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Diplomatic protection and State liability: the judgment of the Spanish National High Court No. 494/2005, of 11 December 2019

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(A) INTRODUCTION

On December 2019, the Administrative Chamber of the National High Court[1] condemned the Spanish state to compensate the Spanish journalist Jose Couso's family for the damages resulting from the omission in the exercise of Spain's diplomatic protection following the death of the journalist in Baghdad (Iraq) on 8 April 2003. This pronouncement has reopened the discussion concerning the connection between the discretionary power of the State, according to international law in the exercise of diplomatic protection and the eventual State liability established in national law. The judgement has received opposing assessments: while some sectors are critical because they consider that it establishes a dangerous jurisprudential precedent that reduces the state's room for manoeuvre in international relations, others have given a very positive assessment of the National High Court's decision because they believe that due compensation has finally been recognised in a case that has also been affected by the vicissitudes that the principle of universal jurisdiction has suffered in our country and in which the journalist's family has been struggling before the courts for 17 years[2].

(B) THE JUDGMENT OF THE ADMINISTRATIVE CHAMBER OF THE NATIONAL HIGH COURT 4391/2019 OF 11 DECEMBER 2019: A STEP FURTHER IN THE PROTECTION OF THE INDIVIDUAL

The judgment resolves the contentious-administrative appeal that the Couso family requested against the General Administration of the State as the result of the rejection by silence of the claim of the State liability for damages resulting from the omission of the diplomatic protection of the State following the death of José Couso. By Writ of 4 September 2008, the procedure was suspended awaiting a final decision on the criminal procedure that had been opened

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[1] SAN 4391/ 2019, of 11 December 2019, ECLI:ES:AN:2019:4391.

[2] For a more detailed analysis of the judgment, see: B. Vázquez Rodríguez, "Protección diplomática y responsabilidad patrimonial del Estado: a propósito del asunto Couso", 39 *Revista Electrónica de Estudios Internacionales* (2020).

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simultaneously to define the competence of the Spanish courts as the result of the amendment of the legal order on universal justice[3]. Once the termination of the criminal case was accredited through its dismissal by the Supreme Court in 2016, the suspension of the contentious-administrative procedure was brought up by a Providence dictated on 18 July 2019.

(1) The arguments of the parties

According to the complainant, journalist José Couso was a person internationally protected by the Forth Geneva Convention of 1949 and by articles 51 and 79 of Additional Protocol I to said Convention, which applies to armed conflicts with an international character, and therefore his death constituted an internationally wrongful act which forced the United States to repair the damage inflicted. As for the requirements for the exercise of diplomatic protection under international law, the complainant considered the existence of the bond of nationality, the exhaustion of local remedies and the proper conduct of the injured party to be proven, and concluded that the omission made by the Spanish Administration constituted an improper functioning of the administration causing serious material and moral damage which the complainants were not under a legal obligation to bear.

On the other hand, the State Attorney rejected the complainant's argument for four main reasons: the discretionary power in the exercise of diplomatic protection; the previous judicial decisions of the Spanish courts requiring that the damage caused derives from an act of retaliation against a previous act of the Spanish administration; the absence of the exhaustion of local remedies and the fact that the family had already received a compensation according to the Royal Decree 8/2004, of 5 November, concerning compensations to the participants in international peace and security operations.

(2) The Judgement: the declaration of the State liability and its basis

Showing a good knowledge of the characteristics of diplomatic protection and its requirements in international law[4], the decision considers that the requirements for the exercise of diplomatic protection were fulfilled in the case, and in this regard it focuses in particular on the qualification of the act attributable to the armed forces of the United States as an internationally illegal act[5], although it is forced to recognize the discretionary power enjoyed by the State for its exercise[6]. Nevertheless, it also adds that

> "such a conception does not fatally determine the internal order of each State as to whether or not the citizen who is the victim of an international illicit act has a subjective right to have the State exercise of

[3] On these matters, see: SÁNCHEZ PATRÓN, J. M., "La competencia extraterritorial de la jurisdicción española para investigar y enjuiciar crímenes de guerra: el caso Couso", *Revista Electrónica de Estudios Internacionales*, nº 14, 2007; FERNÁNDEZ LIESA, C. R., "El asunto Couso en los Tribunales Nacionales y en las Relaciones Internacionales", *Revista Española de Derecho Internacional*, vol. LXIII, nº 2, 2011, pp. 145-169.

[4] See FJ. 7 (FJ: abbreviation of *legal basis* in Spanish).

[5] FJ. 8-11. At this point, it brings up the Advisory Opinion of the Council of State 1491/1991, of 30 January 1992, concerning the death of a journalist in Panama; it does so in order to justify the qualification as an internationally wrongful act and the lack of resources in the internal American judicial system. Otherwise, the case is not comparable because on that occasion the Ministry of Foreign Affairs requested the Advisory Opinion under the assumption that the exercise of diplomatic protection was applicable, and the Council agreed.

[6] FJ. 12.

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> diplomatic protection on his behalf";[7]

and although it accepts that "only a few States incorporate the obligation of the State to exercise protection"[8], the judgment focuses on the task of finding arguments in favour of such right.

The first argument can be found in the work of the International Law Commission (ILC), which points out that:

> "the institution of diplomatic protection is being adjusted in the last few years, recognizing the existence of a real obligation for the State to exercise diplomatic protection on behalf of its citizen if the requirements are fulfilled. Therefore, the International Law Commission of the United Nations (ILC) had initially rejected the possibility of establishing an obligation for the States in that regard, but finally, on the proposal of several of them, the ILC incorporated into the draft convention, received by the General Assembly by Resolution A/62/67 of 8 January 2008, a recommendation to that effect in article 19, according to which a State entitled to exercise diplomatic protection in accordance with the present draft articles should: Give due consideration to the possibility of exercising diplomatic protection, especially when a serious damage had occurred. Even though the articles on diplomatic protection have not been written into a treaty, internationalist doctrine emphasizes that they are now considered to be the definitive reaffirmation of rules of customary international law on this issue, as it would result from the way in which they are mentioned by the International Court of Justice in the Diallo case (Ahmadou Sadio Diallo Case - Republic of Guinea v. Democratic Republic of the Congo)."[9]

The second argument is based on the Spanish national system, since

> "there is no predetermination in our Legal Order of the regulatory source from which the State's obligation to exercise diplomatic protection derives, and so, in the absence of specific legal provisions, it may result from the need to give effect to constitutional values and principles, incorporated in or interpreted with or from international treaties regarding the values involved and the principles of international law to which the State (as a whole) must adapt its action"[10].

The National High Court defines this approach in the analysis of the case-law of the Constitutional Court and the Supreme Court. With regard to the first of these courts, the Administrative Chamber maintains the SSTC (Constitutional Court Judgement) 140/1995 and 18/1997 and from them concludes that

> "In these two decisions of our highest Court it is underlined that the starting point of its statements is that the State has, at least under certain conditions and presumptions, the obligation to perform its activity close to the State that has failed to comply with its obligations in order to achieve the satisfaction of the right of its nationals"[11].

With regard to the SC, the judgment refers to the SSTS (Supreme Court judgment) of 16 November 1974, 29 December 1996, 10 December 2003 and 17 February 1998, from which it concludes that "diplomatic protection constitutes an obligation of the State whose non-compliance, in certain circumstances, may involve its liability"[12]. All the above points lead to the conclusion that:

> "The application of the previous doctrine to the case under consideration here leads to the admission of the appeal and the declaration of the State's liability with the scope that we will later specify, since

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7 FJ. 12.
8 *Ibidem.*
9 *Ibidem.*
10 Previously, the judgment had admitted that "*in Spain, the only mention in this regard appears in Article 21.6 of Organic Law 3/1980, of 22 April, of the Council of State*" (FJ. 7).
11 *Ibidem.*
12 FJ.13.

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> the circumstances of the case made it necessary for the State to carry out its diplomatic activity on behalf of the victims of the death... Nevertheless, (and this has not been called into question in the reply to the complaint) the General State Office merely received and accepted the basis offered by the United States Administration regarding the fact that the attack against the [Direction XXX] was justified and that the death... was an unfortunate accident. There is no evidence of any action having been taken, not only to recognise the illegality of the attack (which the STS of the Second Chamber regrets), but also to compensate for the financial consequences in a reasonable manner. This was despite the numerous requests made in this regard by various parliamentary groups, as stated in the administrative record. ... the Spanish Administration was obliged to perform the necessary activity to promote before the offending State the compensation of the damage inflicted in an illegal way, which it did not do neither in the subsequent moments to the decease... nor to this date"[13].

(3) Assessment of the arguments of the Judgment: a questionable legal construction

In addition to indicating that the existence of a subjective right to diplomatic protection is wrongly compared with the right to invoke the State liability, it should be emphasized that the arguments used to declare the State liability are questionable. Regarding the stipulation in article 19 of the Commission's draft articles, it is a recommended practice that has not reached the condition of a customary law. In this regard, it is contradictory that, at first, the judgement itself describes it as a "recommendation",[14] and then, it attributes a customary character to all the articles of the Draft, mentioning for that purpose the internationalist doctrine —which denies it to article 19, as the Commission itself had previously done— and the Diallo case, in which the ICJ did not pronounce on this specific article[15]. However, quotations from the judgments of the CC are appropriate, since they can help to reinforce the individual's right to be compensated. On the contrary, this is not the case with the case-law of the SC, about which the judgment itself states:

> "It must be accepted that the cases analysed by the case-law of the Supreme Court differ from the present one, which does not allow its mechanical application, since they involved damages caused by a State to our nationals in retaliation for the actions carried out by Spain. There was therefore a causal connection between the activity of our authorities and the damage inflicted by another State on a Spanish citizen, damage which would not have been attempted to be compensated through the exercise of diplomatic protection or would have been in an inappropriate way. On the other hand, according to the case in question here, the death... was caused by the United States army without any causal connection with the actions of our authorities, since... he was a journalist who was performing his professional activity when his fatal death occurred"[16].

Probably aware of the lack of substance of its arguments, after proclaiming the upholding of the appeal and declaring the State's liability, the judgment appeals to other complementary arguments in the same legal Basis:

> "On the other hand, the international illicit act in question also affected a legal asset of first order such as the right to life, meaning that if, as we have stated, one of the essential duties of the State is the protection of its nationals, the State's obligation to provide such protection would reach a superlative degree in accordance with the constitutional relevance of the right to life ex art. 15 EC in connection with Art. 10.2 EC and the international conventions concerning said protection. Nor can it be ignored that the obligation to provide diplomatic protection to the family members ... relates to the specific duty

[13] FJ. 14.

[14] FJ. 12.

[15] In its Judgment of 24 May 2007 concerning the case of *Ahmadou Sadio Diallo (Republic of Guinea v. Republic of the Congo)*, the Court dealt with so-called substitute protection based on article 11 (b) of the Draft articles (see sections 86-93 of the Judgment).

[16] FJ. 13.

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> imposed by Article 39 EC, (...). This is an obligation established in Article 53.3 EC which, although it must be provided through the channels stipulated by the Legal Order, (...) it is evident that diplomatic protection was the ideal and necessary channel for our authorities to fulfil the duty imposed by the aforementioned Article 39 EC."

In addition, the court states that

> "the activity specifically developed involved the exercise of freedom of information - Article 20.1.d) EC - which, as constitutional doctrine has stated from its beginning (...) means "the recognition and guarantee of a fundamental political institution, which is free public opinion, indissolubly related to political pluralism, which is a fundamental value and a requirement for the functioning of the democratic State" (...) Consequently, this objective dimension of freedom of information also advocated in favour of the exemption of diplomatic protection as a form of protection of the aforementioned freedom by guaranteeing the indemnity of its exercise".[17]

This is certainly the most novel aspect of the judgment we are commenting on. According to the National High Court (Administrative Chamber), the right to life, the protection of the family and the freedom of information are constitutional rights and values whose protection may lead to justify the exercise of diplomatic protection and, in its absence, the State's liability. This surely explains the reference to "the constitutional values and principles" to which it alludes before bringing up the case-law of the Constitutional Court and the Supreme Court. But no matter how laudable the desire to repair a material injustice, it is still a pirouette of arguments insufficiently justified from the legal point of view and added after the decision as a complement. It is also surprising that the judgment then adds two more reasons to overcome the barrier of the discretionary power:

> "a) First of all, because the Administration does not provide any justification for its conduct. Not even in the file of liability that ended without an explicit resolution, [...] Although the control of the discretionary action bears specific characters and limits, it is precisely the reasoning of the act that may be one of the elements on which the judicial control of the discretionary power may be based, control that is stolen - or at least made difficult - by the absence of an administrative response. b) Secondly, because if reasons of foreign policy (which is the responsibility of the Government under Article 97 EC) had advised not to develop any diplomatic action in favour of the victims of the death [...] they would not have the legal obligation to bear individually the foreign policy developed in favour of the State as a whole and, ultimately, of the citizens as a whole. The imposition of this sacrifice exclusively on the complainants would be against the "principle of equality before public charges" to which the already cited STC 107/1992, of 1 July, FJ 3 in fine, referred, in order to discard the fact that the non-execution of a Judgment must be suffered by those favoured by it when the State has not developed the diplomatic action that can be expected. We would then be in the case of liability for the normal functioning of the Administration that individuals would not be legally obliged to bear"[18].

This is the conclusion of the argumentative disorder that characterizes this judgment. Without commenting on the obvious absence of a reasoning, which was inevitable because the complaint had been rejected by administrative silence, section a) above raises the question of whether the formal requirement of the existence of an explicit decision is required in all cases in which an individual claims liability for issues relating to the exercise of diplomatic protection. On its side, section b) contains the clearest basis that until now our case-law has offered on the subject under discussion, the principle of equality before public charges, and yet the Judgment does not include it in the central core of the reasoning that leads to its decision, it only mentions it in a secondary

[17] FJ. 14.
[18] FJ. 15.

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way in order to diminish the value of the characteristic of the discretionary power.

All the above leads us to consider that the legal construction of the judgment is questionable. Given the lack of previous court rulings, the Administrative Chamber of the National High Court could have chosen to go further and eliminate the requirement of a previous act of the Spanish Administration causing the illicit act of the foreign State, which the SC has maintained until now, in order to estimate the liability, which results to be excessively restrictive. The principle of equality before public charges and the need to prevent unfair prejudices to the individual provided the opportunity. It could also have elaborated the incidence of those constitutional values that it merely points out. This would have been especially appropriate if we consider that the SC's judgment determining its doctrine in this matter is pre-constitutional. However, the Administrative Chamber has opted for a less consistent and poorly structured argument, in which its main arguments, both those it considers to be based on international law and Spanish case-law, have no substance.

(C) WAITING FOR THE SUPREME COURT

The State Attorney has already filed a brief of preparation of the cassation appeal before the SC. It includes the discretionary power in the exercise of diplomatic protection, the absence of an individual's right to such protection and the conditions established in the previous judicial decisions of the High Court among the reasons cited[19]. Consequently, the Couso case offers the opportunity to confirm its previous doctrine or to take a further step, eliminating the requirement of the act of the Spanish Administration in the causal chain that leads to the damage suffered by the individual. The Administrative Chamber of the National High Court has been sensitive to the peculiarity of the Couso case, but its argumentative construction has some weak points. Hopefully, the SC will be able to find a balance between the discretionary power that the government should possess in the management of foreign policy and the protection on the internal level of the rights of the citizens who may be affected by political decisions taken in that field. In a Rule of Law, this aspect cannot be underestimated. Also, it can be expected that this will be done through more consistent and elaborate legal arguments than those in the decision discussed here. By doing so, it would continue to improve the path it opened in a remote year of 1974.

[19] Brief of preparation of the cassation appeal, State Attorney, No. 639/2020, 24 February 2020. The Minister of Foreign Affairs, European Union and Cooperation expressed a negative view of the National High Court's judgement, considering that the decision "opens up the right to consular protection [sic] in such an extensive manner that it is impossible for the State to assume", Statements by the Minister of Foreign Affairs, European Union and Cooperation, Arancha González Laya, *Europapress*, 3 March 2020.

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