THE CHANGING FACE OF PROTECTION OF THE STATE'S NATIONALS ABROAD

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The theme of the protection of the state's nationals abroad may have seemed a bit passé but is now witnessing a resurgence. It raises questions about the nature of the obligations that states owe to their extraterritorial nationals. The commentary explores the origins of that regime in the international law of protection of aliens, tainted as it was by its association with imperialism, as well as its decline, as it was gradually supplanted by an emphasis on the distinct regimes of human rights and investment protection. It nonetheless argues that protection of nationals abroad is witnessing a renewal as states in the Global South increasingly become concerned with the fate of their nationals in the Global North and as international human rights law turns out not to have provided the full protection one might have expected. To understand that renewal, however, one must also understand it as a metamorphosis, involving modifications in the scope of protection provided, beyond the traditional focus on diplomatic protection; a shift away from the emphasis on isolated 'aliens' to the protection of entire and amorphous 'diasporas'; and the emergence of powerful rights discourses that foreground the obligations of the state of origin to its nationals rather than exclusively of the territorial state to foreigners. Together, these mutations add up to a significant, if occasionally troubling, phenomenon that remains ill-accounted for in the international legal literature.

CONTENTS

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I INTRODUCTION

As COVID-19 spread globally, millions 'stranded' abroad sought the help of their state to advise them and assist in their repatriation.[1] Many scrambled to catch the last plane 'home'. Many states obliged, diligently opening their doors for their nationals (and often only for their nationals)[2] and also sometimes deploying significant efforts to repatriate them by arranging consular assistance and occasionally organising special flights.[3] When they did not, their nationals abroad were often scandalised that more was not done to bring them back home, as they frequently expressed on social media.[4] All of a sudden, the state, sometimes dismissed as a nuisance or a distraction in the discourse of globalisation, appeared as the only place of safety.[5]

What is the nature of this demand that emerges in times of crisis? How justified is it? What broader phenomenon is it a part of? What does it portend for international law? At the heart of the demand for repatriation is, it seems, a demand for protection by the sovereign from dangers experienced 'abroad'. These could be the dangers of an epidemic, but also of war, discrimination, unfair trial or expropriation. These are dangers that result from travel, expatriation and emigration, and that put individuals in a place of particular vulnerability: too far from one's state of nationality to merit its undivided attention, in a place beyond its jurisdictional or enforcement reach, and on the territory of a state that may not have foreigners' best interests at heart. States are thus increasingly called upon — and increasingly willing — to argue

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1 See, eg, Ben Doherty, '"There Are Food Shortages": Thousands of Australians Stuck Abroad amid Coronavirus Plead for Help to Get Home', *The Guardian* (online, 31 March 2020) <https://www.theguardian.com/world/2020/mar/31/i-am-desperate-thousands-of-australians-stuck-abroad-amid-coronavirus-plead-for-help-to-get-home>, archived at <https://perma.cc/LZ6B-L4RW>; Samira Sawlani, 'African Students Trapped in Coronavirus-Hit Wuhan Plead for Help', *Al Jazeera* (online, 5 February 2020) <https://www.aljazeera.com/news/2020/02/african-students-trapped-coronavirus-hit-wuhan-plead-200204082319647.html>, archived at <https://perma.cc/CS3Y-C5RF>.

2 See, eg, Rieka Rahadiana, 'Indonesia Bans Entry of Foreigners to Curb Spread of Virus', *Bloomberg* (online, 31 March 2020) <https://www.bloomberg.com/news/articles/2020-03-31/indonesia-bans-entry-of-foreigners-to-curb-spread-of-coronavirus>, archived at <https://perma.cc/6YM7-CVWC>; 'Coronavirus: Canada to Bar Entry for Most Foreigners — Trudeau', *BBC News* (online, 16 March 2020) <https://www.bbc.com/news/world-us-canada-51861980>, archived at <https://perma.cc/77EV-MMMK>.

3 See, eg, Nik Martin, 'Coronavirus: German Government to Fly Home Tens of Thousands of Tourists', *DW* (online, 17 March 2020) <https://www.dw.com/en/coronavirus-german-government-to-fly-home-tens-of-thousands-of-tourists/a-52811964>, archived at <https://perma.cc/3S2B-QYNC>; Jane Norman, 'DFAT Working behind the Scenes to Repatriate Australians during Coronavirus Pandemic', *ABC News* (online, 5 April 2020) <https://www.abc.net.au/news/2020-04-05/dfat-work-repatriating-australians-covid-19-coronavirus-pandemic/12122338>, archived at <https://perma.cc/2BQY-7TV6>.

4 See, eg, James Landale, 'Coronavirus: Why Are British Travellers Struggling to Get Home?', *BBC News* (online, 30 March 2020) <https://www.bbc.com/news/uk-52093009>, archived at <https://perma.cc/6LRX-F9YJ>; 'Stranded Overseas, Chinese Vent Anger on Aviation Regulator', *Reuters* (online, 27 May 2020) <https://www.reuters.com/article/us-health-coronavirus-china-aviation-idUSKBN23312J>, archived at <https://perma.cc/CPT7-JJCY>.

5 See Frédéric Mégret, 'Returning "Home": Nationalist International Law in the Time of the Coronavirus', *Opinio Juris* (Blog Post, 30 March 2020) <http://opiniojuris.org/2020/03/30/covid-19-symposium-returning-home-nationalist-international-law-in-the-time-of-the-coronavirus/>, archived at <https://perma.cc/MX7S-JNGH>.

for their nationals abroad, take up their fate in bilateral relations and offer forms of assistance, protection and even intervention.

This commentary takes as its starting point that this position of extraterritorial vulnerability and the sort of international relations pressures it is putting anew on the state are emblematic of contemporary international legal developments. Protection of nationals is a nebulous concept that nonetheless describes a core demand addressed to the state to ensure that persons under its jurisdiction do not come in harm's way. We have come to understand protection as territorially determined and owed rather than personally or nationally determined outside borders, an understanding that has, if anything, been magnified by international human rights law.[6] At the same time, the reality of both demands by nationals for extraterritorial protection and the occasional willingness of states to provide it suggests a deeper permanence of mutual expectations about protection that transcend territory.

The phenomenon by which states are called upon to provide their nationals with protection when they are abroad is, of course, nothing new, and its legacy, one deeply linked to the history of imperialism,[7] has often been a dark one. As this commentary will discuss in more depth, this phenomenon has its origins in the now slightly dated institution of diplomatic protection and the body of international law known as the 'protection of aliens'.[8] That branch of international law was destined, as a result of both anti-imperial struggles and the rise of human rights, to become more and more marginal. Its resurgence in our era presents a striking puzzle for international lawyers. This commentary argues that today's protection, which is increasingly understood as the broader defence and championing of the cause of one's nationals abroad, is not quite the same as yesterday's, and that understanding how the two differ is key. The commentary begins by charting how the protection of aliens once rose, then fell and may yet rise again. It then outlines some of the key practical and conceptual developments in today's protection of nationals abroad. The conclusion is devoted to assessing the significance of the phenomenon within international law more generally.

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6 International human rights law obligations are generally understood to apply to persons within the state's jurisdiction, which by and large has tended to coincide with territory. See generally Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press, 2013) 153.

7 See Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013) ch 1.

8 See generally Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (Banks Law Publishing, 1919).

II THE GENESIS, FALL AND RISE OF THE PROTECTION OF ALIENS

Although it is customary to note the decline of the once dominant scheme for the protection of aliens and its replacement by models of protection that are much more universal and supranational,[9] this decline may now be powerfully countered by geopolitical transformations that are giving a renewed currency to the protection of nationals abroad.

A *Origin*

The protection of aliens has been a central theme in the development of international law. From Francisco de Vitoria theorising about the obligations of indigenous peoples to Spanish citizens in the Americas[10] to mixed claims commissions between the United States and Mexico in the early 20th century,[11] it led to a sustained effort to develop the content of duties owed by host states to 'aliens', ie foreign nationals. The basic idea promoted by Western states was that states owed a certain 'minimum standard' of treatment to foreigners.[12] This included both basic protections of the person (freedom from arbitrary arrest, right to a fair trial, physical security etc) and the protection of property (particularly against expropriation).[13] To fail to provide this minimum standard was held to be a 'denial of justice'.[14] This in turn would allow the state of nationality to 'espouse' the claims of its wronged citizens as against the host state and to seek reparations on their behalf.[15]

The law of responsibility for injury to aliens gave rise, in fact, to the basic articulation of principles of state responsibility under international law.[16] It was recognised by the Permanent Court of International Justice as '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'.[17] It is impossible to distinguish that early history of the protection of aliens from the history of imperialism. The protection of aliens was one of the primary vehicles

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9 See, eg, Thomas E Carbonneau, 'The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement' (1984) 25(1) *Virginia Journal of International Law* 99, 105–6.

10 Beatriz Salamanca, 'Early Modern Controversies of Mobility within the Spanish Empire: Francisco de Vitoria and the Peaceful Right to Travel' (2015) 3(1) *Tropos* 14.

11 Frédéric Mégret, 'Mixed Claims Commissions and the Once Centrality of the Protection of Aliens' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge University Press, 2019) 127.

12 See Edwin Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1939) 33 *American Society of International Law Proceedings* 51.

13 Alwyn V Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green and Co, 1938) 507 ('*Denial of Justice*').

14 See generally Freeman, *Denial of Justice* (n 13).

15 See David J Bederman, 'State-to-State Espousal of Human Rights Claims' (2011) 1 *Virginia Journal of International Law Online* 3.

16 Jean d'Aspremont, 'The General Claims Commission (Mexico/US) and the Invention of International Responsibility' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge University Press, 2019) 150.

17 *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Judgment)* [1924] PCIJ (ser A) No 2, 12.

through which the 'standard of civilization' was foisted on peripheral societies.[18] It justified all sorts of impositions, including through the use of force.[19] Indeed, the protection of aliens was widely considered to justify reprisals and self-help, including to reclaim debts.[20] This explains in no small part why that whole branch of international law was held in particularly low esteem by Latin American states and, eventually, what became the Third World.[21]

In addition to being a manifestation of imperialism, the protection of aliens was also a manifestation of statism. Whatever dispute may have arisen as a result of the ill-treatment of a state's nationals abroad was considered to be a dispute between those states and between them only, with the claiming state alleging a violation of *its* rights through the harm that was done to its nationals.[22] The state of nationality could thus waive its claims if it did not suit it to pursue them, there was no recourse to force the exercise of a state's discretion in exercising protection, and whatever monies were collected as a result of an award were not necessarily to be paid to the individual who had suffered the prejudice.[23] In other words, the aggrieved parties might help to serve imperialist designs but were not considered sufficiently important in themselves to have the dignity of claiming their rights.

The protection of aliens thus united three registers in striking fashion: that of imperialism, that of statism and that of rights, since ironically, despite these associations, diplomatic protection would come to be seen as one of the ancestors of human rights protection.[24] An imperfect ancestor no doubt, and doubly so, since rights were protected for aliens that might not be guaranteed to nationals of the host state (or to aliens of other states not so willing or able to uphold them) and rights might accrue to nationals abroad that would not be recognised to nationals at home. Nonetheless, it is not an inconsequential pedigree of the law of the protection of aliens that it can be credited for having developed not only some of the earliest principles of human rights law but also of investment law and even international criminal justice.[25]

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18 See, eg, Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4(3) *American Journal of International Law* 517, 521.

19 Sebastián Mantilla Blanco, *Full Protection and Security in International Investment Law* (Springer, 2019) ch 4.

20 AJ Thomas Jr, 'Protection of Property of Citizens Abroad' [1959] *Proceedings of the Institute on Private Investments Abroad* 417, 419.

21 Ibid 424; SN Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55(4) *American Journal of International Law* 863, 865.

22 *Mavrommatis Palestine Concessions* (n 17) 12.

23 See generally Jan Hostie, 'A Systematic Inquiry into the Principles of International Law Dealing with Diplomatic Protection' (1944) 19(1) *Tulane Law Review* 79.

24 See Alwyn V Freeman, 'Human Rights and the Rights of Aliens' (1951) 45 *American Society of International Law Proceedings* 120.

25 See Frédéric Mégret, 'Qu'est-ce qu'une juridiction « incapable » ou « manquant de volonté » au sens de l'article 17 du *Traité de Rome*? Quelques enseignements tirés des théories du déni de justice en droit international' [What Is an 'Unable' or 'Unwilling' Jurisdiction in the Sense of Article 17 of the *Rome Statute*? Some Lessons Learned from Denial of Justice Theories in International Law] (2004) 17(2) *Revue québécoise de droit international* 185.

B *Decline*

The protection of aliens as a motif in international law fell out of fashion dramatically in the decades following the end of the Second World War as a result of three phenomena. First, the independence of states in the semi-periphery or the newly decolonised world meant that those states were increasingly unwilling and unlikely to accept relatively onerous obligations towards foreign nationals, certainly insofar as such obligations would have created any special regime for the benefit of aliens.[26] The abuses of the regime of protection of aliens had been perceived as a fundamental denial of the sovereignty of the host state, and this was even more so in a context where Western states sought to prevent a historic wave of nationalisations in the Third World.[27] Already during the first half of the 20th century, host states, particularly Latin American ones, had been adamant about three things. First, substantively, that foreigners could not claim higher rights protections than nationals of the host state; that, in other words, the appropriate standard was that of equal 'national treatment' and not some vague 'minimum standard'.[28] Second, procedurally, that if foreigners had a complaint, they should turn to the host state jurisdictions and not seek the assistance of their state of nationality; in other words, as per the Calvo Clause, that they should exhaust local remedies before being allowed to have their cause taken up by their sovereign.[29] This move thoroughly normalised the pursuit of recourses and led some to wonder whether the protection of aliens had ever even been part of 'universal international law'.[30] Third, that under no circumstance could the protection of nationals or a fortiori their property lead to a use of force against them, as had been too often the case until then.[31]

Second, although it is unclear exactly why, it may be that states of nationality themselves not only had increasingly fewer means at their disposal to protect their nationals abroad, but they also had less inclination, relatively speaking, to do so. Where the departure of nationals abroad had once been closely associated with commercial expansion and imperial projection, it increasingly appeared to be a largely privately ordered, decentralised and disjointed enterprise. Emigrants left for good, with little interest nor the ability to maintain strong connections to the state of origin. Former imperial powers learned their lesson to a degree and ceased to automatically and forcefully back their nationals abroad in ways that might have dragged them against their will into disputes with foreign states. The price of maintaining friendly relations with states that were increasingly prickly about their sovereignty was often to be selective about which cases involving one's nationals one decided to push. Given that there was at the time no serious basis on which nationals could have compelled their state to intervene

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26 See Guha Roy (n 21).

27 See A Akinsanya, 'Permanent Sovereignty over Natural Resources and the Future of Foreign Investment' (1978) 7(2) *Millennium: Journal of International Studies* 124.

28 Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (n 12) 51–2.

29 See generally Manuel R Garcia-Mora, 'The Calvo Clause in Latin American Constitutions and International Law' (1950) 33(4) *Marquette Law Review* 205.

30 Guha Roy (n 21).

31 Frank Griffith Dawson, 'Contributions of Lesser Developed Nations to International Law: The Latin American Experience' (1981) 13(1) *Case Western Reserve Journal of International Law* 37, 49–51.

on their behalf, individuals became less likely to seek such espousal in the first place.

Third, the entire architecture of the post-Second World War normative edifice changed in ways that did not favour the sustained operation of the international law of the protection of aliens. Principally, that law became bifurcated between two branches of contemporary international law: the international law of investment and the international law of human rights. The former acquired an increasingly sui generis character that protected investment as such rather than aliens specifically. It refocused attention on large corporations rather than physical persons, and this would eventually lead to their ability to sue directly to recoup their investments.[32] The latter also largely displaced the emphasis on aliens. Rights were to be granted to all human beings as such rather than specifically to nationals or foreigners — or rather, although they continued to be owed to aliens qua humans, this was neither more nor less, for the most part, than what was owed to anyone else.[33]

With the normalisation of the status of the alien in the foreign state, the need for protection from the state of origin receded. If obligations were henceforth owed to all individuals on one's territory, then aliens were at least in theory better off turning towards the host state than their state of nationality. Affiliation with the latter provided no basis for any particular claim to special treatment. Indeed, bypassing the host state to seek diplomatic protection might be the surest way to offend it and delay the provision of remedies. Moreover, even the state of nationality was increasingly divested of any human rights jurisdiction it might have had towards its nationals, given the extraterritorial character of the harms suffered by them. As a result, the regime of protection of aliens has increasingly seemed passé and even redundant.

C *Renewal*

Nonetheless, that regime may be destined for renewal, especially in light of the past decades, for at least three reasons. First, diplomatic protection in the 19th and early 20th centuries operated in a particular geopolitical context marked by formidable asymmetries of power, the imperial expansion of capital and the existence of an ill-assured semi-periphery that had no choice but to accept the concessions that were foisted on it. It focused on typically European or American settlers in Latin America and their sometimes uncertain fate in the face of political upheaval.[34] As a result, protection was largely unidirectional. Although a case can be made that peripheral states occasionally invoked diplomatic protection against Western states,[35] the vast majority were cases brought and often won by imperial powers who, through these cases, asserted their

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32 See Miles (n 7) 84–93.

33 See David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008) 34–5.

34 Julius Goebel Jr, 'The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars' (1914) 8(4) *American Journal of International Law* 802, 831–49.

35 See Richard B Lillich, 'Duties of States regarding the Civil Rights of Aliens' (1978) 161 *Collected Courses of the Hague Academy of International Law* 329, 339–42, 409–10.

domination.[36] It was also limited by its quite formal framework and the limited means of intervention of states of nationality in the host state.

But the second half of the 20th century and the early 21st century have profoundly modified the environment within which protection stands, if at all, to operate. Perhaps most importantly, what it means to be 'abroad' and who lives beyond the state has changed fundamentally. Not only has migration expanded, but its flows have switched from a predominantly North–South axis to a predominantly South–North one.[37] This, in turn, has awakened Southern interest in the protection of its populations in the North. The protection of aliens, in short, was ripe for a gradual, more positive reappraisal.[38] As migration flows have reversed, so has the directionality of protection. It is no longer simply the case that most complaints about ill-treatment come from rich states (although many still do, notably in the related field of international investment law). Global South states have also gradually flexed their muscles when it comes to their nationals abroad. The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* ('*Convention on the Rights of Migrant Workers*'),[39] as very much a hybrid between human rights and sovereign protection,[40] is a case in point, one whose initiative can be largely credited to labour-exporting nations.[41]

Second, the wager on international human rights law as a substitute to the protection of aliens could only be as strong as the universality and robustness of the protections that resulted. As it turned out, those protections often proved to be disparate and inadequate. This is perhaps most dramatically illustrated by the *Convention on the Rights of Migrant Workers*, which was only ratified by labour-exporting nations[42] and thus, in a sense, failed as a specific human rights instrument that would be grounded in universal consensus. Indeed, the Convention itself nods at this by including, in a human rights instrument, a strong element of protection by the state of nationality.[43] At any rate, there has continued to be an at least residual need for the intervention of the state of

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36 Ibid 346–9, 360–3.

37 Population Division, Department of Economic and Social Affairs, *International Migration 2019: Report*, UN Doc ST/ESA/SER.A/438 (2019) 19–24.

38 Richard B Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens' (1979) 73 *American Society of International Law Proceedings* 244, 248.

39 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) ('*Convention on the Rights of Migrant Workers*').

40 See generally Vincent Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' (2013) 28(1) *Georgetown Immigration Law Journal* 225.

41 See generally Antoine Pécoud, 'The Politics of the UN Convention on Migrant Workers' Rights' (2017) 5(1) *Groningen Journal of International Law* 57.

42 See 'International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en>, archived at <https://perma.cc/CV34-K8AS>.

43 See, eg, *Convention on the Rights of Migrant Workers* (n 39) art 23.

nationality on at least functional grounds when the host state was, as it were, 'unwilling or unable' to guarantee rights.[44]

Third, the nature of *émigré* populations has changed quite dramatically. In previous times, emigrants might have relatively quickly severed contacts with their country of nationality. The focus on naturalisation, integration and obstacles to dual citizenship often gave an air of finality to emigration after a couple of generations, beyond a sentimental attachment to a country of origin. Contemporary emigration by contrast has led to the emergence of significant diasporas that are often large, regrouped in certain countries and even cities, keenly aware of themselves and their agency, and capable and willing to maintain links with their state of origin/nationality.[45] The limits of integration, and the ability to obtain host state citizenship without shedding citizenship in the state of origin, have further reinforced the status of diasporas as post-national, 'in-between' collectives.[46] These diasporas' states of origin, in turn, have been increasingly keen to harness their political clout and economic vibrancy for remittances, electoral and democratic might and cultural influence.[47] At the same time, diasporas, for all their occasional strength and successes, often find themselves vulnerable in host states as a result of racism and exclusion, reinforcing the temptation of turning to their state of origin for occasional protection.[48] It has even been argued that the 'digital revolution' has created new conditions for the constant interaction of citizens abroad and their government, increasing expectations that certain obligations will be discharged by the latter (notably in the form of diaspora-specific departments in ministries of foreign affairs) for the benefit of the former.[49]

III THE METAMORPHOSIS OF THE PROTECTION OF NATIONALS

The resurgence of the theme of protection in international law cannot be understood as a linear progression, as much as one that poses a range of new questions. It is bound up, in particular, in a profound metamorphosis of the breadth, beneficiaries and status of protection.

A *From Diplomatic Protection to Sovereign Protection?*

The emphasis on 'diplomatic protection' has long had a strong 'diplomatic' connotation. It conjures up images of diplomats making representations from their governments to other diplomats or state authorities. It invoked, as we saw, a whole register of state responsibility, arbitration and mixed claims commissions. This language has hardly disappeared from international law, but it has

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44 That theme of the residual value of the protection of nationals was long championed by Richard B Lillich: see, eg, Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens' (n 38).

45 See generally Eva Østergaard-Nielsen, 'Diasporas in World Politics' in Daphné Josselin and William Wallace (eds), *Non-State Actors in World Politics* (Palgrave, 2001) 218.

46 See ibid 221; Elena Barabantseva and Claire Sutherland, 'Diaspora and Citizenship: Introduction' (2011) 17(1) *Nationalism and Ethnic Politics* 1.

47 Østergaard-Nielsen (n 45) 225–6.

48 Ibid 221.

49 Jan Melissen and Matthew Caesar-Gordon, 'The Impact of the Digital Revolution on Foreign Ministries' Duty of Care' (Working Paper No 08, Stiftung Wissenschaft und Politik (SWP)/German Institute for International and Security Affairs, February 2017).

transmogrified, suggesting a reality that is now much more complex than merely the formal institution of diplomatic protection and in particular its emphasis on making 'claims' against other states. If nothing else, diplomatic protection (or something close to it) is more likely to be asserted via multilateral jurisdictions than merely on a strictly diplomatic basis. There is by now, for example, a fairly long history of states intervening on behalf of their nationals abroad before international courts.[50] The *Avena and Other Mexican Nationals* and *LaGrand* cases come to mind,[51] but interstate complaints before human rights bodies are also relevant.[52]

Indeed, the language of diplomatic protection probably fails to do justice (if it ever did) to the manifold ways in which protection to nationals abroad stands to be provided. The 'lesser' forms of protection include, for example, a vast array of consular services offered to nationals.[53] These seek to protect such nationals from getting into harm's way but also to alleviate the consequences of situations they have put themselves into. The whole apparatus of consular services is increasingly geared, through travel advisories for example, to maximise the security and wellbeing of nationals abroad. The *Convention on the Rights of Migrant Workers* stipulates quite broadly that 'States Parties shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families'.[54] 'Assistance for nationals abroad' has become a catch-all term for a series of measures to help migrants, expatriates or even tourists, notably in the event of a crisis.[55]

Of 13 possible consular functions listed in art 5 of the *Vienna Convention on Consular Relations*, about half have to do with the nationals of the 'sending State'.[56] Such functions go from the most basic and sending state related (issuance of passports to one's nationals)[57] to include 'helping and assisting nationals' in their dealings with the receiving state in a range of ways.[58] These encompass 'any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State'[59] — a potentially quite broad opening for the state of nationality's extraterritorial activities. The emphasis on

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50 See generally Kimio Yakushiji, 'The International Court of Justice and Diplomatic Protection' in Stefan Kadelbach, Thilo Rensmann and Eva Rieter (eds), *Judging International Human Rights: Courts of General Jurisdiction as Human Rights Courts* (Springer, 2019) 103.

51 *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12; *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466.

52 See, eg, *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A); *Cyprus v Turkey* [2001] IV Eur Court HR 1.

53 Colin Warbrick, 'Protection of Nationals Abroad' (1988) 37(4) *International and Comparative Law Quarterly* 1002, 1002–3.

54 *Convention on the Rights of Migrant Workers* (n 39) art 65(2).

55 See, eg, George Haynal et al, *The Consular Function in the 21st Century: A Report for Foreign Affairs and International Trade Canada* (Report, 27 March 2013).

56 *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) art 5.

57 Ibid art 5(d).

58 Ibid art 5(e).

59 Ibid art 5(m).

consular services as a first vector for sovereign protection — contra the earlier tendency to elevate even minor incidents to diplomatic protection — reflects the normalisation of protection in the presence of significant and stable expatriate populations, as well as of course an increasing regard for the equality of states.

When it comes to criminal cases and detention specifically, the *Vienna Convention on Consular Relations* famously grants consular officials the right to visit, communicate with and assist those detained.[60] Often, however, the protection provided by consulates carries on even after conviction, extending to prison visits and monitoring.[61] In fact, the extraterritorial protective work of states in the criminal realm often goes far beyond the sort of consultations anticipated by the *Vienna Convention on Consular Relations*. In recent years, a number of high-profile criminal cases have shown how far some states are willing to intercede in favour of their nationals who are being prosecuted abroad, outside any real legal diplomatic protection foothold to do so and notably aside from any case of international law violated. China has orchestrated a sophisticated pressure campaign on Canada to secure the release of Huawei executive Meng Wanzhou, whose extradition is sought in the US.[62] Australia recalled its ambassador to Indonesia following the execution in Bali of two Australians for drug trafficking.[63]

There are also many ways in which, outside the criminal justice context, states may complain about the bad treatment reserved to their nationals abroad and adopt measures in response. One area in which states have been active through a range of diplomatic protests is that of discrimination against their nationals. In the early 1960s, for example, Australia sought to limit immigration from Southern Europe by interpreting sponsorship regulations more strictly for them than for immigrants from Northern European countries. Italy responded by refusing to renew the 1951 *Agreement for Assisted Migration* with Australia between 1961 and 1967.[64] African states such as The Gambia have brought up the question of the death of African migrants in the Mediterranean both bilaterally and as a possible matter for referral to the International Criminal Court.[65] Protection can be quite concrete and test the limits of the host state's sovereignty. The Philippines, for example, has developed a quite distinct protective streak vis-à-vis its workers in the Gulf, going as far as to deploy consular channels to help abused domestic workers flee their employers and

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60 Ibid art 36(1)(c).

61 See Standing Committee on Foreign Affairs and International Development, Parliament of Canada, *Strengthening the Canadian Consular Service Today and for the Future: Report of the Standing Committee on Foreign Affairs and International Development* (Report, November 2018) 46–9.

62 'China Urges Canada to "Take Concerns Seriously" and Release Meng Wanzhou', *Global News* (online, 26 June 2019) <https://globalnews.ca/news/5432507/china-renews-demands-canada-wanzhou/>, archived at <https://perma.cc/C6Z6-265T>.

63 Daniel Hurst, 'Bali Nine Executions: Tony Abbott to Recall Australia's Ambassador to Indonesia', *The Guardian* (online, 29 April 2015) <https://www.theguardian.com/world/2015/apr/29/bali-nine-executions-tony-abbott-to-recall-australias-ambassador-to-indonesia>, archived at <https://perma.cc/2LKR-XEN2>.

64 James Jupp (ed), *The Australian People: An Encyclopedia of the Nation, Its People and Their Origins* (Cambridge University Press, 2001) 68.

65 Pap Saine, 'Gambia's Jammeh Wants ICC to Investigate Migrant Deaths', *Reuters* (online, 9 June 2015) <https://www.reuters.com/article/us-europe-migrants-gambia-idUSKBN0OO26720150608>, archived at <https://perma.cc/68HT-RGCM>.

provide a network of safe houses for their protection, much to some of these states' irritation.[66] In a different genre, Saudi Arabia has been known to occasionally help its nationals to escape justice in the US, with Saudi consulates often paying for their bail and then whisking them away.[67]

More generally, states increasingly provide significant repatriation services for their nationals in times of crisis. For example, the 2011 Libyan crisis led to the repatriation of thousands of foreign nationals, including Europeans (for example, about 800 Italians) and Asians (some 4,600 Chinese and 13,000 Filipinos).[68] By 2018, operations from Libya were still taking place, as a number of African nations sought to repatriate would-be African migrants who had become trapped there.[69] States have committed significant means to such repatriation operations, including land, sea and air military personnel.[70] Indeed, the use of force to 'rescue' nationals abroad from terrorist attacks,[71] hostage taking[72] or more general upheaval has long been a discreet leitmotiv in international relations and law.[73] It has sometimes been presented as an exception in its own right to the prohibition on using force and justified under a number of grounds.[74] Where the debate on 'humanitarian intervention' of the late 1990s and early 2000s emphasised duties to 'distant others', the use of force to protect nationals abroad has refocused the debate in part on obligations to 'distant nationals', from its own humanitarian or human rights angle.[75]

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66 Colin Dwyer, 'Viral "Rescue" Videos Ignite Dispute between Philippines and Kuwait', *NPR* (online, 26 April 2018) <https://www.npr.org/sections/thetwo-way/2018/04/26/606170975/viral-rescue-videos-ignite-dispute-between-philippines-and-kuwait>, archived at <https://perma.cc/DPT6-5T3R>.

67 Sebastian Rotella and Tim Golden, 'Saudi Fugitives Accused of Serious Crimes Get Help to Flee while US Officials Look the Other Way', *ProPublica* (online, 26 April 2019) <https://www.propublica.org/article/saudi-fugitives-accused-of-serious-crimes-get-help-to-flee-while-u-s-officials-look-the-other-way>, archived at <https://perma.cc/ZC5E-3XQ3>.

68 'Factbox: Country, Company Libya Evacuation Plans', *Reuters* (online, 25 February 2011) <https://www.reuters.com/article/us-libya-protests-evacuation/factbox-country-company-libya-evacuation-plans-idUSTRE71N3WI20110224>, archived at <https://perma.cc/S2EM-C384> ('Libya Evacuation Plans').

69 See, eg, Rafiu Ajakaye, 'Over 9,400 Nigerians Repatriated from Libya', *Anadolu Agency* (online, 6 August 2018) <https://www.aa.com.tr/en/africa/over-9–400-nigerians-repatriated-from-libya-/1223498>, archived at <https://perma.cc/Z7LR-76LQ>; '13,000 Migrants Repatriated from Libya, but Many Returnees Face Problems', *Euractiv* (online, 30 January 2018) <https://www.euractiv.com/section/africa/news/13000-migrants-repatriated-from-libya-but-many-returnees-face-problems/>, archived at <https://perma.cc/7DUH-8QMF>.

70 'Libya Evacuation Plans' (n 68).

71 David J Gordon, 'Use of Force for the Protection of Nationals Abroad: The Entebbe Incident' (1977) 9(1) *Case Western Reserve Journal of International Law* 117.

72 John R D'Angelo, 'Resort to Force by States to Protect Nationals: The US Rescue Mission to Iran and Its Legality under International Law' (1981) 21(3) *Virginia Journal of International Law* 485.

73 Tom Ruys, 'The "Protection of Nationals" Doctrine Revisited' (2008) 13(2) *Journal of Conflict and Security Law* 233.

74 See generally Jean Raby, 'The State of Necessity and the Use of Force to Protect Nationals' (1988) 26 *Canadian Yearbook of International Law* 253; Kristen E Eichensehr, 'Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues' (2008) 48(2) *Virginia Journal of International Law* 451; Rex J Zedalis, 'Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation?' (1990) 25(2) *Texas International Law Journal* 209.

75 Theodor Schweisfurth, 'Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights' (1980) 23 *German Yearbook of International Law* 159.

These various forms of protection differ widely, but that is in a sense the point: that there is a vast continuum of measures that states can implement to protect their nationals abroad, from the least to the most intrusive.

B *From Protection of Aliens to Protection of Diasporas?*

Diplomatic protection historically tended to have a strong individualist connotation. It typically involved lone entrepreneurs, missionaries and adventurers in Latin America or China, for example, who had somehow put themselves in harm's way, or victims of local mob violence, corruption or revolutionary upheaval.[76] The highly individualised treatment that resulted for aliens as a result of having the backing of their state of nationality was particularly hard to bear for the host states concerned because of the way it seemed to unduly aggrandise the aliens' claims and disrespect local sovereignty.[77] However, nationals abroad had little capacity to organise nor political clout back at home to mobilise protection in their favour, and the primary authority of the territorial state came to be recognised under international law.

What might be called 'diasporic protection', by contrast, has been spurred by the rise of self-identifying, active diasporas as more fundamentally collective actors and their relays in the country of origin. This does not mean that individual cases will not occasionally feature prominently. For example, the execution of Flor Contemplacion in Singapore prompted significant protests in the Philippines, both against Singapore for executing her and against the Philippines for not doing enough to protect her.[78] But these individual cases increasingly appear as prisms through which to raise broader issues about economic inequality or racial discrimination and assume a more institutionalised and collective form often mediated by diasporas themselves. They may involve a rallying of public opinion in the country of nationality and an ongoing renegotiation of the terms of migration, particularly labour migration. For example, in 2018 a diplomatic crisis erupted between the Philippines and Kuwait following the discovery of the corpse of a Filipino domestic worker working there.[79] This heightened existing concerns about the security of Filipinos in the Gulf and led President Rodrigo Duterte to organise a voluntary repatriation program for some of the 250,000 Filipinos already working in Kuwait and to suspend the departure of further workers.[80]

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76 See generally Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008) chs 2–3.

77 Lionel Morgan Summers, 'The Calvo Clause' (1933) 19(5) *Virginia Law Review* 459, 459.

78 Romy Tangbawan, 'Funeral of Executed Maid Transformed into Anti-Government Protest', *AP News* (online, 27 March 1995) <https://apnews.com/4d159d6c82117f842721ab1c38a5ede6>, archived at <https://perma.cc/AL9C-HPEK>. See generally Dan Gatmaytan, 'Death and the Maid: Work, Violence, and the Filipina in the International Labor Market' (1997) 20 *Harvard Women's Law Journal* 229.

79 'Kuwait Death Sentences for Murder of Filipina Maid', *BBC News* (online, 1 April 2018) <https://www.bbc.com/news/world-middle-east-43612778>, archived at <https://perma.cc/3Q9Y-Q236>.

80 'Philippines Says More than 2,200 Citizens in Kuwait Want to Go Home', *Reuters* (online, 12 February 2018) <https://www.reuters.com/article/us-philippines-kuwait-labour-idUSKBN1FV0PZ>, archived at <https://perma.cc/2K4Z-4JTW>.

One of the consequences of this phenomenon is the extent to which the earlier onus on the host state to protect 'aliens' has shifted to a conversation about the nature of the obligations of the state of nationality to protect 'its nationals'. It is not, of course, as if pressure on the host state has entirely abated, and there is certainly an element of the traditional 'protection of aliens' left in international legal discourse.[81] Indeed, the language of protection often entails that a certain claim for protection is made to the host state, for example under human rights law. But that language has tended to be supplanted by an increasing emphasis on the state of nationality and a range of conversations closer to home that implicate in more painful detail, notably under constitutional law, the exact nature of the obligations that this state owes to its nationals. Some states, for example, now clearly make the protection of their nationals abroad a constitutional obligation, even if international law does not.[82] Rather than a law of the 'protection of aliens' implicitly emphasising the obligations of the host state, therefore, we may be witnessing the emergence of a law of the 'protection of nationals', highlighting instead the logical and normative primacy of the obligations of the state of nationality.

A related development is the potentially troubling blurring of the distinction between nationals and ethnic kin abroad. Under international law, only the former gives rise to carefully circumscribed but distinct claims against another state.[83] The protection of non-nationals to whom a state of origin has a looser romantic affiliation, by contrast, is rife with dangers for international relations. Whilst diasporas are often conceived as distant migrants, they are also often constituted, notably in Central and Eastern Europe and the former Union of Soviet Socialist Republics, by the redrawing of borders.[84] The urge by the state of origin to protect these 'near abroad' diasporas has been associated with efforts at interfering with the host state's sovereignty, the subtle undermining of the territorial status quo and even the use of force.[85] This has been particularly clear in the efforts by Russia in Ukraine and its attempt to capitalise on the existence of a large Russian-speaking population in Crimea.[86] At times, the absence of a citizenship link under international law is remedied by untimely en masse attribution of citizenship to diaspora members,[87] in what may well be a first step towards a more legally sanctioned form of challenge to the host state's authority.

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81 See James Crawford, *Brownlie's Principles of International Public Law* (Oxford University Press, 9th ed, 2019) ch 28.

82 Onur Güven and Olivier Ribbelink, 'The Protection of Nationals Abroad: A Return to Old Practice?' in Christophe Paulussen et al (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (Asser Press, 2016) 45, 54.

83 See International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Eighth Session*, UN GAOR, 61st sess, Agenda Item 78, Supp No 10, UN Doc A/61/10 (2006) 16–17 ('*Report of the International Law Commission*'); Crawford (n 81) 729.

84 See Victor Gray, 'Beyond Bosnia: Ethno-National Diasporas and Security in Europe' (1996) 17(1) *Contemporary Security Policy* 146.

85 See, eg, ibid 164.

86 Peter Hilpold, 'Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History' (2015) 14(2) *Chinese Journal of International Law* 237, 245.

87 Szabolcs Pogonyi, 'National Reunification beyond Borders: Diaspora and Minority Politics in Hungary since 2010' (2011) 10 *European Yearbook of Minority Issues* 537.

C *From State Prerogative to Human Right?*

As has been seen, the turn to human rights has historically weakened the architecture of the protection of aliens. Ironically, however, as the attention is refocused on states of nationality, human rights language may have a renewed role to play in framing the relationship of nationals abroad with their state of nationality. Traditional diplomatic protection was certainly never a matter of right, and states were careful to keep the upper hand on what cases they agreed to espouse. In short, nationals might objectively benefit from, but were not entitled to, diplomatic protection, which was, formally at least, exercised for the benefit of the state invoking it. That overall symbolic economy, however, may be changing subtly as a result of the impact of rights discourse in the context of protection. Individuals understand that they are the ultimate beneficiaries of nominally interstate institutions and are more likely to call the fiction on which diplomatic protection or consular assistance relies. The more the demands of protection are framed in the imperative language of safeguarding human dignity, the more the space for states to deny protection will shrink.

Whether extraterritorial protection by one's state can be considered to be a right will depend on a range of factors, including the sort of right involved, the severity of the violation and the ability of and cost for the state to provide it. Denial of basic consular assistance and services, for example, would seem to be incompatible with certain rights,[88] especially in the criminal justice context when the host state itself is under such an international obligation to allow the assistance to proceed.[89] It may be that diplomatic protection itself should, in some cases, be owed as a matter of right, although this is certainly a more contentious proposition. The International Law Commission has hinted in this direction, including as '[r]ecommended practice' that states '[g]ive due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred', '[t]ake into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought' and '[t]ransfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions'.[90] The case for a duty to assert diplomatic protection, moreover, is all the stronger where the protection sought concerns human rights, especially core human rights.[91]

It is worth noting, in that context, that international human rights legal discourse has itself produced a powerful notion of an 'obligation to protect' the

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88 Office of the High Commissioner for Human Rights, 'Set Universal Standards for Effective Consular Assistance, UN Expert Urges States' (Media Release, 25 October 2019) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25213&LangID=E>, archived at <https://perma.cc/RG3B-XL42>.

89 For this argument, see Frédéric Mégret, 'From a Human Right to Invoke Consular Assistance in the Host State to a Human Right to Claim Diplomatic Protection from One's State of Nationality?' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press, 2020) 453.

90 *Report of the International Law Commission*, UN Doc A/61/10 (n 83) 94.

91 See generally Anna Maria Helena Vermeer-Künzli, 'The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument' (PhD Thesis, Leiden University, 2007).

rights of persons within one's jurisdiction.[92] This obligation to protect is the obligation to ensure that such persons' rights are not violated by third parties.[93] It is certainly not specifically connected to the idea of protection of nationals abroad and, in fact, its main thrust is that it operates within the territory of the state of nationality. Indeed, nationals abroad are, at least at first blush, not 'within the jurisdiction' of their state of nationality, and this is indeed the justification most commonly provided by states of nationality for denying them assistance and clinging to the old idea that diplomatic protection is entirely discretionary. Yet the common protective terminology (diplomatic protection, obligation to protect) is not entirely innocuous either.

Although the state of nationality has no jurisdiction *in* the foreign state, this does not mean that it does not have a limited, at least residual jurisdiction *over* its nationals in that foreign state. The debate on extraterritoriality in human rights has almost entirely been framed in relation to extraterritorial, 'cosmopolitan' obligations to non-nationals, vis-à-vis which it is indeed much harder (although not impossible) to assert that a jurisdictional link exists.[94] When it comes to the state's *own* nationals, however, the link of nationality may well be considered to constitute an ongoing and sufficient jurisdictional link for the purposes of providing protection that is already within the power of the state of nationality to provide (eg assistance, possibly diplomatic protection and even, in some cases, repatriation).[95] Especially in cases where the host state is 'unwilling or unable' to provide protection and where failure by the state of nationality to do anything would lead to rights violations, the latter state may come to have a crucial if residual role.

In terms of a general obligation to protect, the *Ilaşcu v Moldova* judgment of the European Court of Human Rights provides authority for the notion that a state at least continues to have human rights obligations to its citizens who live in an occupied part of its territory where it no longer has effective authority.[96] It seems it is only a small step to extend this reasoning to the territory of third states altogether. Diplomatic practices and, notably, the increasing recognition of at least a 'duty of care' of foreign ministries to respond to threats to the security of their nationals, although probably not reflective of a strong *opinio juris*, indicate that carelessness about the rights of one's citizens abroad is no longer an option.[97]

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92 Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9(2) *Human Rights Law Review* 225.

93 Ibid 226.

94 See den Heijer and Lawson (n 6).

95 For an effort to recast diplomatic protection from a human rights lens, see Sébastien Touzé, *La protection des droits des nationaux à l'étranger: Recherches sur la protection diplomatique* [Protection of the Rights of Nationals Abroad: Research on Diplomatic Protection] (Pedone, 2007).

96 *Ilaşcu v Moldova* [2004] VII Eur Court HR 179, 262–7 [310]–[335], 278–82 [376]–[394]. On the requisite proximity for the application of the obligation to protect in the international law of alien protection and human rights, see Monica Hakimi, 'State Bystander Responsibility' (2010) 21(2) *European Journal of International Law* 341, 342.

97 See Nina Græger and Wrenn Yennie Lindgren, 'The Duty of Care for Citizens Abroad: Security and Responsibility in the In Amenas and Fukushima Crises' (2018) 13(2) *Hague Journal of Diplomacy* 188.

IV CONCLUSION

This commentary has highlighted the importance of sovereign protection of nationals abroad as a phenomenon to understand current developments that resurrect long neglected international legal motifs whilst simultaneously transcending them. The vulnerability of nationals abroad, as illustrated among others by the COVID-19 pandemic, in a context where the host state may not be particularly able or willing to safeguard their rights, has created new opportunities for vigorous action by the state of nationality. For example, Mexico became alarmed during the COVID-19 pandemic that seasonal Mexican farm workers in Canada were being infected on a large scale as a result of poor accommodation.[98] The Mexican authorities took up the issue at the highest level with their Canadian partners, temporarily stopped the flow of migrant workers to Canada and eventually came to an agreement with the Canadian authorities that would allow better monitoring of working conditions.[99]

It is in the nature of such interventions, novel and sui generis as they may be, that they crystallise certain expectations about one's state and its residual obligations to its citizens abroad. The idea that arrangements that objectively benefit individuals were actually never subjectively for their benefit will increasingly strike the human rights mind as odd, prompting calls for state prerogatives to be used — within certain limits, no doubt — for the benefit of the very persons whose rights protection stands to be enhanced as a result.[100] International law will increasingly be asked to mediate the tension between the host state and the state of nationality, even as diasporas themselves become increasingly vocal actors in their own legal destiny vis-à-vis both states.[101]

The phenomenon is probably more pervasive than commonly thought, although hardly all-encompassing. International and private alternatives for protection exist that bypass the role of the state of nationality altogether — in fact, to call them alternatives misrepresents the fact that they are by now largely dominant. Consider the case of reparations, for example. Individuals are more likely these days to seek them from the host state directly and, failing that, appeal to some supranational human rights body. When it comes to investment, corporations are more likely to sue states directly or seek arbitration than invoke the protection of their state. In other words, agents are relatively unlikely to go

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98 'Mexico Hits Pause on Sending Temporary Foreign Workers after COVID-19 Deaths', *CBC News* (online, 15 June 2020) <https://www.cbc.ca/news/canada/windsor/mexico-pauses-tfw-to-canada-covid-1.5613518>, archived at <https://perma.cc/ZS8Y-PNHP>.

99 Amanda Coletta and Gabriela Martínez, 'Migrant Farmworkers Die in Canada, and Mexico Wants Answers', *The Washington Post* (online, 19 June 2020) <https://www.washingtonpost.com/world/the_americas/migrant-farmworkers-die-in-canada-and-mexico-wants-answers/2020/06/18/2e419766-b00a-11ea-8f56-63f38c990077_story.html>, archived at <https://perma.cc/CH7D-S77X>; Stephanie Levitz, 'Mexico to Resume Sending Workers after Promise of Improved COVID-19 Protections', *National Observer* (online, 22 June 2020) <https://www.nationalobserver.com/2020/06/22/news/mexico-resume-sending-workers-after-promise-improved-covid-19-protections>, archived at <https://perma.cc/Q3PF-C9LC>.

100 Annemarieke Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18(1) *European Journal of International Law* 37.

101 Larissa Van den Herik and Frédéric Mégret, *Diasporas and International Law* (Cambridge University Press, forthcoming).

'horizontal' and activate interstate frameworks, to the extent that there are perfectly accessible domestic and supranational ones to choose from 'vertically'.

This is not to mention a range of transnational mechanisms by which they may also obtain satisfaction and that bypass not so much the horizontal axis as the state altogether. Corporations, travel agencies, insurance companies and security companies all provide an array of services to persons abroad that are protective in the broad sense of the term and may even be informed by their own quasi-legal concept of 'duty of care'.[102] For example, in case of repatriation following a disaster, individuals may expect the company that flew them to a foreign country to fly them back. Corporations may even rely on private security companies to provide them with options in case of a breakdown of the security situation. In neither case is the state of nationality likely to be their first thought.

None of this should obscure, however, the powerful role that the state will continue to play as a sort of ultimate guarantor of extraterritorial protection. Even the privatisation of extraterritorial functions is in part merely a consequence of the neoliberalisation of the state but remains tethered to the sovereign. These supranational or private protective vehicles, moreover, are not always available or efficient. In such a case, turning to one's state for further support and specific action may be a significant element in tipping the balance in one's favour. Following major disasters or war outbreaks, it is often only the state that has the wherewithal to deploy forces to rescue nationals stranded abroad. Individuals or corporations do not have (for the most part) diplomatic offices or militaries. They are not embedded in the matrix of international law in the way states are and therefore cannot draw on its privileges. In times of exception, when normal institutions fail, populations remain reliant on the residual backing of their sovereign. Indeed, the state remains the holder of a series of key functions and prerogatives that make it uniquely suited to the task of protection: it has the political, diplomatic, economic and sometimes military muscle to make its case heard by another state; it can act as an aggregator of multiple claims that would otherwise stand little chance of being resolved on their own; and it is increasingly, whether domestically or internationally, under an obligation to provide such protection.

In more theoretical terms, the return of 'sovereign protection', within and beyond the state's borders, suggests a not necessarily wholesome fusion of at least three registers. First, a neo-romantic focus on 'nationals' at the expense of the territorialisation of protection and state action. This could be at the expense of non-national residents, dual nationals or racialised nationals within the state's territory, as well as at the expense of the sort of 'distant strangers' that were, for better or for worse, the focus of cosmopolitan discourse. It could also herald forms of protection and even political organisation that shun the traditional international legal emphasis on territory to recompose allegiances, citizenship and sovereign responsibility along much more personal/national lines, especially if the line between nationals and ethnic kin is blurred.

Second, a neo-Hobbesian insistence on 'protection' as expressing a basic but also potentially quite forceful emphasis on human security that dramatises the stakes and that may drive protection towards hostile or violent policies. Forceful

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[102] See generally Maaike Okano-Heijmans and Matthew Caesar-Gordon, 'Protecting the Worker-Citizen Abroad: Duty of Care beyond the State?' (2016) 2(4) *Global Affairs* 431.

intervention, needless to say, does not become legal merely because it is claimed to be on behalf of one's nationals. Nor will 'protection' always do justice to the complexity of the needs of populations abroad, including due to their continued vulnerability to the policies of the host state. An overblown intervention by the state of nationality, for example, could put a diaspora in a very tricky situation and compromise a fragile local modus vivendi.

Third, a neoliberal emphasis on rights discourse as providing not only a reason but a *duty* for states to intervene on behalf of their nationals abroad. This shifts the emphasis away from traditional duties to other states (notably, to respect their sovereignty) and towards amorphous transnational entities whose 'rights' protection may lead to renewed interference and hegemony. It creates opportunities for juridification, constitutionalisation and adjudication, but it also potentially creates competing sovereignties for human rights purposes, depoliticises complex issues of foreign policy and can lead to the excessive prioritising of the interests of nationals abroad.

On the bright side, then, the mutation charted in this commentary may herald a more pragmatic, decentralised and communitarian take on human rights, one in which states are the acting centres of broader transnational–national communities that frame republican solidarities and one which increasingly expresses itself on a South–North axis. On the dark side, the emphasis on 'my nationals' human rights' may merely resurrect imperial patterns, further splinter the already highly unequal status of nationals and foreigners and create explosive tensions between states.