual claimant. But even this may not work out in practice, as the Hannevig case demonstrated. And in any event it would not be possible for the Government to claim compensation for all its *internal* expenses, which are inextricably woven into the general cost of running the Foreign Service.

These are all reasons which the *individual claimant,* too, would have had to take into account, if he had been entitled to advance the claim himself. They are *weaknesses of his own claim.* Reference may be made in this connexion to § 34 of the Swedish Foreign Service Instructions of 1967, which provides:

> The Foreign Service shall transmit and support any representation made by a Swedish national to a foreign authority or international organization, but shall carefully examine the validity of such representation.

§ 35 of the former Decree of 1932 was more specific:

> A Head of Legation and a Consul may communicate to a foreign authority, and support before that authority representations made

[2] *Stortingsforhandlinger* 1958, p. 2606.

> by a Swedish subject, but, before any step is taken for such purpose, they should carefully examine the validity of the representation and abstain from any claim which does not appear sufficently justified.

This must at least cover the grounds listed under (1)–(4) above.

(5) But the Government must be entitled to go further than this. It must take care of its own reputation in the foreign state, and must then refuse to espouse claims of *doubtful moral value*. Such moral defects may be connected with the origin or nature of the claim or with the moral standing of the individual claimant. There are practical examples of both. But the most practical case is when the claimant has *no genuine connection with Norway*. It happens quite frequently that persons have retained their formal Norwegian nationality, but have been living in a foreign country for many decades, have paid no taxes to Norway, have not voted or performed military service in Norway, etc. For all practical purposes such people belong to the state against which they want Norway to take action. It does not always appear reasonable that they should enjoy protection in their real homeland beyond that which other residents of that country enjoy.[3] If Norwegian nationals were considered entitled to diplomatic protection as a matter of law, then it would be difficult to make an exception for these people. In practice, no such exception is known to have been made by the Norwegian Ministry for Foreign Affairs, although the possibility was considered at some stage in the Hannevig case. Nevertheless, the Government must be entitled to refuse to put its efforts, money and prestige behind a claim in which no genuine Norwegian interests are involved. In some other countries there are provisions to this effect.[4]

These, too, are reasons which are *connected with the claim*. But one cannot stop here.

(6) The Government must also be allowed to view the claim in relation to *its own political interests* and its general relations

[3] Bismarck stated in 1872 (quoted from Dochring, *op. cit.* p. 1):

"Wer das Vaterland verlässt, nicht zur Betreibung vorübergehender Geschäfte, sondern um dauernd seinen Aufenthalt im Ausland zu nehmen, hat kein unbedingtes Recht auf Schutz; ob ihm derselbe zu gewähren, ist eine Frage der Politik . . . ."

This despite the categorical wording of the German Constitution in this respect, see *above*, under IV.

[4] The American Foreign Service Instructions contain provisions which have this effect, see Makarov, "Consideraciones sobre el derecho de proteccion diplomatica", *Revista española de derecho international*, VIII (1955) p. 516.

with the state concerned, as they affect its *other* nationals. Eek (pp. 99–100) points out that this should not be exaggerated, and that the Government would be less likely to incur political and other repercussions by pressing the claim if it had a clear duty under its municipal law to sponsor claims which are justified in themselves. This is probably true. But Eek makes an exception for extreme cases (*yttersta undantagsfall*). And indeed, in exceptional cases the Government must be entitled to refuse to sponsor claims even for such reasons of its own. This was strongly emphasized in a Swiss judgment of 1943.[5] A clear example is given by Sørensen (p. 405), namely that the Government may not want to give the impression that it *recognizes* a government which for political reasons it does not want to recognize.

(7) In this connection the Government must also be entitled to evaluate the *relative merits of claims* and select, if not for presentation, then at least for pressing, those having the best chances of success, taking all the above-mentioned considerations into account. In practice the Norwegian Ministry for Foreign Affairs is not known to have refused to sponsor a claim on this basis. But it does take such considerations into account when—during the negotiation of a number of claims in connection with nationalization of property in a foreign state—it becomes necessary to concentrate the efforts. It is an accepted principle of *international* law that states may waive the claims of their nationals.[6] Sørensen assumes that the Government is also *entitled* to do so under *municipal* Danish law, certainly if the waiver is confined to the right of *diplomatic protection,* but probably also if the waiver comprises the individual's own claim under the internal law of the foreign state.[7] The *latter* question is not relevant in the present context. But under Norwegian law, too, the Government must be entitled, vis-à-vis its nationals, to waive its right to exercise diplomatic protection in respect of a particular claim, for any of the reasons enumerated above, or for other similar reasons which can be considered as relevant and appropriate.

It should be emphasized that, in a practical case, the decision of the Ministry for Foreign Affairs will depend upon an evalua-

[5] Reported in *Schweizerische Juristenzeitung,* XXXIX (1943) p. 500.
[6] They are, as the Norwegian term goes, "legitimert" (empowered) to do so.
[7] *Loc. cit.,* pp. 409–10, cf. also Odevall, "Globalersättning för ekonomiska intressen i utlandet", *Nordisk Tidsskrift for international Ret* og *Jus gentium,* XXIV (1954) pp. 16–27.

tion of many, if not all, the factors which have been listed above, and that in so doing it must attribute to each factor the weight which the merits of the particular case require.

This discussion has been conducted primarily with a view to diplomatic *protection*. In cases which involve no violation of international law, there are even stronger reasons for taking a number of considerations into account before deciding to intervene vis-à-vis a foreign government.

VII. CAN THE CLAIMANT CONTEST THE GOVERNMENT'S EVALUATION?

If we assume that the Foreign Service is entitled to take all these considerations into account, we come to the crucial question whether their evaluation can be challenged by the individual whose claim is concerned. If he disagrees with their decision, he can always appeal to superior administrative authorities (the Cabinet). But can he appeal to the courts?

The answer must be sought in the general principles of Norwegian administrative law, which have been evolved on the basis of court practice.

It is a well-known principle of administrative law that certain decisions are left for the administrative authorities to make after a comparatively free evaluation of all relevant considerations, without being bound by specific criteria prescribed by law. This is called in Norwegian "forvaltningens frie skjønn". And it is a principle of Norwegian administrative law that this free evaluation cannot, basically, be reviewed by the courts, despite the fact that the latter are entitled to review administrative decisions.

In the field of diplomatic protection and assistance we are in fact faced with such free administrative evaluation. This was, in effect, what the court said in the *Köpke* case, which has been cited earlier. And this is true even if, in principle, one believes that there is a *duty* to render diplomatic protection and assistance—at least if such duty is based upon general administrative law or upon the Foreign Service Act, the vague provision of which was discussed under IV. But even if it is based upon the "Instructions for the Foreign Service", this will hold true in most cases.

Even if these Instructions were considered, in principle, to confer *rights* upon private individuals, most provisions of the Instructions are so loosely formulated that a "free administrative evaluation" is the natural interpretation. This is certainly true of the basic provision in Chapter 7 § 15 (quoted in full above, under IV) that a Norwegian subject who is indicted abroad *shall* be given "*such assistance as is warranted by the circumstances.*" It is also true of Chapter 9 § 17.1:

> If it comes to the knowledge of a Foreign Service Station that a Norwegian vessel has been shipwrecked or has met with other disaster, the Station shall render the assistance warranted by the circumstances.

Less explicit is Chapter 7 § 5:

> Foreign Service Officials shall safeguard and promote Norwegian economic interests in the country where they are serving, and contribute to a development of the trade relations, create interest for Norwegian goods and services, reply to commercial inquiries and otherwise support (*støtte*) Norwegian firms and business people.

The competent Foreign Service officials are themselves in the best position to determine *how* they can "support" (*støtte*) Norwegian firms.

More doubtful is Chapter 9 § 9 on sailors who disappear from their ship:

> When the Master of a Norwegian ship requests the assistance of a Foreign Service Station in having a seaman belonging to the ship's crew brought on board because he has failed to report for duty on board in due time, or has left the ship without being entitled thereto, the Station *shall* take whatever steps the circumstances warrant and, *if necessary,* ask the competent local authorities to assist in having the seaman brought on board.

It is controversial whether the administration's application to individual cases of such terms as "necessary" (*nødvendig*)[1] can be reviewed by the courts. Castberg says that the presumption

[1] Similar terms are used in § 38.2 of the Swedish Royal Foreign Service Decrees of 1932 and 1967. The former read:

"If a deceased Swedish subject should leave property at a place within a Consular district, the Consul shall, at the request of the Swedish heirs or in anticipation of the appearance of such heirs or their agent, take any *necessary steps* to safeguard their rights to the property." (Italics added.)

must be that they cannot.[2] The expert commission "Forvaltningskomitéen" does not accept this as a general rule and tends rather to take the opposite view.[3] Eckhoff says that "*it depends*".[4] He cites seven cases. Four of these deal with the term "nødvendig". They were all *expropriation* cases, and the court refused to review the administration's evaluation. It is submitted that that must be the answer in the present case, too. Here, as in expropriation cases, the competent official on the spot is better placed to make the evaluation.

An apparently more rigid provision is found in the second paragraph of Chapter 9 § 17, which states:

> If a seaman from such a ship arrives within the Station's district, the Station shall ensure that the seaman receives the treatment to which he is entitled according to Norwegian law, collective wage agreement or international convention.[5]

However, foreign authorities are not in the pocket of Norwegian Foreign Service officials. It is not within the power of the latter to determine that the foreign state shall give Norwegian nationals the treatment they are entitled to according to international treaty. The Foreign Service official can only *urge* the foreign government to fulfil its treaty commitments. What steps he should take to that end must be for him to judge, rather than the court.

Indeed, there appears to be no provision in the Foreign Service Instructions which is so formulated that it would lend itself to a "*right*" for private individuals to claim diplomatic protection or assistance.

[2] *Innledning til forvaltningsretten*, 3rd edition (Oslo 1955) pp. 107–10. Castberg also points out that the attitude in *Sweden* is more in favour of review.

[3] *Innstilling fra Forvaltningskomitéen*, pp. 374–5, which also points out that the situation in *Denmark* in respect of expropriation is more in favour of review.

[4] "Domstolskontroll med forvaltningen i Norge", *Jussens Venner*, Serie Æ nr. 1 (hösten 1964) pp. 10–13, printed earlier in *Tidskrift utgiven av Juridiska föreningen i Finland*, 1963, p. 75 ff.

[5] § 43.1 of the earlier Swedish Royal Foreign Service Decree of 1932 used similar terms:

"A Consul shall ensure that within his district a Swedish vessel enjoys the rights and privileges assured to the Swedish flag."

The new provisions of 1967 merely repeat the *general* provision of the earlier § 24, in the following terms (§ 28):

"Diplomatic and consular stations shall ensure (*vaka över*) that Sweden and Swedish subjects and enterprises are accorded the rights and privileges to which they are entitled by treaty or otherwise."

position or assisted him, had his own government's Foreign Service taken action. However, this will in most cases be extremely difficult, if not impossible, to prove. The *Köpke* case, which has been quoted above, under V, may serve as an example of this.

The individual must also be entitled to reparation (5) if the Foreign Service has agreed to take diplomatic action, but has *committed faults in the course of its action* which have caused loss to him. This type of "tjenesteforsömmelse" might not be quite so difficult to prove.

It might facilitate the position of the individual if it were incumbent upon the Foreign Service to *give reasons* for its refusal to take action. Until recently there was no general duty under Norwegian law to do this, although in practice the Foreign Service did give reasons, at any rate if asked to do so.[3] § 24 of the Law Concerning Administrative Acts of 10 February 1967 now prescribes a duty to give reasons if asked. However, it also provides that exceptions may be made for certain matters.[4] And foreign affairs may easily be one of the fields where exception is made, because in foreign affairs it may be difficult to give *all* the reasons in all cases.[5]

IX. THE LIABILITY OF THE GOVERNMENT FOR THE FAULTS OF ITS OFFICIALS

However, before it is possible to conclude that the individual can sue his government for reparation in the exceptional cases described under VIII, there is still one question to consider, viz. whether the government is liable for the faults of its officials in this respect. The point must be raised because there are doubts in Norwegian administrative law on the general problem of the liability of the Government for the faults of its officials.

It should be noted that the decisions to render diplomatic protection—and, in many cases, also decisions to render diplomatic assistance—are made by the *Ministry* for Foreign Affairs. And it

[3] See *Innstilling fra Forvaltningskomitéen,* avgitt 13 mars 1958, pp. 215–20.

[4] *Travaux préparatoires: Ibid., Odelstingsproposisjon nr. 38 (1964–65)* and *nr. 2 (1965–66); Innstilling Odelstinget II (1966–67); Beslutning Odelstinget nr. 29 (1966–67).*

[5] Cf. *Innstilling fra Forvaltningskomitéen,* p. 225, *Odelstingsproposisjon nr. 38 (1964–65),* p. 125, and § 19 of the Act.

is agreed that the Government is liable for the acts of its *ministries*. It is only the question of the liability of the Government for acts of its "*subordinate*" organs which at present is unclear and in a period of transition. And even this question has now lost much of its importance, because of the amendment of § 437 of the Code of Civil Procedure which was adopted in 1962. Under this an individual who claims reparation for damage suffered as a result of a decision by subordinate authorities—*in casu* the diplomatic or consular mission—must appeal to the superior authority —*in casu* the Ministry for Foreign Affairs—before he can sue in court. This means that the decision is made by the Ministry, for which the Government is undoubtedly responsible.

Nevertheless, a few words may be said about the legal position, should the case still present itself.

Two important judgments on the liability of the government—the *Aubert* case of 1925[1] and the *Vogt* case of 1952[2]—arose out of faults committed by Norwegian *consuls* in the performance of *direct* (internal) assistance[3] to Norwegian nationals. The 1925 *Aubert* case concerned exercise of *governmental authority*—and liability was *denied*. The 1952 *Vogt* case concerned deposit of property with the consulate and the Government was *held liable* on the basis of a special *statutory* provision.

However, it is clear from *obiter dicta* in the latter judgment and from subsequent pronouncements—notably by Judge Bahr,[4] by Professor Kristen Andersen[5] and in a commission draft from 1958 for a statute on the subject[6]—that the tendency now is towards general liability of the Government as a main rule. This is already agreed in respect of acts which do not involve exercise of governmental authority, as diplomatic protection and assistance probably do not.

It is interesting to note that in the only known case concerning diplomatic protection—the *Köpke* case of 1926—the Court did not base its decision upon the then one-year-old *Aubert* judgment, nor did it give any other indication that the Government's

[1] *N.Rt.* 1925, p. 526.
[2] *Ibid.*, 1952, p. 536.
[3] Cf. *supra*, I *in fine*.
[4] *Obiter dictum* in the *Vogt* judgment, *loc. cit.*, and statement in Norsk forsikringsjuridisk forening on 16 October 1953, quoted in Castberg, *Innledning til forvaltningsretten*, 3rd ed. (Oslo 1955) pp. 281–3.
[5] *Erstatningsrett* (Oslo 1959) pp. 117–29.
[6] *Utkast med motiver til lov om Statens og kommunenes erstatningsansvar*, avgitt desember 1958, p. 13.

liability would be excluded in principle. It rejected the claim on other grounds. And so—as Kristen Andersen has pointed out—did the Supreme Court in the *Reinflytning* case of 1932 and the *Jan Mayen* case of 1935.

Indeed, it may be assumed that the Supreme Court would not today deny the liability of the Government for acts of its diplomatic or consular organs, whether these relate to so-called diplomatic protection or assistance, to assistance vis-à-vis private foreign nationals or to internal assistance, given directly to the Norwegian nationals concerned.

It has already been submitted that if the Foreign Service decides to render diplomatic protection or assistance, the individual concerned can claim reparation if the Foreign Service, in the course of such protection or assistance, commits faults which cause loss to him. Castberg has taken the view, giving an example of assistance vis-à-vis *private* foreign nationals, that the Government is not liable unless it had a *duty* to perform the task concerned.[7] However, what has been said about the modern tendency towards governmental liability applies here, too. At least in the case of diplomatic protection and assistance, where private citizens are entirely dependent upon the assistance of their government, it would not be reasonable to apply the principles of "act of grace" or "gratuitous services", upon which Castberg apparently bases his view. This is certainly so under the new Norwegian draft statute on the liability of the Government.[8] It provides in § 1:

> A state or a municipality is liable if damage has been caused in public service in a manner that is unjustifiable (*uforsvarlig*) vis-à-vis the person suffering damage, by wilful or negligent act of any person who has acted for the public authorities, or otherwise by disregard of what can reasonably be expected of the service.[8]

This gives the individual a right to compensation, despite the fact that the draft provision does not necessarily presuppose that the Government had a *duty* to act and that the individual had a *right* to claim such action.

[7] *Op. cit.*, p. 313, cf. *supra*, I *in fine*.

[8] *Utkast med motiver til lov om Statens og kommunenes erstatningsansvar*, avgitt desember 1958, p. 50; cf. *Odelstingsproposisjon nr. 48 (1965–66)* pp. 30–37 and 47–51. (Italics added.)

X. CONCLUSIONS: IS THERE AN INDIVIDUAL RIGHT AND A GOVERNMENTAL DUTY?

Indeed, it is submitted that the above-cited draft provision adequately expresses the correct legal position in respect of diplomatic protection and assistance also. It states all that private individuals can claim in a court. They can claim it on the basis of general administrative law. If the Foreign Service Instructions are considered to grant individual rights,[9] they can base their claims on those Instructions, too. But it is doubtful whether there is any relevant provision of the Instructions that goes further than § 1 of the draft statute.

Moreover, the "rights" of the individual mean very little in practice, as far as *legal* action is concerned. It is true that the individual on behalf of whom the Foreign Service has refused to intervene vis-à-vis foreign authorities is entitled to appeal against this refusal in the courts. However, the courts cannot review the most important aspects of the decision, in fact the aspects which would usually be the controversial ones, namely the evaluation of the various factors which can be adduced for and against diplomatic intervention or assistance. The courts can only act in the more extreme cases, where the Foreign Service has acted *unreasonably,* or has failed to act because of laziness, disorganization, etc. Furthermore, even in such circumstances the court probably could not compel the Foreign Service to *exercise* diplomatic protection or assistance. But it can grant the individual claimant *reparation* for the damage he has suffered as a result of the refusal. And this it can also do if the Foreign Service has made mistakes in the *execution* of its decision to protect or assist. But reparation is conditional upon proof that the damage would have been averted if the Foreign Service had acted, or had acted earlier, or properly. And this proof is in most conceivable cases very hard, if not impossible, to provide. It can therefore be said that the individual has only *a limited enforceable right* and that, even to this limited extent, the right is *hardly enforceable in practice.*

If these conclusions are accepted, then the question of whether there is a "right" to claim and a "duty" to give diplomatic protection and assistance, becomes one of terminology. In the view of the present writer, it would be misleading to say that there is a legal "right" to diplomatic protection and assistance. In this

[9] See *supra,* under IV.

respect, what appears to be the prevailing view must be endorsed. All the individual can claim is that the Foreign Service shall receive his claim, consider it to the extent it merits, and determine whether or not protection or assistance should be given in a reasonable and responsible manner, without basing itself upon irrelevant criteria ("utenforliggende hensyn") or undue discrimination. And finally, if it takes action, it should take proper care not to prejudice unduly the claim or the general interests of the individual concerned.

These are also the *duties* of the *Government,* in a legal sense. In these circumstances, it appears somewhat artificial to say that the Government has a "*duty*" to render diplomatic protection and assistance, as most writers do, if we want to use the term "duty" in a legal sense. It would only be paying lip service to the modern tendency to improve the legal status of the individual to say that the state has a "duty" to give diplomatic protection and assistance, unless this is coupled with a corresponding legal right for the individual. This, however, is a question of terminology—or definition.