

**Participation and the Protection of Citizens Abroad in
International Law**

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Declaration

I hereby state that this thesis is entirely my own original work and has not been submitted for any other degree at any other university or educational institution. All sources of information have been indicated and due acknowledgement has been given to the work of others.

Signed:

Suzanne Akila

For Sufyan and Laila

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Abstract

While the concept of protecting citizens abroad is a familiar one in public debate and international law, the practice of protection is little studied. Two ideas define the way in which the protection of citizens abroad is understood. Since the early twentieth century, international legal scholarship has contemplated the protection of citizens abroad through the decisions of international courts and tribunals. Many legal and non-legal measures may be taken to protect a citizen from a violation of international law abroad, yet scholars focus their attention narrowly on international legal cases. The second idea is that protection is a State enterprise. States may be praised for their interventions on behalf of their citizens or lambasted for their inaction. Scholarly analyses focus almost exclusively on State behaviour and preferences, without considering how other actors may influence, drive or inhibit protection. These framing ideas, international litigation as protection and a focus on States as protective actors, obscure other dimensions of protecting citizens from violations of international law abroad.

This thesis investigates the nature of participation in the protection of citizens abroad and its significance for international law. It explores the actors who drive and deliver the protection of nationals, the behaviours that constitute the practice of protection, and the motivating factors for protective behaviour. The purpose of the study is to better understand the phenomenon of protection. The thesis examines examples of protection by Germany, Mexico and Australia. I observe that the protection of citizens abroad is a multi-actor phenomenon, where networks of actors form together to produce protective outcomes. Where there is an alignment of values and the opportunity to harness expertise, networks may form to devise strategies of intervention and perform tasks of protection. I propose that, in order to better account for participation in the international order, a more complex view of sovereignty is needed. I argue that the protection of citizens abroad is best understood through the concept of distributive sovereignty, whereby States distribute and delegate their protective functions across a network of State and non-State actors.

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Chapter 1

Introduction

International law characterises the protection of citizens abroad as an exclusively State enterprise.¹ Ideas of sovereignty, citizenship and State responsibility in international law have influenced this trajectory. Yet many international lawyers have come to recognise that a focus only on States fails to capture the full suite of activity in the international legal order, thereby obscuring the ‘reality of international legal participation’, and various modes of protection.² This thesis investigates the nature of participation in the protection of citizens abroad. It explores the actors who drive and deliver the protection of nationals, the behaviours that constitute the practice of protection, and the motivating factors for protective behaviour.³ The purpose of the study is to better understand the phenomenon of protection by examining its modalities. It also considers the significance of these practices for international law.

Public and scholarly focus on States in the protection of citizens abroad has not been without reason. The relationship between citizen and State is central to understandings of the protection of citizens abroad. Nationality serves as a powerful concept linking an individual to the State in a number of legal, political and social ways.⁴ Moreover, citizens are an integral aspect of statehood in international law.⁵ A national’s treatment abroad may affect a State’s interests, including economic or political interests or other kinds of values like human rights. States elect which values or interests to pursue by protecting nationals who embody those values abroad.

The contemporary practice of protecting citizens abroad is poorly understood, even from an exclusively State-centred perspective. Protection can be manifested by an array of actions, but there are few studies that identify or analyse who participates and

¹ See, eg, Edwin Borchard, *The Diplomatic Protection of Citizens Abroad: Or The Law of International Claims* (Banks Law Publishing Company, 1915); John Dugard, ‘Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission’ (2005) 24 *Australian Yearbook of International Law* 75; James Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge University Press, 2002).

² Robert McCorquodale, ‘Beyond State Sovereignty: The International Legal System and Non-State Participants’ (2006) 8 *International Law: Revista Colombiana de Derecho Internacional* 103, 106.

³ Note I use the terms ‘citizen’ and ‘national’ interchangeably in this thesis.

⁴ James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 509-510.

⁵ *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).

how. As an area where law, politics and sovereignty collide, many variables influence if, how and why a national may receive protection from his or her State of nationality. Some of the factors that affect whether or not an intervention will occur include the nature of the harm, the locale in which the harm occurs, the character or status of the national, and the extent to which the harm relates to State interests. The question of whether an individual should be protected is coupled with concern about *how* a national will be protected. Until 1945, the use of force was a legitimate mechanism for the protection of nationals abroad.⁶ However, rules in international law now limit efforts of protection to peaceful means.⁷ A national may receive consular assistance or be the beneficiary of diplomatic representations by her State of nationality. Sometimes a State brings a legal action in an international court or tribunal to seek a remedy on behalf of its citizen.

The modern enterprise of protecting nationals abroad attracts a wide range of actors. Non-State actors, particularly civil society organisations, are now involved. One example of the role of non-State actors is human rights advocacy and campaigning by civil society organisations.⁸ Many writers situate the protective behaviour of non-State actors in isolation from State action, or do not consider it to be protection at all. However, non-State actors can influence when States protect their nationals and the kind of strategies that are employed. Non-State actors, such as human rights organisations, have even performed functions traditionally belonging to the State, such as litigation and making representations on an individual's behalf.

The modalities of protection by both State and non-State actors have had little academic investigation or analysis. Most scholarly attention has been focused on litigation on behalf of nationals before the International Court of Justice (ICJ). Scholars have primarily shown interest in doctrinal aspects of these cases, rather than the broader question of how and why litigation has been used as a tool of protection. The nature of doctrinal analysis also has the effect of rendering invisible the participation or contribution of non-State actors by focusing only on the narrative of the State parties.

Finally, little is known about the patterns or strategies of protecting citizens abroad, how diplomatic protection is exercised beyond ICJ litigation, the actors that contribute

⁶ Mathias Forteau, 'Rescuing Nationals Abroad' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 947, 954.

⁷ See 'Text of the Draft Articles of Diplomatic Protection,' in International Law Commission, *Report of the International Law Commission on the Work of its 58th Session*, UN GAOR, 61st sess, Supp No 10, A/61/10 (1 May - 9 June and 3 July - 11 August 2006) 16 [49] ('*Draft Articles on Diplomatic Protection with Commentaries*' or '*Draft Articles on Diplomatic Protection*').

⁸ Reprieve, Amnesty International, and Human Rights Watch each have programmes addressing the treatment and protection of individuals abroad.

to its practice or why it is exercised at all. International law defines the rules of protection, but techniques of protection combine political, diplomatic and legal means. Questions exist as to whether new techniques have accompanied the increased participation of non-State actors or if States themselves have adapted their responses. And while it is clear that law's role is an important one, the extent of its power as a mechanism of authority has escaped scrutiny.

Diplomatic Protection in International Law

Emer de Vattel presented the protection of citizens abroad as an issue related to the law of nations in 1758, characterising it as a right of States.⁹ He opined that there were some kinds of harm against a citizen that were of such a nature that they could be considered to be harm against the State itself.¹⁰ In this sense, States can choose to stand in the place of their nationals to seek a remedy for the harm inflicted by the offending foreign State. This concept of transforming individual injury to State injury coupled with the ability of States to pursue action on a national's behalf is referred to as the doctrine of diplomatic protection. The proximity of State/citizen interests and Vattel's characterisation of protection as a matter related to the law of nations have shaped the way in which protection is regulated in international law.

Since Vattel's characterisation of protection, international law has been the main vehicle for addressing the protection of citizens abroad.¹¹ The law of State responsibility, the law on the treatment of aliens, the law of diplomatic protection, law on nationality, international human rights, and international investment law address the protection of citizens.¹² The International Law Commission (ILC), a UN body

⁹ Emer de Vattel, *Law of Nations* (Béla Kapossy and Richard Whatmore trans, Liberty Fund, 2008) [trans of: *Le Droit Des Gens* (first published 1758)].

¹⁰ For further discussion of Vattel and diplomatic protection see Kate Parlett, *The Individual in the International Legal System* (Cambridge University Press, 2011) 49; M Sornarajah, *International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 121.

¹¹ See, eg, Borchard, *Diplomatic Protection of Citizens Abroad*, above n 1; Frederick Sherwood Dunn, *The Protection of Nationals: A Study in the Application of International Law* (John Hopkins Press, 1932); Alwyn V Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green and Co, 1938); Chittharanjan F Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford University Press, 1967); Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia, 1983); Francisco V García-Amador, *The Changing Law of International Claims* (Oceana Publications, 1984); Carmen Tiburcio, *The Human Rights of Aliens Under International and Comparative Law* (Martinus Nijhoff, 2001); John Dugard, 'Diplomatic Protection' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press Online, 2012); Annemarieke Vermeer-Künzli, *The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument* (PhD Thesis, Leiden University, 2007); Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008).

¹² See García-Amador, above n 11; Amerasinghe, *Diplomatic Protection*, above n 11.

established in 1947 for the purpose of codifying and developing international law, undertook programmes of study to codify the rules of diplomatic protection.¹³ The ILC's programme of study concluded in 2006 with the adoption of the *Draft Articles on Diplomatic Protection*, which reflect the customary international rules of diplomatic protection.¹⁴

The Draft Articles on Diplomatic Protection define diplomatic protection as:

the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.¹⁵

This definition reveals two features of the legal regime regulating the protection of citizens abroad. The first is that responsibility for breaches of international law against individuals is invoked between States.¹⁶ Second, the *Draft Articles on Diplomatic Protection* recognise the right of States to invoke protection in favour of their citizens, meaning that there is no obligation on States in international law to intervene if their citizens experience a human rights violation abroad.¹⁷ States can exercise their right to intervene in a number of ways, such as consular assistance, diplomatic representations, negotiations, mediation, arbitration, judicial settlement and severance of diplomatic ties.¹⁸

Definitions and Scope

Several terms and concepts at the heart of this thesis require definition. The first issue is the way in which the protection of nationals abroad is conceived. Most studies on protection refer to the legal concept of diplomatic protection in international law. However, I approach the protection of citizens abroad as a larger category than the

¹³ *Statute of the International Law Commission 1947*, GA Res 39/39 (18 November 1981) art 1(1). For a broader discussion of the ILC's work on State Responsibility see Crawford, *Articles on State Responsibility*, above n 1; for a discussion of diplomatic protection see John Dugard, 'Diplomatic Protection' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of State Responsibility* (Oxford University Press, 2010) 1051.

¹⁴ *Draft Articles on Diplomatic Protection with Commentaries*, 13 [49]. The *Draft Articles* themselves are not binding, however, they refer to and codify customary international law principles, which are binding. The Special Rapporteur on Diplomatic Protection also attempted to progressively develop some aspects of the law of diplomatic protection beyond the existing rules of customary international law.

¹⁵ *Draft Articles on Diplomatic Protection* art 1.

¹⁶ *Draft Articles on Diplomatic Protection with Commentaries*, 25-26.

¹⁷ John Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, International Law Commission, 52nd sess, Agenda Item 6, UN Doc A/CN.4/506 (7 March 2000). There are three requirements before a State may intervene: the commission of an internationally wrongful act (a violation of international law), the existence of a bond of nationality between the injured individual and the intervening State (article 3(1)), and that the individual has exhausted all domestic remedies in the foreign State.

¹⁸ Amerasinghe, *Diplomatic Protection*, above n 11, 27.

doctrine of diplomatic protection. The protection of citizens abroad, or ‘protection’ in this thesis, refers to a range of legal and non-legal actions by State and non-State actors on behalf of a citizen abroad in anticipation of or in response to a breach of international law. This definition therefore encompasses a wider range of behaviours and actors of which diplomatic protection is a subset.

Many of the practices this thesis explores fall somewhere along a continuum between consular assistance and diplomatic protection. Scholars have traditionally understood diplomatic protection as occurring once all domestic remedies in the foreign State have been exhausted. Within this view, all actions taken prior to exhaustion, or actions that are not taken by a State, do not constitute diplomatic protection. Moreover, the practice of diplomatic protection is an invocation of State responsibility, and therefore remedial in character. It is rare, except in legal cases, for a State to declare that it is adopting its citizen’s injury as its own. So in those circumstances where there is no international litigation, how can the behaviour of a State and its actors be identified as diplomatic protection? It seems that under the diplomatic protection regime in international law all actions taken prior to exhaustion are not protection, or rather that all actions taken after exhaustion are protection. Both these positions exclude practices that are protective in their intent and nature. This thesis explores these tensions and includes consular action within the definition of protection.

This work is limited to an examination of the protection of natural persons or citizens, even though the doctrine of diplomatic protection extends to legal persons. There is extensive scholarship on the protection of corporations particularly in international investment law.¹⁹ Protection in favour of corporations is fundamentally different in nature to the protection of individuals, and I only examine injuries against individuals falling within international human rights law and breaches of the *Vienna Convention on Consular Relations* (1963).²⁰

Another issue of scope and definition are the terms ‘citizen’ or ‘national.’ This thesis relies upon the definition of nationality provided in article 4 of the *Draft Articles on Diplomatic Protection*. In accordance with this definition, if a person has acquired nationality in accordance with the laws of their State either ‘by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with

¹⁹ See generally Campbell McLachlan, Lawrence Shore and Matthew Weiniger, *International Investment Arbitration* (Oxford University Press, 2007); Kate Parlett, ‘Diplomatic Protection and the International Court of Justice,’ in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013) 87, 104.

²⁰ *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).

international law' then I have referred to that individual as a citizen or a national of the State concerned.²¹ Articles 3(2) and 8 of the *Draft Articles on Diplomatic Protection* envisage that States may extend diplomatic protection to lawful habitual residents, stateless persons and/or refugees. The inclusion of a broader range of potential beneficiaries of diplomatic protection in these specific articles is an exercise in progressive development of the law and fall outside the scope of this thesis.

This thesis investigates behaviours and activities of actors beyond the State. The term 'non-State actors' has been criticised by international lawyers for being a negative definition in relation to States.²² Some scholars suggest that 'public' and 'private' actors may be a better demarcation.²³ Distinctions are drawn in the following chapters between the general category of non-State actors and the narrower category of civil society organisations. The broader category of non-State actors is used to describe individuals, the media, professional associations and academics, whereas I use the term civil society organisation to refer in particular to human rights organisations and advocacy groups.

Participation is also a concept that requires some elaboration for the purpose of this thesis. There are various conceptions of participation in the international system. The right to participate as an actor in international law is traditionally predicated on statehood. States occupy a privileged position in international law as 'subjects' or the bearers of the full suite of rights and obligations in the legal system. All other things and entities not capable of bearing international rights and duties fall into the category of 'objects' of international law.²⁴ This characterisation, sometimes referred to as the 'subject/object dichotomy', 'legal subjectivity' or 'international legal personality', dominates understandings of and practices within the international legal system. For example, standing to appear before the ICJ is limited to States.²⁵ In relation to the protection of citizens abroad, the structure of diplomatic protection as an inter-State action manifests this classical approach.

²¹ *Draft Articles on Diplomatic Protection with Commentaries* art 4, 31.

²² See, eg, Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 3, 14-19.

²³ Anne Peters, Till Förster and Lucy Koechlin, 'Towards Non-state Actors as Effective, Legitimate and Accountable Standard Setters' in Anne Peters et al (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 492, 536.

²⁴ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 49.

²⁵ Statute of the International Court of Justice art 34(1).

Recent scholarship in international law signals a departure from the classical premise of participation in the international legal system.²⁶ James Crawford describes the problem of traditional legal subjectivity:

International law affects everyone but participation in the international law system is very unevenly distributed. Traditionally only States were considered subjects of international law, but this is no longer true.²⁷

Since the ICJ decision in the *Reparations* case, which recognised the possibility that non-State actors can bear rights and responsibilities in international law, legal scholarship has challenged the ‘subject-object dichotomy’ as the sole basis for understanding international legal participation.²⁸

This study takes as its starting point Rosalyn Higgins’ concept of ‘participation’ in the international legal system.²⁹ In Higgins’ view, international law is a process of decision-making. She rejects that only States are subjects of international law and, in fact, rejects the subject/object dichotomy as a misnomer.³⁰ Instead, Higgins adopts a wide view of participation where there are number of participants in the international legal system, who variously possess rights and duties and participate in the process of decision-making. She claims that ‘within that process (which is a dynamic not a static one) there are a variety of participants, making claims across state lines, with the object of maximizing various values.’³¹ Higgin’s concept of participation in the international legal system enables a broader range of actors, behaviours and values to be identified and analysed in the international legal order.

²⁶ See, eg, McCorquodale, ‘Beyond State Sovereignty’, above n 2; Robert McCorquodale, ‘An Inclusive International Legal System’ (2004) 17 *Leiden Journal of International Law* 477; Higgins, above n 24, 50; Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2013); Parlett, *The Individual in the International Legal System*, above n 10.

²⁷ James Crawford, *Chance, Order, Change: The Course of International Law* (The Hague Academy of International Law, 2014) 181-82.

²⁸ *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174. See, eg, Higgins, above n 24, 50; Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press, 2004); Anthony Carty, ‘International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law’ (2005) 6 *Melbourne Journal of International Law* 534.

²⁹ Higgins, above n 24, 39.

³⁰ *Ibid* 49.

³¹ *Ibid* 50.

Approaches to the study of international law

Traditional approaches

The protection of citizens abroad, and especially diplomatic protection, are most often studied within international law's dominant theoretical and methodological framework: legal positivism. Positivism takes as its baseline positive rules regulating State behaviour that are based on State consent. The positivist approach centres on States as the ultimate generators of law. International law, according to positivists, is a set of rules governing relations between States.³² The positivist origins of international law have influenced the manner in which international law is studied and understood. German jurist, Lassa Oppenheim, characterised international law as a science based on the process of establishing, applying and critiquing rules governing the relations of States.³³ He stated that the primary task in international law is to determine:

... the existing recognized rules of international law. Whatever we think of the value or a recognized rule – whether we approve or condemn it, whether we want to retain, abolish, or replace it – we must first of all know whether it is really a recognized rule of law at all, and what are its commands.³⁴

Oppenheim outlined several aspects of the method of international law, including establishing the historical origins of rules, criticising rules, preparing rules for codification, encouraging the peaceful settlement of disputes between States and, the interpretation of the rules in treaty and custom.³⁵

A focus on rules has dominated the field. Some writers note that, unlike the approach taken in international relations, international lawyers avoid causal analysis or prediction.³⁶ Tom Ginsberg and Gregory Shaffer observe that the majority of international law scholarship relates to 'formal law and normative prescription, paying special attention to the International Court of Justice.'³⁷ Some scholars critique the narrow focus of positivism in international legal scholarship: 'beneath the surface of much scholarship ... are a host of unanswered questions about presuppositions, conceptions and missions, all of which influence how they undertake their analyses of an issue'.³⁸ Hans Morgenthau criticised the positivist approach to international law as

³² Cf Crawford, *Chance, Order, Change*, above n 27, 179. Crawford characterises international law as a system, not merely rules.

³³ Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2(2) *American Journal of International Law* 313.

³⁴ *Ibid* 315.

³⁵ *Ibid* 314-322, 349.

³⁶ Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, 191.

³⁷ Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106(1) *American Journal of International Law* 1, 2.

³⁸ Steven R Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *American Journal of International Law* 291, 291.

a 'juridical pseudo-logic' which was an 'artificial makeshift by which a stationary law could be reconciled with a moving social reality.'³⁹ Yet, positivism remains central to international law as a discipline and a profession.⁴⁰ While it may not encompass all the power, politics and participants of the international legal system, it persists as the dominant method for identifying international legal rules.

Positivism has influenced nearly all scholarly excursions into the protection of citizens abroad. The sources of international law, as understood within positivism, have guided legal scholars away from studying the practice of protection. International lawyers have been concerned classically with identifying or developing rules to regulate the behaviour and relations of States. The *Statute of the International Court of Justice* (the 'Statute') defines the sources of international law as treaties, custom, general principles of international law, and the subsidiary sources of judicial decisions and academic contributions.⁴¹ The rulings of the ICJ, while not a binding source of law in themselves, contribute to a corpus of the recognised rules of international law and their interpretation.⁴² By articulating the sources for resolving disputes between States, the *Statute* has also had the influence of directing the inquiry and method of legal scholarship to rule-elaboration in international law.⁴³ A doctrinal approach does, of course, enable an assessment of State behaviours through the identification of customary international law (State practice and *opinio juris*). However, a methodological framework based on identifying doctrine is restricted to the behaviour of States alone and therefore cannot address fully the question of participation in the protection of citizens abroad.

Another problem, which is not limited to the area of protection, is the secrecy surrounding State practice or conduct. The legal foundation of the protection of citizens abroad is State interest. States may be reluctant to release information about the existence or content of negotiations or diplomatic representations made on behalf of their citizens. States are even more guarded in relation to national security or sensitive relationships with other States. In response, many scholars have relied on case law for their analyses given its availability and public nature. These sources exclude much of

³⁹ Hans J Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34(2) *American Journal of International Law* 260, 270. Note, however, that Morgenthau's position has been criticised as 'simplistically cynical'. See Richard Falk, 'The Adequacy of Contemporary Theories of International Law – Gaps in Legal Thinking' (1964) 50(2) *Virginia Law Review* 231, 233.

⁴⁰ Anne Orford, 'Scientific Reason and the Discipline of International Law' (2014) 25(2) *European Journal of International Law* 369, 372.

⁴¹ *Statute of the International Court of Justice* art 38.

⁴² *Ibid* art 59.

⁴³ Oppenheim, above n 33, 313.

the practice of protection from critical analysis, particularly actions prior to legal proceedings.

The approach in this thesis has been informed by these restraints. I engage with frameworks that examine international law and its actors beyond the macro level of rules and State behaviour. The thesis is informed by three approaches: network theory/nodal governance, practice theory and international legal history.

Networks, nodal governance and practice theory

What is a network? A network can be defined as ‘a group of people who exchange information, contacts, and experience for professional or social purpose’ but also ‘an arrangement of intersecting vertical and horizontal lines.’⁴⁴ A theory of networks can be understood as the study of individuals, organisations and institutions, and the lines that connect them together in social, political and legal action or purpose. Networks can also be understood as a theory for dissecting and reassembling decision-making or the implementation of policy between a range of State and non-State actors.⁴⁵ The motivation behind applying a network-based approach is to enable governance processes to be viewed as ‘interactive, fragmented, multidimensional policy-making involving a range of state and non-state actors’.⁴⁶ This inclusion of all actors is necessary for a pluralistic view of influence where actors are both subjects and objects of regulation.⁴⁷ One theory of networks is Bruno Latour’s Actor-Network Theory (ANT). In Latour’s theory, both human and non-human entities are included in analysis thereby ‘accounting for the very essence of societies and natures.’⁴⁸ Latour explains the power of the network nicely: ‘[s]trength does not come from concentration, purity and unity, but from dissemination, heterogeneity and the careful plaiting of weak ties.’⁴⁹ The strength formed in networked connections between actors is not defined by geography, but by association.⁵⁰ This is exemplified in transnational networks of global civil society, where actors (individuals and organisations) are associated by common goals and value orientations.

⁴⁴ *Oxford English Dictionary* (Oxford University Press, 3rd edition, 2010) 1193.

⁴⁵ Rachel Parker, ‘Networked Governance or Just Networks? Local Governance of the Knowledge Economy in Limerick (Ireland) and Karlskrona (Sweden)’ (2007) 55(1) *Political Studies* 113, 118.

⁴⁶ *Ibid* 116.

⁴⁷ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 23.

⁴⁸ Bruno Latour, ‘On Actor-Network Theory: A Few Clarifications’ (1996) 47 *Soziale Welt* 369, 369.

⁴⁹ *Ibid* 370.

⁵⁰ *Ibid* 371.

Network theory and nodal governance offer diagnostic models for analysing the connections between different actors and entities. Braithwaite and Drahos' model of 'webs of influence' identifies axes of actors, mechanisms and principles to distil and examine different relationships.⁵¹ In their work on nodal governance, Burris, Drahos and Shearing propose a model for understanding concentrations of power within networks in what they refer to as 'nodes.'⁵² They note that networks of actors intersect and that those intersections or nodes are sites of governance where actors and networks can exercise regulatory power.⁵³ Both modes of inquiry, webs of influence and nodal governance, recognise the plurality of actors in global governance. The case studies in this thesis engage these approaches to disaggregate the State enterprise of protection of citizens abroad and to identify how actors are connected, the techniques they use and the factors that contribute to their success and participation.

An advantage of network theory is that it penetrates the inherently 'macro' doctrinal narrative of international law. The macro doctrinal narrative focuses on State responsibility and the rules that govern when States can intervene on behalf of their citizens abroad. Moreover, traditional international legal scholarship focuses on formal legal connections. The network theory narrative, by contrast, involves an analysis of smaller or more specific actors and their contribution to challenging or building practice of international law and the protection of citizens in specific instances or regions. The actors, processes and values that contribute to the protection of citizens abroad become visible through a network lens.

Based in the discipline of international relations, practice theory similarly examines the actions and practices of diplomatic actors.⁵⁴ Adler and Pouliot argue that a view of international relations and world politics through the lens of the practices or 'competent performances' enables a better account of the global system.⁵⁵ They provide definitional parameters for understanding practices through a hierarchy of behaviour, action and practice:

The distinction between behavior and action is the easiest to grasp: action is behavior imbued with meaning. Running in the streets aimlessly is mere behavior, running after a thief is an action endowed with meaning. Practices, however, are patterned actions that are embedded in particular organized contexts and, as such,

⁵¹ Braithwaite and Drahos, above n 47, 551.

⁵² Scott Burris, Peter Drahos and Clifford Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30, 36.

⁵³ *Ibid* 39.

⁵⁴ Emanuel Adler and Vincent Pouliot, 'International Practices' (2011) 3 *International Theory* 1.

⁵⁵ *Ibid* 2.

are articulated into specific types of action and are socially developed through learning and training... [references omitted].⁵⁶

Adler and Pouliot favour an empirical approach to the study of practices, emphasising context and language for diagnosing the different levels of behaviour, action and practice.⁵⁷ This thesis examines international and domestic practices of a range of State and non-State actors and identifies patterns in protective actions. Together with network theory and nodal governance, this methodological orientation of examining micro-processes informs the analysis in this thesis on how the behaviour of actors contributes to changing practice of the protection of citizens abroad.

Events, concepts, people

International legal history is an evolving methodology in international law with scholars applying it in different ways.⁵⁸ Fassbender and Peters note that there are two dominant strains of legal history in international law: doctrinal history, which they describe as ‘the teachings of important theorists of international law, their development, and interaction,’ and diplomatic history (an area they relate to military history) which concentrates on States and treaty-making.⁵⁹ However, Fassbender and Peters criticise these dominant approaches, particularly for the manner in which they consider law as a ‘variable of political and military events.’⁶⁰ Moreover, doctrinal and diplomatic histories replicate the classical approach to the protection of citizens abroad, whereby scholars treat ‘history’ as the history of rules rather than practice. A more critical account of international law’s development and the role of law has emerged in recent scholarship. These approaches lend themselves to a new analysis of protection in international law.

Writing on the emergence of history and historiography in international law, Hueck recognises that ‘[i]deas in international law are not created in vacuums, but as a result of the interaction of various protagonists within the academic, diplomatic, political and economic fields’.⁶¹ Examples of this approach include Peevers’ analysis of the role of law in justifying the use of force or Pearson’s ‘negotiation tracing’ analysis of the civil

⁵⁶ Ibid 5.

⁵⁷ Ibid 8.

⁵⁸ Ingo J Hueck, ‘The Discipline of the History of International Law: New Trends and Methods on the History of International Law’ (2001) 3 *Journal of the History of International Law* 194, 212.

⁵⁹ Bardo Fassbender and Anne Peters, ‘Introduction: Towards a Global History of International Law’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2014) 1, 12.

⁶⁰ Ibid.

⁶¹ Hueck, above n 58, 213.

society in the Rome Statute negotiations.⁶² These inquiries report on and analyse a negotiation process or series of decisions, providing an account of specific actors and the dynamics leading to the outcomes. This kind of international legal history widens the scope of activity to be captured and rejects the State as the central unit of analysis.⁶³ From a methodological perspective, some scholars writing in this area have framed inquiries on the history of international law through the prisms of events, concepts and people.⁶⁴

This study considers the categories of events, concepts and people in past instances of protection in order to examine how past instances of protection occurred and who participated. Each of the case study chapters provides a narrative of the protection ‘event’ in the form of the process of decision-making, the narrative of individual participation and motivation, and protagonists’ contributions to the development of a concept or course of action. In line with newer approaches to international legal history, the chapters detail networks, their modes and the nature of their connections. The case studies focus on processes or ‘transformation’ rather than the outcomes of legal cases.⁶⁵ While this thesis is not formally international legal history, it engages in the method and concern of this field for micro-processes and the role of individuals in international legal events and concepts.

Micro international law

The study of international law, with a focus on actors, motivations, power and practice, is what I refer to as a ‘micro’ international law approach or methodology.

A micro international law approach is informed by and, in some ways, is a reaction to the idea of macro international law. Macro international law focuses on the behaviours of States and international institutions, actors that I will refer to as ‘macro actors.’ Many accounts of international law examine macro actors and the rules that govern them. However, each of the approaches discussed above are interested in the subcutaneous level of international law and global governance: they aim to discover what lies under the surface of traditional accounts of international law and politics.

⁶² Charlotte Peevers, *The Politics of Justifying Force: The Suez Crisis, Iraq War and International Law* (Oxford University Press, 2013); Zoe Pearson ‘Non-governmental Organizations and the International Criminal Court: Changing Landscapes of International Law’ (2006) 39 *Cornell International Law Journal* 243.

⁶³ Fassbender and Peters, above n 59, 9.

⁶⁴ Ibid 1; Onuma Yasuaki, Claudio Grossman and Outi Korhonen, ‘The History of International Law: Universality and Particularity’ (2000) 94 *American Society of International Law: Proceedings of the Annual Meeting 2000* 44, 46.

⁶⁵ Fassbender and Peters, above n 59, 9.

With a focus on a wider range of actors, micro international law examines the behaviour of the individuals, State sub-units and non-State actors not usually accounted for in classical narratives of international law. Apart from a more plural approach to actors, micro international law also interrogates the processes that contribute to international law and the way in which they shape power distribution in the global legal order. An inquiry of this kind is concerned with how the practices, motivations, affiliations and values of actors produce and constitute international law.

Some of the questions this approach may ask include, who are the actors and what are their goals? What techniques do they use to pursue their goals? How do actors contribute to the development of rules and process? What values do actors attempt to embed or challenge in the international system? What networks are these actors a part of and what role do their networks play? How is international law invoked or curbed by micro actors and how does this affect macro international law? The answers to these questions can help to reveal where power resides in international law, as well as inform solutions, normative agendas, and ultimately shape the mechanisms used to address problems of the global order.

This thesis then provides a micro international legal account of the protection of citizens abroad. Its primary concern, participation, cannot be addressed through traditional macro international law methodologies, such as doctrinal legal analysis or lawmaking. Instead, I aim to interrogate the nature of participation in the protection of citizens abroad through understanding the processes and practices of actors, the techniques they employ and their motivations.

Participation functions as a diagnostic probe for investigating protection. Yet, while this thesis examines the nature of participation in relation to the protection of citizens abroad, questions emerge about the nature of participation in international law more broadly. Debates about who has the right to participate in international law as a subject as well as more recent scholarship on how international law can better account for the involvement of non-State actors emerge. While existing approaches to participation have attempted to accommodate non-State actor participation, this scholarship is focused on lawmaking and liability. The case studies in this thesis, however, reveal different models of participation, especially through networks. I consider how different actors contribute not only to lawmaking and liability, but also to the fulfilment of rights and duties in international law.

Methods

This thesis uses several methods including semi-structured open-ended interviews, roundtable interviews, documentary analysis, participant observation and doctrinal analysis.

I present a comparative analysis of three national case studies of the protection of citizens abroad: Germany, Mexico and Australia. Germany and Mexico each brought cases in relation to the treatment of their citizens by the United States before the ICJ. Australia considered ICJ litigation as an avenue of protection, but did not institute proceedings.

While I have noted the over-emphasis of the discipline of international law on case law, two of the three case studies relate to litigated examples of protection in the ICJ. I selected this approach for two reasons. The first reason relates to the use of litigation as a last resort for States in dispute resolution. I proceeded on the assumption that States and other actors would use other peaceful means, like negotiations, consular and diplomatic representations, to resolve their disputes prior to the commencement of legal proceedings.⁶⁶ The two litigated cases provide a rich source of data about the suite of non-ICJ measures and the preferences of actors to use those mechanisms. The second reason relates to the 'publicness' of the cases in the ICJ. I was able to rely on publicly available information provided by the parties in the ICJ cases as a foundation for making further inquiries into the actors, their motivations and strategies, as well as to trace the processes leading to litigation. Moreover, the contentious nature of the cases had subsided allowing participants to speak more candidly about their experience and views in the interviews.

Another reason for the selection of Germany, Mexico and Australia was my aim to capture a cross-section of global practice. The cases provide examples of State practice from the global north and south, as well as civil and common law traditions. There are other States, such as the Philippines and Indonesia, which have protection programmes related to the rights of migrant workers that could have been considered.⁶⁷ However, I chose cases concerning similar violations for reasons of comparison and limited it to three cases in order to make the project achievable as a PhD thesis.

⁶⁶ *Draft Articles on Diplomatic Protection with Commentaries*, 27.

⁶⁷ See for example, Mary Lou L Alcid, 'NGO-Labor Union Cooperation in the Promotion of the Rights and Interests of Landbased Overseas Filipino Workers' (2006) 15(3) *Asian and Pacific Migration Journal* 335.

Each case study chapter addresses two aspects of the protection of citizens abroad. The first aspect considers a historical case and the second explores the domestic settings for the protection of citizens abroad in each of those States. The emphasis in the historical cases is on pre-litigation measures, not the legal outcomes of the cases. However, I have provided brief summaries of the judicial decisions where applicable. Examination of the domestic settings varies in each chapter. For example, more attention is given to Mexico's novel approach given that literature on the Mexican system in English is limited. The sections addressing domestic national systems are not intended to provide exhaustive descriptions, but rather, provide a context for the historical cases and a basis for understanding contemporary practices of protection. Overall, each chapter has a different emphasis: the Germany chapter focuses on pre-litigation action, the Mexico chapter examines various programmes and policy settings for the protection of Mexicans in the United States, and the Australian chapter explores the tensions between consular assistance and protection.

I conducted interviews with approximately 50 participants in the form of semi-structured open-ended interviews and roundtable discussions. These interviews and roundtables occurred in 2013-2014 in Germany, Belgium, United Kingdom, United States, Mexico and Australia. I interviewed government officials, civil society actors/organisations, legal practitioners from the ICJ cases, the second Special Rapporteur on Diplomatic Protection, and academics to understand how the protection of citizens abroad was achieved in each case. I also spoke with consulate officials from Mexico and Germany and former consular officials from Australia. I interviewed the Director of the Mexican Capital Legal Assistance Program and a senior lawyer from the project. I chose to interview persons who were directly involved in the cases, as well as those who work on policy and legal issues. I tried to speak directly to lawyers involved in the preparation of submissions for the ICJ cases. I interviewed at least one government lawyer and one non-government lawyer (i.e. external counsel retained by States) from each case. Some States were prepared to provide more information than others, as was the case with government departments. I held two government roundtables, one with officials from Mexico's Directorate of Protection and another with Consular and Crisis Management Division from the Australian Department of Foreign Affairs and Trade. As an officer with the Australian government I had access to government officials working on protection issues from both the legal and consular perspectives in Australia. I was permitted to undertake consular training provided by the Australian Department of Foreign Affairs and Trade. This training comprehensively addressed the role of consular officials and the welfare basis of the Australian protection system, including a visit to a maximum-security prison facility and a morgue.

In light of my affiliation, I interviewed a number of non-government practitioners and academics for their perspectives on the work and performance of the Australian government, as well as the other States examined, in order to provide a balanced analysis. This included interviews with Amnesty International's International Secretariat, Reprieve UK and Australians Detained Abroad. While many of the participants were happy to be identified in the thesis, in most instances I have not included this information in order to avoid third person identification.

Structure of the Thesis

This study is organised in three parts. Part I (chapters one, two and three) addresses historical and theoretical aspects of the protection of citizens abroad and methods for studying the practices of international law. Chapter two provides an introduction to the origin and development of the legal concept of diplomatic protection in international law. The chapter reviews the literature on diplomatic protection, including the legal conditions of its application and case law of the ICJ. It examines the contributions of doctrinal and State-centric studies to the narrative of protection. Chapter three addresses the relationship between structures of international law and methods for examining participation in the global order. It explores how international legal scholars have accounted for the involvement of non-State actors in lawmaking and accountability, while preserving traditional ideas of sovereignty. This chapter considers how network theory can be applied to the protection of citizens abroad and its participants.

Part II (chapters four, five and six) investigates three case studies of protection. Chapter four traces the narrative of *LaGrand* (Germany v United States), a case brought before the ICJ in 2001.⁶⁸ Germany commenced proceedings on behalf of two German nationals facing the death penalty in Arizona. Germany based its case against the United States on a breach of the *Vienna Convention on Consular Relations* as well as a claim for diplomatic protection in customary international law.⁶⁹ This chapter focuses on pre-litigation protection and the factors that contributed to the initiation of proceedings.

⁶⁸ *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 9 ('LaGrand').

⁶⁹ Vienna Convention on Consular Relations, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).

Chapter five considers the commencement of another ICJ case, *Avena* (Mexico v United States), based on the same VCCR breach as *LaGrand*.⁷⁰ This chapter also details Mexico's programmes for the protection of Mexican citizens in the United States. Several programmes embedded in the domestic system of the United States expose the changing form of protection as a phenomenon with both global and local expression.

Chapter six analyses the case of *Van Nguyen*, a matter that the Australian government contemplated taking to the ICJ. Unlike the other two cases this thesis examines, *Van Nguyen* provides an example of when networks of State and non-State actors take action separately, but do not merge. The Australian case study exemplifies a protective system directed towards non-legal means of protection.

Part III draws together the practice in the previous chapters and considers its significance for international law. Chapter seven analyses modes of engagement in the protection of citizens abroad, particularly through networks, and their relationship to sovereignty. This chapter revisits scholarship on sovereignty, either as the exclusive domain of the State or as a waning aspect of the world order. It explores how polarised views of sovereignty detract from understanding the way that complex global and transnational issues are dealt with through evolving governance arrangements between various actors, institutions and organisations. While some scholarship has taken into account the participation of a wider range of actors, it has done so through preserving a traditional conception of sovereignty in international law. I argue that in order to better account for participation in the international order, a more complex view of sovereignty is needed. The protection of citizens abroad is best understood through the concept of distributive sovereignty, whereby States distribute and delegate their traditionally exclusive protective function across a network of State and non-State actors.

⁷⁰ *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12 ('Avena').

Chapter 2

Diplomatic Protection in International Law

The legal framework that governs diplomatic protection in international law has been the primary lens for understanding participation in the protection of citizens abroad. From the first expression of the concept by Vattel to work by the Special Rapporteur on Diplomatic Protection in 2006, legal scholars construct diplomatic protection as an exclusively State enterprise. Studies on protection focus on doctrine developed by international courts and tribunals in resolving disputes between States. A broader understanding of participation in protection cannot be achieved without addressing the development of the legal concept of diplomatic protection and its origin as an inter-State action in international law. The aim of this chapter is to review the legal framework and debates on diplomatic protection to understand how scholars perceive participation in protection. Section one considers the history and development of diplomatic protection in international law. Section two outlines the current legal framework governing diplomatic protection and the application of consular functions to the protection of citizens abroad. Section three analyses recent normative debates about diplomatic protection, international human rights law and the position of the individual in international law.

I. Development of Diplomatic Protection in International Law

The historical practice of diplomatic protection is rife with controversy. In the 20th century, some States perceived diplomatic protection as a political manoeuvre cloaked in the language of law, while others touted its practice as the application of an international minimum standard.¹ Scholars have similarly been divided in capturing the essence of diplomatic protection. Earlier scholarship envisages it as an action enlivening the interests of States embodied in their citizens, while the more recent trend is to conceive of diplomatic protection as an action for the benefit of securing the rights of individuals who lack standing in the international order. Needless to say, States have been at the heart of the debate.

¹ John Dugard, *Articles on Diplomatic Protection* (2013) United Nations Audiovisual Library <<http://legal.un.org/avl/ha/adp/adp.html>>.

The practice of diplomatic protection emerged from citizens representing the interests of the crown in their dealings abroad.² Diplomatic practice by States in the 18th century consisted of reprisals for the torts committed on the subjects of a king abroad, usually merchants. Sovereigns intervened on behalf of merchants whose goods were appropriated without compensation while in the territory of a foreign State. Diplomatic protection functioned as a mechanism to secure a crown's interests by pursuing rights embodied in the activities of travelling citizens.³

The development of diplomatic protection came with the growth of sovereignty and the transition towards a society of States.⁴ Diplomatic protection, or the international minimum standard, was used as a tool by stronger States against weaker States to gain regional economic power through the interests vested in their citizens.⁵ It is also relevant that the concept of diplomatic protection developed to include protection of both legal and natural persons.⁶ States could exercise their discretion to intervene on behalf of corporations vested with commercial and economic interests.⁷ Amerasinghe notes that:

In the nineteenth and early twentieth centuries diplomatic protection was seen as a weapon wielded by wealthy nations against the poorer or less developed nations, particularly those in the western hemisphere. ...diplomatic protection came to be associated more generally with a tussle between developed and less developed States connected particularly with foreign investment by nationals of developed States.⁸

The relationship between the United States and some Latin American States provides an example of how diplomatic protection was used in this manner. The United States invoked diplomatic protection on behalf of United States' corporations, typically mining companies operating in Latin American States, such as Mexico. For a range of reasons, Mexico appropriated assets, including land, belonging to companies from the United States.⁹ This prompted intervention by the United States government on behalf

² See Louis B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *American University Law Review* 1, 2; Robert Kolb, 'The Protection of the Individual in Times of War and Peace' in Bardo Fassbender and Anne Peters (eds), *The History of International Law* (Oxford University Press, 2012) 318, 333.

³ Kolb, above n 2, 333.

⁴ Edwin Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, (Banks Law Publishing, 1915) 3.

⁵ Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008) 15; Dugard, 'Articles on Diplomatic Protection', above n 1; Frederick Dunn, *The Protection of Nationals* (John Hopkins Press, 1932) 19; Francisco V García-Amador, *The Changing Law of International Claims* (Oceana Publications, 1984).

⁶ *Draft Articles on Diplomatic Protection* art 1.

⁷ Amerasinghe, *Diplomatic Protection*, above n 5, 15.

⁸ *Ibid* 19.

⁹ Edwin Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1940) 38(4) *Michigan Law Review* 445, 446.

of its corporations left without compensation for the forcible acquisitions.¹⁰ Mexico argued that this policy did not constitute a breach of international law on the basis that corporations from the United States were treated on the basis of equality in accordance with Mexico's national standard.

As a reaction to foreign intervention, Latin American States introduced clauses in commercial contracts that limited the rights of foreign corporations to national treatment only. These clauses, referred to as 'Calvo clauses' or the 'Calvo doctrine,' were considered to override whatever international standard was being asserted.¹¹ The Calvo doctrine was an attempt by Latin American States to limit the rights of aliens to national treatment through contractual obligation. In effect, countries like Mexico used commercial contracts to force Western companies to waive their rights to bring a claim against the host State.¹² The Calvo Clause preserved national treatment as the appropriate standard and thereby enabled some States to refute the existence of an international minimum standard. This early practice of diplomatic protection created a negative perception of the institution. John Dugard reflects that particularly Westerners:

... turned to their national States for protection which sometimes took the form of arbitration and sometimes the use of force. Inevitably, the bullying approach adopted by the Western Powers to Latin American States in protecting their nationals' interests gave diplomatic protection a bad reputation among developing nations.¹³

While developing States viewed diplomatic protection as a mechanism of regional and domestic economic intervention, the United States claimed it preserved an international standard of behaviour.¹⁴ Edwin Borchard, a government lawyer from the United States, argued that there was an international minimum standard on the treatment of aliens to which all countries were obliged to extend to aliens in their territory.¹⁵ Borchard rejected the Calvo doctrine, claiming that the law of nations imposed common standards upon States. He explained:

The body of international law developed by diplomatic practice and arbitral decision, indefinite as it may be, represents the minimum which each state must accord the alien whom it admits. Whether called the fundamental, natural, or

¹⁰ Dunn, above n 5, 15.

¹¹ Some States constitutionally entrenched the Calvo requirement, so that as a matter of law it would be included in all contracts. Amerasinghe suggests that the Calvo Doctrine was regional custom in Latin America. Amerasinghe, *Diplomatic Protection*, above n 5, 193.

¹² García-Amador, *Changing Law of International Claims*, above n 5, 52.

¹³ Dugard, 'Articles on Diplomatic Protection', above n 1.

¹⁴ Borchard, 'Treatment of Aliens', above n 9.

¹⁵ *Ibid* 445.

inherent rights of humanity or of man or of the alien, this minimum has acquired a permanent place in the protective ambit of international forums.¹⁶

Borchard argued that the appropriate source of rights was international law, not a domestic standard. He rejected Mexico's claim of national treatment, ultimately claiming that '[t]he doctrine of equality as the final test of international obligations is thus in effect a repudiation of the many decisions of international tribunals which establish such obligations as a rule of international law.'¹⁷ The Latin American perspective, however, was that the international minimum standard was a United States/European construction designed to enable the United States to gain economic power in different regions of the developing world by interfering with the sovereignty of other States.

These historical events are a precursor to what has since evolved into aspects of international human rights law and international investment law. International investment law has become a *lex specialis*, influenced by the early practice of diplomatic protection.¹⁸ These bodies of law have acquired acceptance in the broader international legal regime reflected by the panoply of rules and scholarship on those subjects.¹⁹

However, despite the antecedents of diplomatic protection as a contested political phenomenon, most scholars have focused their attention on the legal conditions of its application. The historical context for the development of diplomatic protection reinforces that the driving forces of protection and the actors involved are integral to understanding when, why, where and how diplomatic protection is invoked in favour of a citizen.

Early scholarship

The first statement of the principle of diplomatic protection, traced to Swiss jurist Emer de Vattel in 1758, provided little in the way of rules:

... Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the

¹⁶ Ibid 448.

¹⁷ Ibid 450.

¹⁸ Kate Parlett, 'The ICJ and Diplomatic Protection' in Christian Tams and James Sloan (eds), *Development of International Law by the International Court of Justice* (Oxford University Press, 2013) 87, 104.

¹⁹ See, eg, Annemarieke Vermeer-Künzli, 'Diplomatic Protection as a Source of Human Rights Law' in Dinah Shelton (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 250.

aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety.²⁰

Vattel's statement did not prescribe the circumstances in which a nationality State may intervene or the modalities of how a State may protect its citizen. His statement established that there is a bond between the citizen and State and that the State's interest may be affected. In his construction of protection in international law, Vattel recognised the ability of the State to be indirectly injured by a wrong against its citizen. At the time of his writing, the individual did not have standing against foreign States in international law and would therefore rely on her State of nationality to bring an action pursuing a remedy on her behalf. This transformation of direct individual injury into indirect State injury is now referred to as the 'Vattelian fiction.'

Edwin Borchard's monograph *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* clarified the parameters of diplomatic protection by outlining rules for its operation and practice in 1915.²¹ His work unified scholarly writing and concepts of the rights of aliens, the international minimum standard and the law of international claims. Borchard definitively narrowed the legal scope of diplomatic protection as a right of States and did not engage with normative aspects of the protective function or the question of whether diplomatic protection possessed any obligatory character. While the question to whom the right of diplomatic protection belongs is debated even today, Borchard's classic conception of the principle still stands:

While tacitly undertaking to abide by local law, a rule supported by principle, international practice has given aliens a reserved power, after the vain exhaustion of local remedies, to call upon the diplomatic protection of their own government, if their rights, as measured not necessarily by the local, but by the international, standard have been violated. The citizen abroad has no legal right to require the diplomatic protection of his government. Resort to this remedy of diplomatic protection is solely a right of the government, the justification and expediency of its employment being a matter for the government's unrestricted discretion.²²

Borchard's position received approval from the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924:

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

²⁰ Emer de Vattel, *Law of Nations* (Béla Kapossy and Richard Whatmore trans, Liberty Fund, 2008) [trans of: *Le Droit Des Gens* (first published 1758)] 298.

²¹ Borchard, *Diplomatic Protection of Citizens Abroad*, above n 4.

²² *Ibid* vi.

reality asserting its own right - its right to ensure, in the person of its subjects, respect for the rules of international law.²³

While there are still arguments in favour of creating a limited obligation in international law on States to intervene on behalf of their citizens in certain cases of grave violations, the character of diplomatic protection as a right of States remains the generally accepted position.²⁴

The methodological influence of Borchard's work is significant. Borchard's conceptualisation of diplomatic protection has influenced major scholarship in the area, including the approach of relying on case law and arbitral decisions. His work identified the practice of the United States and awards of arbitral tribunals as the principal sources for his analysis.²⁵ While Borchard discussed examples of protection and regional circumstances for its exercise in the context of his time, subsequent scholarship focuses on the doctrines he discerned. Part of the canon of writing on diplomatic protection, Borchard's work establishes and reinforces the position of States as the exclusive proponents and motivators of protection.

Coupled with Borchard's preference for case law, the manner in which he structured his study on diplomatic protection around legal relationships has shaped conceptions of participation in this area. He examined the three relationships involved in protection: the citizen and his/her national State, the alien and the host State, and relations between States. This tripartite structure reflects a classical understanding of the structure of public international law as a system of rules regulating the relationships of States. Yet Borchard's enumeration of only three relationships limits an analysis of diplomatic protection to only two actors: the individual and the State. Even in the absence of modern non-State actors like civil society organisations, other actors including the Church, corporations and private associations are likely to have influenced States in the protection of citizens abroad at the time of Borchard's writing. Of course, Borchard's aim was not to study protection as a phenomenon, but to elaborate a set of rules around its practice.

²³ *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 12.

²⁴ *Draft Articles on Diplomatic Protection with Commentaries*, 26. The Special Rapporteur on Diplomatic Protection accepts that an obligation does not yet exist in international law. Note however, that the Special Rapporteur argued that there were some circumstances in which a State could be obliged to protect a citizen. To reconcile this position, in his final report, the Special Rapporteur notes that the definition provided in the Draft Articles leaves open the question of whose right is being asserted – the individual's or the State's.

²⁵ Borchard, *Diplomatic Protection of Citizens Abroad*, above n 4, viii.

In 1932, Frederick Dunn wrote a monograph on diplomatic protection which differed to the doctrinal approach of scholarship on diplomatic protection. Dunn rejected the narrowness of previous legal studies. He claimed that by confining their attention exclusively to doctrine scholars 'were obtaining a very incomplete and often inaccurate picture of the process by which decisions were actually reached on questions of diplomatic protection'.²⁶ Dunn focused on diplomatic protection as a partly legal, partly political action that embodied a 'clash of interests' and a process of decision-making.²⁷ He was concerned with the normative power of law and its regulatory influence in the decision-making around the protection of citizens abroad.²⁸ In order to address these concerns, Dunn claimed that to improve our understanding of diplomatic protection, a different methodology was needed:

The time comes ... in all fields of knowledge when, as a result of changing conditions, an enlargement of experience, or an improvement in methods of inquiry, new ranges of phenomena appear which cannot be accounted for by any acceptable hypothesis drawn from the existing conceptual system or readily reconciled with any current doctrines.²⁹

For Dunn, diplomatic protection is a 'man-made institution designed for particular social ends'.³⁰ His work adopted a much wider lens for examining the protection of citizens abroad, particularly by including actions in anticipation of a breach of international law, not just remedial actions in response to a wrongful act.³¹ Subsequent scholarship on the protection of citizen abroad has not embraced Dunn's methodological approach, perhaps because he failed to provide a doctrinal contribution to the rules of diplomatic protection.

Almost half a century later, Cuthbert Joseph defined diplomatic protection as an institution with doctrinal foundations.³² Following the form established by Borchard, Joseph's definition reinforced the legal character of diplomatic protection by positioning it within the overarching framework of State responsibility:

diplomatic protection can be defined as a procedure for giving effect to State responsibility involving breaches of international law arising out of legal injuries to the person or property of a State.³³

Joseph examined conditions surrounding the exhaustion of local remedies and nationality, thereby consolidating the scholarly trend of rule elaboration. In

²⁶ Dunn, above n 5, 3.

²⁷ Ibid 22.

²⁸ Ibid 5-12.

²⁹ Ibid 5.

³⁰ Ibid 3.

³¹ Ibid 18.

³² Cuthbert Joseph, *Nationality and Diplomatic Protection* (AW Sijthoff, 1969) 2.

³³ Ibid 1.

acknowledging Borchard's scholarly design of 'dual classification of persons coming within the jurisdiction of a State as nationals and aliens' Cuthbert's work provides one example of the dominant approach in the study of protection.³⁴

In his analysis, Joseph explored various aspects of the changing practices between members of the Commonwealth, including an analysis of the conclusion of treaties³⁵ and municipal nationality laws and naturalisation practices.³⁶ While *Nationality and Diplomatic Protection* did explore diplomatic protection, Joseph's project was more concerned with the principle of nationality and its evolution within the Commonwealth after the Second World War.³⁷ Notably, however, Joseph rejected Borchard's postulate that the failure of a State to protect its citizens did not attract responsibility in international law, citing the *European Convention on Human Rights* as an example of how failure to protect citizens could attract State responsibility.³⁸ While Joseph's methodological approach followed judicially settled cases, he also relied upon treaty provisions and legislation to identify the practice and attitudes of States.

The majority of legal scholars who address the protection of citizens abroad through the lens of diplomatic protection have employed similar methods of legal analysis discussed earlier. Chittharanjan Amerasinghe, who wrote three monographs on diplomatic protection, State responsibility and the exhaustion of local remedies, relied on cases as the dominant source of his studies.³⁹ This is exemplified by his reference to article 38 of the ICJ *Statute*.⁴⁰ Even though he considers the practice of States, Amerasinghe emphasises judicial decisions for 'creating or reflecting State practice giving rise to customary law and general principles of law, both of which are primary legal sources of equal force.'⁴¹ However, legal arguments made by States in court proceedings or written memorials do not provide a full picture of State practices and motivations.

Moreover, avoiding examination of the full suite of actions in the protection of citizens abroad perpetuates an assumption in the literature that diplomatic protection is most frequently exercised and settled through judicial proceedings and that States are the

³⁴ Ibid 3-4.

³⁵ Ibid 67.

³⁶ Ibid 77.

³⁷ Joseph faced some criticism for his approach as lacking balance, particularly because he did not pay more attention to the modern law of citizenship and diplomatic protection. See John Hopkins, 'Nationality and Diplomatic Protection: The Commonwealth of Nations by Cuthbert Joseph' (1971) 29(2) *Cambridge Law Journal* 327.

³⁸ Joseph, above n 32, 233.

³⁹ Chittharanjan F Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford University Press, 1967); Chittharanjan F Amerasinghe, *Local Remedies in International Law* (Cambridge University Press, 2nd ed, 2004); Amerasinghe, *Diplomatic Protection*, above n 5.

⁴⁰ Amerasinghe, *Diplomatic Protection*, above n 5, 5.

⁴¹ Ibid.

only actors that participate in the process. In fact, due to the sensitivity of diplomatic protection, States are more likely to resolve a matter through a negotiation or through diplomatic channels than through litigation:

... the simplest means of settling disputes arising between States, and that to which they as a rule resort to before they make use of other means is negotiation. In a different sense it also has been noted that negotiation is far the most important of the means of settlement, and a great majority of the disputes are settled every day by negotiation, without publicity or even attracting the attention of the public.⁴²

Modern scholarship on the role of consular and diplomatic officials also suggests that citizens abroad are most frequently dealt with through 'consular diplomacy, where modern consular services... go hand in hand with (quiet) diplomacy and international negotiation.'⁴³ By failing to diversify sources of practice beyond the judgments of courts and arbitral tribunals, scholars overlook how diplomatic protection is practised and how it has evolved. The protection of citizens abroad, either through the formal avenue of diplomatic protection, or by other means, is a hybrid legal/political mechanism in a broader international and political order.

Codification by the International Law Commission

Codification of the customary rules of diplomatic protection formed part of the International Law Commission's agenda from the early 1950s. From this period until 1995, diplomatic protection was considered within the International Law Commission's broader programme of study on State responsibility.⁴⁴ The first Special Rapporteur on State Responsibility, Francisco García-Amador, considered the treatment of aliens within this programme of study.⁴⁵

When the second Special Rapporteur for State Responsibility, Roberto Ago, took over the study he drew a distinction between the violations of international law (primary rules) and the rules related to attribution of liability to States for international wrongs (secondary rules).⁴⁶ Amerasinghe describes secondary rules as 'rules relating to the capacity to espouse or institute claims and to the exhaustion of local remedies.'⁴⁷ This

⁴² García-Amador, *Changing Law of International Claims*, above n 5, 518.

⁴³ Maaïke Okano-Heijmans, 'Change in Consular Assistance and the Emergence of Consular Diplomacy' (2010) *Netherlands Institute of International Relations* (Clingendael Diplomacy Papers No 26) 6.

⁴⁴ International Law Commission, *Analytical Guide to the Work of the International Law Commission: State Responsibility* <http://legal.un.org/ilc/guide/9_6.shtml>.

⁴⁵ FV García-Amador, *Report on International Responsibility*, Yearbook of the International Law Commission, Vol II, UN Doc A/CN.4/96 (20 January 1956) 174, 199.

⁴⁶ James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002) 3.

⁴⁷ Amerasinghe, *Diplomatic Protection*, above n 5, 21.

distinction between primary and secondary rules is the foundation for codification of both State responsibility and diplomatic protection by the International Law Commission. Both studies were completed based on an examination of the rules on the attribution of liability for internationally wrongful acts, rather than violations that would give rise to responsibility.

In 1995 the International Law Commission decided that diplomatic protection would be considered as an independent programme of work for codification and progressive development.⁴⁸ There were two Special Rapporteurs on diplomatic protection between 1995 and 2006. Special Rapporteur Mohamed Bennouna completed two reports but did not complete the study due to his appointment as a judge to the International Court of Justice. John Dugard, the second Special Rapporteur on diplomatic protection, completed the programme of work and prepared a total of seven reports, including conclusion of the *Draft Articles on Diplomatic Protection* in 2006.

The International Law Commission's Working Group on Diplomatic Protection excluded an examination of the nature of the diplomatic protection – either as a right of States or individuals – from the study.⁴⁹ The Special Rapporteur's reports were therefore limited in scope to the traditionally accepted customary international law concept of diplomatic protection as the right of States alone.⁵⁰ The traditional view of diplomatic protection as a right of States was accepted by the Special Rapporteur. Furthermore, to confine the scope of the study, the Special Rapporteur explicitly proposed to the International Law Commission not to 'seek to extend the scope of the draft articles beyond matters normally and traditionally viewed as belonging to the nationality of claims and the exhaustion of local remedies.'⁵¹

However, the Special Rapporteur attempted to progressively develop some articles of diplomatic protection beyond obligations in customary international law, which were ultimately rejected by the International Law Commission.⁵² The Special Rapporteur introduced a limited obligation on States to provide protection in circumstances where a breach of a *jus cogens* norm occurred. Article 4 of the first incarnation of the *Draft Articles* provided that:

⁴⁸ John Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, International Law Commission, 52nd sess, Agenda Item 6, UN Doc A/CN.4/506 (7 March 2000) 1.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ John Dugard, *Third Report of the Special Rapporteur on Diplomatic Protection*, International Law Commission, 54th sess, Agenda Item 4, UN Doc A/CN.4/523 (7 March 2002) 15.

⁵² Annemarieke Vermeer-Künzli, *The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument* (PhD Thesis, Leiden University, 2007) 58.

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State.
2. The State of nationality is relieved of this obligation if:
 - (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;
 - (b) Another State exercises diplomatic protection on behalf of the injured person;
 - (c) The injured person does not have the effective and dominant nationality of the State.
3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.⁵³

The ILC, however, rejected the Special Rapporteur's proposed progressive development. The ILC noted that there was scarce evidence of practice to support such a development of the law:

States had constitutions indicating that the individual did have a right to diplomatic protection. Some constitutions contained wording to the effect that the State had to protect the legitimate rights of its nationals abroad or that the nationals of the State should enjoy protection while residing abroad. He did not, however, know whether those rights were enforceable under the municipal law of those countries or were simply intended to ensure that a national injured abroad had the right of access to the State's consular officials.⁵⁴

The inclusion of draft Article 4 revived a debate on the rights of the individual in international law, to be discussed later in this chapter. Scholars have subsequently argued that diplomatic protection is a tool to supplement the system of individual rights developed in international human rights law under the *International Covenant on Civil and Political Rights* and other treaties.⁵⁵

The International Law Commission's methods

The Special Rapporteur on Diplomatic Protection relied upon a number of sources in the preparation of the *Draft Articles on Diplomatic Protection*. The reports examined evidence of State practice through national constitutions, legislation and domestic jurisprudence.⁵⁶ States were asked to submit examples of their practice to the ILC for consideration as part of the study.⁵⁷ Dugard notes that very few States submitted

⁵³ Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, above n 48, 223.

⁵⁴ *Report of the International Law Commission on the work of its 52nd Session*, UN GAOR, 55th Session, Supplement No. 10, A/55/10 (1 May - 9 June and 10 July - 18 August 2000) 77.

⁵⁵ See generally Vermeer-Künzli, *Protection of Individuals by Means of Diplomatic Protection*, above n 52.

⁵⁶ Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, above n 48, 27-32.

⁵⁷ Interview with John Dugard, Special Rapporteur for Diplomatic Protection (The Hague, July 2013).

information regarding their practice on diplomatic protection and some of those that did submit information confused the subject with diplomatic immunities.⁵⁸

Faced with this limitation, the programme of study on diplomatic protection could not address the way in which States and non-State actors contribute to protection or consider how other relationships (beyond Borchard's tripartite structure) may influence its practice. The programme of study by the ILC reinforced doctrinal legal analysis in international law. This reflects the nature of the ILC as an institution whose task it is to identify rules and codify them.⁵⁹

II. Legal Framework Governing Diplomatic Protection

Diplomatic protection is a principle of customary international law. The rules governing its practice are contained in various treaties and State practice, with case law contributing to ongoing development of the principle. As discussed above, the ILC completed its programme of work codifying the rules of diplomatic protection in a non-binding instrument, the *Draft Articles on Diplomatic Protection* (2006).⁶⁰ This section of the chapter will briefly review the rules of diplomatic protection and the instruments that regulate its practice. It is not intended to provide an exhaustive review of the doctrinal developments of diplomatic protection, which scholars and the ILC have already documented comprehensively.⁶¹

Draft Articles on Diplomatic Protection and the Articles on State Responsibility

Two programmes completed by the ILC on diplomatic protection and State responsibility reflect the codified customary rules of diplomatic protection in international law. Three requirements of admissibility apply before a State can espouse or bring a claim on behalf of its citizen through diplomatic protection. The injury must be caused by the commission of an internationally wrongful act, the individual must

⁵⁸ Ibid.

⁵⁹ *Statute of the International Law Commission* 1947 art 1(1).

⁶⁰ *Draft Articles on Diplomatic Protection with Commentaries*.

⁶¹ See, eg, Amerasinghe, *Diplomatic Protection*, above n 5, 191-282; Parlett, 'The ICJ and Diplomatic Protection', above n 18, 87; Natalie Klein, 'Dispute Settlement Options for the Protection of Nationals Abroad' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press, 2014) 436.

possess the nationality of the intervening State and the individual must have exhausted all local remedies.⁶²

The ILC's *Articles on State Responsibility* (2001) define an 'internationally wrongful act' as an 'act or omission which is attributable to the State and constitutes a breach of a State's international obligation'.⁶³ Given that States possess different rights and duties in accordance with their obligations in treaties and customary international law, the wrong alleged must go beyond the threshold of a municipal wrong and must be a breach of international law arising from a binding obligation on the State. An example that illuminates this distinction is the obligation on a detaining State to inform an alien or foreign national in its custody that he or she is entitled to contact their national consulate.⁶⁴ This obligation is a treaty obligation owed between States under the *Vienna Convention on Consular Relations* and, therefore, failure to comply with this requirement is a breach of international law giving rise to responsibility or liability.

Article 44 of the *Articles on State Responsibility* sets out general requirements of admissibility applicable to all invocations of liability between States, including diplomatic protection:

The responsibility of a State may not be invoked if:

- (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.⁶⁵

Articles 5(1) and 14 of the *Draft Articles on Diplomatic Protection* mimic those in the *Articles on State Responsibility* on nationality and exhaustion of domestic remedies.

Article 5(1) states that:

A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.⁶⁶

The second requirement of admissibility is that the individual who is the subject of the claim must possess the nationality of the intervening State. Nationality is a domestic matter for States to determine, however there are rules in relation to how the

⁶² *Draft Articles on Diplomatic Protection* art 1.

⁶³ *Articles on State Responsibility* art 2.

⁶⁴ *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) art 36.

⁶⁵ *Articles on State Responsibility* art 44.

⁶⁶ *Draft Articles on Diplomatic Protection with Commentaries*, 35.

nationality requirement must be satisfied in a claim of diplomatic protection.⁶⁷ Amerasinghe has described the ‘usual form’ of the requirement as the continuous nationality rule, namely that the individual must possess nationality of the intervening State from the point of injury to the point of judicial determination of a matter.⁶⁸ Both Amerasinghe⁶⁹ and Dugard⁷⁰ have relied on the *Kren* case to demonstrate the rule:

It is a well settled principle of international law that to justify diplomatic espousal, a claim must be national in origin; that it must, in its inception, belong to those to whom the state owes protection and from whom it is owed allegiance (Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 666). Further, although the national character will attach to a claim belonging to a citizen of a state at its inception, the

claim ordinarily must continue to be national at the time of its presentation, by the weight of authority (Borchard, *supra*, p. 666), and there is a general agreement that it have a continuity of nationality until it is filed (Feller, *The Mexican Claims Commission*, p. 96).⁷¹

While the claim itself must be a national claim, the nature and quality of nationality required to meet this condition has been a topic of concern for legal scholars.⁷² The issue of nationality was brought before the ICJ in *Nottebohm (Liechtenstein v Guatemala)*.⁷³ The Court in *Nottebohm* defined nationality as ‘a legal bond having as its basis a social fact of attachment, an effective connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.’⁷⁴ In this case the ICJ held that the individual must display a ‘genuine link’ of nationality.⁷⁵ Debates have occurred as to whether or not the test in *Nottebohm* of ‘genuine link’ or ‘effective nationality’ ought to apply as general principles of international law.⁷⁶ Some scholars have concluded that the rule in *Nottebohm* is not a general principle, but rather reflects the particular circumstances of the case.⁷⁷ The ILC also limited the application of the *Nottebohm* judgment to its facts and did not recognise the requirement of a genuine link of nationality.⁷⁸ For legal persons, the issue of nationality is determined by the

⁶⁷ *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, opened for signature 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937) art 1.

⁶⁸ Amerasinghe, *Diplomatic Protection*, above n 5, 96.

⁶⁹ *Ibid* 98.

⁷⁰ Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, above n 48, 241.

⁷¹ *Kren Case*, US-Yugoslavia Claims Commission, ILR (1953) 20, 234.

⁷² Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, above n 48, 242.

⁷³ *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4.

⁷⁴ *Ibid* 23.

⁷⁵ *Ibid* 23.

⁷⁶ *Draft Articles on Diplomatic Protection with Commentaries*, 33.

⁷⁷ Tamás Hoffmann, ‘The Perils of Judicial Construction of Identity’ in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 497, 503.

⁷⁸ Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, above n 48, 242.

place of incorporation and registration rather than by the nationality of the shareholders.⁷⁹

Finally, the injured individual must exhaust all local remedies prior to his or her State of nationality espousing a claim. Article 14 of the *Draft Articles on Diplomatic Protection* sets out the conditions of the rule and defines the remedies individuals must exhaust:

(1) A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

(2) 'Local remedies' means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.⁸⁰

Article 14, above, reflects the accepted position in international law discussed by the ICJ in the *Interhandel* case:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.⁸¹

Dugard noted that this requirement presented the least controversy in the ILC's codification process.⁸² Once the requirements of admissibility have been met, States may invoke or exercise diplomatic protection on behalf of a citizen through a range of actions. Some of these protective measures include consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, severance of diplomatic relations and economic pressure.⁸³

In accordance with the rules of diplomatic protection, the categorisation of whether an action is deemed to be protection hinges on the exhaustion of domestic remedies. An action only becomes diplomatic protection once the injured individual exhausts all domestic remedies available in the foreign State. This approach creates a number of

⁷⁹ See *Barcelona Traction Light and Power Company Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3.

⁸⁰ *Draft Articles on Diplomatic Protection with Commentaries* art 14, [70]. There is an exception to the exhaustion rule where the available remedies are ineffective or futile, see Amerasinghe, *Diplomatic Protection*, above n 5, 149.

⁸¹ *Interhandel Case (Switzerland v United States of America) (Preliminary Objections)* [1959] ICJ Rep 6, 27.

⁸² Dugard, 'Articles on Diplomatic Protection', above n 1.

⁸³ Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, above n 48, 43.

problems. The first of these problems is that the characterisation of the same action before and after the exhaustion of domestic remedies would change by virtue of exhaustion occurring. For example, the actions of a consular officer making representations on behalf of a detained national before the exhaustion of domestic remedies would be classified as consular assistance. But does the classification of the same action change to diplomatic protection when it occurs after the exhaustion of domestic remedies?

Some scholars have answered this question by distinguishing between preventative and remedial action. Annemarieke Vermeer-Künzli argues that consular assistance is preventative in nature, while diplomatic protection is remedial.⁸⁴ Others have instead distinguished between different forms of consular assistance. Maaïke Okano-Heijmans, for example, identifies that there are three forms of the consular function: documentary services, individual assistance, and crisis in foreign lands.⁸⁵ Jan Wouters, Sanderijn Duquet and Katrien Meuwissen in turn draw a distinction between assistance and protection on the one hand, and administrative and legal functions on the other.⁸⁶ None of these classifications fully correspond with the practice of protection or the problem of exhaustion. Most scholars acknowledge a level of consular function that is administrative or facilitative in nature. However, there seem to be levels of protective action at the consular level that have not fully been taken into account within existing categories.

Vienna Convention on Consular Relations and Vienna Convention on Diplomatic Relations

Some aspects of the protection of citizens abroad, such as consular assistance, are found in the *Vienna Convention on Consular Relations* and the *Vienna Convention on Diplomatic Relations*.⁸⁷ Article 3 of the *Vienna Convention on Diplomatic Relations* refers to functions of diplomatic missions:

⁸⁴ Annemarieke Vermeer-Künzli, 'Diplomatic Protection and the Consular Assistance of Migrants' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 265, 266.

⁸⁵ Maaïke Okano-Heijmans, 'Consular Affairs' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press, 2013) 473, 478.

⁸⁶ Jan Wouters, Sanderijn Duquet and Katrien Meuwissen, 'The Vienna Conventions on Diplomatic and Consular Relations' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press, 2013) 510, 514-516.

⁸⁷ *Vienna Convention on Consular Relations*; *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964).

1. (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; ...
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.⁸⁸

The *Vienna Convention on Consular Relations* outlines several consular functions. Article 5 states:

Consular functions consist in:

- (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; ...
- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State; ...
- (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
- (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons.⁸⁹

The two Conventions reflect a historical divide in the nature and purpose of consular and diplomatic functions. Diplomatic functions include commencing or defending legal actions on behalf of the sending State. The consular function, however, is described as having no political or representational character.⁹⁰ Wouters, Duquet and Meuwissen have pointed out that the networks of actors connected to each of these functions also differs. They argue that the exercise of diplomatic functions are traditionally coordinated with the central government of the sending State, whereas consular functions are performed through contact with local actors, such as police and prisons.⁹¹

In the protection of citizens abroad this differentiation between consular and diplomatic functions is not always reflected in practice. Luke Lee and John Quigley argue that separating the consular and diplomatic functions can at times be 'impractical'.⁹² In a similar vein Wouters, Duquet and Meuwissen observe that the lack of specificity in the VCCR and VCDR lends itself to agents performing consular and diplomatic functions interchangeably.⁹³ Coupled with these observations, the nature of the protection of citizens abroad presents a number of challenges to the traditional

⁸⁸ *Vienna Convention on Diplomatic Relations* art 3(1)(b) and 3(2).

⁸⁹ *Vienna Convention on Consular Relations* art 5.

⁹⁰ Wouters, Duquet and Meuwissen, above n 86, 516.

⁹¹ *Ibid.*

⁹² Luke T Lee and John Quigley, *Consular Law and Practice* (Oxford University Press, 3rd ed, 2008) 541.

⁹³ Wouters, Duquet and Meuwissen, above n 86, 517.

model of consular and diplomatic functions envisaged by the Conventions. For example, individual cases may attract more media attention, putting pressure on States to face the changing expectations of their public to provide increased responses, including consular, diplomatic and political action. The combination of politicised consular services and a shift from the representation of specific interests to the representation of the general public's welfare abroad has meant that consular cases may receive diplomatic attention depending on the circumstances.⁹⁴ Some scholars argue that the protection of citizens abroad has catalysed a new form of service called 'consular diplomacy' whereby issues faced by citizens abroad straddle consular and diplomatic functions.⁹⁵

One area of protection that blurs the division between consular and diplomatic action further is the detention of nationals. Article 36(1)(b) of the *Vienna Convention on Consular Relations* has been the subject of litigation in the International Court of Justice on several occasions (discussed further in chapters four and five). It states that:

(b) [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph...⁹⁶

This provision of the VCCR creates a number of interrelated rights for individuals and States. In cases when foreign nationals are detained in custody, the individual is entitled to be informed of his or her right to consular assistance and to communicate with his or her consulate, and the host State is obliged to notify the State of nationality of the detention should this be requested by the individual.⁹⁷

Apart from the guidance provided in article 36 of the *Vienna Convention on Consular Relations*, the manner and content of protection of nationals is not prescribed. The interests at stake, situation of the individual, bilateral relationship, resources of the State of nationality and the political pressure on the State to intervene are factors that influence the shape of an intervention. Taking into account these factors, the treaty provisions above were drafted in a manner to allow States to perform the protective function, in its consular, diplomatic or hybrid form, in a variety of ways. For example, a telephone call or visits to a detained national are forms of consular assistance. Lee and

⁹⁴ Okano-Heijmans, 'Consular Affairs', above n 85, 483.

⁹⁵ Okano-Heijmans, *Change in Consular Assistance and the Emergence of Consular Diplomacy*, above n 43, 8.

⁹⁶ *Vienna Convention on Consular Relations* art 36(1)(b).

⁹⁷ *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 9, 77.

Quigley note that consular assistance can range from attending to the welfare of detained nationals, the provision of a list of local lawyers, or even a fully funded defence in the case of those facing the death penalty.⁹⁸

States can exercise their discretion as to which approach to use in each case. However, the content of protection in the consular and diplomatic forms, while nebulous, are subject to greater public scrutiny and increasing human rights discourse. Some States such as Germany have constitutional and legislative provisions that enshrine the right to consular assistance for their nationals abroad.⁹⁹ There are other States that have faced pressure to follow Germany's model through creating a right, or at least a legitimate expectation of consular assistance for nationals abroad that could be tested in a court in the citizen's State of nationality.¹⁰⁰

The question of the existence and extent of an obligation to assist or protect a national has come before domestic courts. The detention of foreign nationals, particularly by the United States in Guantánamo Bay, prompted a number of cases in which individuals asserted that they were entitled to protection by their State of nationality.¹⁰¹ In the case of *Abassi*, a British national detained at Guantánamo Bay claimed that the United Kingdom was obliged to 'respond positively' to his request for assistance.¹⁰² The England and Wales Court of Appeal held that there was no obligation on the government of the United Kingdom to make specific representations on behalf of the detained individual, but that there was a legitimate expectation that the government would consider the request.¹⁰³ This view seems to resonate with scholars who argue there is a duty, albeit a general one, in which State discretion determines the content of assistance and individuals cannot demand or request specific action.¹⁰⁴

The relationship between protection and the consular function of States is in constant flux. This is exemplified by the changes in participation in the consular function. States are enlisting the assistance of other actors to help with the growing political pressure. For example, Mexico established a network of lawyers in the United States, and the

⁹⁸ Lee and Quigley, above n 92, 148-9.

⁹⁹ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany]; *Konsulargesetz* [Consular Law] (Germany) 11 September 1974, Federal Law Gazette I, 2317.

¹⁰⁰ Donald Rothwell, 'Response to Invitation to Comment' *Department of Foreign Affairs and Trade Consular Strategy 2014-2016*, 29 January 2014, 7.

¹⁰¹ See Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75(2) *Nordic Journal of International Law* 279; Lee and Quigley, above n 92, 134-137.

¹⁰² *R v (on the application of Abbasi and another) v Secretary of State* [2002] EWCA Civ 1598 (6 November 2002) 68.

¹⁰³ *Ibid* 106.

¹⁰⁴ See, eg, Victor M Uribe, 'Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice' (1997) 19 *Houston Journal of International Law* 375, 381; Lee and Quigley, above n 92, 133.

United Kingdom seeks advice from a committee of external lawyers who assist the local counsel of detained nationals.¹⁰⁵ Maaïke Okano-Heijmans identifies this development through three broader trends in consular affairs: network diplomacy (more actors), consular diplomacy (where consular and diplomatic services for citizens are combined) and public diplomacy (increasing accountability to mass publics in national and international constituencies).¹⁰⁶ However, there is little that addresses the role of law or its prevalence in regimes of protection or its relationship with diplomatic protection within this framework. Okano-Heijman's analysis helps to disclose the pressures on States and the direction of consular services, but does not reveal how these developments are connected to the institution of diplomatic protection or the contemporary practice of protection generally.

While there may be general agreement about administrative consular functions such as the provision of visas and minor assistance, the content of the protective function as embodied by consular and diplomatic action, may be contested. For example, Amerasinghe contends that actions by both consular and diplomatic officials prior to a violation do not constitute diplomatic protection.¹⁰⁷ Similarly, ILC Special Rapporteur on Diplomatic Protection argued that actions taken prior to the exhaustion of domestic remedies, usually consular assistance, are not diplomatic protection.¹⁰⁸ These two positions represent the current views in legal scholarship on the protection of citizens abroad. While the settled position excludes certain actions from being classified as diplomatic protection, it is clear that there is a broader category of protective behaviour of which diplomatic protection is a subset. Dunn premised his work on a definition of diplomatic protection that encompassed:

... all cases of official representation by one government on behalf of its citizens or their property interests within the jurisdiction of another, for the purpose, either of preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained.¹⁰⁹

This wider view of what constitutes action for the purpose of protection is better aligned with the complexities and challenges of consular and diplomatic functions today. Moreover, taking Dunn's wider definition as a baseline, it is possible for legal scholars to capture a wider suite of activity in the protection of citizens abroad.

¹⁰⁵ Mexican Capital Legal Assistance Program is discussed in chapter 5; Lee and Quigley, above n 92, 148.

¹⁰⁶ Okano-Heijmans, 'Consular Affairs', above n 85, 483.

¹⁰⁷ Amerasinghe, *Diplomatic Protection*, above n 5, 45.

¹⁰⁸ *Draft Articles of Diplomatic Protection with Commentaries*, 27 [10].

¹⁰⁹ Dunn, above n 5, 18.

Other instruments

Bilateral treaties or memorandums of understanding may also govern consular and diplomatic relations between States. In practice, such agreements and arrangements supplement provisions in the *Vienna Convention on Consular Relations*. Treaties and other legally binding agreements may contain international obligations which, when breached, may constitute an internationally wrongful act giving rise to the right to invoke diplomatic protection. For example, the United States has over fifty bilateral conventions and less than treaty-status documents regulating consular relations and providing additional details on the treatment of United States' nationals abroad.¹¹⁰ One such treaty between the United States and Hong Kong stipulates a number of additional time requirements for notification, timeframes for visitation, and the provision of legal representation, which are not specified in the VCCR.¹¹¹

In 1985, the UN General Assembly adopted a resolution titled the *Declaration of Human Rights of Individuals Who Are Not Nationals of the Countries in Which They Live*.¹¹² This resolution, while non-binding in nature, describes the State right in article 36(1) of the VCCR of an individual's right to make contact with her State of nationality's consulate.

These other instruments form part of the complex regulatory framework of diplomatic protection in international law. While some of them may be non-binding, they express regulatory force by shaping the practice and character of diplomatic protection. Bilateral treaties and instruments of less than treaty status can also guide and develop custom in the practice of diplomatic protection and consular relations at regional or bilateral levels.

III. Diplomatic Protection and International Human Rights Law

The Special Rapporteur on Diplomatic Protection: a human rights agenda

Concern about the status of the individual in the international legal order has been closely linked to debates about diplomatic protection and State responses to human

¹¹⁰ See 'Bilateral Consular Conventions' *US Department of State, Bureau of Consular Affairs* <<http://travel.state.gov/content/travel/english/legal-considerations/international-treaties-agreements/bilateral-consular-conventions.html>>.

¹¹¹ *Agreement Between the Government of the United States of America and the Government of the People's Republic of China Regarding the Maintenance of the United States Consulate General in the Hong Kong Special Administrative Region*, signed 26 March 1997 (entered into force 1 July 1997).

¹¹² UN GAOR 116th Plenary meeting A/RES/40/144 (13 December 1985).

rights violations.¹¹³ At the outset of the codification effort, the Special Rapporteur on Diplomatic Protection expressed doubt about the ability of individuals to achieve a remedy for wrongdoing by States in international law.¹¹⁴ The Special Rapporteur acknowledged the changing role of the individual in international law, marked by access to complaints mechanisms to enforce human rights.¹¹⁵ However, despite these changes in standing, the Special Rapporteur observed the tendency of some scholars to overstate this development.¹¹⁶ In the absence of enforceable remedial mechanisms, he sought to secure the place of diplomatic protection as a mechanism in international law for protecting individual human rights. The Special Rapporteur stated that:

Although individuals today enjoy more international remedies for the protection of their rights than ever before, diplomatic protection remains an important weapon in the arsenal of human rights protection. As long as the State remains the dominant actor in international relations, the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights.¹¹⁷

The Special Rapporteur's reports cast diplomatic protection as a necessary, albeit under-utilised, mechanism of human rights observance.¹¹⁸ In his first report to the ILC, the Special Rapporteur rejected claims that diplomatic protection had become obsolete or a relic of past practice and argued that it offers the 'most effective remedy' for the advancement of human rights.¹¹⁹

The ILC programme of study and the Special Rapporteur's characterisation of diplomatic protection as a human rights instrument triggered a revival of scholarship on protection. Many scholars, including Amerasinghe, Vermeer-Künzli, Craig Forcece, Natalie Klein and Lise Barry have followed Dugard's lead.¹²⁰ Dugard's reports changed

¹¹³ See Carmen Tiburcio, *The Human Rights of Aliens Under International and Comparative Law* (Martinus Nijhoff, 2001) 35; Amerasinghe, *Diplomatic Protection*, above n 5, 50; Enrico Milano, 'Diplomatic Protection and Human Rights Before the International Court of Justice: Re-fashioning Tradition?' (2004) 35 *Netherlands Yearbook of International Law* 85; Natalie Klein and Lise Barry, 'A Human Rights Perspective on Diplomatic Protection: David Hicks and his Dual Nationality' (2007) 1 *Australian Journal of Human Rights* 13; Vermeer-Künzli, *Protection of Individuals by Means of Diplomatic Protection*, above n 52; John Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' (2005) 24 *Australian Yearbook of International Law* 75.

¹¹⁴ Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, above n 48, 213.

¹¹⁵ *Ibid* 214.

¹¹⁶ John Dugard, *Third Report of the Special Rapporteur on Diplomatic Protection*, above n 51, 3-4.

¹¹⁷ Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, above n 48, 10.

¹¹⁸ Dugard, *Third Report of the Special Rapporteur on Diplomatic Protection*, above n 51, 1.

¹¹⁹ Dugard, *First Report of the Special Rapporteur on Diplomatic Protection*, above n 48, 213. For an example of critiques of diplomatic protection, see 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.

¹²⁰ Amerasinghe, *Diplomatic Protection*, above n 5, 73; Annemarieke Vermeer-Künzli, 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*' (2007) 56(3) *International and Comparative Law Quarterly* 553; Dugard, 'Diplomatic Protection and Human Rights', above n 113; Craig Forcece, 'Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in

discourse related to diplomatic protection by modernising the language as it relates to human rights. Instead of dealing with ‘international minimum standard’ and ‘law on aliens’ Dugard shifted the debate towards international human rights and status of the individual in international law.

The individual in international law

The capacity of the individual to seek and receive a remedy in international forums has changed over time. As discussed in chapter one, within the framework of international law as a system of ‘objects’ and ‘subjects’ only States possess rights and duties within this dichotomy. Individuals fall within the category of ‘objects’ of international law, a situation in which they traditionally do not have standing in the international order. Rosalyn Higgins notes that scholars, particularly those from the positivist tradition, have received this construction with ‘uncritical acceptance.’¹²¹ However, the position of the individual in international law has enlarged. The individual now bears some limited rights and obligations in the international legal system.¹²² Robert Kolb notes that:

The legal regime protecting the individual (or sanctioning him, which is but another aspect of a will to protect) has been considerably strengthened. Haphazard and punctual institutions of the past have been transformed in ever-growing and fully fledged regimes of protection.¹²³

The regimes of protection Kolb refers to are various individual complaints mechanisms under treaties such as the *International Covenant on Civil and Political Rights (1966)* (‘ICCPR’).¹²⁴ The *First Optional Protocol to the ICCPR* (‘First Optional Protocol’) creates a mechanism for individuals to make complaints against States Parties for breaches of the ICCPR.¹²⁵ The treaty body responsible for the ICCPR, the Human Rights Committee, provides ‘views’ to the State party alleged to have committed the violation asking the State to provide the aggrieved individual with a remedy.

Even though these mechanisms resemble a form of standing for individuals to bring actions against States for wrongdoing, their scope is limited and States have questioned

International Law’ (2005) 37 *George Washington International Law Review* 469, 475; Klein and Barry, above n 113, 13.

¹²¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 49.

¹²² Kate Parlett, *The Individual in the International Legal System* (Cambridge University Press, 2011) 365.

¹²³ Kolb, above n 2, 319.

¹²⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). For a discussion of complaints procedures see Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999) 142.

¹²⁵ *First Optional Protocol International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

the binding nature of the Human Rights Committee's views.¹²⁶ Moreover, the Human Rights Committee is inundated with complaints, affecting the turnaround time in which views are issued and leaving individuals without a remedy for long periods. From a jurisdictional perspective, complaints may only be lodged against States that are parties to both the originating treaty (for example the ICCPR) and the protocol establishing the mechanism. Klein recognises the vulnerable position of individuals detained abroad, particularly the 'limited means of their own to enforce their rights.'¹²⁷ Vermeer-Kunzli echoes this issue:

Those who believe that individuals have complete and full agency under international law will reject the legal fiction in diplomatic protection (and say in fact that it never existed and that the Court in *Mavrommatis* was wrong), while those who consider the state as the primary actor in the international field and who reject to a large extent the individual as an entity with international legal personality will maintain the fiction as a desirable, and necessary, tool for the protection of individual rights.¹²⁸

This type of scholarly intervention, however, assumes that States do not protect their citizens abroad, or at the very least, do not consistently exercise diplomatic protection in favour of their citizens.

Modern scholarship that addresses the intersection of protection and human rights of citizens abroad has been predominantly normative. Prompted by Dugard's characterisation of diplomatic protection as instrumental to human rights, many protection scholars have engaged in debates about how infrequently States exercise diplomatic protection in favour of their citizens and how they ought to exercise it more often. For example, Klein and Barry analyse the situation of Australian citizen David Hicks, an Australian citizen detained at Guantánamo Bay.¹²⁹ Forcese similarly contemplates the situation of Canadian dual nationals.¹³⁰ Ben Saul examines legal frameworks for the protection of journalists reporting on armed conflict.¹³¹ These scholars conceive of diplomatic protection as a mechanism that favours the individual in international law by creating an avenue for redress. This argument also places the

¹²⁶ For example, Canada does not consider the views of the Human Rights Committee to be binding. Joanna Harrington, 'Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection' (2003) 48 *McGill Law Journal* 55, 60.

¹²⁷ Natalie Klein, 'David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the Legal Parameters of Australia's Protection of its Citizens Abroad' (2001) 35(1) *Melbourne University Law Review* 134, 159.

¹²⁸ Annemarieke Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18(1) *European Journal of International Law* 37, 44.

¹²⁹ Klein and Barry, above n 113, 13.

¹³⁰ Forcese, above n 120, 475-477.

¹³¹ See Ben Saul, 'The International Protection of Journalists in Armed Conflict and Other Violent Situations' (2008) 14(1) *Australian Journal of Human Rights* 99, 105.

individual at the centre of protection and diplomatic protection within the broader international human rights system.¹³²

The normative stance of this scholarship provides an important vantage point for understanding the potential of diplomatic protection as an instrument for the benefit of individuals. It focuses on the emancipatory capacity of State action and the role of States in bringing actions of behalf of individuals who do not have standing in traditional international legal forums. The analysis of State interventions in this scholarship is largely based on legal cases and an analysis of the work of the Special Rapporteur. However, many of these scholars continue to advocate normatively through the rules of admissibility, rather than considering how States invoke their right to diplomatic protection, how other actors may assist States to protect their citizens and how the framework of diplomatic protection fits within this broader practice. These approaches to the protection of citizens abroad replicate methodological preferences for case law and infrequently consider non-legal avenues for protecting citizens abroad.

The human rights turn in the International Court of Justice

A number of cases have been brought before the ICJ and its predecessor, the Permanent Court of International Justice, relating to claims of diplomatic protection. Since 1998, the ICJ has heard four cases of diplomatic protection in relation to individual human right violations.¹³³ Three of those cases, *Breard*, *LaGrand* and *Avena*, concerned the application of the VCCR.

In all three cases the United States was alleged to have breached the dual requirement under the *Vienna Convention* to inform individuals of their right to contact their consulate and to provide consular notification to the States that their citizens were being held in the custody of the United States.¹³⁴ The first of the cases, *Breard*, was an action commenced by Paraguay against the United States. Breard was a Paraguayan national who had not been informed of his right to contact the Paraguayan consulate after being arrested for rape and murder. He appealed his conviction within the United

¹³² Darren O'Donovan et al, 'An Analysis of Home-State Obligations to International Migrants' (1 June 2013) *Bond University, Centre for Law, Governance and Public Policy Paper*, available at SSRN: <<http://ssrn.com/abstract=2276741>>.

¹³³ *Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)* [1998] ICJ Rep 248; *LaGrand Case (Germany v United States of America) (Judgment)* [2001] ICJ Rep 9; *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Judgment)* [2010] ICJ Rep 639.

¹³⁴ *Vienna Convention on Consular Relations* art 36(1).

States, but failed to succeed. The *Optional Protocol Concerning the Compulsory Settlement of Disputes* (1963) establishes that should a dispute arise in relation to the interpretation or application of the *Vienna Convention*, the ICJ has jurisdiction to resolve it.¹³⁵ Paraguay instituted proceedings in the ICJ on 3 April 1998 and applied for provisional measures to ensure that Mr Breard was not executed prior to the merits of the case being heard.¹³⁶ The ICJ issued an order for provisional measures on 9 April 1998, however, on 10 November 1998 Paraguay applied to the Court to discontinue the case, before the matter proceeded to the merits stage.¹³⁷

LaGrand and *Avena* also concerned a breach of article 36 of the VCCR. The United States detained nationals from Germany and Mexico for breaches of domestic criminal law, but failed to inform the foreign nationals of their right to contact their consulates and notify their national States of their custody.¹³⁸ The individuals in each case were convicted and sentenced to death without the benefit of consular assistance, which could have been provided had the United States notified the foreign States of the detention of their nationals. In separate actions Germany and Mexico initiated proceedings in the ICJ against the United States.

In these cases the Court gave a wider interpretation of the rights contained in the VCCR, which is considered to codify aspects of diplomatic protection. In *LaGrand*, the ICJ held that individuals had a right to consular assistance under the VCCR.¹³⁹ This was a controversial ruling, particularly given that the VCCR is a treaty understood to create binding obligations between States, rather than creating rights for individuals. In *Avena*, the Court expanded on its interpretation of the requirement to inform and notify ‘without delay’ contained in article 36 of the VCCR. In both cases (discussed in further detail in chapters four and five), the United States argued that the claims of diplomatic protection were misplaced given that the disputes arose in relation to the VCCR, not the customary international principle of diplomatic protection.

These three cases marked a shift in the way that States used their discretion to intervene on behalf of their citizens abroad. As discussed in the first part of this chapter, historically States instituted proceedings before the ICJ to protect economic interests,

¹³⁵ *Optional Protocol Concerning the Compulsory Settlement of Disputes*, opened for signature 24 April 1963, 596 UNTS 487 (entered into force 19 March 1967) art 1.

¹³⁶ *Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)* [1998] ICJ Rep 248.

¹³⁷ *Vienna Convention on Consular Relations (Paraguay v United States of America) (Order of 10 November 1998)* [1998] ICJ Rep 426. Note that the details of why Paraguay withdrew the case are not public.

¹³⁸ *Vienna Convention on Consular Relations* art 36.

¹³⁹ *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 9, 77.

yet these three cases each addressed human rights concerns, specifically the application of the death penalty. Even though all the cases related to a technical breach of the VCCR, some scholars understood these cases as human rights actions, using the mechanism of diplomatic protection as an avenue of redress. Enrico Milano describes this change in the nature of the cases brought before the ICJ as a 'humanisation' of diplomatic protection:

The recent jurisprudence, in particular that on the VCCR, concerns instead injuries committed upon individual rights of other nature, which more most clearly resemble what we tend to conceive as human rights. The link between human right, individual rights and diplomatic protection has been rendered concrete mostly due to the creative litigating strategies of the applicant states, which have 'dragged' the Court into a new field, rather than a progressive attitude of the Court itself.¹⁴⁰

While Milano and others consider the recent cases before the ICJ as part of a new turn in the practice of diplomatic protection towards human rights, this optimism may overstate reality. In both *LaGrand* and *Avena* the Court decided that questions of diplomatic protection did not require redress given that the primary issue of the VCCR breach was resolved. While the cases do mark a novel advance in the way that States protect their nationals, Milano overlooks the manner in which the creative litigation strategies were generated and who formulated them.

IV. Conclusion

Legal scholars have understood diplomatic protection and the protection of citizens as the domain of States. The structure of international law as a system of States has contributed to the manner in which diplomatic protection has developed as an inter-State action in international law. This chapter has argued that the protection of citizens abroad is more than a set of rules, and its practice is more complex than current literature suggests. Underpinned by State interest, the protection of citizens abroad has attracted a broader range of actors to its practice, each of whom may challenge or confirm the centrality of States in some way. Moreover, as consular and diplomatic functions merge, action taken in anticipation of a breach of international law and prior to the exhaustion of domestic remedies is increasing. In a globalised world where there are many actors in the international system, this narrow State-centric approach tells us little about how international rights and obligations are performed and resisted, or who participates, motivates and inhibits the protection of citizens abroad.

¹⁴⁰ Milano, above n 113, 138.

Chapter 3

Participation in the International Legal System

In the previous chapter I explored the traditional approach of studies on the protection of citizens abroad, which focus on State action and formal sources of law. Studies on the protection of citizens abroad have focused on the State as a single entity, without fully considering how different parts of the State may motivate or inhibit protection. International legal scholarship has also explored the participation of non-State actors in a range of areas, but has yet to consider how they participate in and influence the protection of citizens abroad. The aim of this chapter is to consider scholarship on participation in the international legal system and to outline a framework for investigating participation in the protection of citizens abroad in the following case studies. First, the chapter outlines approaches in international legal scholarship to the study of State, non-state actors and shared participation. The second section of the chapter considers how network theories shed light on the relationship between State and non-State actors.

I. International Law Perspectives on Participation

Several scholars have contemplated how to account for the growing number of actors and their influence in the international legal system in the absence of a cohesive theory of legal personality in international law.¹ Some focus their attention on the position of the individual in international law, the role of civil society organisations or international organisations, and the involvement of the corporation.² An account that includes all these actors and supplements traditional legal subjectivity is Rosalyn Higgins' theory of participation in international law.³ According to Higgins, how actors are actually involved in the processes and decisions of international law is the litmus test of participation, not their formal status. Her approach acknowledges that States are still central, but not the sole actors in the system.⁴ Similarly, James Crawford refers to

¹ See, eg, Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press, 2004); Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2013).

² Samantha Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31(3) *Sydney Law Review* 343, 348.

³ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 39-50.

⁴ *Ibid* 39.

the theory of exclusive State participation in international law as a ‘myth’ that has been replaced with ‘... an open casting call, in which the legal order assigns roles for states, entities and individuals on the stage based largely on performance, and where status is only a *prima facie* criterion.’⁵ Robert McCorquodale maps an inclusive international legal system through the prism of the UN values and obligations.⁶ Despite agreement among these scholars that a wider lens for viewing participation is needed, the concept and conditions for participation in the global order remain unsettled.

In debates about participation, many of the same questions emerge: what are the rights and responsibilities of various participants and how can they be established? Which behaviours (of which participants) will the development of international law be based upon? Or put another way, who has the capacity to make international law? Questions on legal subjectivity or personality levitate towards a reappraisal of the rules related to the bearing of rights and responsibilities. While these questions are critical to the practical operation of international law, they narrowly construe participation. These kinds of concerns tend to fall into a macro approach to international law focusing on formal rules and their development. This tension is exemplified by Crawford’s response to the minimisation of formal status. While Crawford agrees that States are no longer the only subjects, he contends that Higgins’ account only partially captures the challenge of participation in international law:

if we say, with Rosalyn Higgins, that the question is not one of formal personality but of actual participation, we may seem to capture an element of the crowded international scene, but at the expense of another; for how far we can participate may well be affected by issues of status – whether one is eligible to chair the drafting committee, or entitled to sit in the delegates’ lounge, or none of the above. In practice, issues of status do not go away... .⁷

This debate reveals a friction between the reality of plural participation and the conditionality of participation. Crawford ultimately returns to the rules to resolve the discomfort, by positing that statehood continues to be the benchmark for participation and that no credible alternative exists.⁸ This phenomenon of returning to the State to understand plural participation in international law reproduces the State-centricity that a broader account of participation is trying to achieve. Susan Marks observes that

⁵ James Crawford, ‘Foreword’ in Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2013) xiv.

⁶ Robert McCorquodale, ‘An Inclusive International Legal System’ (2004) 17 *Leiden Journal of International Law* 477.

⁷ Crawford, ‘Foreword’, above n 5, xiii.

⁸ James Crawford, *Chance, Order, Change: The Course of International Law* (The Hague Academy of International Law, 2014) 181.

arguments about State-centrism often reinforce the centrality of States as ‘the central problematic with respect to which analysis and policy must be formulated.’⁹

Debates on the conditions of participation presuppose that other actors or participants will engage in international law in the same way as States. These concerns also assume that formal status is the only manner in which actors can influence the system or shape legal outcomes. A micro international law approach can function as a corrective to these assumptions by focusing on how actors overcome or capitalise on a lack of formal status to achieve their goals. However before turning to these issues, some specific approaches to participation of State and non-State actors in international law must be addressed.

State participation in international law

Each State engages with international law differently. Moreover, different parts of each State engage with international law differently. States, however, are considered indivisible entities in international law.¹⁰ A traditional view of the State as a monolithic entity has subsisted across a range of areas in international legal practice, including the protection of citizens abroad. Understanding the State as comprising many participants, each with their own agenda, values and modalities, can enable a richer account of the actors who generate and perform protection. This disaggregated approach can also enhance an analysis of nodes of power and generators of action. This section considers two models that recognise the State as being constituted by multiple actors and units in international law: transgovernmentalism and functionalism.¹¹

Functionalism in international law can be described in several ways.¹² Some argue that as a theory it investigates ‘the interrelations among the elements making up the entire social system’.¹³ Others, such as Hans Morgenthau, posit that it is a theory or method

⁹ Susan Marks, ‘State-Centrism, International Law and the Anxieties of Influence’ (2006) 19(2) *Leiden Journal of International Law* 339, 342.

¹⁰ *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 2.

¹¹ Douglas M Johnston, ‘Functionalism in the Theory of International Law’ (1988) 26 *Canadian Yearbook of International Law* 3; Karen Knop, ‘Re/Statements: Feminism and State Sovereignty in International Law’ (1993) 3 *Transnational Law and Contemporary Problems* 293; Christoph Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’ (1993) 4 *European Journal of International Law* 447.

¹² Functionalism is not limited to international legal scholarship. Other disciplines including social science and political science use this concept. See, eg, Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984) 85.

¹³ Johnston, above n 11, 18.

for analysing the relationship between social forces and international law.¹⁴ Martti Koskenniemi describes ‘functionalist doctrine’ as a way of studying international law as a response to changing social needs.¹⁵ Some scholars suggest that it emerged as a response to the fetishisation of sovereignty in international legal scholarship.¹⁶ One of those scholars, Karen Knop, argues that power relations between different entities in the international system are structurally overlooked: ‘international law has ignored what is actually happening in the international legal community, who the actors really are, and what each one does’.¹⁷ Functionalists emphasise the need to examine the realities of the system empirically.¹⁸ The process of revealing the actors involved in international law phenomena provides what Knop refers to as an ‘empirical corrective’ to the traditionally inflexible inter-State relations framework of international law.¹⁹

Functionalism’s empirical concerns also extend to the way in which the State is conceptualised and understood as an actor. Functionalists argue that all parts of the international system ought to be taken into account, including the organs of a State. Second, functionalism is interested in the function of actors and entities, rather than their status or categorisation in international law. Christoph Schreuer explains:

Rather than grope for the seat of sovereignty, we should adjust our intellectual framework to a multi-layered reality consisting of a variety of authoritative structures. Under this functionalist approach what matters is not the formal status of a participant (province, state international organization) but its actual or preferable exercise of functions.²⁰

Adopting the language of ‘participants’ in the international system, Schreuer moves beyond the sovereign veil and observes that there are many authoritative structures internal and external to the State. Schreuer and other functionalists criticise the dominance of the sovereign model of participation and argue that it obscures activities and their nature in the international system. In the functionalist account, a focus on participation through function reveals the interdependencies and relationships between State and non-State actors.²¹

¹⁴ Hans J Morgenthau, ‘Positivism, Functionalism, and International Law’ (1940) 34(2) *American Journal of International Law* 260, 275.

¹⁵ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) 523.

¹⁶ Knop, above n 11, 335. It should be noted that functionalism as a concept was borrowed from the social sciences.

¹⁷ *Ibid.*

¹⁸ Morgenthau, above n 14, 260; Koskenniemi, above n 15, 523.

¹⁹ Knop, above n 11, 335.

²⁰ Schreuer, above n 11, 453.

²¹ Johnston, above n 11, 21.

Another theory that disaggregates the State is transgovernmentalism.²² Anne-Marie Slaughter's theory of transgovernmentalism draws on the work of regulatory theorists, sociologists and political scientists to disassemble the State and to identify networks of decision-making in international law. Slaughter's model of global order focuses on the networks established between government counterparts across national borders. She investigates relationships between government agencies – describing connections as 'government networks' and the product of these relationships more broadly as the theory of 'transgovernmentalism.'²³ The intention of this disaggregation is to identify connections between actors that would otherwise go unseen in the classical international law model of States. Slaughter instructs her reader on how to better view the world through transgovernmental networks:

Stop imagining the international system as a system of states – unitary entities like billiard balls or black boxes – subject to rules created by international institutions that are apart from, “above” these states. Start thinking about a world of governments, with all the different institutions that perform the basic functions of governments – legislation, adjudication, implementation – interactions both with each other domestically and also with their foreign and supranational counterparts. States still exist in this world; indeed, they are crucial actors.²⁴

Slaughter asserts that relying on the State as an exclusive unit of analysis inhibits our understanding of global governance and the way that international law develops. She proposes that within the networks established between government counterparts across national borders decision-making and concentrations of power occur.

Slaughter observes vertical and horizontal networks in the international system. The vertical order refers to the connections that occur between State units and supranational organisations or institutions. The horizontal order refers to the connections directly between government agencies and their counterparts in other States. Horizontal networks include executive, judicial and legislative networks running at the sub-State level. Within the horizontal networks there are 'direct interactions across sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments.'²⁵ For example, foreign ministries in different countries may exchange information and set standards for consular practice without executive approval. According to Slaughter, the objectives and function of these networks varies.²⁶ Transgovernmental networks can be

²² Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).

²³ Ibid 145.

²⁴ Ibid 5.

²⁵ Ibid 10.

²⁶ Ibid 145.

characterised as information networks, harmonisation networks, coordination networks and enforcement networks, based on their function.²⁷

Transgovernmentalism and the networks Slaughter describes can be understood as a map for tracing forms of international cooperation. Kal Raustiala observes the coordinating value of transgovernmental networks:

The state is instead disaggregating for purposes of cooperation: domestic officials are reaching out to their foreign counterparts regularly and directly through networks, rather than through state-to-state negotiation of the kind that dominated 20th century cooperation. This notion of 'disaggregated sovereignty' is at the center of transgovernmental theory.²⁸

Raustiala and Slaughter emphasise the role of networks as vehicles for information exchange and the coordination of activity among disaggregated parts of States. The benefit of transgovernmentalism is that it provides a framework for unveiling the connections shared by sub-units of State actors between different States. It also identifies a broader range of government actors and their connections than the traditionally monolithic State-centred model. Transgovernmental networks can also, at least in part, explain global cooperation in relation to transnational problems.

However, transgovernmentalism has limitations. How the State is disaggregated and who is included and excluded in this exercise has consequences for how we characterise global governance and explain actions by States and non-States alike. In rethinking State participation, it illuminates the risk that disaggregation can lead to reaggregation of the State in a number of ways. This intellectual process could result in groupings along function, subject matter, level (local, national, regional, international), geography, membership composition or structure. Transgovernmentalism does not challenge the nature of the State, but only seeks to break it into parts that can be reaggregated as a whole, thereby preserving classic conceptions of sovereignty and participation in international law.

This theory also maintains State sovereignty by conceiving of networks as State-only networks. In this sense, transgovernmentalism remains a fundamentally State-centric a model for understanding participation in the international legal order. Slaughter does not adequately address the role of non-State actors in the international system. Transgovernmentalism recognises the existence of non-State actors, but it does not go beyond placing them as a phenomenon outside of the networks formed between State agencies where, in Slaughter's view, power is generated and exerted. In this

²⁷ Ibid 144.

²⁸ Kal Raustiala, 'The Architecture of International Cooperation' (2002) 43 *Virginia Journal of International Law* 1, 10-11.

characterisation of participation in the international system, non-State actors have their own separate networks that interact with transnational State networks. However, even this limited acknowledgement replicates an emphasis on the State, with non-State actors on the periphery. What the transgovernmental model cannot achieve is an explanation of how different actors (State and non-State) employ modes of influence and how they interact with one another, sometimes within the same network, to achieve their goals.

Both transgovernmentalism and functionalism exemplify alternative approaches in international legal thinking on the composition of the State. Unveiling sovereign structure is the first step to understanding where power resides within the State and how the activities related to international law are propelled and hindered. The transgovernmentalism and functionalism approaches recognise, even if it is in a minimalist way, the existence of actors beyond formal State structures. A functionalist outlook in particular can help to identify how interdependencies between State and non-State actors evolve. In order to understand participation in the protection of citizens abroad beyond the classical State-centred model, an account of non-State actors also needs to be considered.

Non-State actor participation in international law

There is a cacophony of voices addressing the nature and role of non-State actors in international law. Writers have considered the repercussions of the presence and participation of non-State actors in customary international law, human rights compliance, the creation of norms and the capacity of States to exercise their sovereignty.²⁹ This section will consider some of these approaches within international legal scholarship on the role of non-State actors in international law, with an emphasis on civil society organisations.

²⁹ See, eg, Hilary Charlesworth, 'The Unbearable Lightness of Customary International Law' (1998) 92 *Proceedings of the Annual Meeting (American Society of International Law)* 44; Isabelle R Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1990) 31 *Vanderbilt Journal of International Law* 211; José Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005); Barbara K Woodward, *Global Civil Society in International Law-Making and Global Governance* (Martinus Nijhoff Publishers, 2010); Jean d'Aspremont (ed), *Participants in the International Legal System* (Routledge, 2011); Pierre-Marie Dupuy and Luisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar, 2008); Philip Alston (ed), *Non-state Actors and Human Rights* (Oxford University Press, 2005); Andreas Bieler, Richard Higgott and Geoffrey Underhill (eds), *Non-state Actors and Authority in the Global System* (Routledge, 2011); Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press, 2005).

Non-State actors fall outside formal State structures. These entities may include corporations, professional associations, armed groups and civil society. However, the concept may also include other private and public actors, such as religious bodies, the media, individuals, families and universities. Some scholars have made a distinction between economic and civil non-state actors, defining civil non-state actors as ‘non-governmental organizations (NGOs), charities, trusts, foundations, advocacy groups and national and international non-state associations.’³⁰

Legal scholars have been concerned with the standing of non-State actors within the matrix of subjects and objects of international law discussed earlier in this chapter.³¹ Non-State actors have narrow parameters for appearing before international courts and tribunals (if at all) and their practice does not formally contribute to the development of international law under the sources of law in the ICJ *Statute*, with the exception of the teachings of eminent publicists.³² Math Noortmann observes the preoccupation of categorising different kinds of participants, particularly as they relate to issues of responsibility and legitimacy. Noortmann identifies the legal status of non-State actors, their legitimacy in the system, the extent and content of their personality, and the legal character of agreements entered into with States as the issues of greatest concern to international legal scholars.³³ Marks, however, classifies the concerns by theme: she characterises the two concerns of international legal scholars as regulation of non-State actors (armed groups for example) and inclusion of non-State actors (activists and civil society) in norm-making and enforcement.³⁴ These approaches, whether based on theme or on principle, consider the role of non-State actors within a State-based system. They attempt to analyse the impact of non-State actor behaviour on the State or on classical State processes (such as treaty negotiations).

Civil society organisations are one group of non-State actors whose participation in the international legal system has received different forms of legitimacy. Alan Boyle and Christine Chinkin have noted that the UN Charter fails to define what constitutes a civil society organisation. Along with other writers, such as Philip Alston, Boyle and Chinkin recognise that these kinds of actors are defined in the negative, ‘through what they are not: they are not established by a government or by intergovernmental agreement and

³⁰ Bridget M Hutter, ‘The Role of Non-state Actors in Regulation’ (2006) *Centre for Analysis of Risk and Regulation* (Discussion Paper 37), 2.

³¹ Pierre-Marie Dupuy, ‘Conclusion: Return on the Legal Status of NGOs and on the Methodological Problems that Arise for Legal Scholarship’ in Pierre-Marie Dupuy and Luisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar, 2008) 204, 204.

³² *Statute of the International Court of Justice* art 38(1)(d).

³³ Math Noortmann, ‘Presentation’ in Jean d’Aspremont (ed), *Participants in the International Legal System* (Routledge, 2011) xxxix.

³⁴ Marks, above n 9, 341.

their resources should come primarily from voluntary contributions'.³⁵ Holly Cullen and Karen Morrow have broadly defined civil society to include 'public organisations, which are not State organisations: the media, educational institutions, religious bodies and voluntary associations'.³⁶ Mary Kaldor, however, considers the nature of participation for individuals as the defining feature of civil society.³⁷ Kaldor defines civil society as a process

through which individuals negotiate, argue, struggle against or agree with each other and with centres of political and economic authority. Through voluntary associations, movements, parties, unions, the individual is able to act publicly.³⁸

Another identifying characteristic of civil society organisations is the nature of their pursuits. Oscar Schachter notes that while many civil society organisations can be understood as striving for higher order or community values, they can also be 'uncivil' in their objectives.³⁹ Schachter critiqued approaches to civil society that obscure their diversity and the conflict of different interests they engage.⁴⁰

Civil society organisations have gained a bigger profile in international law and its institutions since the early 1900s.⁴¹ Increased participation by civil society organisations in multilateral negotiations and forums has had an impact on the dynamics of international law and political affairs. Some scholars, like Boyle and Chinkin, advance the claim that civil society organisations participate in the enforcement of international law through naming and shaming States for poor compliance with treaty obligations and by participating in treaty-monitoring processes.⁴² Civil society participation in treaty negotiations has also increased. Civil society actors can put forward negotiating positions, draft text and design monitoring mechanisms to influence the outcome of a negotiation.⁴³ Advocacy and litigation have

³⁵ Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 3, 14; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 52-53.

³⁶ Holly Cullen and Karen Morrow, 'International Civil Society in International Law: The Growth of NGO participation' (2001) 1(1) *Non-State Actors and International Law* 7, 8.

³⁷ Mary Kaldor, 'Global Civil Society' (2003) 79(3) *International Affairs* 583, 585.

³⁸ *Ibid* 585.

³⁹ Oscar Schachter, 'The Decline of the Nation-State and Its Implications for International Law' (1997) 36 *Columbia Journal of Transnational Law* 7, 12.

⁴⁰ *Ibid* 14.

⁴¹ For a history of NGOs or as they have historically been termed, 'private associations' see Steve Charnovitz, 'Nongovernmental Organizations and International law' (2006) 100(2) *American Journal of International Law* 348. For a general overview of the participation of NGOs in international law see Cullen and Morrow, above n 36.

⁴² Boyle and Chinkin, above n 35, 81.

⁴³ Zoe Pearson, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39 *Cornell Journal of International Law* 243, 244; Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Routledge, 2006) 58;

been important tools for civil society to shape norms, contribute to law-making and to drive specific values, particularly human rights values. Civil society organisations have also assumed representational responsibilities on behalf of individuals in various judicial and non-judicial settings, including before international human rights treaty bodies, international courts and tribunals and within domestic systems.⁴⁴ Participation by civil society actors has contributed to shaping the content and the processes of international law without the formal status States possess.⁴⁵

There is a tension between the participation of non-State actors in international law more broadly and the implications that their inclusion in the international legal system has on sovereignty. Some schools of thought in international legal scholarship equate the increased participation and influence of civil society actors with the demise of State centrality.⁴⁶ For example, Schachter argued that the increased participation of non-State actors affects the relevance of States, while some argue that it remains highly controversial.⁴⁷ Scholars contemplate whether non-State actor participation creates vacuums of legitimacy in the international legal order through a democratic deficit.⁴⁸ Others, such as Luigi Condorelli and Antonio Cassese, have tried to capture changes in participation as an affirmation of State sovereignty. They observe the shift in the shape of sovereignty in international law:

Although the limits to the sovereignty of states are increasingly growing in quantity and depth, partly in consequence of delegations of authority to supranational institutions and agencies, it remains true in substance that those growing limits still ultimately arise from the choice of the states: the choice to bind themselves, the sovereign choice to accept limits to their sovereignty. The overall logic of the phenomenon does not, therefore, appear to be that of expropriation of state competencies, but rather that of assignment, transfer, or delegation.⁴⁹

Condorelli and Cassese preserve the concept of State sovereignty by showing that any change or limit to State power flows from State consent. In the quote above, they

Hadii M Mamudu and Stanton A Glantz, 'Civil Society and the Negotiation of the Framework Convention on Tobacco Control' (2009) 4(2) *Global Public Health* 150; Michele M Betsill and Elisabeth Corell, 'NGO Influence in International Environmental Negotiations: A Framework for Analysis' (2001) 1(4) *Global Environmental Politics* 65.

⁴⁴ Boyle and Chinkin, above n 35, 84.

⁴⁵ Charnovitz, above n 41, 360.

⁴⁶ Kal Raustiala, 'Participatory Revolution in International Environmental Law' (1997) 21 *Harvard Environmental Law Review* 537, 572-573.

⁴⁷ Schachter, above n 39, 13. See, eg, Pearson, above n 43; Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) *Yale Journal of International Law* 107.

⁴⁸ Martha L Schweitz, Donna Sullivan and Peter D Bell, 'NGO Participation in International Governance: The Question of Legitimacy' (1995) 89 *Proceedings of the Annual Meeting (American Society of International Law)* 415, 417.

⁴⁹ Luigi Condorelli and Antonio Cassese, 'Is Leviathan Still Holding Sway Over International Dealings?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 14.

describe sovereign power with the same characteristics as the concept of energy in physics: it can only be transferred or converted, but never created or destroyed. This suggests that there is a certain immutable character to sovereignty, no matter how it is expressed or by whom. Condorelli and Cassese also contemplate that the sovereignty of States, State power and function, can be assigned, transferred or delegated. In their list, Condorelli and Cassese omit the idea that State and non-State actors may also share powers and functions.

Studies by legal scholars largely focus on understanding the impact of non-State actor involvement on the State-based system of international law and the way in which wider participation can erode State sovereignty. However, the content of relationships between State and non-State actors can shape the course of international law and its practice. Moreover, the relationships between those actors vary. Condorelli and Cassese's concern for the delegation and distribution of power is an idea that warrants further attention, particularly as it relates to the relationship between State and non-State actors. Where one relationship or activity may diminish sovereign power, another may enhance it. The anxiety of diminishing State power can inhibit a diagnosis of the advantages States gain through their relationships with non-State actors, and vice versa.

Shared participation: State and non-State actors in international law

International legal scholarship has plotted the relationship between State and non-State actors narrowly. As discussed in the last section, some scholarship has conceptualised non-State actor involvement in international law as diminishing the traditional sovereign model.⁵⁰ Others have traced the relationship as part of broader change in lawmaking and governance.⁵¹ Some frame the relationship between actors within the lens of accountability.⁵² This section explores how legal scholars have understood and explained joint participation of State and non-State actors in international law with a focus on lawmaking and liability.

⁵⁰ Schachter, above n 39, 7.

⁵¹ See generally, Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012); Anne Peters et al (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009); Karsten Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations in International Law' (1999) 6 *Indiana Journal of Global Legal Studies* 579.

⁵² Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law' (2013) 34 *Michigan Journal of International Law* 359; See generally, Andre Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press, 2015).

In the absence of a global legislative authority, lawmaking in international law is linked to legal personality.⁵³ The competence to make international law (creating new rules and repealing others), either through treaty or custom, is limited to States as subjects of international law.⁵⁴ State consent is therefore the basis of all rules in the international legal system. From this viewpoint, the involvement of any additional actors in lawmaking processes derogates from the centrality of State-consent and, ultimately, States themselves.

Newer definitions of lawmaking encompass a wider range of behaviours and outputs. For example, some scholars have conceptualised lawmaking as ‘norm-setting or public policy-making by public authorities.’⁵⁵ By enlarging the definition of lawmaking, there has been greater scope to include and analyse the contributions of non-State actors in processes of norm development and rule creation.⁵⁶ Anne Peters et al. observe that academic engagement with the novel contributions of non-State actors to lawmaking processes is virtually non-existent.⁵⁷

Emerging thought in international legal scholarship provides a more pluralistic account of what international law is, how it is made and by whom.⁵⁸ Pauwelyn, Wessel and Wouters examine changes in the techniques and products of lawmaking in the global order, identifying the development of ‘informal international law.’ Informal international lawmaking is characterised by three trends.⁵⁹ First, Pauwelyn et al. contend that formal international lawmaking is in demise. They argue that the output of international law of treaties and other formal sources, has been superseded by the ‘preference of states for informal arrangements’ and normative instruments.⁶⁰ Second, Pauwelyn et al. identify that the processes of informal lawmaking are more likely to be characterised by networked processes, rather than formal treaty-based process or forums. The final development is that the actors involved in informal lawmaking are

⁵³ Portmann, above n 1, 8.

⁵⁴ Boyle and Chinkin, above n 35, 1.

⁵⁵ Joost Pauwelyn, ‘Informal International Lawmaking: Framing the Concept and Research Questions’ in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 21.

⁵⁶ Boyle and Chinkin, above n 35, 41-97.

⁵⁷ Anne Peters et al (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 4. They identify only one work that explicitly deals with this concern: José Alvarez *International Organizations as Law-Makers* (Oxford University Press, 2005).

⁵⁸ Peters et al, above n 57, 4; Slaughter, above n 22; Joost Pauwelyn, Ramses A Wessel and Jan Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’ (2014) 25 *European Journal of International Law* 733.

⁵⁹ Pauwelyn, above n 55, 15-20.

⁶⁰ Pauwelyn, Wessel and Wouters, ‘When Structures Become Shackles’, above n 58, 736.

not limited to the classic subjects of international law.⁶¹ The informal international law project is not concerned with the status of the norms or standards being developed as either binding or non-binding, but instead with the legitimacy and accountability of the actors and processes.⁶²

Another perspective on the relationship between States and non-State actors is the presence of liability. Two common issues of concern in the area of liability are whether the State can be made liable for non-State behaviour and whether non-State actors bear responsibility in international law and can therefore be held accountable for breaches of international obligations. Examples of these concerns include scholarship that addresses the use of private security companies in armed conflict,⁶³ the responsibility of corporations⁶⁴ and the responsibility of non-State armed groups for breaches of international humanitarian law.⁶⁵ Concern for liability or responsibility in international law generally flows from the framework for attributing liability and State responsibility. This framework, codified in the ILC's *Articles on State Responsibility*, poses several problems as they relate to plural participation. The first is that the ILC's programme of study and subsequent codification did not aim to diagnose the behaviour of non-State actors, only States. Second, the *Articles on State Responsibility* recognise the State as a unitary entity, with some limited recognition for constitutive State actors.⁶⁶

This framework has influenced the approach of scholars, whereby they focus on fitting the behaviour of non-State actors into structures that govern the behaviour of States. The *Articles on State Responsibility* provide some scope to hold non-State actors responsible for internationally wrongful acts. However, the traditional framework of State responsibility is too limited and 'cannot adequately regulate, and ensure accountability for, non-state actors acting in conjunction with states.'⁶⁷ Jean d'Aspremont et al. reject the *Articles on State Responsibility* as the exclusive lens for

⁶¹ Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'An Introduction to Informal International Lawmaking' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 1, 3.

⁶² Pauwelyn, above n 55, 28.

⁶³ See, eg, Christopher Kinsey, *Corporate Soldiers and International Security: The Rise of Private Military Companies* (Routledge, 2006); Chia Lehnardt, 'Individual Liability of Private Military Personnel Under International Criminal Law' (2008) 19(5) *European Journal of International Law* 1015; Emanuela-Chiara Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 *International Review of the Red Cross* 525.

⁶⁴ See, eg, Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) *Modern Law Review* 598.

⁶⁵ See, eg, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006).

⁶⁶ *Articles on State Responsibility* art 4.

⁶⁷ Jean d'Aspremont et al, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62(1) *Netherlands International Law Review* 49, 51.

understanding how State and non-State actors may jointly cause harmful conduct in international law.⁶⁸ In their argument, they note that the *Articles on State Responsibility* do not (and cannot) fully address the behaviour of non-State actors, nor does the conceptual framework of the *Articles on State Responsibility* deal with shared responsibility between State and non-State actors. They observe that classical approaches to liability in international law isolate the actions of State and non-State actors from one another.⁶⁹

How have scholars envisaged a relationship of shared liability between State and non-State actors? There is some scholarship that considers how State and non-State actors can be held responsible jointly for harmful actions in international law. This form of plural participation is referred to as ‘shared responsibility’ in international law.⁷⁰

D’Aspremont et al. define shared responsibility as a situation where both State and non-State actors are ‘held accountable for a certain conduct without this conduct necessarily giving rise to responsibility in the formal and breach-based understanding of the term in international law.’⁷¹ In their account of shared responsibility, d’Aspremont et al. acknowledge the complexity of multi-actor conduct in international law:

... the impugned forms of conduct of non-state actors – whether or not constituting a breach of their obligations – have proved to be complex and composite practices as they often involve the contribution or participation of other actors, including states (and international organisations). Impugned actions by non-state actors rarely fall short of any state (or international organisation’s) involvement.⁷²

This characterisation of participation envisages composite or plural practices as a reality of liability in international law. The idea of shared responsibility, however, is still largely confined to harmful conduct or breaches of international law. The multiplicity of participants or ‘composite practices’ that d’Aspremont et al. describe have not been considered in relation to the fulfilment of rights or duties in international law.

Accountability and compliance prevail as the dominant lenses for viewing the relationship between State and non-State actors in the shared responsibility approach. Despite this limitation, d’Aspremont et al. provide a useful typology of shared action between State and non-State actors, which may be used to understand and explain

⁶⁸ Ibid 61.

⁶⁹ Ibid 58.

⁷⁰ Nollkaemper and Jacobs, ‘Shared Responsibility in International Law’, above n 52; d’Aspremont et al, above n 67.

⁷¹ d’Aspremont et al, above n 67, 51.

⁷² Ibid 51.

relationships between actors in the protection of citizens abroad. The typology of shared action foresees three tiers: joint action, concurrent action (where by actors aid and assist one another) and cumulative action (where different actors take up action but do not coordinate).⁷³ While this perspective on shared action in international law focuses on networks of harm, it is possible to apply this framework to other kinds of activities in international law including the fulfilment of rights and duties.

International law has yet to attend to the relationship between State and non-State actors beyond the prism of harm, liability or lawmaking. Actors do not only cause harm jointly, they also pursue and fulfil other kinds of rights and obligations jointly. For example, the protection of citizens abroad is not a violation or a breach, but a right in international law. Actors can participate in preventing harm, fulfilling a legal obligation or pursuing a remedy on behalf of an injured citizen. In the protection of citizens abroad, neither lawmaking nor accountability explain the content of the relationship between State and non-State actors or their participation in protection. It is therefore useful to go beyond international legal scholarship to explain how State and non-State actors connect and interact.

II. Governance and Networks in International Law

Various disciplines use network theories to investigate the connections between different actors in order to better understand the driving forces of law, regulation and governance.⁷⁴ A study of networks can disaggregate the State into its composite actors, recognise the participation of actors outside of formal State structures and analyse the relationships between them. In addition to identifying the existence and nature of connections between actors, a network approach also diagnoses the modalities, values and techniques of networked action. This section will outline theories of networks and nodal governance and how they have been applied to international law. It establishes frameworks that can be applied to and assist in the understanding the protection of citizens abroad.

⁷³ Ibid 65.

⁷⁴ See, eg, Emilie M Hafner-Burton, Miles Kahler and Alexander H Montgomery, 'Network Analysis for International Relations' (2009) 63(3) *International Organization* 559; Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998); John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000); Barry Wellman, 'Network Analysis: Some Basic Principles' (1983) 1(1) *Sociological Theory* 155.

Networks, regulation and governance

Networks offer a model for understanding the connections between actors. Governance and regulatory scholars have shown particular interest in networks as forms of regulation. John Braithwaite and Christine Parker define regulation broadly:

Regulation can mean more than just the enforcement of legal rules. ... On the broadest reading, regulation means even more than that. Much regulation is accomplished without recourse to rules of any kind. It is secured by organizing economic incentives to steer business behaviour, by moral suasion, by shaming, and even by architecture. On this broadest view, regulation means influencing the flow of events.⁷⁵

Braithwaite argues that the way the world is regulated and power is harnessed has shifted away from a Statist order.⁷⁶ Bridget Hutter explains that this change has its source in the participation of non-State actors:

Contemporaneous with the changing fashions of state regulation has been a broadening conceptualisation of regulation. The growing recognition of the limits of public law approaches to regulation led governments and regulatory scholars to turn their attention to alternative methods and sources of regulation. So regulation is no longer regarded as the exclusive domain of the state and governments and the role of non-state actors in regulation is now widely acknowledged.⁷⁷

A governance lens, at the most general level, enables us to view social, legal and political phenomena through a range of actors and their connections. There are multiple modes of governance and as many theories to match, including good governance, networked governance, corporate governance and governance without government.⁷⁸ Some governance scholars suggest that the State, or what they describe as 'formal government,' does not occupy a more privileged position than other actors, but rather 'is merely one – albeit an important – actor among many others.'⁷⁹ In his study on network power, Manuel Castells suggests that, 'even the most powerful states, have some power (mainly destructive), but not all the power'.⁸⁰ These scholars suggest that traditional State power exercised through coercion, command and control has been superseded by a more nuanced expression of power through cooperation and alliance formation within networks.⁸¹ Common to all the modes of governance is an

⁷⁵ Christine Parker and John Braithwaite, 'Regulation' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 120, 120.

⁷⁶ John Braithwaite, 'Methods of Power for Development: Weapons of the Weak, Weapons of the Strong' (2004) 26 *Michigan Journal of International Law* 297, 300.

⁷⁷ Hutter, above n 30, 2.

⁷⁸ Kees Van Kersbergen and Frans Van Waarden, "'Governance' as a Bridge Between Disciplines: Cross-Disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy' (2004) 43(2) *European Journal of Political Research* 143, 145-51.

⁷⁹ Ibid 152.

⁸⁰ Manuel Castells, 'A Network Theory of Power' (2011) 5 *International Journal of Communication* 773, 776.

⁸¹ Van Kersbergen and Van Waarden, above n 78, 152.

underlying assumption that governance is pluricentric rather than unicentric and that networks emerge as an important organising framework for relationships between different actors.⁸²

What can network theory show us about the relationship of State and non-State actors? Scholars outside international legal scholarship have traced patterns of delegation, assignment and coordination between State and non-State actors in a range of areas.⁸³ Hutter notes that ‘States are delegating or relinquishing some of their functions to other actors on the sub-State level as well as on the inter-State level’.⁸⁴ This kind of delegation can occur directly, indirectly, explicitly or implicitly. One example of this indirect delegation is the regulatory function that non-State actors, such as human rights global civil society organisations, can perform by setting standards or raising moral concerns on issues such as the death penalty and due process. Civil society campaigns are freer to express popular views, or demand the application of international human rights law standards, which due to comity and the constraints of non-interference in international law, States may be unable to express publicly. Particularly in international human rights law advocacy, civil society and public lawyers ‘contribute to the information gathering, standard setting and behaviour modification aspects of regulatory control.’⁸⁵ This is consistent with Hutter’s observation that ‘[n]on-state regulation may have a strong normative dimension which may help the behaviour modification aspects of regulation. These centre on industry morality and institutionalising responsibility...’.⁸⁶ States may benefit from situations when non-State actors perform traditional State functions (like representations, advocacy, mobilisation and litigation). These exchanges between State and non-State actors are typically overlooked in analyses of the protection of citizens abroad. States can and often do ‘co-opt’ actions by non-State actors like civil society or lawyers to fill the gaps in protection that they are not able to fill due to political constraints.⁸⁷

There are many models of networks and networked governance. Two such models are webs of influence and nodal governance.⁸⁸ The webs of influence theory developed by John Braithwaite and Peter Drahos elaborates an analytical framework for understanding different kind of networks and how they operate. The framework relies

⁸² Ibid 151; Clifford Shearing and Jennifer Wood, ‘Nodal Governance, Democracy, and the New “Denizens”’ (2003) 30(3) *Journal of Law and Society* 400, 403.

⁸³ Hutter, above n 30, 15.

⁸⁴ Schreuer, above n 11, 449.

⁸⁵ Hutter, above n 30, 1.

⁸⁶ Ibid 13.

⁸⁷ Ibid 1.

⁸⁸ Braithwaite and Drahos, above n 74, 550; Scott Burris, Peter Drahos and Clifford Shearing, ‘Nodal Governance’ (2005) 30 *Australian Journal of Legal Philosophy* 30, 36.

on three analytical tools: the actors that participate, the principles they pursue and the mechanisms that they use to achieve their aims.⁸⁹ Braithwaite and Drahos explain that ‘globalization of regulation never occurs on the basis of a single mechanism, no matter how powerful’.⁹⁰ The ‘webs of influence’ framework approaches the regulation of business as a contest of principles within competing networks of actors. The networks in business regulation, or ‘webs’ as they refer to them in their study, can be characterised in different ways. Some networks prove to be of webs of influence and while others are webs of coercion. These webs employ different techniques, including manipulating technical standards, setting agendas and mobilising other actors to achieve aims.

Some networks are more powerful than others and some actors in each network operate in clusters of location or modality. These clusters are referred to as ‘nodes’ and can express regulatory power. Nodes are the sites of governance where ‘knowledge, capacity and resources are mobilized.’⁹¹ Braithwaite defines nodes as ‘a point in time and space where a cluster of actors collaborate to mobilize pooled resources to tie together strands in ... networks of power’.⁹² Castells explains that the exercise of control in networks is contingent on two mechanisms of power.⁹³ The first is the ability to constitute or form a network, including programming (or reprogramming) its objectives. The second mechanism for exercising power is the ability to coordinate other networks to form cooperative efforts or strategies. He describes these mechanisms as ‘programming’ and ‘switching.’⁹⁴ Burris, Drahos and Shearing explain that this kind of power is exemplified in their model of nodal governance, another framework for explaining networks.

Burris et al. define nodal governance as ‘an elaboration of contemporary network theory that explains how a variety of actors operating within social systems interact along networks to govern the systems they inhabit’.⁹⁵ Nodal governance endorses the view that particular nodes are endowed with the power to ‘manage and change the course of events’.⁹⁶ To develop this theory, Burris, Drahos and Shearing frame nodal governance within complex systems theory – a Hayekian concept that claims that

⁸⁹ Braithwaite and Drahos, above n 74, 15.

⁹⁰ Ibid 13.

⁹¹ Burris, Drahos and Shearing, above n 88, 37.

⁹² Braithwaite, above n 76, 300.

⁹³ Castells, above n 80, 776.

⁹⁴ Ibid.

⁹⁵ Burris, Drahos and Shearing, above n 88, 33.

⁹⁶ Ibid 33.

outcomes emerge from adaptive responses of the actors to their environment and not always from their intentions.⁹⁷ Burriss, Drahos and Shearing state that:

Outcomes are produced by the complex interaction of what people do, how they relate to one another, the institutions, technologies and mentalities they deploy, their biological equipment and the conditions and stimuli from the larger physical and social environment in which they operate.⁹⁸

Mentalities, technologies, resources and institutions are another set of analytical tools for examining networks, their character and their power.⁹⁹ Burriss et al. define these diagnostic probes:

a way of thinking (mentalities) about the matters that the node has emerged to govern; a set of methods (technologies) for exerting influence over the course of events at issue; [r]esources to support the operation of the node and the exertion of influence; and a structure that enables the directed mobilization of resources, mentalities and technologies over time (institutions).¹⁰⁰

It is clear that there is some overlap between webs of influence and nodal governance, particularly in the diagnostic probes of each theory. Where, for example, one particular tool of power may be described as a ‘mechanism’ in webs of influence, it can also be characterised as a ‘technology’ in nodal governance.

Networks and regulatory perspectives have made their way into some analyses of international law. Hilary Charlesworth and Emma Larking apply a regulatory lens in their work on the Universal Periodic Review (UPR). They argue that by viewing international processes or instruments through the lens of regulation one can draw attention to the goals embedded in the process and the devices actors deploy to achieve those objectives.¹⁰¹ Noting that the UPR is a political process examining the implementation of law, Charlesworth and Larking emphasise how a regulatory lens can explain the complex relationship between law and politics:

Using a regulatory lens ... brings the social and political power that the process exerts into focus, without assuming that the power is effective in relation to the explicit aims... [s]uch an analysis encourages rich description as well as critique in respect of the power relations at play.¹⁰²

In the context of the protection of citizens abroad there are comparative power relations at play. There are regional and international politics between States, the nature of the individual and the breach alleged, ideas of citizenship, international

⁹⁷ Ibid 34.

⁹⁸ Ibid 34.

⁹⁹ Ibid.

¹⁰⁰ Ibid 37-8.

¹⁰¹ Hilary Charlesworth and Emma Larking, ‘Introduction’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review* (Cambridge University Press, 2015) 8.

¹⁰² Ibid.

human rights law standards, the limits of traditional Westphalian sovereignty, the attempts of civil society to influence States and the limits to the resources of the actors. Actors such as civil society, courts, corporations, universities, lawyers, politicians, governmental departments/agencies and international institutions like the ILC are involved in the decision-making and outcomes related to the protection of an individual abroad. Some of them form networks of standard-setting and behaviour modification, some are norm entrepreneurs pursuing changes in policy, while others form networks to disable action or change. One example is the role of the ILC's Special Rapporteur for Diplomatic Protection, discussed in chapter two. Since his reports on the codification of diplomatic protection, there has been an increase in scholarship on the relationship between diplomatic protection and human rights, demonstrating the normative influence of the law (in this instance, codification) as a mechanism by the Special Rapporteur and the ILC, functioning as a norm entrepreneur and a regulatory node.

III. Participation, Networks and the Protection of Citizens Abroad

Since the canonical academic contributions on diplomatic protection in the early twentieth century, the presence and participation of non-state actors and entities in international law has proliferated. Civil society organisations in particular can influence the direction and outcomes in international law despite their lack of formal status as subjects of international law. How do these developments apply to the protection of citizens abroad?

Higgins' model of participation in international law is a starting point for understanding multi-actor action in the protection of citizens abroad, but network theory supplements her approach by providing the framework for analysing that participation. The following chapters investigate what networks exist in the protection of citizens abroad, as well as the characteristics and functions of those networks. If networks are a significant part of the protection of citizens abroad, two concerns emerge. The first is why networks have emerged in this area of international law (especially since it has historically been characterised as a State enterprise) and the second is how they shape interventions on behalf of citizens. How do networks facilitate and inhibit action? How do different modes of participation by different actors influence the phenomenon of protection in international law? By addressing these questions, I hope to sketch a picture of the nature of participation in the protection of citizens abroad, which includes multiple actors from within the State and beyond.

The activities of civil society organisations in the protection of citizens abroad are of specific interest. Compared with the authority of the State, which is based on its legal character, civil society organisations garner influence through their moral authority.¹⁰³ Civil society actors aim to influence States with higher-order values including human rights, women's rights and environmentalism.¹⁰⁴ In the absence of an international legal obligation on States to intervene on behalf of their citizens, the moral authority of civil society becomes an important tool for generating action. Civil society actors can attract attention to values like citizenship, the death penalty and human rights to put moral pressure on governments to take action. Civil society organisations also take advantage of their transnational character and presence to pursue morally founded globalised agendas.¹⁰⁵

Whereas States are faced with political, legal and physical limitations to their interventions, civil society organisations are not restricted by comity and international law prohibiting interference with territorial and political sovereignty.¹⁰⁶ These organisations also have greater scope for soft intervention, '[b]eing autonomous and nimble, NGOs can travel to trouble spots where governments and IOs fear to go or are slow to reach'.¹⁰⁷ The fluidity and mobility of civil society coupled with some moral distance from matters of strict national interest creates a transnationalism which has 'served as a source of strength for NGOs in their various interactions with governments. NGOs act as a solvent against the strictures of sovereignty'.¹⁰⁸ An example of this political and physical agility is the Amnesty International *Individuals at Risk* campaign (previously named 'Human Rights Defenders'). Amnesty International campaigns on behalf of individuals experiencing human rights abuses or advocates who have been imprisoned for political purposes. One technique that the *Individuals At Risk* campaign uses is mobilisation: '[i]nformation is gathered daily and sent out to thousands of people who immediately compose letters, emails, and faxes to government officials or others with the power to halt the abuse'.¹⁰⁹ Non-State actors and civil society organisations are able to employ techniques that are not available to States and can rely on global networks of actors to mount interventions on behalf of individuals experiencing human rights violations.

¹⁰³ Charnovitz, above n 41, 348. *Contra* Simone Chambers and Jeffrey Kopstein, 'Bad Civil Society' (2001) *Political Theory* 837.

¹⁰⁴ Schachter, above n 39, 13.

¹⁰⁵ Kaldor, above n 37, 590-591.

¹⁰⁶ Note however that civil society actors must still comply with the domestic laws of the States in which they operate.

¹⁰⁷ Charnovitz, above n 41, 362.

¹⁰⁸ *Ibid* 348.

¹⁰⁹ *Amnesty International*, 'Individuals at Risk Campaign' <<https://campaigns.amnesty.org/campaigns/individuals-at-risk>>.

Civil society can also be limited in what it can achieve. While informality serves as a mechanism or technique of flexibility for some civil society organisations, it is equally the case that the benefits of formal status belonging to States are often out of reach. One such benefit is that States and their agents benefit from diplomatic privileges and immunities in their interactions with other States, whereas civil society organisations and their officers do not. Civil society organisations do not have the same rights as States under international law to have consular access and to provide consular services to nationals (discussed in chapter two). States also have the capacity to bring inter-State actions with binding judgments in international courts and tribunals, and which can attract global attention.¹¹⁰ Formal status as a State may also allow an audience with host governments that civil society organisations may not have.

In this respect, there are limitations and benefits of formal and informal status attached to action by State and non-State actors. The case studies in this thesis explore how multi-actor networks can overcome and exploit some of these limitations to achieve effective interventions on behalf of nationals abroad.

IV. Conclusion

The State is central in international law, however, international legal scholarship has focused on specific aspects of the concept of the State and the idea of sovereignty that accompanies it.¹¹¹ There is an array of legal thought that examines the identities and activities of non-State actors, yet there are few writers that contemplate different manifestations of the State from an international law perspective.¹¹² Part of understanding networks and their operation in international law is to consider their influence on the State as an entity. As public-private partnerships and multi-actor action grow, do the activities, objective and values of these networks reshape the State? While most scholarship has focused internally on State organs, or on the influence of non-State actors on law-making and international processes, I focus on the gap in scholarship addressing the interaction of non-State actors with State actors in the

¹¹⁰ Note that there are some tribunals that allow non-State actors, like corporations, to bring actions against States. This is particularly the case in investor-State disputes arising under bilateral and multilateral treaty arrangements.

¹¹¹ John Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97(4) *American Journal of International Law* 782; Cf Gerry Simpson, 'The Guises of Sovereignty' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re-envisioning Sovereignty: The End of Westphalia?* (Ashgate, 2008) 51, 63. Simpson argues that there is an uncoupling of sovereignty from Statehood.

¹¹² I note that political science scholars have challenged the idea of the State and State sovereignty. See, eg, Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999); Abram Chayes and Antonia Handler Chayes. *The New Sovereignty* (Harvard University Press, 1998).

execution of international legal rights and duties. As Condorelli and Cassese suggest, the transfer, assignment and delegation of State competencies are a reality of international law.¹¹³ The following chapters consider how this reality of plural participation manifests itself in the protection of citizens abroad and how a range of actors fulfil and deny the promise of protection.

¹¹³ Condorelli and Cassese, above n 49, 14.

Chapter 4

Germany

In 1999 Germany commenced proceedings in the International Court of Justice (ICJ) against the United States for breaches of the *Vienna Convention on Consular Relations*, while also invoking its right of diplomatic protection in customary international law.¹ The case was brought on behalf of two German citizens, brothers Karl and Walter LaGrand, who were sentenced to death in the United States. Strangely, although the brothers had both been executed prior to the merits of the case being heard, Germany proceeded with its action in the ICJ. The aim of this chapter is to explore how State and non-State actors can participate in the generation of a legal case. Section one outlines the background to the legal proceedings and some legal aspects of the ICJ's ruling. Section two of the chapter traces the processes leading to multi-actor participation in the intervention on behalf of the LaGrand brothers. Part three examines how and why Germany intervened using legal proceedings in the ICJ on behalf of two men who knew little of their national connection and had been convicted of serious violent crimes.

I. Background to the *LaGrand* case

The arrest, conviction and death sentences of the LaGrand brothers in the United States, both born in Germany but possessing no other connection to their birthplace, led to a contentious case before the ICJ.

Progeny of a German woman, Karl and Walter LaGrand moved from Germany to the United States as young children. Unbeknownst to them, they never acquired citizenship during their residence in the United States. An American serviceman (their mother's partner at the time of their emigration from Germany) adopted the brothers and gave them the surname name LaGrand. In January 1982 Walter and Karl LaGrand committed a bank robbery in Arizona. They killed one person and inflicted serious injuries on another. At the time of their arrest they informed police that they were Americans, on the assumption that they had been naturalised. Karl and Walter

¹ *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466; *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force on 19 March 1967) art 36(1)(b).

LaGrand were convicted of armed robbery and murder by an Arizona court and were sentenced to death. The LaGrands appealed their sentences from 1987 until 1998.²

It is not clear at what stage in the United States' criminal proceedings the revelation about their German nationality occurred. In its judgment the International Court of Justice noted that:

Although they lived in the United States for most of their lives, and became the adoptive children of a United States national, they remained at all times German nationals, and never acquired the nationality of the United States. However, the United States has emphasized that both had the demeanour and speech of Americans rather than Germans, that neither was known to have spoken German, and that they appeared in all respects to be native citizens of the United States.³

At some point during their custody they met another German incarcerated in the same facility who informed the brothers that an official from the German consulate had visited him and provided some support during his criminal proceedings.⁴ Once the LaGrand brothers contacted their consulate, Germany began the process of making representations on their behalf. Germany intervened through a series of political and diplomatic measures, including representations at their appeals and at every level of the political and legal system of the United States.⁵

Germany and legal counsel for the brothers attempted to raise the breach of the VCCR obligations during the appeals proceedings in Arizona. Under Arizona's criminal law however, the doctrine of 'procedural default' prevented the presentation of any new legal grounds on appeal that a defendant had not previously raised. The practical impact of this procedural rule was that the issue of consular notification could not be relied upon as a ground for appeal because the LaGrands had not raised it in their trials.⁶ It became clear that Germany's diplomatic and political efforts had failed when Karl LaGrand was executed on 24 February 1999.

LaGrand (Germany v United States)

Once domestic remedies in the United States had been exhausted, Germany commenced legal proceedings in the ICJ. Germany filed for provisional measures in the

² *Arizona v Walter LaGrand*, 153 Ariz 21 (1987); *Arizona v Karl Hinze LaGrand*, 152 Ariz 483 (1987).

³ *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 475.

⁴ Interview with Germany's Legal Counsel #1 in *LaGrand* (The Hague, June 2013).

⁵ This includes an application in the United States Supreme Court for an injunction against the execution of Walter LaGrand in compliance with the ICJ's order of provisional measures. See *Federal Republic of Germany et al v United States et al*, 526 US 111 (1999).

⁶ 'Counter-Memorial of the United States of America', *LaGrand (Germany v United States of America)* [2001] ICJ Pleadings [76].

ICJ to prevent the execution of the second brother, Walter LaGrand, who was scheduled to be executed on 3 March 1999. The Court granted provisional measures on 2 March 1999, but Walter LaGrand was executed the next day.⁷ Despite the execution of both Karl and Walter LaGrand prior to the merits stage of the case, Germany proceeded with its action against the United States.

Germany based its case against the United States on two grounds: a breach of the VCCR and its right of diplomatic protection. The primary goal of the VCCR is to provide an ‘international convention on consular relations, privileges and immunities,’ while also contributing ‘to the development of friendly relations among nations, irrespective of their differing constitutional and social systems.’⁸ As discussed in chapter two, there are a number of obligations flowing from article 36(1) of the VCCR. Some of those obligations include the duty on States to inform foreign nationals of their right to have consular access, and to notify other States when their nationals come into their custody. These obligations facilitate States to provide consular assistance to their nationals and make representations about the conditions of their custody to the detaining State if needed.⁹

In its claim before the ICJ, Germany argued that the LaGrand brothers had not been informed of their right to contact the German consulate without delay and that the German consulate was not notified of their custody once the United States authorities realised that the brothers were German nationals. The United States government acknowledged that it had failed to notify Germany that the LaGrands were in its custody and issued a formal apology in relation to the breach.¹⁰ However, Germany argued that if it had received consular notification of the LaGrands’ detention without delay, it could have provided the brothers with assistance in their proceedings, leading to the possibility of an outcome less than the death penalty.¹¹

Germany made several arguments in addition to the alleged violation of article 36. It also argued that the failure of the United States to fulfil its obligations under the VCCR amounted to a breach of an individual right under article 36 – a right to consular assistance.¹² Germany also alleged violations of its right in customary international law to diplomatic protection.¹³ Germany invoked its right in customary international law to diplomatic protection based on the alleged injury to its citizens. In its memorial

⁷ *LaGrand (Germany v United States of America) (Provisional Measures)* [1999] ICJ Rep 9.

⁸ *Vienna Convention on Consular Relations* preamble paragraph 3.

⁹ *Ibid* art 36(1)(b).

¹⁰ *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 473.

¹¹ *LaGrand (Germany v. United States of America) (Judgment)* [2001] ICJ Rep 466, 491.

¹² *Ibid* 481.

¹³ *Ibid* 474.

Germany claimed that the United States had ‘injured Germany *indirectly* through its failure to accord to German nationals in the United States the treatment to which they were entitled under international law.’¹⁴ By pleading diplomatic protection, Germany adopted the injury against the LaGrand brothers as its own. The United States rejected these grounds and argued that the ICJ did not have jurisdiction to hear matters arising under customary international law.¹⁵ The ICJ rejected this argument and held that it had jurisdiction to hear matters arising under customary international law, including Germany’s claim of diplomatic protection.¹⁶ However, the Court saw no need to decide on the question of diplomatic protection.¹⁷

On the substantive legal issues, the Court decided in favour of Germany. The ICJ held that the failure of the United States to notify Germany of the custody of its citizens and to inform the LaGrands of their right to contact the German consulate was a breach of the VCCR. The Court ordered review and reconsideration as the remedy.¹⁸ The Court also adjudged that article 36 of the VCCR created individual rights.¹⁹ International lawyers showed great interest in the ICJ case.²⁰ The Court’s use of binding provisional measures was a significant development in the use of the Court’s powers.²¹

Germany’s interventions on behalf of Karl and Walter LaGrand

Interventions by Germany can be divided into actions taken before and after 1998. This date corresponds with elections in Germany resulting in a change of government. Routine consular actions were taken by Germany on behalf of the brothers prior to 1998. However, after 1998, the actions taken by Germany included a range of consular,

¹⁴ ‘Memorial of the Federal Republic of Germany’, *LaGrand (Germany v United States of America)* [2001] ICJ Pleadings [4.86].

¹⁵ *LaGrand (Germany v. United States of America) (Judgment)* [2001] ICJ Rep 466, 482.

¹⁶ *Ibid* 489.

¹⁷ *Ibid* 494.

¹⁸ *Ibid* 514.

¹⁹ *Ibid* 483.

²⁰ See, eg, Carsten Hoppe, ‘Implementation of *LaGrand* and *Avena* in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights’ (2007) 18(2) *European Journal of International Law* 317; Malcolm D Evans, Martin Mennecke and Christian J Tams, ‘*LaGrand* Case (Germany v United States of America)’ (2002) 51(2) *International and Comparative Law Quarterly* 449; William J Aceves, ‘*LaGrand* (Germany v United States)’ (2002) *American Journal of International Law* 210; Christian J Tams, ‘Consular Assistance: Rights, Remedies, and Responsibility Comments on the ICJ’s Judgment in the *LaGrand* Case’ (2002) 13(5) *European Journal of International Law* 1257.

²¹ *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 503.

diplomatic and political measures.²² In addition to routine consular measures Germany made ‘energetic moral and political appeals’.²³ These appeals included:

every diplomatic means at its disposal in order to prevent the carrying out of the death sentences ... Both the President and the Chancellor of the Federal Republic of Germany appealed to the President of the United States, the latter also to the Governor of Arizona. Foreign Minister Fischer and Minister of Justice Däubler-Gmelin raised the issue with their respective counterparts in the United States Administration and with the Governor of the State of Arizona. Démarches were undertaken by the German Ambassador to the United States. A further démarche followed on behalf of the European Union. Both the German Ambassador and the German Consul-General in Los Angeles explained the German position to the Board of Executive Clemency of the State of Arizona on the days prior to the execution of the brothers. In his second letter to United States Secretary of State Albright dated 22 February 1999, the German Foreign Minister, Joschka Fischer, raised the issue of a violation of the Vienna Convention - to no avail. [references omitted].²⁴

German officials and politicians attended and made representations in the clemency hearings.²⁵ Claudia Roth, President of the Green Party and chair of the Bundestag Human Rights Committee, travelled to Arizona in 1999 to attend the LaGrand hearings in person, along with civil society representatives and a local German lawyer.²⁶

Germany’s efforts to save the LaGrands were frustrated by the allocation of powers between the state of Arizona and the federal government of the United States. Arizona had jurisdiction for state-based criminal matters, including decisions on clemency. The United States government faced a domestic deadlock with Arizona whose judiciary and politicians disregarded the VCCR and the LaGrand’s claim that it had been breached. The government of the United States did not have the power to prevent the application of the death penalty to Karl and Walter LaGrand or force Arizona to review the matter.

²² This was a point of criticism raised by the United States in the ICJ case, where it noted that Germany’s efforts escalated after 1998. See ‘Counter-Memorial of the United States of America,’ *LaGrand (Germany v United States of America)* [2001] ICJ Pleadings [30]-[36].

²³ ‘Memorial of the Federal Republic of Germany’, *LaGrand (Germany v United States of America)* [2001] ICJ Pleadings [1.03].

²⁴ *Ibid* [2.11].

²⁵ *Ibid* [2.10].

²⁶ Karen Bagge, ‘Die Selbstherrlichkeit der Grossmacht’ [trans: The Arrogance of the Super Power] (April 1999) *Amnesty International Journal (German Section)* <<https://www.amnesty.de/journal>>.

II. Networks

State and non-State actor participation

State actors

In the German bureaucracy the two major ministries concerned, the Federal Ministry of Justice and the Federal Foreign Office, did not agree on whether Germany should proceed with judicial action against the United States.²⁷ Concerned with maintaining Germany's relationship with the United States, the Federal Foreign Office opposed the idea of taking its ally to the ICJ.²⁸ Use of the ICJ mechanism contributed to elevating the matter from the privacy of diplomacy to the publicity of international legal action. Moreover, in the view of the Federal Foreign Office the public nature of the case risked endangering United States-Germany relations. However, the Ministry of Justice was more concerned with the legal case and the technical grounds available to Germany under the VCCR.²⁹ In each German ministry, the United States was both a military ally and legal foe. On one front Germany had a military alliance with the United States and on another it was challenging domestic death penalty values in a public and international forum. The conflicting positions of the ministries was ultimately resolved by the Federal Chancellor's office, which instructed the ministries to proceed with an action in the ICJ.³⁰

This decision by the political classes of government may be explained by reference to political forces present in Germany in 1998-1999. The political environment in Germany contributed to elevating the LaGrand brothers' situation from a matter of consular concern to a matter of international judicial concern. In 1999 the Social Democrat and Green parties ousted the Conservatives from power in the German federal election, making it the first time that these parties formed government in Germany. Prior to the right-of-centre Christian Democrat-led government handover to the incoming Social Democrat and Greens government, the German Parliament (*Bundestag*) voted to commit Germany to participation in Kosovo as part of the broader NATO intervention. The consequence of this decision by the *Bundestag* was that it would be the first occasion that Germany would participate in an armed conflict since the Second World War. The incoming Social Democrat/Greens government upheld the decision to join the NATO forces – a decision that was hugely unpopular with the German public. In their examination of Germany's policy in Kosovo, Aubrey Hamilton and Engjellushe Morina situate this decision in its domestic context:

²⁷ Interview with Germany's Legal Counsel #2 in *LaGrand* (Göttingen, July 2013).

²⁸ *Ibid.*

²⁹ Interview with German Official #1 (Berlin, August 2013).

³⁰ Interview with Germany's Legal Counsel #1 in *LaGrand* (The Hague, June 2013).

This decision was made at a time when the center-left - Social Democratic Party (SPD) still distinguished between measures to preserve peace, which were considered good, and measures to create peace, which many rejected. Ready to normalize Germany's military role in geopolitics and "create peace" in Kosovo, the coalition government of the SPD and Greens pushed through a positive vote for German intervention in Kosovo.³¹

As a result of the government's decision to participate in the armed conflict in Kosovo, the newly formed government lost support from its core constituency early in its incumbency.³² Germany's support for military participation was unpopular with voters in light of the government's historically pacifist orientation.³³ The controversy of the government's decision echoed in the media and public – it manifested in protests and physical attacks on Greens ministers, including Foreign Minister Joschka Fischer.³⁴ The decision to intervene on behalf of the LaGrands may have been an attempt to win back the coalition's base in a strong move towards human rights protection and anti-death penalty values (values more akin to their political ideology and that of their voters).³⁵

Non-State actors

The ICJ memorials and judgment reveal little about the participation of non-State actors in Germany's interventions on behalf of the LaGrand brothers. Non-state actors, however, played a critical role in attracting public attention to the situation of the LaGrands and mobilising an existing network of anti-death penalty actors. The involvement of non-State actors in Germany pivots on the attention generated by the media around the sentencing and executions of the brothers. The LaGrands' plight came into German public consciousness sometime in 1999. Steffen Ufer, a German lawyer from Munich, was involved in the LaGrand criminal cases in Arizona. Some suspected that Ufer leaked the German government's reluctance to bring an action to the German media in order to raise the profile of the issue and to apply some pressure on the German government to act.³⁶ Ufer's actions changed the case from a distant Arizona criminal trial to an internationalised contest of values relating to the death penalty. The prospect of the executions generated a great deal of public attention in Germany, including debate about Germany's values as a rule of law State. It led to

³¹ Aubrey Hamilton and Engjellushe Morina, *Germany's Foreign Policy Towards Kosovo: A Policy Perspective* (Prishtina Council on Foreign Relations, 2014) 7.

³² Interview with Germany's Legal Counsel #2 in *LaGrand* (Göttingen, July 2013).

³³ 'Schröder on Kosovo: "The Goal was Exclusively Humanitarian"', *Spiegel International* (online), 26 October 2006 <<http://www.spiegel.de/international/schroeder-on-kosovo-the-goal-was-exclusively-humanitarian-a-444727.html>>.

³⁴ Joschka Fischer was attacked with cans of red paint by protesters, resulting in a burst eardrum. 'German Greens Avoid Political Crisis', *BBC news* (online), 14 May 1999 <<http://news.bbc.co.uk/2/hi/europe/343503.stm>>.

³⁵ Interview with Germany's Legal Counsel #2 in *LaGrand* (Göttingen, July 2013).

³⁶ Interview with Germany's Legal Counsel #1 in *LaGrand* (The Hague, June 2013).

several developments for the LaGrands: the mobilisation of an existing global anti-death penalty campaign, the formation of a network of State and non-State actors and public support for action.

One group of civil society actors that influenced the intervention on behalf of the LaGrand brothers was the European anti-death penalty campaign. The anti-death penalty campaign gained momentum, within Europe, with the entry into force of *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms* ('Protocol No. 6'),³⁷ and beyond Europe, with the entry into force in 1991 of the *Second Optional Protocol to the International Covenant on Civil and Political Rights* aiming at the abolition of the death penalty ('Second Optional Protocol').³⁸ Germany is a party to both treaties, having ratified *Protocol No. 6* on 1 August 1989 and the *Second Optional Protocol* on 18 August 1992. Following ratification, Germany formed part of the broader European campaign against the death penalty, which served as a springboard for a larger global campaign for the abolition of capital punishment. Girling describes the transition of the anti-death penalty campaign from a European to a global phenomenon as the point when 'a very vocal and evangelical European voice gained prominence on the international stage.'³⁹ Civil society organisations Amnesty International and Human Rights Watch launched specialised international campaigns addressing the death penalty as part of the momentum.⁴⁰ Germany also took part in the campaign for the abolition of the death penalty, drawing attention to its actions and campaign activities in its memorial submitted to the Court.⁴¹

Once the imminence of the brothers' executions became apparent, the German section of Amnesty International received daily inquiries from the public about actions the organisation could take to prevent the LaGrands from being put to death.⁴² In response, it launched the 'National Coalition to Abolish the Death Penalty' (NCADP), a national

³⁷ *Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Death Penalty*, opened for signature 28 April 1983, ETS 114 (entered into force 1 March 1985) in force for Germany 1 August 1989.

³⁸ *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

³⁹ Eva Girling, 'European Identity and the Mission against the Death Penalty in the United States' in Austin Sarat and Christian Boulanger (eds), *Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford University Press, 2005) 112, 114.

⁴⁰ Information on Amnesty International's campaign against the death penalty can be found online at: <<https://www.amnesty.org/en/what-we-do/death-penalty/>>. Information on Human Rights Watch's efforts can be found online at: <<https://www.hrw.org/tag/death-penalty>> .

⁴¹ 'Memorial of the Federal Republic of Germany', *LaGrand (Germany v United States of America)* [2001] ICJ Pleadings nn 3.

⁴² Bagge, above n 26.

campaign addressing the use of the death penalty globally. As the domestic public mobilisation campaign gained momentum, so did Germany's advocacy on behalf of the LaGrands in the United States. Karen Bagge, a representative of Amnesty International, was sent to Arizona to conduct appeals on behalf of the LaGrands. She appeared alongside Steffen Ufer, the German ambassador Jürgen Chrobog, Claudia Roth, lawyer Carla Ryan (counsel for Karl LaGrand) and Bruce Burke (counsel for Walter LaGrand) in the LaGrands' clemency hearings in 1999. Prior to the clemency appeals, Bagge recounted that she met with the lawyers for the brothers, the German ambassador, Steffen Ufer, Claudia Roth and Matthias Lemphul (representative of the NCADP). Both State and non-State actors strategised together about their collective approach and the role that each actor would take in the clemency hearings.⁴³ This multi-actor group also presented 50 000 signatures from the German public petitioning the Governor of Arizona for clemency for the LaGrands.

There were three networks of anti-death penalty actors: the transnational or global network, the European network and the German network. Domestic non-state actors in Germany harnessed existing network advocacy at the European and global level to further their own campaigns. Simultaneously, German civil society actors localised the transnational anti-death penalty campaign through the LaGrands. With the prospect of two German citizens being executed, civil society actors in Germany could capitalise on the imminent and proximate threat of the death penalty to mobilise public support and apply pressure on the German government. The local network of anti-death penalty advocates harnessed existing expertise and experience from the European anti-death penalty campaign to raise awareness and put forward a policy position of intervention. Meanwhile, the global anti-death penalty network applauded Germany's decision to bring legal action in the ICJ as an example of how States could respond to the death penalty.

The actors in the intersecting anti-death penalty networks can be described as epistemic communities (networks of experts) that the government relied upon. Peter Haas argues that '[e]pistemic communities may introduce new policy alternatives to their governments, and depending on the extent to which these communities are successful in obtaining and retaining bureaucratic power domestically, they can often lead their governments to pursue them.'⁴⁴ Haas suggests that regimes can contribute to the empowerment of new groups of actors. In the case of Germany, the existing international and European human rights regime, coupled with the success of the

⁴³ Ibid.

⁴⁴ Peter M Haas 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control' (1989) 43(3) *International Organization* 377, 402.

international campaign against the death penalty served as a platform for the empowerment of civil society and individual actors to lobby for the LaGrands' case to be juridified.

Germany's constitutional and legal framework for the protection of citizens

Another source of pressure on the German government to intervene on behalf of the LaGrand brothers may be found in Germany's domestic legal framework for protection of citizens. The provision of consular assistance and the protection of citizens abroad are governed by Germany's constitution, the *Basic Law of 1949 (Grundgesetz)* and the *Consular Law (1974)*.⁴⁵ The *Consular Law* sets out a number of the arrangements relevant to the protection of German citizens, including that assistance may include legal protection.⁴⁶ Framed in general terms, the *Consular Law* creates a conditional obligation on consular officers to 'help Germans in their consular district requiring assistance if the state of distress cannot be resolved in any other way.'⁴⁷ The generality of the language in the legislation ensures a wide margin for consular officers to exercise discretion in the provision of assistance to German citizens.

The *Basic Law* contains a number of protections for citizens, which are binding law.⁴⁸ The *Basic Law* creates a foundation for Germany as a rule of law and democratic State, which is reflected in its constitutional provisions.⁴⁹ With a rigorous and active court system, this constitutional document is an important component of government decision-making and civic participation. The *Basic Law* in Germany guides a range of government action. Werner Ebke and Matthew Finkin describe the *Basic Law* as setting minimum goals and that these standards 'have to play a role in decision-making on all levels of State action.'⁵⁰ Eberle argues that human dignity is at the centre of the German constitutional framework: 'it infuses throughout the whole constitutional order, obligating the state both to protect and realize it.'⁵¹ He goes on to argue that:

the systematization of German legal science, centers around the human person as a 'spiritual-moral' individual, and her dignity, including especially her ability to

⁴⁵ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany];

Konsulargesetz [Consular Law] (Germany) 11 September 1974, Federal Law Gazette I, 2317.

⁴⁶ *Konsulargesetz* [Consular Law] (Germany) 11 September 1974, Federal Law Gazette I, 2317, art 5(3).

⁴⁷ *Ibid* art 5(1).

⁴⁸ Werner F Ebke and Matthew Finkin (eds), *An Introduction to German Law* (Kluwer Law International, 1996) 67.

⁴⁹ *Ibid* 47.

⁵⁰ *Ibid* 55.

⁵¹ EJ Eberle, 'Observations on the Development of Human Dignity and Personality in German Constitutional Law' (2012) 33(3) *Liverpool Law Review* 201, 206.

realize human capacity and satisfaction. Human values are thus the focal point of the legal order.⁵²

Article 2(2) of the *Basic Law* titled ‘Rights of Liberty’ states that, ‘[e]veryone has the right to life and to inviolability of his person. The freedom of the individual is inviolable. These rights may only be encroached upon pursuant to a law.’⁵³ Within this right is the obligation on the German government to protect the life of nationals, including the provision of consular assistance. There is an important role for German courts in interpreting the *Basic Law* in accordance with the protection of human dignity and the right to life.⁵⁴ In the case of *Rudolph Hess* the Federal Constitutional Court held that the German government is ‘constitutionally obliged to a duty to protect German nationals and their interests against foreign States...’⁵⁵ While the judgment does not specify to which articles this obligation would apply, it would seem that it confers a general obligation on the government to protect the rights of its citizens, particularly those fundamental rights such as the right to life. Some scholars have interpreted this judgment to be a constitutional enshrinement of the right to diplomatic protection by Germany.⁵⁶

In the case of the LaGrand brothers, the threat of a domestic constitutional challenge may have motivated the German government’s response to their plight.⁵⁷ This may also explain the Ministry of Justice’s approach to the case as a legal necessity and its attribution of more weight to the constitutional legal obligations to protect the right to life than to the political considerations raised by the Foreign Ministry about the Germany-United States relationship.

III. Networked Governance, Values and Law in *LaGrand*

The commencement of the *LaGrand* case in the ICJ cannot be explained through the actions of State actors alone. The case implicates a network of State and non-State actors relying on different mechanisms to achieve the goal of intervention. Actors including non-governmental organisations, judicial institutions, public constituencies,

⁵² Ibid 229.

⁵³ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 2(2).

⁵⁴ Eberle, above n 51, 206.

⁵⁵ *Rudolf Hess*, Bundesverfassungsgericht [German Constitutional Court] 2 BvR 419/80, 16 December 1980 reported in (1980) BVerfGE 55, 349; 90 ILR 387, 396.

⁵⁶ Annemarieke Vermeer-Künzli, ‘Restricting Discretion: Judicial Review of Diplomatic Protection’ (2006) 75(2) *Nordic Journal of International Law* 279, 282. Note, however, that the Court did not uphold Hess’ appeal in its decision. It held that the courts should be reticent in assessing the discretion of the political organs of the State.

⁵⁷ Interview with Germany’s Legal Counsel #1 in *LaGrand* (The Hague, June 2013).

media and individuals influenced the decisions of the government through moral pressure, political mechanisms and law. This section will consider three things: how those networks formed, the use of law as a technique of protection, and the nature and function of those networks.

The LaGrand protection network: formation, function and techniques

Network formation

How did the network between State actors and non-State actors in the LaGrand action form? One explanation is that changes in government policy can occur when States become 'porous' to civil society influence.⁵⁸ Christopher Pallas and Anders Uhlin argue that civil society organisations are not able to achieve change without access to the State and alignment to its interests.⁵⁹ Pallas and Uhlin also observe that in order for there to be success in civil society efforts to influence a State, they must offer 'technical expertise or constituent support'.⁶⁰ The civil society and private actors involved in the LaGrand proceedings in the United States were able to offer the German government expertise on United States domestic law, international human rights law and the anti-death penalty campaign and to deliver the support of the mass public in Germany.

Another important aligning interest that contributed to forming the network was a desire by different actors to gain legitimacy with their respective audiences. Mark Suchman notes that legitimacy affects the way that people respond, relate and understand an organisation or entity.⁶¹ He identifies two dimensions related to seeking legitimacy: one of continuity versus credibility, and another of active versus passive support.⁶² Organisations that have legitimacy are considered by their target audience to be more trustworthy and more meaningful. This legitimacy may be gained through active approval of the decisions or directions or acquiescence (active/passive support).⁶³ After the newly elected government's decision to commit Germany to the Kosovo War contributed to a deficit in its moral legitimacy, the government needed to display its capacity to 'do the right thing.'⁶⁴ In the face of falling popularity, the German government sought to assert its human rights credentials, particularly with its

⁵⁸ Christopher L Pallas and Anders Uhlin, 'Civil Society Influence on International Organizations: Theorizing the State Channel' (2014) 10(2) *Journal of Civil Society* 184, 188.

⁵⁹ *Ibid* 186-7.

⁶⁰ *Ibid* 199.

⁶¹ Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) *Academy of Management Review* 571, 575.

⁶² *Ibid* 574.

⁶³ *Ibid* 575.

⁶⁴ *Ibid* 579.

disenchanted voters, through the *LaGrand* action. Even after the execution of both German citizens by the United States, the ICJ case served as a ‘hollow symbolic gesture’ to the German public about Germany’s values.⁶⁵ Human rights civil society in Germany was seeking legitimacy within their broader anti-death penalty regime as the leader in the transnational and global campaign. The ICJ translated into a concrete ‘win’ for the campaign and reinforced the moral legitimacy of the anti-death penalty message.

Function

The network of protection in the *LaGrand* action challenges pre-existing notions of what ‘protection’ is and its characterisation as an exclusive State function. The *LaGrand* example helps to separate the protection of citizens abroad into two components or tasks. The first component relates to value-generation (the motivation to intervene) and second relates to the practical modalities of intervention (the acts of protection).

The motivation to intervene on behalf of an injured national may be fuelled by a range of factors. Moral or political values including political expediency, national values, human rights, security or the rule of law, can emerge as driving normative forces. In the case of the *LaGrands*, the aim or value of intervention on behalf of the brothers was complex. As discussed earlier in the chapter, prior to 1998 Germany provided routine consular assistance to the *LaGrand* brothers. It was not until domestic criticism of the German government intensified that Germany’s political classes became motivated to protect the brothers more robustly. Civil society actors, however, were motivated by the global publicity an ICJ case would attract for the anti-death penalty effort, as well as the prospect of obtaining a binding judgment to bolster their campaign. The alignment of interests that helped form the network also aided in generating the very purpose of the network, which was to mount an intervention.

The second component of protection is a practical one relating to the modalities of a protective action. These practical aspects include representations, consular visits and negotiations. In the *LaGrand* protection network, actors undertook these tasks (classically understood as State functions) irrespective of their status as a State or non-State actor. For example, throughout Germany’s active period of intervention after 1998, civil society organisations were simultaneously coordinating efforts with the German government and making representations directly to the Governor of Arizona and the United States government.

⁶⁵ Ibid.

State and non-State actors distribute and claim these classical State capacities for a range of reasons. Within a multi-actor network, nodes can determine which actors will fulfil certain tasks based on the circumstances. For example, the node of actors that participated in the LaGrand brothers' clemency hearings in the United States strategised about how to make the most from each actor. Amnesty International's representative conveyed the political and moral messages related to human rights and morality of Arizona's use of the death penalty. German State actors, on the other hand, were restrained by the requirement to show respect for United States sovereignty and therefore focused on breaches of the VCCR. Plural participation in a protective action facilitates burden sharing between actors and allows nodes to target specific messages and behaviours for the specific situation. The strategic approach of the German/human rights node maintained Germany's political neutrality, while simultaneously expressing human rights concerns. In this case, the actors were able to harness existing expertise and political capital effectively to win popular support in Germany and achieve leadership in the anti-death penalty movement.⁶⁶

Braithwaite and Drahos have explored this phenomenon in global business where States and business corporations (and other actors) act as agents for one another. This reflexive agency reconstitutes both agents and principals continually.⁶⁷ The idea of co-agency may also be applied to the protection of citizens abroad. The traditional State functions of protecting citizens abroad (both generating motivation and the modalities) are reassigned to civil society, media and individual actors within a multi-actor network depending on the shared objectives of the network. Actors may perform tasks interchangeably to achieve the goals of the network.

Law as a technique of protection: law to mobilise, law to neutralise

Studies on the protection of citizens abroad often fail to interrogate the different ways in which law manifests itself in protective actions. The *LaGrand* case reveals how law operates as a tool for actors to achieve their aims and gain power. Law is deployed as a technique of protection in two ways: law as an instrument of mobilisation and law as an instrument of neutralisation. Civil society actors advocating for the LaGrand brothers relied on international human rights law standards to campaign for increased German intervention. Civil society mobilised the public, media and parts of the German government around the LaGrands' plight on the grounds that it was based on, supported, and required by law. In this respect, human rights law functions as a

⁶⁶ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) 16.

⁶⁷ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 479.

mobilising force where actors engage the authority of law, through litigation, to pursue claims and enforce rights. These actors drew on the perceived authority of law to compel action and negotiate standards for State behaviour.

Various German government actors relied on law as a neutralising force. Counsel for Germany in *LaGrand* emphasised the technicality of the case under article 36 of the VCCR noting in Germany's memorial that the case was not one about values.⁶⁸ Germany's reliance on the formality and objectivity of law in the *LaGrand* case occurs for a number of reasons. The first is that the United States conveyed to Germany that it did not want the case to turn into a global anti-United States platform.⁶⁹ By framing the dispute in a technical manner the German government could preserve the bilateral relationship between Germany and the United States, and Germany and the NATO alliance. Germany deployed the law as a neutral and mediating force focused on technical treaty compliance rather than a comparison between national human rights values. Germany and the United States attempted to strip the case of culture, moral norms and national values by situating the ICJ proceedings in a realm of technical legal interpretation, far from the perils of values or politics. By presenting the case with this aura of technical neutrality Germany discouraged other States from joining the claim thus avoiding the risk of politicising the action.

The technicality of the legal action also served to neutralise its characterisation as a political or national claim. While diplomatic protection is understood as a claim based on nationality, the case did not linger on points of nationality or nationalism. Instead, the action was framed as a legal requirement, based on the values entrenched in the German *Basic Law*. This sensitivity around nationalism in Germany can be explained by what German scholars refer to as 'constitutional patriotism.'⁷⁰ This substitution of values, from the national to the constitutional, is evident in the manner in which Germany avoided making a nationalistic claim about the treatment of its citizens.

Simultaneously, *LaGrand* served as a vehicle for Germany to express its political and moral values about the death penalty, even though the ICJ case specifically addressed consular notification. An anti-Americanism was embedded in German society at the time of *LaGrand* and grew at the announcement of participation in Kosovo.⁷¹ Karen Bagge's article (Amnesty International's representative) on the treatment of the

⁶⁸ 'Memorial of the Federal Republic of Germany', *LaGrand (Germany v United States of America)* [2001] ICJ Pleadings [1.08].

⁶⁹ Interview with Germany's Legal Counsel #1 in *LaGrand* (The Hague, June 2013).

⁷⁰ See generally, Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press, 2007); Ralf Dahrendorf, *Society and Democracy in Germany* (Anchor 1967); David Abraham, 'Constitutional Patriotism, Citizenship, and Belonging' (2008)(6) *International Journal of Constitutional Law* 137.

⁷¹ Interview with Germany's Legal Counsel #1 in *LaGrand* (The Hague, June 2013).

LaGrand brothers was titled 'The Arrogance of the Super Power' and exemplifies this anti-United States sentiment in Germany prior to the case.⁷² The ICJ case allowed the contestation of values to occur under the guise of law as a neutral arbiter. While at the international level and within its memorials Germany claimed the pursuit of a legal technicality under the VCCR, the message for Germany's domestic audience conveyed a contest of values about the death penalty. Germany's rule of law orientation and its constitutional protection for the right to life were juxtaposed with the United States' pro-death penalty stance. The ICJ's decision was a success for Germany's values and an opportunity to distinguish itself from the United States in the view of the German public.

State sovereignty and participation

The LaGrand case provides two disaggregating lenses for State sovereignty. Tensions arose among German government actors, including the bureaucracy, executive and individual politicians. These cleavages are a regular occurrence in the way that many democratic and developed States resolve policy issues domestically. What seems even more interesting is that German sub-State actors formed alliances with actors outside of the State structure. The German Foreign Ministry aligned itself with NATO and the German Ministry of Justice aligned itself with civil society and the public – each respectively forming their own network of resistance and protection. Federalism appears as a second fracture in the classic paradigm of sovereignty. The source of the dispute between Germany and the United States can be traced to the disunity between the United States government and the state of Arizona. The disaggregation between the state and federal governments created an opportunity for the United States to exploit limitations on its ability to act, arguing that power resided with Arizona. Implementation of the ICJ's decisions in relation to the VCCR in *LaGrand* and *Avena* (discussed in chapter 5) continue as a point of contention between the United States government and its states. Both these examples demonstrate how plural networks endeavour to harness and repudiate political claims and achieve governance outcomes.

⁷² Bagge, above n 26.

IV. Conclusion

The situation of the LaGrand brothers reveals plural participation of State and non-State actors in pre-international litigation action and the generation of an international legal case to protect nationals abroad. It also demonstrates how the modalities of plural participation or shared action can occur. Once interests between the non-State actors and State actors aligned, juridification of the death penalty value emerged as a course of action. While non-State actors cannot initiate legal proceedings in the ICJ this case study shows how, through networks and nodes, civil society organisations can motivate States to commence legal action. Germany's government also benefited from its relationship with civil society actors by capitalising on their moral authority with the German public and the transnational anti-death penalty campaigns on foot at the time. Actors shared information and developed strategy, showcasing how expertise exchange can benefit different actors and contribute to the shared objectives of the network. An assessment of the existence and operation of networks cannot be limited to a consideration of their coordinating aspect alone, but must include a substantive analysis of norm and value generation. The co-agency displayed by the multi-actor network in LaGrand demonstrates that States are not solely responsible for the modalities of protection. The LaGrand case exemplifies the manner in which actors deploy the law in different forums to mobilise support or to neutralise political and moral concerns, often in contradictory ways.

Chapter 5

Mexico

This chapter investigates Mexico's protection programmes in the United States and *Avena and Others (Mexico v United States)*.¹ Mexico's policies to protect its citizens are based on targeted consular and legal programmes in the United States. The aim of this chapter is to analyse how networked action can facilitate the participation of a broader range of actors in the protection of citizens abroad and how multi-actor networks transform the protection of citizens abroad into local action. Section one examines *Avena*, the third ICJ case against the United States concerning consular notification under the VCCR. Section two analyses Mexico's suite of programmes and policies for the protection of its nationals in the United States. Then, I examine the role of nodes and techniques they employ at the national and international level. Finally, the chapter considers the relationship between Mexico's model of protection and the rules of diplomatic protection in international law.

I. *Avena and others (Mexico v United States) (2004)*

In 2004, Mexico instituted legal proceedings in the ICJ against the United States. Mexico alleged a breach of the *Vienna Convention* and of its right of diplomatic protection under customary international law. Mexico brought the *Avena* case on behalf of 54 Mexican nationals who had been sentenced to death in various jurisdictions in the United States. On 9 January 2003, Mexico made an application to the Court for provisional measures to prevent the execution of three Mexican nationals in anticipation of the Court's judgment on the merits.² The Court granted provisional measures on 5 February 2003.³ Mexico sought review and reconsideration of the cases affected by the United States' failure to provide consular notification under article 36(1) of the *Vienna Convention*.

The Court considered several issues in its judgment. First, the Court defined the phrase 'without delay' in article 36(1) of the *Vienna Convention*. The Court noted the use of

¹ *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12.

² *Avena and Other Mexican Nationals (Mexico v United States of America) (Provisional Measures)* [2003] ICJ Rep 77 [11].

³ *Ibid* [55].

different phrases to describe the content of article 36 of the *Vienna Convention*. The Court clarified and distinguished:

As regards the terminology employed to designate the obligations incumbent upon the receiving State under Article 36, paragraph 1 (b), the Court notes that the Parties have used the terms “inform” and “notify” in differing senses. For the sake of clarity, the Court ... will use the word “inform when referring to an individual being made aware of his rights under that subparagraph and the word “notify” when referring to the giving of notice to the consular post.⁴

Furthermore, the Court identified three ‘separate but interrelated’ elements in the obligations under article 36(1)(b): the individual’s right to be informed without delay of the right to contact and communicate with his or her consulate, the sending State’s right to be notified without delay of the individual’s custody through its consular post, and third, the obligation of the receiving State to forward without delay any communication for the consular post from the individual if she requests.⁵ The Court also observed that the violation of the individual’s rights under the *Vienna Convention* could also result in a violation of a State’s rights and in doing so, the Court acknowledged the interdependence of the elements it identified in article 36.⁶ The Court revisited the distinction between an individual injury and a direct injury to the State arising from a breach of article 36. The Court recounted that should States experience a direct injury under international law, the requirement to exhaust all domestic remedies is no longer applicable. In its judgment, the Court decided it was not necessary to consider Mexico’s claim on the ground of diplomatic protection, but instead proceeded on Mexico’s direct injury.⁷

The Court also specified when the obligation to inform and notify without delay in article 36 arises. Mexico argued that for the right in article 36(1) to have effect, the person must be informed of their right to contact their consulate immediately and prior to any interrogation or questioning.⁸ The Court rejected Mexico’s interpretation. After consulting the *travaux* to the Diplomatic Conference, the Court concluded that the obligations in article 36 of the *Vienna Convention* accrue ‘as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.’⁹

⁴ *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12, 26.

⁵ *Ibid* 43 [61].

⁶ *Ibid* 36 [40].

⁷ *Ibid*.

⁸ *Ibid* 47 [79].

⁹ *Ibid* 49 [88].

In the Court's decision on the merits, it held that the United States had breached its obligation under the Vienna Convention to advise 51 of those detained Mexican nationals of their right to receive consular assistance from Mexico without delay. The Court held that the United States was required to provide review and reconsideration as a remedy for the breach, but that, 'the concrete modalities for such review and reconsideration should be left primarily to the United States.'¹⁰

United States-Mexico relationship and the protection of Mexicans

The history of the United States-Mexico relationship provides political context for the initiation of the *Avena* case. The Mexican community in the United States has been estimated to be over 11 million¹¹ and undocumented Mexican migrants at over six million.¹² A shared history between the United States and Mexico has shaped Mexican migration to the United States, particularly to the southern states. The Mexican-US war in the 1800s was fought over territories now forming part of the United States (Texas, California and New Mexico). The border changed in 1847, but the presence of Mexicans in those territories did not. Mexicans have consistently been connected to those territories, contributing to the ongoing movement of people from Mexico into the United States. However, social discrimination, economic hardship and a lack of security related to migration status has led to a situation of systemic vulnerability for many Mexicans in the United States, including poor health and education outcomes.¹³ Moreover, the United States introduced policies in the 1990s to discourage both documented and undocumented migration across the US-Mexican border.¹⁴

Mexicans in the United States embody Mexico's national interest, particularly in the form of economic support for the domestic Mexican population. In 2010, Mexico received approximately \$22 billion USD in remittances from Mexican nationals in the

¹⁰ Ibid 62 [131]. The ICJ's decision on remedies faced criticism, see, eg, Natalie Klein, 'Avena and Other Mexican Nationals' (2004) 11 *Australian Journal of International Law* 143, 153-55.

¹¹ Sierra Stoney and Jeanne Batalova, 'Mexican Immigrants in the United States' (28 February 2013) *Migration Policy Institute* <<http://www.migrationpolicy.org/article/mexican-immigrants-united-states#1>>.

¹² Pew Research, 'US Unauthorised Immigration Population Trends, 1990-2012' *Hispanic Trends Project* (23 September 2013) <<http://www.pewhispanic.org/2013/09/23/unauthorized-trends/#Mexico>>.

¹³ See generally Barbara Schneider, Sylvia Martinez, and Ann Ownes, *Hispanics in the Future of America* (National Academies Press, 2006); Darrell Steffensmeier and Stephen Demuth, 'Ethnicity and Sentencing Outcomes in US Federal Courts: Who is Punished More Harshly?' (2000) 65(5) *American Sociological Review* 705.

¹⁴ Douglas S Massey, Jorge Durand and Nolan J Malone, *Beyond Smoke and Mirrors: Mexican Immigration In An Era of Economic Integration* (Russell Sage Foundation, 2002) 2.

United States.¹⁵ Mexico's effort to protect its citizens is linked to a broader domestic consensus that Mexicans settling in the United States require support and protection.¹⁶ Ricardo Ampudia reflects on the connection between protecting nationals in the United States with Mexico's foreign policy:

The defense of Mexicans abroad, and the promotion of respect for the human rights, for years have been two of the main pillars of Mexican foreign policy, upon which is based the task of protection performed by the Mexican government. Consular protection, especially that provided to migratory workers who go to the United States, has a long tradition in the history of Mexican diplomacy.¹⁷

Systemic hardship combined with the economic importance of remittances from Mexicans in the United States inform Mexico's protective activism and the support that government policies enjoy from the public and civil society.¹⁸ Mexico has also tied its protection policies to a campaign against the use of the death penalty on Mexican citizens by the United States, another area in which there is support from the Mexican public.

Some have suggested that Mexico's attitude towards the death penalty is informed by domestic human rights reforms made by the government prior to the *Avena* case.¹⁹ Mexico's domestic human rights situation came under international scrutiny in the 1990s. The Inter-American Court of Human Rights reviewed allegations of flagrant human rights abuses in Chiapas (a state of Mexico) and electoral irregularities.²⁰ A report by Human Rights Watch in 1990 outlined the significant shortcomings of Mexico's approach to human rights and contributed to focusing the Mexican government's attention on human rights issues.²¹ Following this criticism, Mexico put in place a number of reforms.²² The Mexican government accepted recommendations made by the Inter-American Court of Human Rights.²³ On 6 June 1990 the National

¹⁵ Steve Brito, Ana Corbacho and René Osorio, 'Remittances and the Impact on Crime in Mexico' (May 2014) *Inter-American Development Bank Paper Series 2*.

¹⁶ Interview with Mexican Government Official #2 (Mexico City, February 2014).

¹⁷ Ricardo Ampudia, *Mexicans on Death Row* (Arte Público Press, 2010) 105.

¹⁸ Roundtable with Directorate of Protection, SRE (Mexico City, February 2014).

¹⁹ Ibid.

²⁰ 'Report on the Situation of Human Rights in Mexico' (Country Report, Doc 7 rev 1, OEA/Ser.L/V/II.100, Inter-American Commission of Human Rights, 24 September 1998) <<http://www.cidh.org/countryrep/Mexico98en/table-of-contents.htm>>.

²¹ Human Rights Watch Report on Mexico: Americas Watch, *Human Rights in Mexico: A Policy of Impunity* (June 1990) <<http://www.hrw.org/sites/default/files/reports/Mexico906.pdf>>.

²² For a more detailed investigation of human rights in Mexico see Kathryn Sikkink, 'Human Rights, Principled-Issue Networks, and Sovereignty in Latin America' (1993) 47 *International Organization* 411, 428-435.

²³ See 'Final Recommendations and Conclusions' in 'Report on the Situation of Human Rights in Mexico' (Country Report, Doc 7 rev 1, OEA/Ser.L/V/II.100, Inter-American Commission of Human Rights, 24 September 1998) <<http://www.cidh.org/countryrep/Mexico98en/table-of-contents.htm>> [673].

Human Rights Commission was established by Presidential decree.²⁴ The Mexican government also introduced reforms to the death penalty. Initially, the government imposed a moratorium on the application of the death penalty, followed by a constitutional amendment in 2005 prohibiting the death penalty.²⁵ With the domestic moratorium on the use of the death penalty in place, there was frustration from the Secretaria de Relaciones Exteriores (‘Mexican Foreign Ministry’ or ‘SRE’) that executions of Mexican nationals continued in the United States.²⁶

Background to the case

The strategy and momentum for the ICJ case was generated, predominantly, within the Secretaria de Relaciones Exteriores. Individuals within the SRE served as catalysts for the *Avena* and the development of Mexico’s protection policies. SRE Deputy Legal Advisor Joel Hernández, and Legal Advisor Juan-Manuel Gómez Robledo, shared a frustration about Mexico’s limited ability to intervene on behalf of Mexican nationals on death row in the United States.²⁷ Both Hernández and Gómez Robledo had been posted to the United States as diplomats and had witnessed first-hand the difficulties faced by Mexicans within the US criminal justice system.²⁸ Inspired by the Court’s judgment in *LaGrand* in 2001, Joel Hernández and Gómez Robledo proposed initiating proceedings against the United States in the ICJ for breaches of the *Vienna Convention*. Based on their personal experience in the United States as consular and diplomatic officials, combined with the momentum created by the *LaGrand* case, Hernández and Gómez Robledo embarked upon convincing their government to institute legal proceedings against the United States.

Once Luis Derbez, Mexico’s Foreign Minister, granted his approval, the SRE undertook consultations with domestic stakeholders prior to commencing the case in 2004.²⁹ Internal government consultations included both houses of congress, chambers of

²⁴ Comisión Nacional de los Derechos Humanos <<http://www.cndh.org.mx/Antecedentes>>.

²⁵ *Constitución Política de los Estados Unidos Mexicanos* [Constitution of Mexico 1917]. Amendments to articles 14 and 22 were made on 23 June 2005. See generally Hands Off Cain, *Mexico Factsheet* <<http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=24&nome=mexico>>. Note, however, that Mexico has a limited prohibition, with the death penalty still being applicable in circumstances of treason.

²⁶ Roundtable with Directorate of Protection, SRE (Mexico City, February 2014).

²⁷ Interview with Mexican Government Official #1 (Mexico City, February 2014).

²⁸ Interview with Sandra Babcock (Chicago, February 2014).

²⁹ It is not clear precisely when consultations took place, only that they occurred in advance of the case being filed in the ICJ.

commerce, ministers and President Vicente Fox.³⁰ Consultations aimed to achieve a critical mass of support for legal action. Informal consultations were also conducted with Sandra Babcock, an American lawyer. Babcock's involvement in the *Avena* case began with her legal practice in the United States on *Vienna Convention* consular notification requirements and the death penalty for foreign nationals.³¹ Babcock had experience arguing *Vienna Convention* claims when representing Mexicans and other foreign nationals on death row in the United States. The SRE invited Babcock to participate in the *Avena* case as a link into the United States legal system by 'providing the US expertise that was required for the *Avena* case.'³² Babcock also suggested that Mexico needed a legal team to assist with conduct of the litigation. Donald Donovan of Debevoise and Plimpton (a New York law firm) had previously assisted Germany in the *LaGrand* case and agreed to take on the matter *pro bono*.³³

Some Mexican stakeholders feared economic or political reprisals by the United States in response to the ICJ proceedings.³⁴ The SRE argued that the ICJ was an apolitical forum for resolving international law disputes between States. Furthermore, the SRE contended that the authority of the Court neutralised any political sentiment that the United States could have attributed to Mexico's case.³⁵ The SRE's position is consistent with broader Latin American sentiment about the role of international courts. Ximena Fuentes observes that Latin American States have a commitment to international adjudication for the resolution of disputes. Fuentes suggests that 'they have confidence in international law and in the capabilities and impartiality of the Court,' which she argues is reflected in an increased tendency to use the ICJ.³⁶ Hernández and Gómez Robeldo countered stakeholder fears by framing the ICJ action as part of Mexico's duty to protect its citizens abroad.³⁷ Coupled with the argument about the neutrality of international legal adjudication, Hernández and Gómez Robeldo appealed to a deeper nationalistic sentiment about the treatment of Mexican nationals within the United States discussed earlier in this chapter.

The approach of catalyst actors in the lead up to *Avena* highlights a tension between nationalism and internationalism. Some scholars have reflected on how the training of international lawyers shapes the normative agenda of their goals and expertise, in this

³⁰ Interview with Mexican Government Official #1 (Mexico City, February 2014).

³¹ Interview with Sandra Babcock (Chicago, February 2014).

³² Interview with Mexican Government Official #2 (Mexico City, February 2014).

³³ Interview with Mexican Government Official #1 (Mexico City, February 2014).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Ximena Fuentes, 'Latin American States and the ICJ' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press, 2014) 79, 80 and 105.

³⁷ Interview with Mexican Government Official #1 (Mexico City, February 2014).

case, one of internationalism.³⁸ Oscar Schachter, for example, described the stratifying effect of education on international lawyers as a ‘general phenomenon of internalization of social values shared by those brought up and educated within the same national society.’³⁹

Government officials in the SRE described Gómez Robledo as the ‘engine-room’ for Mexico in *Avena*.⁴⁰ Babcock and others characterised Gómez Robledo as ‘human-rights oriented’ and possessing a commitment to the international rule of law.⁴¹ Gómez Robledo was educated in France and served in a number of capacities in international organisations including the International Law Commission and as Chairman of the UN Sixth Committee in New York.⁴² Hernández was educated at New York University and served as Director-General of the United Nations.⁴³ Anne Orford notes that ‘the belief in the role of international law is embodied in the everyday life of those who imagine themselves as agents of humanitarianism and human rights’.⁴⁴ The duty to protect, as promulgated by Hernández and Gómez Robledo, fuels both nationalist and internationalist tendencies. Protection is embodied as part of the national interest, yet because of the education and humanitarian orientation of key figures in the SRE, the appropriate forum for its contestation is at the international level.

Internationalism was not a feature of the United States’ response to Mexico’s claim, however. A series of meetings between the Mexican and United States governments were held in Washington DC to resolve the matter, however diplomatic and political efforts were not successful.⁴⁵ Following these efforts, Mexico reached the view that it had exhausted all its avenues.⁴⁶

³⁸ Anne Orford, ‘Embodying Internationalism: The Making of International Lawyers’ (1998) 19 *Australian Yearbook of International Law* 1, 14.

³⁹ Oscar Schachter, ‘The Invisible College of International Lawyers’ (1977) 72 *Northwestern University Law Review* 217, 219.

⁴⁰ Interview with Mexican Government Official #2 (Mexico City, February 2014).

⁴¹ Interview with Sandra Babcock (Chicago, February 2014).

⁴² ‘Juan Manuel Gómez-Robledo Chairman of Sixth Committee: Biographical Note’ (UN Press Release, BIO/3806-GA/L/3294, 13 September 2006).

⁴³ ‘Ambassador Joel Hernández is elected to the Inter-American Judicial Committee’ (Embassy of Mexico in Malaysia Press release, 11 June 2014) see <http://embamex.sre.gob.mx/malasia/index.php/mexico-today/440-ambassador-joel-hernandez-of-mexico-is-elected-to-the-inter-american-juridical-committee-iajc>.

⁴⁴ Orford, above n 38, 9.

⁴⁵ Interview with Mexican Government Official #2 (Mexico City, February 2014); *Avena and Other Mexican Nationals (Mexico v United States of America) (Provisional Measures)* [2003] ICJ Rep 77, 79 [6].

⁴⁶ Interview with Mexican Government Official #2 (Mexico City, February 2014).

Reception of the International Court of Justice judgment of *Avena* by the United States

Despite the legal success of the case, outcomes flowing from *Avena* in the United States have been mixed. There has been one instance of review and reconsideration arising from the ICJ's ruling. The Oklahoma Court of Criminal Appeals granted review and reconsideration to Osbaldo Torres in the form of a new hearing.⁴⁷ Many US states, academics and practitioners, however, have rejected the *Avena* judgment on the basis that it inserts 'international and foreign law into U.S. judicial decision-making', and that the decision of the ICJ was an 'intrusion on U.S. sovereign authority'.⁴⁸ Domestic rejection of the ICJ judgment was manifested by executions of Mexicans listed in *Avena*. For example, Edgar Tamayo was executed in Texas in January 2014.⁴⁹ In similar circumstances to the aftermath of *LaGrand*, US states like Arizona and Texas have guarded their criminal jurisdiction fiercely.

In 2005, United States President George W Bush issued an Executive Order requiring states to comply with the *Avena* decision to provide review and reconsideration.⁵⁰ The US government's attempt to resolve the domestic impasse was met with resistance. In the 2006 case of *Sanchez-Llamas*, the United States Supreme Court considered the question of treaty implementation arising from the VCCR and held that the procedural default rule of states overruled the judgment of the ICJ.⁵¹ Moreover, in a challenge to the President's Executive Order in the case of *Medellin v Texas*, the Supreme Court held that an Executive Order was not sufficient to implement the VCCR because it is not a self-executing treaty and that legislation was required to implement the *Avena* judgment.⁵² These Supreme Court decisions provided some relief for the United States government – there was nothing more that the United States could do directly to implement the ICJ's decision in *Avena*. Since the judgment in *Medellin* the United States government has expressed the view that the matter can only be resolved by the

⁴⁷ Klein, above n 10, 156.

⁴⁸ Laurence E Rothenberg, 'International Law, US Sovereignty, and the Death Penalty' (2004) 35(3) *Georgetown Journal of International Law* 547, 548. See generally Curtis A Bradley, 'Enforcing the *Avena* Decision in US Courts' (2006) 30 *Harvard Journal of Public Policy* 119; Reynaldo Anaya Valencia et al, '*Avena* and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence from the World' (2005) 23(2) *Yale Law and Policy Review* 455; Duncan B Hollis, 'Executive Federalism: Forging New Federalist Constraints on the Treaty Power' (2005-2006) 79 *Southern California Law Review* 1327.

⁴⁹ Tom Dart, 'Mexican Edgar Tamayo Executed in Texas Despite Last-minute Pleas', *The Guardian* (online), 23 January 2014 <<http://www.theguardian.com/world/2014/jan/23/mexican-edgar-tamayo-executed-texas>>.

⁵⁰ George W Bush, 'Memorandum of the Attorney-General: Compliance with the Decision of the International Court of Justice in *Avena*' (28 February 2005) <<http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>>.

⁵¹ *Sanchez-Llamas v Oregon*, 548 US 331 (2006).

⁵² *Medellin v Texas*, 552 US 491 (2008).

legislature not the executive.⁵³ This political deadlock in the United States has relieved the government from the pressure of implementing *Avena* and has left Mexico's international legal efforts without a substantive outcome.

The Directorate of Protection in the SRE has not succeeded in its campaign to secure the legislative amendments required for implementation of the ICJ decision by the United States.⁵⁴ A bill brought before the United States congress in 2014 did not pass.⁵⁵ Mexico established a working group, Mexican Civil Rights Advisory Group (MCRAG), to address the issue of implementing legislation and to strategise with local actors about other concerns related to Mexican nationals in the United States. In response to the resistance of the United States to the ICJ rulings in *LaGrand* and *Avena*, Mexico invests in the local level by allocating more resources to pre-trial procedures and programmes.

II. Mexico's Protection Framework in the United States of America

Mexico's policy-oriented approach to the protection of its citizens in the United States is manifested by a series of programmes intended to provide individual and structural intervention. These programmes provide four avenues for protecting and assisting Mexican citizens: a referral to an attorney from the Mexican consulate's consultant attorney list; Mexican Capital Legal Assistance Program (MCLAP); Programa de Asistencia Jurídica a Mexicanos a través de Asesorías Legales Externas (referred to as PALE or the External Legal Assistance Program), and finally, Proteje, a programme that previously funded class action cases on behalf of Mexican nationals.⁵⁶ Mexico has put in place a number of governance arrangements to deliver targeted protection for Mexican nationals through these programmes. This part of the chapter focuses on the MCLAP and PALE programmes. It considers the objectives of the programmes and outlines their operation.

The aim of Mexico's consular programme is to provide 'assistance and advice to Mexicans in their dealings with local authorities, visiting Mexicans in detention, prison, hospitals, or assistance in any other difficult situation, and representing Mexicans who

⁵³ Interview with Mexican Government Official #2 (Mexico City, February 2014).

⁵⁴ Roundtable with Directorate of Protection, SRE (Mexico City, February 2014).

⁵⁵ Ibid.

⁵⁶ Proteje was administered in conjunction with a Chicago law firm. The Peña Nieto government did not renew funding for the Proteje programme and therefore at the time of writing, the programme was not pursuing any further matters. However, there is still scope within the PALE to pursue litigation as an avenue for setting legal precedent.

are incapable of handling their own affairs'.⁵⁷ Representation is central to Mexico's protection regime. Prior to the introduction of the MCLAP and PALE programmes, Mexico's consular officers participated in the domestic criminal trials of Mexican citizens. Mexican diplomats and consular officers attended court hearings and even presented statements to courts on behalf of Mexico and Mexican nationals on trial. Consular officials presented mitigation arguments and registered Mexico's national interest in the treatment of its nationals in US court proceedings. In-court statements were coupled with out-of-court diplomacy by way of letters to judges, governors and district attorneys, and Third Person Notes to the Federal government. These representations did not lessen the instances of Mexican nationals being sentenced with the death penalty or reduce the systemic discrimination experienced by Mexicans in the US criminal justice system.⁵⁸ Mexico needed more expertise in the US legal system to increase its impact. In response to this problem, Mexico developed legal programmes embedded in the US criminal justice system by employing US lawyers to run cases for Mexican nationals at risk of receiving a death penalty sentence. This strategy changed the face of Mexico's interventions on behalf of its nationals in the United States.⁵⁹

Mexican Capital Legal Assistance Program (MCLAP)

The SRE introduced MCLAP in 2000 as part of a suite of measures to assist Mexicans in the US criminal justice system. The programme is centrally administered and funded by the SRE in Mexico City and implemented by the consulates and the MCLAP Director, a United States lawyer. Through the MCLAP, Mexico retains lawyers in the United States to represent and assist Mexican nationals at risk of receiving a death sentence. Since its inception, MCLAP has identified and accredited lawyers with expertise in the death penalty or 'capital cases' in each state. Mexican consulates work in conjunction with lawyers in the United States to defend Mexican nationals.

Despite two ICJ rulings against the United States, consular notification in accordance with article 36 of the *Vienna Convention* occurs inconsistently.⁶⁰ Mexican consulates receive notification through different avenues and at different stages of the legal process (pre-arrest, arrest, pre-charges, post-arraignment etc). Members of the MCLAP network assist the consulates to monitor court lists and media for the names of

⁵⁷ Victor M Uribe, 'Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice' (1997) 19 *Houston Journal of International Law* 375, 380.

⁵⁸ Roundtable with Directorate of Protection, SRE (Mexico, February 2014).

⁵⁹ *Ibid.*

⁶⁰ Interview with Adriana Gonzalez Felix, Consul for Protection and Legal Affairs, Consulate General of Mexico (San Francisco, February 2014).

Mexican nationals accused of serious crimes, particularly where there is the possibility that the death penalty could be applied. Once the consulate is informed of the pending charges, an MCLAP attorney is appointed and funded by the consulate to follow the case, even though the individual may already have been appointed a lawyer by the court in that jurisdiction.

Throughout the process, the consulate and the MCLAP attorney coordinate their efforts. To ensure efficiency and a harmonised approach, the national attends a meeting in the Mexican consulate, together with the MCLAP attorney and their court-appointed lawyer (should he/she wish to attend). Consulates request Mexican nationals to complete a standard questionnaire, which is designed to extract mitigation information, including early identification of mental illness and special circumstances. The answers to the questionnaire help the consulate to retrieve further information on the national's Mexican antecedents for their defence. With both consulate officials and the MCLAP attorney attending hearings and participating in the case, the MCLAP programme embeds a strategic element throughout the process by ensuring consistency and providing experience.

MCLAP has an important role to play in capital (death penalty) criminal cases in several ways. The MCLAP attorney serves as an adjunct lawyer to the case, depending on the appointed lawyer's experience and willingness. Some court-appointed lawyers are eager to accept additional resources and assistance from MCLAP, while others do not wish to have their case shadowed.⁶¹ MCLAP provides background information, documents from Mexico, research, motions and prepares letters to the prosecutor and District Attorney.⁶² The programme also hires investigators or 'mitigation specialists' depending on the case and the jurisdiction. MCLAP does a Preliminary Mitigation Investigation (PMI), whereby an investigator is hired to do a skeletal investigation. This will include meeting with family members, collecting documents and background research.⁶³ MCLAP, the consulate and the SRE follow cases from their inception until they are concluded.

External Legal Assistance Program for Mexicans (PALE)

Another programme, PALE, addresses a wider range of issues concerning Mexican nationals in the US legal system. The PALE focuses on immigration, labour, human

⁶¹ Interview with Greg Kuykendall, Director of MCLAP (Telephone, April 2014).

⁶² Ibid.

⁶³ Ibid.

rights, family law and criminal law not involving the death penalty. The consulate assesses applications received from Mexican nationals for assistance and can provide up to \$US5000 for a lawyer appointed from the consulate's list of local attorneys. Based on criteria developed by the SRE, each consulate compiles lists of lawyers, law firms and civil society organisations in their jurisdiction or state. These criteria include Spanish language ability, accessibility of their offices to Mexican nationals, extensive litigation experience, successful history of Mexican advocacy cases, an interest in representing Mexican nationals demonstrated by previous *pro bono* assistance, and a commitment to service of multiple cases through a fixed fee (flat fee) or preferential hourly rate.⁶⁴

Each Mexican consulate determines eligibility for funding and may develop its own criteria for case eligibility under the PALE. Consulates may consider cases concerning Mexican national interests, humanitarian concerns (such as immigration), public interest cases where there is scope to develop an important legal precedent and politically controversial or sensitive matters.⁶⁵ If the consulate regards a matter as falling within this general guide, it is referred to an attorney from the consulate's list and the consulate funds legal costs from within their budget. Unlike the MCLAP, the PALE is not centrally administered by the SRE. It is a self-funding program, whereby revenue raised from visa, passport and other applications is redirected into the PALE program.⁶⁶ This approach of devolved funding and decision-making enables Mexican consulates to be responsive to the needs of the Mexican citizens in their constituency.

Most State-based protection and consular approaches are focused on civil and political rights, particularly fair trial rights. Labour rights, cultural rights and gender/LGBTI rights do not attract the same attention from States as the death penalty, torture and due process rights. The position under international law however is that claims may be espoused on behalf of an individual in the commission of any internationally wrongful act. A unique feature of the PALE is that its scope extends to victims of crime and systemic discrimination. Consular officers are able to identify matters where Mexican nationals face systemic issues that do not involve due process rights through this programme. PALE-funded cases have also been brought against police officers for

⁶⁴ Interview with Adriana Gonzalez Felix, Consul for Protection and Legal Affairs, Consulate General of Mexico (San Francisco, February 2014).

⁶⁵ Ibid.

⁶⁶ Ibid.

police brutality and wrongful death, as well as to protect labour rights of Mexican nationals.⁶⁷

III. Networks of Participation

Mexico's approach to protecting nationals is contingent upon two significant features. The first is that the delivery of protection is based on networks of actors. One of these networks is Mexico's fifty consulates in the United States – more than any other State with a diplomatic presence in the United States. Mexico's consular network, and its associated local contacts, provides the infrastructure for Mexico to pursue its protection policies. The second feature of Mexico's approach is the inculcation of values within its networks, a role performed by protective and legal nodes in both the United States and Mexico. This aim of this part is to analyse the technologies of Mexico's protection network and appraise the advantages of a formal networked approach to the protection of citizens abroad.

Expertise: cultural, technological and technical

Mexican nationals in the US criminal justice system experience a number of cultural, linguistic and technical obstacles. Kuykendall, Amezcua-Rodriguez and Warren identify the cultural impediments facing foreign nationals in the United States:

Foreigners facing the death penalty in the United States may be especially vulnerable and often suffer from a range of inherent disadvantages, such as ignorance of important cultural and legal norms, lack of trust in the attorney-client relationship, inability to consult with familial confidants, and significant physical and cultural barriers to a competent mitigation investigation.⁶⁸

Mexican nationals accused of crimes in the United States rely upon the cultural and legal expertise of their MCLAP attorneys to overcome these barriers. Actors in the MCLAP and PALE programmes perform a number of knowledge brokerage and translation roles. MCLAP bridges the linguistic divide between Mexican nationals and US officials with the provision of Spanish-speaking attorneys. Programme attorneys also operate as a cultural bridge. As local lawyers in the United States, MCLAP attorneys can explain the legal processes and concepts to Mexican nationals and cultural issues to United States officials. Their ability to easily access and translate

⁶⁷ Ibid.

⁶⁸ Gregory J Kuykendall, Alicia Amezcua-Rodriguez and Mark Warren, 'Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client' (2008) 36 *Hofstra Law Review* 989, 992.

information within and around the court system is of immense value to the success of a Mexican national's case. As domestic legal experts, MCLAP attorneys also provide procedural knowledge and substantive legal expertise of each jurisdiction. Coupled with their broader experience as criminal lawyers, MCLAP attorneys specialise in capital cases and mitigation.

The Mexican consulate and its officers also play a role as cultural brokers. Victor Uribe, a Mexican diplomat, writes that '[t]he consul ... represents familiarity. The presence of a fellow national who speaks the same language gives great psychological relief to distressed nationals detained in a strange environment.'⁶⁹ The cultural connection between consular officers and Mexican nationals in these circumstances facilitates mitigation. Mexican consular officers provide the antecedents and context of the individual's life from within Mexico as part of mitigation processes. MCLAP lawyers have reflected on how beneficial partnerships with consulates are for defending cases:

Working with consular authorities from a foreign client's country of origin can lead to a culturally and linguistically competent life-history investigation that would otherwise be difficult or even impossible to achieve.⁷⁰

Through this cultural proximity to the national, consulates can facilitate the provision of information to MCLAP attorneys who in turn translate those details into mitigation arguments within the relevant criminal jurisdiction in the United States.

Criminal mitigation in the United States is one area of domestic law where the legal norms are especially complex. Unlike some systems where mitigation involves expressions of remorse and characterisations of the criminal behaviour as an aberrance, mitigation in the United States relates to showing a life-course consistent with criminal behaviour.⁷¹ Defence lawyers in United States criminal proceedings try to showcase a defendant's family history that demonstrates mental illness or behavioural issues. Mitigation aims to show that the criminal behaviour was consistent with the mental diagnosis and social antecedents of the defendant. Greg Kuykendall, Director of the MCLAP, notes that mitigation 'is very easy to misunderstand and collecting statements and affidavits showing that the defendant behaved out of character is a disservice to the client.'⁷² The MCLAP attorney mediates the challenging terrain of mitigation through their court experience and legal expertise in the various criminal justice systems of the United States.

⁶⁹ Uribe, above n 57, 378.

⁷⁰ Kuykendall, Amezcua-Rodriguez and Warren, above n 68, 990.

⁷¹ Interview with Greg Kuykendall, Director of MCLAP (Telephone, April 2014).

⁷² *Ibid.*

Coupled with the expertise of domestic lawyers in the United States, the political and issues-based expertise of civil society allows for a broad range of interventions. Civil society organisations identify systemic issues and access the political and public policy sphere. Local community organisations in the United States also play a role.⁷³ Community organisations communicate information about Mexico's programmes and services provided to Mexicans in the United States. The role of community organisations is an important one, particularly for generating local support and managing expectations.⁷⁴ The involvement of community organisations allows the consulates to delegate the management of some of the community's expectations and the dissemination of information.

Communication and distribution of information are fundamental techniques of Mexico's protection network in the United States. The MCLAP Director in the United States collates information and uses statistics as a tool to manage the programme and direct funding.⁷⁵ Digitalised files in an electronic system streamline processes, allowing for a better flow of information between the SRE and MCLAP attorneys in each case. Kuykendall has emphasised the importance of digitalising the MCLAP's workflow as a way of 'increasing the statistical relevance' of MCLAP's work.⁷⁶ MCLAP has been able to aggregate relevant data to drive policy and influence various actors in the United States. For example, in jurisdictions where Mexicans have been sentenced to death in the past (for example, Texas, Arizona, and Los Angeles and Harris counties in California) a Mexican national is 13 times less likely to receive the death penalty with MCLAP involvement than an identically placed American.⁷⁷ The MCLAP Director's use of statistics helps to chart a track record of success, rather than relying on anecdotal evidence. Kuykendall also uses the statistical evidence to communicate to the Mexican government that 'this is well-spent money and can often mean the difference between life and death.'⁷⁸ Kuykendall argues that 'money is the single most important factor' in the success of the regime.⁷⁹

The benefit of MCLAP's data collection goes beyond resource allocation. Wendy Espeland and Berit Vannebo note that numbers, in the form of quantification, perform

⁷³ Interview with Adriana Gonzalez Felix, Consul for Protection and Legal Affairs, Consulate General of Mexico (San Francisco, February 2014).

⁷⁴ Ibid.

⁷⁵ Interview with Greg Kuykendall, Director of MCLAP (Telephone, April 2014).

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

an important function in accountability narratives.⁸⁰ They argue that quantification makes for easy comparison, it communicates efficiency as moral value, it directs attention to improve outcomes and it interacts with the authority of law.⁸¹ Espeland and Vannebo's conclusions resonate with the way in which MCLAP harnesses quantification as a strategy. Statistical evidence of the success rate of the programme helps to mobilise and recruit actors into MCLAP, particularly local lawyers. Quantification also informs the programme's goals. The Director uses the statistics to highlight where more attention/money is required. The statistical accounts provide a metric to base the validity of the programme for Mexico and to make a more authoritative claim to funding. Therefore, quantification serves as an important technique of the network: both as a directive force, a claim for funding by the MCLAP Director and a justification for funding to the Mexican executive by the SRE.⁸²

MCLAP has a budget of over \$3.5 million USD, largely within the discretion of the Director.⁸³ Reliance on local expertise for knowledge of court processes, expert litigators and investigators allows the Director to form a targeted programme for the provision of legal representation within the United States. The structure of the programme and its investment in the expertise offered by the US lawyers means that the Director of MCLAP has enough discretion/flexibility to make decisions related to the cases without consulting the SRE on every decision on each case.⁸⁴ The SRE devolves much of its power into the local networks to conduct the casework, appearances and to exercise legal judgment and strategy in each case.

The ICJ cases of *Avena*, *LaGrand* and *Breard* add weight to MCLAP claims related to breaches of the consular notification requirement earlier in the criminal proceedings. Kuykendall, Amezcua-Rodriguez and Warren note that '[t]he diplomatic and legal conflict generated by the treaty violation was instrumental in convincing the prosecution not to seek death against the client.'⁸⁵ With death penalty cases costing as much as \$1 million USD, early intervention transforms the MCLAP into a cost-saving programme for Mexico.⁸⁶ The experience of the Programme demonstrates that there is more flexibility in the pre-trial phase for MCLAP attorneys to convince a prosecutor not to consider the death penalty.⁸⁷ A pre-trial emphasis has produced results. Less than

⁸⁰ See generally Wendy Nelson Espeland and Berit Irene Vannebo, 'Accountability, Quantification, and Law' (2007) 3 *Annual Review of Law and Social Science* 21.

⁸¹ *Ibid* 39-40.

⁸² *Secretaria de Relaciones Exteriores*, 'Internal Brief for the Mexican Foreign Minister' (February 2014).

⁸³ Roundtable with Directorate of Protection, SRE (Mexico City, February 2014).

⁸⁴ Interview with Greg Kuykendall, Director of MCLAP (Telephone, April 2014).

⁸⁵ Kuykendall, Amezcua-Rodriguez and Warren, above n 68, 1004.

⁸⁶ Interview with Greg Kuykendall, Director of MCLAP (Telephone, April 2014).

⁸⁷ *Ibid*.

one percent of pre-trial cases in which MCLAP is involved will have the death penalty applied.⁸⁸ Moreover, cases involving the MCLAP are more likely to be resolved before trial. Therefore, procedural knowledge of the system enables MCLAP attorneys to exert their influence in the most malleable phase of proceedings. By addressing the treatment of Mexican nationals prior to trial, the programme can avoid entrenched judicial outcomes that must then be appealed through courts in the United States.

Nodal governance: orchestrating protective values

Several nodes in Mexico's protection networks direct goals and guide collaboration in the protection of Mexican nationals in the United States. The Mexican Civil Rights Advisory Group, briefly discussed in section one of this chapter, formalises the relationship between Mexico and US civil society organisations. The MCRAG forms a 'fundamental component of the efforts of the Mexican government to protect the interests of its nationals in the United States.'⁸⁹ Civil society organisations with a focus on a range of civil liberties, human rights, and litigation meet regularly with the Mexican government. The Advisory Group identifies possible test cases, provides updates on pending cases and coordinates strategy. Some of these CSOs include the American Immigration Council, American Civil Liberties Union and the National Immigrant Justice Center. The MCRAG is intended to

provide a channel to exchange views and develop collaborative strategies to maximize resources in order to provide Mexican nationals with needed legal orientation and services and to take comprehensive approaches to face upcoming challenges and to promote policies that benefit immigrant communities.⁹⁰

In combination with the strong professional network with lawyers in the United States, the working group adds another arm to Mexico's expertise network, particularly in the form of campaigning, public awareness and identifying suitable test cases. This connection between civil society and the Mexican government extends Mexico's anti-death penalty campaign to the domestic political context of the United States. MCRAG formally incorporates non-State actors into the Mexico's decision-making and, by doing so, forms an important node for generating the political strategy of the network.

Alliances are integral to Mexico's protection regime. In this respect Mexico's outreach is not limited to organisations and institutions in the United States. The SRE visits other countries to talk about their policies and programmes, establish civil society networks

⁸⁸ Ibid.

⁸⁹ *Secretaria de Relaciones Exteriores*, 'Mexican Civil Rights Advisory Group' (September 2014).

⁹⁰ Ibid.

and to connect with international organisations.⁹¹ For example, in 2013 the SRE's Diplomatic Protection Directorate attended a Consular Forum in London where they participated in information sharing between States and other actors.⁹² The SRE node cultivates relationships that have a practical role in Mexican advocacy on behalf of its citizens. Edgar Tamayo's case in Texas exemplifies the SRE's outreach strategy. In anticipation of Tamayo's execution in January 2014, Mexico was able to procure letters from the European Parliament, civil society organisations, thirteen States, UN bodies, and the Vatican to the Texas Governor expressing concern over the application of the death penalty in the case.⁹³ While international pressure did not ultimately succeed in preventing the execution, the SRE's strategy contributed to improving and expanding Mexico's global alliances.

The MCLAP Director, along with senior MCLAP attorneys, function as a separate node that focuses on building alliances with local legal communities in the United States.⁹⁴ Human rights arguments and organisations struggle for resonance in death penalty states, such as Arizona and Texas, where Mexicans are being tried. Kuykendall notes that in some states it is extremely difficult to convince the state executive to grant clemency because of the strong pro-death penalty stance of many state Governors and their constituencies.⁹⁵ The presentation of death penalty cases through the lens of human rights is a disservice to defendants in pro-death penalty jurisdictions, particularly if the individual is accused of violent crime. Instead of pursuing a human rights angle in cases, the MCLAP Director engages with communities of legal practitioners and the judiciary in order to raise the profile of the programme and improve awareness of the structural disadvantages Mexican nationals face in the US criminal justice system. This includes presentations at legal conferences and participation in legal associations and societies. The approach of this node is on local action in legal networks. It aims to use the language and concepts of the jurisdictions in which MCLAP functions to normalise the existence of the programme and to put a local face on what is ultimately a foreign State intervention.

A nodal approach also preserves and consolidates expertise within various levels of the network. The presence of local US lawyers trained in specific jurisdictions provides consistency, an aspect of protection that is often frustrated by consular officers in diplomatic service. As with most diplomatic posts, most SRE staff rotate every three

⁹¹ Roundtable with Directorate of Protection, SRE (Mexico City, February 2014).

⁹² Ibid; *Consular Forum: Contemporary Consular Practice – Trends and Challenges* (3-5 September 2013) <<https://www.wiltonpark.org.uk/conference/wp1258/>>.

⁹³ Roundtable with Directorate of Protection, SRE (Mexico City, February 2014).

⁹⁴ Interview with Senior MCLAP Attorney (Berkeley, February 2014).

⁹⁵ Interview with Greg Kuykendall, Director of MCLAP (Telephone, April 2014).

years between the central agency in Mexico City and other international postings. Prior to the introduction of MCLAP, the expertise and networks formed by individual officers was lost when they completed their posting and returned to the SRE or to moved on to another posting. Through the MCLAP model, however, local legal practitioners on the MCLAP attorney list, the MCLAP Director, the SRE, and civil society participation in the MCRAG node maintain expertise. Moreover, each member of the SRE team in Mexico City has served in a US consulate, which aids understanding of challenges at the coalface of Mexico's protection work. Nodes rely on continuity as a tool to nurture local, national and transnational relationships and to consolidate procedural and substantive knowledge in the different legal systems of the United States.

Mexico's protective regime is driven by a normative agenda to protect Mexican citizens from harm or discriminatory treatment in the United States. To achieve this objective, nodes perform the function of populating each network with values and goals. This may include opposition to the death penalty, minimising the vulnerability of Mexican nationals in the United States, due process or compliance with international law. Each node caters to a specific audience of actors. The SRE node focuses on international outreach and civil society networks. The MCLAP Director addresses local legal networks. Together the MCLAP and SRE devise and endorse due process values and other goals for the transnational MCLAP network. MCRAG and the SRE node cultivate strategy and messages for political networks in the United States. Finally, each consulate has the capacity to function as a node. Consulates communicate Mexico's support to its nationals in the jurisdiction, and its values, such as fairness, due process and rule of law, to the wider community.

Competing values emerge and are contested in the operation of these networks. Mexico's anti-death penalty and protection impulses must be balanced with respect for domestic legal processes in the United States. Through the MCLAP, Mexico has been able to balance this contest by participating within the domestic legal system, electing to be a part of forums in the United States, rather than competing against it or attempting to circumvent it through political and diplomatic efforts. Another contest of values arises between the treatment of Mexico's domestic constituency and the perception of privileged treatment for Mexicans in the United States. Serious concerns related to the economy, employment, education, health care and the drug wars in Mexico contribute to a tension between domestic politics and foreign policy. The SRE

faces some, albeit limited, pressure to justify spending on the programme in the face of potential criticism.⁹⁶

Mexico's protection programmes have come under growing domestic scrutiny in recent years. The first freedom of information (FOI) request was lodged in relation to the programme in 2013.⁹⁷ The FOI request inquired into Mexico's campaign to prevent the execution of Mexican national, Edgar Tamayo in January 2014 by Texas. The request related to how much money was spent on his case, the nature of actions taken, and whether compensation had been awarded to his family.⁹⁸ Criticism of the Mexican government in relation to Tamayo's case fell into two categories: criticism for not doing enough to save a Mexican citizen and criticism for spending money on Mexicans convicted of serious crimes outside of Mexico when the money could be better spent domestically.⁹⁹ The FOI request signals some resistance against Mexico's foreign programmes to protect citizens. The domestic challenges to Mexico's policies and their funding heighten the need for nodes to orchestrate the values of the programmes across a range of networks.

IV. Local protection and international law

The Mexico case study reveals three developments of the protection of citizens abroad in a policy-oriented setting. The first relates to the formal incorporation of State and non-State actors into the strategy and delivery of the protection of Mexican nationals in the United States. Non-state actors, particularly domestic lawyers and civil society organisations in the United States, play an important role in the Mexican protection programmes. The success of the programmes relates to the technologies of protection, particularly the way in which nodes delegate and assign protection tasks to actors within each network. Nodes may take advantage of the formal status or identity of a particular actor to achieve goals. Mexico distributes its sovereign function to protect its citizens across a range of actors in each of its networks. The model of protection in MCLAP and the PALE explored in this chapter may be described as 'polycentric regulation' where 'the state is not the sole locus of authority'.¹⁰⁰ Black notes that in some networks the presence of multiple actors and normative goals can fragment the

⁹⁶ Roundtable with Directorate of Protection, SRE (Mexico City, February 2014).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Julia Black, 'Legitimacy, Accountability and Polycentric Regulation: Dilemmas, Trilemmas and Organisational Response' in Anne Peters et al (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 241, 241.

objectives of the regime.¹⁰¹ A networked, nodal approach to protection helps to harness and develop subject-matter expertise, standardise objectives, and deliver harmonised interventions through coordination between State and non-State actors.

The second development is the predominantly local character of the intervention. The participation of domestic criminal lawyers in the United States who are sympathetic to the cause of Mexican nationals puts a local or ‘American’ face on the programme and partially masks Mexico’s participation in each criminal jurisdiction. As a technology of the programme, masking or giving a local identity to the intervention has a depoliticising influence, albeit a limited one, on the protection programmes. The expertise of domestic criminal lawyers has aided the MCLAP to shift its efforts to early intervention within the local criminal justice system. As the most effective mechanism for protecting nationals from a death sentence, early intervention can minimise public exposure and politicisation of cases.

Finally, Mexico’s practice of protection marks a departure from classically remedial foundation of diplomatic protection flagged in chapter two. As part of a more systemic strategy, both the PALE and MCLAP networks shift protection from being reactive, awaiting violation and seeking a remedy subsequently, to a more aggressive stance of pursuing categories of rights and using resources to anticipate and prevent violations. Christian Tams acknowledges that the ICJ has shifted its approach ‘away from a largely remedial understanding of international responsibility, whose main focus is the reparation of *past* wrongs.’¹⁰² The Mexico case study provides an example of how there is a disjuncture between the rules of diplomatic protection and the contemporary practice of protection.

V. Conclusion

Neither *LaGrand* nor *Avena* secured the lives of the German and Mexican citizens at the centre of those cases. While the ICJ proceedings were legally successful, they raise the question: how effective can international litigation be in protecting the human rights of citizens abroad? Some scholars have reported that ‘formal international law is stagnating not only in quantity but also quality.’¹⁰³ Pauwelyn, Wessel and Wouters

¹⁰¹ Ibid 242.

¹⁰² Christian J Tams, ‘Consular Assistance: Rights, Remedies and Responsibility: Comments on the ICJ’s Judgment in the *LaGrand* Case’ (2002) 13(5) *European Journal of International Law* 1257, 1259.

¹⁰³ Joost Pauwelyn, Ramses A Wessel and Jan Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’ (2014) 25(3) *European Journal of International Law* 733, 734.

suggest that States are moving away from formal law towards softer mechanisms, or what they term ‘informal international law’.¹⁰⁴ In Mexico’s case, reliance upon formal international law may be diminishing in some respects. However, the Mexican protection network’s strategy does not jettison formal law altogether, but instead combines several fields, including United States’ domestic law and politics, to achieve its aims. In widening the scope of its activities, the Mexican protection network also simultaneously facilitates broader participation from a range of actors, blurring the demarcation between State and non-State actors.

Beneath the surface of a macro international law analysis, the Mexican regime of protection is a manifestation of international law that is not accounted for within the traditional paradigm. Because MCLAP is embedded in the United States’ domestic legal system, a macro international law approach would not detect any international legal activity in the Mexican model, or perhaps account for it as mere consular assistance. However, Mexico’s interventions are based entirely on the idea that Mexico is entitled to protect its citizens from violations by another State, an international law concept. The programmes are based on principles of international law, which include explicit rights and obligations in the VCCR.¹⁰⁵ Through a micro international law analysis it is possible to observe how the actors rely on different legal concepts or values, and when international law is invoked. Shifting focus away from analyses of the formal invocation of diplomatic protection can reveal how power relations are managed and how different objectives are achieved in the protection of citizens abroad.

¹⁰⁴ Joost Pauwelyn, Ramses A Wessel and Jan Wouters, ‘An Introduction to Informal International Lawmaking’ in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 1, 2-3.

¹⁰⁵ *Vienna Convention on Consular Relations* art 36.

Chapter 6

Australia

Legal scholarship suggests that international litigation is the main avenue for addressing the protection of citizens abroad. The reality of international litigation is that it is costly, time-consuming and public in nature. While there have been many cases dealing with diplomatic protection, few cases have been brought before the ICJ in relation to the protection of individual rights. Thus, participants in the international system employ other strategies and modes of protection. Many protective actions will commence or come in contact with consular forms of protection or assistance. In some States, consular tasks are no longer limited exclusively to State officials: private actors may be contracted to provide consular services or civil society organisations may take up this role.¹ In this chapter, I explore consular action as a mode of protection, focusing on Australia's approach to the protection of its citizens abroad. This chapter also examines the practical and structural tensions between consular assistance and protection. Despite academic focus on legal cases of protection, consular action remains the most likely avenue for resolving issues related to the treatment of citizens abroad. Section one considers the case of Van Tuong Nguyen, where the Australian government employed consular and diplomatic means to protect. Section two examines the formation and role of networks in Van Nguyen's case. Section three details the framework and modalities of the Australian consular system, with a focus on values of welfare and regulatory flexibility.

I. Background to Van Tuong Nguyen's Situation

Australian national, Van Tuong Nguyen, was convicted for trafficking just under 400 grams of heroin by Singapore in March 2004. Subject to Singaporean law, Van Nguyen was sentenced to a mandatory penalty of death. The Australian government made a range of diplomatic and political representations to the government of Singapore on behalf of Van Nguyen prior to his execution.² These representations urged the Singaporean government not to apply the death penalty and to impose a lengthy custodial sentence in its place. However, these representations were ultimately

¹ Luke T Lee and John Quigley, *Consular Law and Practice* (Oxford University Press, 3rd ed, 2008) 562; Interview with Reprieve UK (London, August 2013).

² The Hon Alexander Downer, 'Nguyen Van Tuong - Representations to Singapore Ministers and President' (Media Release, 28 November 2005)

<http://www.foreignminister.gov.au/releases/2005/nguyen_van_tuong_representation_singapore.html>.

unsuccessful. The Australian government also considered the option of bringing a case before the ICJ, but decided not to institute proceedings on the basis that there was no jurisdictional grounds to do so.

On 2 December 2005 Van Nguyen was executed in Singapore. While the Australian government was criticised by legal practitioners, the public and academics for not making strong enough representations or taking action early enough on Van Nguyen's behalf,³ robust consular and diplomatic measures were taken in an effort to prevent his execution.

State and non-State actor interventions

The Australian government and other actors took a range of actions to halt Van Nguyen's execution. While Van Nguyen had legal representation in both Singapore and Australia, the Australian government, given the increasing public profile of the matter, made a number of high-level representations to Singapore in relation to the application of the death penalty. These representations included seven written representations from the Prime Minister, Governor-General and Foreign Minister in relation to Van Nguyen to Singapore.⁴ There were also a number of oral representations made by Australian ministers, the Prime Minister, Governor-General, the Parliamentary Secretary, senior Department of Foreign Affairs and Trade (DFAT) officials and the Australian High Commissioner in Singapore to Singaporean officials and ministers.⁵ Various Australian parliaments urged Singapore, through parliamentary motions, to commute Van Nguyen's sentence to a custodial one in which the death penalty would not be applied.⁶ One example of Australia's early representations prior to Van Nguyen's trial included written correspondence from the Australian Foreign Minister, Alexander Downer, to his Singaporean counterpart:

I wish to convey formally to you the Australian Government's support for Mr Nguyen's lawyers' request that he be tried on charges that do not carry a mandatory death sentence. Australia is opposed to capital punishment and outlawed the death penalty in 1973. I understand that Nugyen [sic] has agreed to plead guilty to a non-capital offence which would involve a very substantial prison sentence. If Singapore

³ See, eg, 'How Australia Failed Nguyen Tuong Van', *Sydney Morning Herald* (online), 1 December 2005 <<http://www.smh.com.au/news/editorial/how-australia-failed-nguyen-tuong-van/2005/11/30/1133311102197.html#>>.

⁴ The Hon Alexander Downer, 'Nguyen Van Tuong - Representations to Singapore Ministers and President' (Media Release, 28 November 2005) <http://www.foreignminister.gov.au/releases/2005/nguyen_van_tuong_representation_singapore.html>.

⁵ Ibid.

⁶ See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 10 November 2005, 19413-18 (Amanda Fazio).

were able to accept that plea, Australia would be ready to explore all possible avenues for Mr Nguyen to serve his sentence in Australia rather than in Singapore at Singaporean expense.⁷

The content of other representations by the Australian government was not made public, however representations continued even after Van Nguyen's conviction.⁸ The Foreign Minister made numerous representations on behalf of Van Nguyen and publicly campaigned for the death penalty not to be applied. In early November 2005 however, the Australian Prime Minister, John Howard, concluded that Australia had exhausted all available avenues to prevent the execution of the 25-year-old Australian.⁹

On 21 November 2005, the same day as the Prime Minister's claim that there were no other options available to the government, media outlets began reporting that lawyers for Van Nguyen believed that there was a possible avenue for relief against the death penalty at the ICJ.¹⁰ Two Melbourne-based lawyers, Lex Lasry QC and Julian McMahon, represented Van Nguyen in Australia. Lasry and McMahon worked with local lawyers in Singapore on different stages of Van Nguyen's case, including clemency proceedings following his conviction. Lasry and McMahon, both domestic criminal specialists, retained two public international lawyers to advise them on the available options: Donald Rothwell, a legal academic at the Australian National University and Christopher Ward, a barrister specialising in international law.

Rothwell and Ward argued that not all international avenues had been exhausted. They devised a legal strategy for a case to be brought by Australia against Singapore in the ICJ. Unlike the *Breard*, *LaGrand*, and *Avena* cases, which were based upon the *VCCR*, there was no clear internationally wrongful act giving rise to jurisdiction before the ICJ in Van Nguyen's case. Initially, Rothwell had proposed the *forum prorogatum* principle, which would allow a matter to be brought to the ICJ without a specific

⁷ Letter from Alexander Downer, Minister for Foreign Affairs of Australia to Professor S Jayakwnar, Minister for Foreign Affairs and Minister for Law Republic of Singapore, 5 November 2003.

⁸ The Hon Alexander Downer, 'Nguyen Van Tuong - Representations to Singapore Ministers and President' (Media Release, 28 November 2005)

<http://www.foreignminister.gov.au/releases/2005/nguyen_van_tuong_representation_singapore.html>.

⁹ Alison Caldwell, 'No More to be Done for Nguyen, Says PM', *ABC* (online) 21 November 2005

<<http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/worldtoday/content/2005/s1512878.htm>>.

¹⁰ ABC Canberra, *Interview with Foreign Minister The Hon. Alexander Downer*, 21 November 2005 (Ross Solly)

<http://parlinfo.aph.gov.au/parlInfo/download/media/radioprpm/ZO3I6/upload_binary/zo3i61.pdf;fileType=application%2Fpdf#search=%22666%20ABC.%20CANBERRA%22>.

jurisdictional ground being identified.¹¹ The lawyers also suggested another basis for jurisdiction under the *Single Convention on Narcotics 1961* ('*Single Convention*').¹²

Both Australia and Singapore were parties to the *Single Convention* at the time of Van Nguyen's conviction.¹³ Article 48 of the *Single Convention* provided jurisdiction for disputes between States parties to be brought before the ICJ for resolution.¹⁴ Rothwell and Ward argued that under the *Single Convention* States were required to apply the penalties listed, which did not include the death penalty. They suggested that the application of the death penalty was not foreseen by the *Single Convention* and identified that the Convention only stipulates custodial sentences. Therefore Van Nguyen's death sentence was a breach of Singapore's obligations as a party to that Convention.¹⁵ Rothwell and Ward also argued that the *Single Convention* ought to be applied in conjunction with the norms of international human rights law prohibiting the death penalty. The strategy of finding a ground for jurisdiction was a gateway to applying for an order of provisional measures from the ICJ. It was envisaged that if the ICJ granted an order for provisional measures it would create time for a diplomatic solution to be negotiated before the merits stage, assuming compliance by Singapore of the Court's order for provisional measures.¹⁶ The strategy of seeking provisional measures before the ICJ was informed by the other death penalty matters brought before the ICJ.

Once Van Nguyen's lawyers made the announcement in the media, Alexander Downer contacted Rothwell and Ward to discuss the avenues that had been put into the public domain. The Foreign Minister, Rothwell and Ward discussed over the telephone what international legal options were available.¹⁷ On the instruction of the Foreign Minister, the Department of Foreign Affairs and Trade along with the Attorney-General's

¹¹ Interview with Donald Rothwell (Canberra, April 2014). See International Court of Justice, *Jurisdiction* <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2>>.

¹² ABC Radio, 'Nguyen Case Arguable Before ICJ: Barrister', *The World Today*, 23 November 2005 (Alison Caldwell) <<http://www.abc.net.au/worldtoday/content/2005/s1515027.htm>>; *Single Convention on Narcotic Drugs* opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964) as amended by the *Protocol Amending the Single Convention on Narcotic Drugs, 1961*, opened for signature 24 March 1972, 976 UNTS 3 (entered into force 8 August 1975).

¹³ Entered into force for Australia 1 December 1967; entered into force for Indonesia 3 September 1976. See UN Treaty Collection for details of signatories to the *Single Convention*:

<https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=vi-15&chapter=6&lang=en

¹⁴ *Single Convention on Narcotic Drugs*.

¹⁵ Interview with Christopher Ward (Canberra, May 2014).

¹⁶ Interview with Donald Rothwell (Canberra, April 2014).

¹⁷ *Ibid.*

Department, met with Rothwell and Ward to discuss the options.¹⁸ At this meeting, Rothwell and Ward presented their proposals to the government legal advisors.

The legal prospects of a case brought under the *Single Convention* were in contention.¹⁹ The first significant legal issue was that the *Single Convention* did not explicitly prohibit the application of the death penalty. A case would therefore need to argue that the treaty either impliedly prohibited the death penalty, or that there was another binding rule of international law preventing Singapore from applying the death penalty. Singapore was not a party to the *Second Optional Protocol* to the ICCPR prohibiting the death penalty or the *International Covenant on Civil and Political Rights*.²⁰ Therefore, the argument that applying the death penalty would be a breach of the *Single Convention* was contingent on a successful claim that there was an obligation not to conduct the death penalty in customary international law or that it had achieved *jus cogens* status, as a non-derogable norm of international law. These arguments, especially in relation to a customary prohibition of the death penalty, were speculative, particularly given that a number of States continue to apply the death penalty. Another issue was that an order for provisional measures from the ICJ did not ensure that Singapore would comply by suspending the execution. The ICJ had issued orders to halt executions in the past, but these produced mixed results. In the case of the *LaGrand*, the ICJ's order for provisional measures failed to prevent Walter LaGrand's execution.²¹

Rothwell and Ward suggested that external counsel be approached for independent legal advice on the issue. James Crawford, an Australian academic and practitioner based at Cambridge, was asked to provide advice on the prospect of success. Overnight, he advised that the avenue and arguments proposed were unlikely to be successful before the ICJ. In a public interview Downer noted that:

I spoke the night before last to a couple of lawyers, Chris Ward and Professor Don Rothwell, about some ideas they had on how we could use the International Court of Justice to try to assist Van Nguyen and stave off his execution. The first thing I did was arrange for the Attorney-General's Department and my Department to examine their ideas, which seemed at least, prima facie, to be at least worth examining. And I'm sorry to say that their examination was pretty negative; they didn't think that there was any realistic way, even on the basis of the ideas put

¹⁸ Interview with Alexander Downer, Minister for Foreign Affairs (Doorstop Interview, 25 November 2005)

<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FTH2I6%22>>.

¹⁹ Interview with former Australian Government Official #2 (Canberra, July 2014).

²⁰ *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

²¹ See chapter four for a discussion of the provisional measures.

forward by Chris Ward, that we could go to the International Court of Justice without Singapore accepting the jurisdiction. ... [B]earing in mind that this is a question of life or death, it was worth referring these ideas one stage further to Professor James Crawford ... [H]e has emailed back today saying that on the basis of the ideas that have been put forward there simply was no basis for going to the International Court of Justice.²²

Following the announcement that the legal arguments and jurisdiction to bring a case before the ICJ were not strong enough to commence litigation, the Australian government was criticised for not taking further measures, particularly trade sanctions, against Singapore. A member of the government argued that economic threats ought to have been made against Singapore in an attempt to save Van Nguyen's life and that the Commonwealth Heads of Government Meeting (CHOGM) also should have been used as a forum to apply pressure on Singapore.²³

The Prime Minister and Foreign Minister made it clear that Australia was not prepared to use trade or other substantive aspects of the bilateral relationship to negotiate a more favourable outcome for Van Nguyen. The Foreign Minister and Prime Minister rejected that trade was an appropriate tool to negotiate with:

Obviously it would do Singapore damage if we imposed trade sanctions, and obviously it would do us a lot of damage as well. The consequence of it would be absolutely zero in relation to helping Van Nguyen. It would only harden Singapore's resolve.²⁴

This reflects a common tension that States face when balancing competing interests of protecting a citizen with maintaining or insulating a bilateral relationship.

II. Networks in Van Nguyen

Networks influenced the participation of State and non-State actors in Van Nguyen's case, albeit in a different form to the examples in Germany and Mexico. In this case, networks were forged along traditional groupings of formal status. Two networks appear in Van Nguyen: a network of government lawyers and a network of non-government lawyers. In contrast with the preceding chapters, here the government and

²² Interview with Alexander Downer, Minister for Foreign Affairs (Doorstop Interview, 25 November 2005)

<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FTH216%22>>.

²³ Michelle Grattan and Ian Munro, 'Airline Row Linked to Nguyen', *The Age* (online), 24 November 2005 <<http://www.theage.com.au/articles/2005/11/23/1132703253004.html?from=top5>>.

²⁴ ABC Canberra, *Interview with Foreign Minister The Hon. Alexander Downer*, 21 November 2005 (Ross Solly).

non-government networks interacted with one another, but did not merge, incorporate one another into their activities, nor take shared action.

Government networks

Government lawyers serve an important decision-making function as a community of specialists. They possess and harness technical knowledge and may enable protection in the form of legal action. In Van Nguyen's case, the network of decision-making actors was comprised of international lawyers from the International Legal Branch of DFAT (DFAT-Int), the Office of International Law in the Attorney-General's Department (OIL) and the Foreign Minister.

The government network in the Van Nguyen case exemplifies the flexibility of the Australian system in responding to the protection of citizens abroad. A network of government experts can be assembled to respond to the citizen's need in each case. This approach creates different nodes of power for each matter, particularly when different geographic, political and legal issues are involved. Van Nguyen's case required international law expertise, an in-depth knowledge related to the jurisdiction of the ICJ and the prospects of a legal case before the Court. This expertise was harnessed when the network of lawyers from DFAT and AGD formed to address this issue. In this way, government networks dealing with protection in the Australian system are constituted, disassembled and reconstituted in accordance with the demands that arise and the expertise required. This fluidity, however, also creates certain tensions between the bureaucracy and the political classes of government. The flexibility of forming responsive government networks or nodes on a case-by-case basis can create opportunities for the political classes to intervene in departmental processes or demand outcomes from the government network. In Van Nguyen's case, the Foreign Minister's intervention marshalled the government network into action, creating an *ad hoc* network to consider legal options available to protect Van Nguyen.

Australia's relationship with international dispute resolution mechanisms has influenced the modalities of protection and the way in which government networks relate to the use of international litigation to resolve protection issues. Some note that Australia does not have a propensity to litigate issues internationally.²⁵ Henry Burmester suggests that Australia's litigation history in international law has been based on the environment and natural resources, or matters before the World Trade

²⁵ Interview with former Australian Government Official #2 (Canberra, June 2014).

Organisation.²⁶ James Crawford describes Australia's relationship with litigation in the ICJ as one of divergence. He states that there are two narratives to explain Australia's involvement with the Court:

one ... in which Australia approaches the ICJ as a friend, supportive of the effective operation of a rules-based system of international relations, and another, where the same approach is made in order to promote an agenda of national self-interest.²⁷

This vexed relationship with international dispute mechanisms and international law more broadly has resulted in Australia's increased systemic emphasis on means other than litigation to protect citizens abroad, particularly consular and diplomatic action.

Public lawyer networks

The network formed by Lasry, McMahon, Rothwell and Ward exemplifies the connections formed between lawyers conducting public work (either public law work or public international law work) in Australia. These lawyers mobilised on Van Nguyen's behalf to apply pressure on the government, using the media as a vehicle to achieve their objectives. However, the role of public lawyers is not limited to their formal function of representation or using the media to support their client's case.

This case study illustrates a central role that public lawyers play in Australia in the advocacy of international law and human rights in the public sphere. In the Australian context, lawyers and legal academics take responsibility for bringing matters to the attention of the public, often advocating legal positions as part of a network. Rosanne Kennedy's examination of the Van Nguyen case stated that 'Australian lawyers, Lex Lasry and Julian McMahon, played a powerful mediating role in shaping representations of Van Nguyen and mobilising protest against his execution.'²⁸ Additionally, Lasry and McMahon's recruitment of public international lawyers Rothwell and Ward steered Van Nguyen's narrative away from drug-related transnational criminality to an international human rights issue connected to the death penalty.

An important tool this network employed in the Van Nguyen case was the use of the media. Rothwell noted that McMahon, Lasry and Ward had collectively agreed to

²⁶ Henry Burmester, 'Australia's Experience in International Litigation' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press, 2014) 61, 62.

²⁷ James Crawford, 'Australia and the International Court of Justice' (2003) 14(2) *Melbourne Journal of International Law* 1, 30.

²⁸ Rosanne Kennedy, 'The Media and the Death Penalty: The Limits of Sentimentality, the Power of Abjection' (2007) 14(2) *Humanities Research* 29, 33.

approach the media in order to apply pressure on the government and possibility to create an opportunity for an audience with Downer.²⁹ In the case of Van Nguyen, Kennedy noted that:

His lawyers kept his case out of media, fearing negative coverage would alienate the Singapore government and endanger his chance of a reprieve. After legal appeals had failed however, his case became a media sensation, and featured prominently in newspapers, on current-affairs programs, and on Internet sites for several weeks.³⁰

Modern discourses on consular affairs and protection observe that media attention can translate into government attention in a specific case.³¹ Media attention can give issue-networks the opportunity to drive their clients' cases up on a government's priority list by putting the matter in public view. Public pressure and negative media are mechanisms for issue-networks trying to confront or alter government policies in the absence of a clear legal structure addressing consular and protection action by Australia. Yet these networks must also balance the need to advance their causes using the media with the imperative to build and maintain trust with government officials and politicians. In this respect, the Germany and Mexico case studies testify to the connection between the positive participation of government agencies and a successful intervention by civil society and public lawyers.

Public lawyers, including academic lawyers, in Australia come together in issue networks, often to offer alternatives to the government view in the media and the public. Prominent public international lawyers, particularly legal academics, along with public law advocates and barristers, work with organisations and professional associations to advocate on controversial issues, particularly in relation to Australia's human rights record. Past examples have included the detention of David Hicks without charge in Guantánamo Bay, the treatment of asylum seekers and the introduction of a bill of rights.³²

Australia's conservative approach to human rights and international law has created opportunities for non-government issue-networks to form and lobby the government. Hilary Charlesworth et al., reflect on the approach of the government in power at the time of the Van Nguyen case: '[t]he present Coalition government has retreated from a

²⁹ Interview with Donald Rothwell (Canberra, April 2014).

³⁰ Kennedy, above n 28, 29.

³¹ Maaïke Okano-Heijmans, 'Change in Consular Assistance and the Emergence of Consular Diplomacy' (2010) *Netherlands Institute of International Relations* (Clingendael Diplomacy Papers No 26) 5.

³² See, eg, Law Council of Australia, 'Legal Advice In the Matter of the Legality of the Charge Against David Hicks' (Media Release, 8 March 2007) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/MR0607JuristsConcludeThatHicks'ChargeisRetrospective.pdf>>. Legal advice was prepared by Andrew Byrnes, Hilary Charlesworth, Donald Rothwell, Tim McCormack and other prominent public international law and public law academics.

high level of engagement with international law, displaying particular ambivalence about the international human rights system.³³ They also note that the attitude of the Australian government was selective: the government was cautious in relation to human rights, but showed enthusiasm for trade liberalisation and bilateralism.³⁴ Sarah Joseph observes a similar tendency under the Howard government, where human rights in foreign policy shifted from a multilateral to a bilateral emphasis.³⁵ Particularly in the area of human rights, non-government lawyers have been galvanised by government reluctance or inaction.

Another driving force for the involvement of public lawyer networks in policy debates on human rights and international law in Australia is the absence of a strong civil society influence. Cynthia Banham argues that Australia's human rights culture and civil society institutions remain weak relative to other liberal democracies.³⁶ Some organisations, such as the Human Rights Law Centre focus on a range of issues related to Australia's performance on international law and human rights.³⁷ Global civil society organisations, Human Rights Watch and Amnesty International, lack the presence they possess in other States in Europe or the United States. Moreover, few organisations address the protection of Australian citizens abroad. One organisation specifically focused on the treatment of Australians in foreign criminal justice systems, Australians Detained Abroad, was launched in 2014.³⁸ It focuses on providing services to detained Australian nationals, including interpreting services and assistance with finding local counsel for those detained in a foreign jurisdiction.³⁹ Public lawyers and legal academics fill the lacuna. As issue activists, public lawyers take up advocacy and campaigning as a network or epistemic community.⁴⁰

This function that public lawyers in Australia serve is consistent with the findings of Yves Dezalay and Bryant Garth who describe the role of lawyers as that of 'moral entrepreneurs'.⁴¹ Dezalay and Garth argue that the persuasiveness of lawyers, in this

³³ Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423, 433.

³⁴ *Ibid* 435.

³⁵ Sarah Joseph, 'The Howard Government and the International Human Rights System' (2008) 27 *Australian Yearbook of International Law* 45, 65.

³⁶ Cynthia Banham, *The Responses of Liberal Democracies to the Torture of Citizens: A Comparative Study* (PhD thesis, Australian National University, 2015) 109-114.

³⁷ Human Rights Law Centre <<http://hrlc.org.au>>.

³⁸ Australians Detained Abroad <www.australiansdetainedabroad.org>.

³⁹ Interview with Dan Mori, Australians Detained Abroad (Canberra, September 2014).

⁴⁰ See Peter M Haas, 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control' (1989) 43(3) *International Organization* 377.

⁴¹ See generally Yves Dezalay and Bryant Garth, 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes' (1995) 29(1) *Law and Society Review* 27.

case public lawyers, is linked to '[t]he social capital and charisma (and even idealism) of elite lawyers respected for their careers and accomplishments.'⁴² Burmester identifies that 'the promptings of outside international lawyers appear to be important in raising litigation as a core strategy in seeking resolution of a particular dispute and forcing government to consider it carefully as an option.'⁴³ In the absence of a strong civil society history or human rights culture in Australia, academics such as Rothwell and public interest barristers such as Lasry, McMahon and Ward perform the function of holding the government to account for its decisions and policies, particularly in the media and public forums.⁴⁴

The relationship between consular action and protection

The tension between consular assistance and diplomatic protection punctuates all the case studies in this thesis, particularly Van Nguyen. In practice, the difference between consular assistance and protection in international law is not as clear as legal scholars suggest. Case law provides a clear example of an invocation of diplomatic protection: in *LaGrand* and *Avena*, Germany and Mexico respectively invoked their right of diplomatic protection in international law in conjunction with their claims under the VCCR. In Van Nguyen's situation however, the absence of formal legal action before an international court or tribunal makes the case more difficult to assess. How can protection be identified in the absence of legal proceedings and why is this issue important?

Distinguishing between consular assistance and protection goes to the question of what kind of action constitutes the protection of citizens abroad. As discussed in chapter two, there are scholars who argue that States ought to protect their citizens more often.⁴⁵ Some even argue that there is a duty upon States to protect their citizens abroad.⁴⁶ Understanding which behaviour is included in or excluded from the definition of protection sets the parameters of debates about invocation of the concept. The Special Rapporteur on Diplomatic Protection excluded consular forms of action from the definition of diplomatic protection:

⁴² Ibid, 60.

⁴³ Burmester, above n 26, 68.

⁴⁴ Charlesworth et al, above n 33, 433.

⁴⁵ See, eg, John Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' (2005) 24 *Australian Yearbook of International Law* 75.

⁴⁶ See discussion in Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008) 80-90.

Diplomatic protection may be exercised through diplomatic action or other means of peaceful settlement. It differs from consular assistance in that it is conducted by the representatives of the State acting in the interest of the State in terms of a rule of general international law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interests of the individual, acting in terms of the Vienna Convention on Consular Relations. Diplomatic protection is essentially remedial and is designed to remedy an internationally wrongful act that has been committed; while consular assistance is largely preventive and mainly aims at preventing the national from being subjected to an internationally wrongful act.⁴⁷

This position of the Special Rapporteur implies that there is no distinction between routine assistance and more robust consular intervention. Annemarieke Künzli, offers three grounds for distinguishing between consular assistance and diplomatic protection.⁴⁸ These are: the parameters on consular activities set within the *Vienna Convention*, the level of representations made, and the nature of consular activities as ‘preventative’ versus that of protection as ‘remedial’.⁴⁹

The categorisation of protection based on these parameters, particularly the prescription of consular activities in the VCCR and the preventative/remedial dichotomy, do not resonate with scholarly developments or with State practice. Diplomacy scholars contest that there is a clear distinction between consular and diplomatic functions,⁵⁰ while others postulate that there are muscular forms of consular assistance that are directed towards the protection of nationals.⁵¹

The diminishing distinction between consular acts and diplomatic protection corresponds with shifting attitudes about the best forms of protection. The preceding chapters discuss and demonstrate that distinguishing between preventative and remedial action does not allow for an accurate examination of a State’s protective actions. In the Australian context, the framework for consular services and the significant funding allocated to this area of government activity suggests that consular action is intended to be the primary mode for the protection of Australian citizens abroad. Perhaps it is these complexities that have led legal scholars writing on protection to conceive of diplomatic protection through the lens of legal proceedings where ‘[i]nterventions outside the judicial process on behalf of nationals are generally not regarded as constituting diplomatic protection but as falling under consular

⁴⁷ *Draft Articles of Diplomatic Protection with Commentaries* [9].

⁴⁸ Annemarieke Künzli, ‘Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance’ (2006) 66 *Heidelberg Journal of International Law* 321, 322.

⁴⁹ *Ibid.*

⁵⁰ Lee and Quigley, above n 1, 541; Jan Wouters, Sanderijn Duquet and Katrien Meuwissen, ‘The Vienna Convention on Diplomatic and Consular Relations’ in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press, 2013) 516; Okano-Heijmans, ‘Change in Consular Assistance and the Emergence of Consular Diplomacy’, above n 31, 1.

⁵¹ Okano-Heijmans, ‘Change in Consular Assistance and the Emergence of Consular Diplomacy’, above n 31, 8.

assistance instead.⁵² This approach, however, eclipses other legitimate manifestations of protection.

How can cases of diplomatic protection be distinguished from cases of consular assistance? Diplomatic protection reflects a situation where the State ‘adopts’ the injury of its citizen as its own, or as more recent legal scholarship suggests, it is the individual’s injury but the State brings an action in the absence of an avenue that the individual can bring in his or her own right. For this to occur in practice, there is a point when a State makes this decision, either implicitly or explicitly to adopt its citizen’s injury or commence proceedings. This turning point is a moment of transformation when a claim changes from an individual injury to a State injury, or when a State takes carriage of a matter on a national’s behalf. Therefore, in order to determine whether or not diplomatic protection has been invoked in the absence of legal proceedings, the moment of transformation must be identified.

The other case studies in this thesis do not provide an example of when a State ‘declared’ the transformation or adoption of a claim prior to legal proceedings in the ICJ. Nor is there a custom by States of declaring the adoption of an individual’s injury or commencement of a claim. In the previous case studies, consular forms of protection were part of a trajectory of international legal action. Had there been a basis for jurisdiction before the ICJ in Van Nguyen’s situation, then Australia’s consular and diplomatic representations on his behalf could be commensurate to the trajectory of action in *LaGrand* and *Avena*. Where consular action appears in isolation, it can be difficult to characterise it as a form of protection in the absence of further State action.

Did the actions Australia took in anticipation of Van Nguyen’s execution constitute diplomatic protection? Rothwell argues that Van Nguyen’s case was an example of diplomatic protection by Australia because Van Nguyen exhausted his domestic remedies in Singapore and the Australian government was considering further options for action.⁵³ The law on diplomatic protection requires that the commission of an internationally wrongful act occur prior to an invocation of diplomatic protection by a State, yet it is contentious whether Singapore committed an internationally wrongful act in Van Nguyen’s case. If the legal argument proposed by Rothwell and Ward based on the *Single Convention* (discussed in section one of this chapter) met the threshold of an internationally wrongful act, there still remains the question of whether the

⁵² Künzli, above n 48, 322.

⁵³ Donald Rothwell, ‘Response to Invitation to Comment’ *Department of Foreign Affairs and Trade Consular Strategy 2014-2016*, 29 January 2014, 3.

Australian government's actions of considering an option to bring an action could be considered diplomatic protection in accordance with international law.

The Van Nguyen case illuminates the complexity of identifying a moment of transformation in the absence of formal legal proceedings. Moreover, the demarcation in the rules of diplomatic protection is not clear enough to distinguish acts of protection from routine consular assistance. Therefore, other factors need to be considered.

There are other factors that contribute to whether a behaviour, policy or action can be characterised as protection. Some of these factors include the language and mechanisms employed, the actors who are engaged, and the protective intent of the behaviour. Language, whether explicit or implicit in its intent, can convey the level of commitment a State or network gives to an individual's situation. The language used by the Australian Foreign Minister, for example, displayed commitment to protecting Van Nguyen from execution:

I'm open to suggestions from people, and I have read very carefully what different people have said. I have listened to the argument very closely, because I feel very pained about this case, and I'm - like all Australians, I don't like to give up.⁵⁴

The Australian Foreign Minister's public communication and official correspondence conveyed Australia's position in relation to Van Nguyen's treatment, which indicated that the government's efforts were of a higher order than mere consular assistance or routine diplomatic representations. Who is involved, the ways in which those actors are involved, and the manner in which action is taken, are factors that lend themselves to identifying the substantive attributes of a protective action. The alternative, an arbitrary line of whether the action is preventative or remedial and whether domestic remedies have been exhausted, leads to uncertainty about the character of an action as assistance or protection.

III. The Australian Framework for the Protection of Nationals Abroad

Australia offers a comprehensive consular service aimed at maintaining and securing the welfare of Australian citizens abroad. The Van Nguyen case demonstrates the benefits of flexibility in the Australian protection regime, where government networks can assemble to address issues as they arise. This section provides a general overview of

⁵⁴ ABC Canberra, *Interview with Foreign Minister The Hon. Alexander Downer*, 21 November 2005 (Ross Solly)

<http://parlinfo.aph.gov.au/parlInfo/download/media/radioprnm/ZO3I6/upload_binary/zo3i61.pdf fileType=application%2Fpdf#search=%22666%20ABC,%20CANBERRA%22>.

Australia's regime of protection and considers some of the challenges that a consular regime of protection may present.

Constitutional and legislative framework

Like many States, Australia does not have explicit constitutional or legislative arrangements related to the protection of citizens abroad. The legal rights of Australians abroad have often arisen without recourse to the Australian courts. These cases have primarily attracted public interest through media attention. One category of these cases has involved Australian nationals and their corporate and commercial transactions. Stern Hu, a corporate executive of Rio Tinto and a dual Australian-Chinese national, was arrested in China and convicted in 2010 on grounds of stealing commercial secrets and accepting bribes.⁵⁵ Another example is the case brought against Matthew Joyce and Marcus Lee, Australian businessmen detained in the United Arab Emirates in relation to corruption charges connected with a commercial property transaction.⁵⁶ Another category of cases has involved political rights and freedom of speech issues. Australian journalist Peter Greste was sentenced and convicted *in absentia* in Egypt for several charges including spreading false news and detained for over a year without appropriate due process.⁵⁷ Julian Assange, head of the organisation WikiLeaks has been threatened with charges by the United States for information leaks related to national security.⁵⁸ More recently, death penalty cases of Australians in South East Asia have attracted a great deal of attention.⁵⁹

There have been few instances in which Australian domestic courts have heard challenges to government decisions in relation to the provision of consular services or protection arising under the Australian Constitution. Section 75 of the *Australian Constitution* vests original jurisdiction in the High Court and other federal courts to

⁵⁵ See Joshua Neoh, Donald R Rothwell and Kim Rubenstein, 'The Complicated Case of Stern Hu: Allegiance, Identity and Nationality in a Globalized World' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 453.

⁵⁶ 'Australian Marcus Lee Flies Home From Dubai After Four-year Legal Nightmare', *ABC News* (online), 20 January 2014 <<http://www.abc.net.au/news/2014-01-19/australian-marcus-lee-leaves-dubai-after-acquittal-of-fraud-cha/5207370>>.

⁵⁷ Esther Han, 'Peter Greste and al-Jazeera Colleagues Sentenced to Three Years' Jail by Egyptian Court', *Sydney Morning Herald* (online), 30 August 2015 <<http://www.smh.com.au/national/peter-greste-and-aljazeera-colleagues-sentenced-to-three-years-jail-by-egyptian-court-20150829-gjarov.html>>.

⁵⁸ 'Julian Assange Arrested in UK, Denied Bail', *CBS News* (online), 7 December 2010 <<http://www.cbsnews.com/news/julian-assange-arrested-in-uk-denied-bail/>>.

⁵⁹ 'Bali Nine: Andrew Chan and Myuran Sukumaran Executed by Indonesian Firing Squad', *ABC News* (online), 28 April 2015 <<http://www.abc.net.au/news/2015-04-29/andrew-chan-and-myuran-sukumaran-executed/6426654>>.

consider all matters arising under treaty⁶⁰ and all matters affecting consuls or other representatives of other countries.⁶¹ Two cases that challenged executive discretion were brought by Australian citizens detained at Guantánamo Bay by the United States in connection with the ‘War on Terror’, David Hicks and Mamdouh Habib. Both Mr Hicks and Mr Habib commenced proceedings against the Australian government on different grounds.⁶² Neither case was concluded: David Hicks was returned to Australia to serve the remainder of his sentence and Mamdouh Habib’s claim reached an out of court settlement.⁶³

In the matter of *Hicks v Ruddock*, David Hicks sought judicial review of the considerations that the Australian government took into account in its decision not to intervene or seek his repatriation to Australia from Guantánamo Bay.⁶⁴ The Federal Court considered the Australian government’s application to dismiss Mr Hicks’ action on the basis that there was no case to answer (an application for summary judgment). The action was brought while Mr Hicks was still in detention. At the time of the Federal Court judgment, Mr Hicks had not been charged and had spent over five years in the custody of the United States. Mr Hicks argued that the Australian government had a duty to lawfully consider his request for protection and that when taking the decision not to intervene on his behalf, the government took into account irrelevant considerations, namely that there was no crime under Australian law for which he could be prosecuted.

The Australian government argued that the matters Mr Hicks raised were non-justiciable because they concerned foreign relations and the act of state doctrine, which prevents the courts of one country from adjudicating on the actions of another country, applied in the case. The Australian government argued that there was no case to answer and that the matter ought not proceed on the ground that Mr Hicks’ case had no prospect of success. The relevant issue before the Court, for the purpose of this chapter, was whether the refusal of the Australian government to request the United States to repatriate Mr Hicks was a decision that could be set aside by the Federal Court on the ground that the decision-maker took into account irrelevant considerations.⁶⁵

⁶⁰ *Australian Constitution* section 75(i).

⁶¹ *Ibid* 75 (ii).

⁶² *Hicks v Ruddock* [2007] FCA 299; *Habib v Commonwealth* (No 2) (2009) 175 FCR 350.

⁶³ Stephen Tully, ‘Habib v Commonwealth: Clarifying the State of Play for Acts of State?’ (2010) 32 *Sydney Law Review* 711, 721.

⁶⁴ *Hicks v Ruddock* [2007] FCA 299.

⁶⁵ *Ibid* at [11].

Mr Hicks argued that under section 61 of the *Australian Constitution* the Australian government had a duty to consider the exercise of power to protect an Australian citizen, particularly ‘a citizen in the predicament of Mr Hicks’.⁶⁶ Mr Hicks submitted that while this duty was not legally enforceable, it was an ‘imperfect obligation’ on the government to consider the request.⁶⁷ He also argued that while the duty did not give standing for an individual to challenge the government’s decision, irrelevant considerations could not be taken into account that would be inconsistent with the duty, such as the prospect of his prosecution in Australia.⁶⁸

The Federal Court decision considered only admissibility and justiciability, not the substantive grounds of the case. The Court agreed with the arguments put forward by Mr Hicks, stating that ‘the law is far from settled’ on the issue of justiciability of executive action related to protection.⁶⁹ The Court also held that the application for *habeas corpus* was justiciable and the act of state doctrine did not justify a finding of no case to answer as per the government’s request, even though there were implications for foreign policy.⁷⁰ Mr Hicks was released from Guantánamo Bay before the matter could proceed to the merits. The question of whether or not there is a duty to consider a request for protection by an Australian citizen is thus still unresolved by Australian courts.

After his release from Guantánamo Bay Mr Habib brought an action against the Australian government for the tort of misfeasance in public office.⁷¹ This tort requires that there be an invalid or unauthorised act done maliciously by a public officer in the purported discharge of his/her public duty and which causes loss or harm to the plaintiff. Mr Habib alleged that Australian officers were complicit in his detention and torture in Egypt.⁷² However, the case was settled prior to the Federal Court decision.

The absence of constitutional or legislative protection in Australia has prompted scholars to lobby the Australian government to secure a legal right to consular assistance. In the review of DFAT’s consular strategy in 2014, some public submissions suggested legislative amendments to achieve this. The argument in favour of legislative changes runs as follows: in order to deal with increasing demands on DFAT, as well as to ensure consistency across cases, legislation could create a legitimate expectation in

⁶⁶ Ibid at [61].

⁶⁷ Ibid at [62].

⁶⁸ Ibid at [66].

⁶⁹ Ibid at [77].

⁷⁰ Ibid at [34].

⁷¹ *Habib v Commonwealth* (No 2) (2009) 175 FCR 350.

⁷² See Tully, above n 63.

law that a request for assistance will be considered by the government. Rothwell's submission argued that:

the time has come for a right of consular assistance to be enshrined in Australian law so that governments have a standard which they are required to meet in providing assistance to Australians overseas, and in the most egregious cases can be held accountable. A Consular Services Act should be enacted ... [to] make clear the capacity of the Australian government to represent Australians overseas, but also the legal entitlement of citizens to that representation.⁷³

The submission by Ben Saul and Alexandra Horne also made the same argument:

providing a strong, substantive right, additionally recognises that Australian governments should not be entitled to 'trade off' an Australian's right to secure their government's protection from foreign human rights violations in favour of other Australian governmental interests, such as economic or political interests.⁷⁴

Part of the reason for the suggested legislative change by these scholars is the lack of a transparent framework in the provision of consular services. Justin Brown, the First Assistant Secretary of the Consular Services and Crisis Management Division at DFAT has publicly noted that 'while we're happy to assist in most cases the level of the intensity of our interaction is something which varies from case to case.'⁷⁵ The stakeholder responses to DFAT's Consular Strategy, coupled with the domestic legal cases, suggest that there is growing pressure on the Australian government to make consular protection more muscular. However, there has, so far, been no indication that the introduction of legislation addressing consular rights is likely.

Australia's consular service

Australia has a network of consular and diplomatic posts around the world that help to service millions of Australians who travel, work and live overseas. The protection of citizens abroad by Australia structurally and procedurally falls within general consular operations (i.e. routine consular assistance).⁷⁶ The vast majority of the requests for assistance received by DFAT are routine consular matters and do not relate to serious

⁷³ Donald Rothwell, 'Response to Invitation to Comment' *Department of Foreign Affairs and Trade Consular Strategy 2014-2016*, 29 January 2014, 7.

⁷⁴ Ben Saul and Alexandra Horne, 'Issues Paper: Development of New Consular Strategy' *Department of Foreign Affairs and Trade Consular Strategy 2014-2016*, 29 January 2014, 3.

⁷⁵ SBS Radio, 'What Assistance Should Australians Get Overseas?' *World News Australia* (Interview with Justin Brown, First Assistant Secretary Consular Services and Crisis Management Division, Department of Foreign Affairs and Trade) 9 December 2013 <<http://www.sbs.com.au/news/article/2013/12/09/what-assistance-should-australians-get-overseas>>.

⁷⁶ Both matters of protection and of routine consular assistance are housed within a single operational and strategic division, the Division on Consular and Crisis Management. DFAT's Annual Report also does not distinguish between different forms of action, reporting all services as 'assistance'. See Department of Foreign Affairs and Trade, *DFAT Annual Report 2013-2014*, 195.

human rights violations or breaches of international law. Consular assistance is administered jointly by Australian consular and diplomatic posts and centrally coordinated by the Consular Services and Crisis Management Division within DFAT. Other government stakeholders that support DFAT's lead role include the AGD and the Department of Prime Minister and Cabinet (PM&C). The aim of Australia's consular services programme is:

to support and assist Australian travellers and Australians overseas through high-quality consular service, including accurate and timely travel advice, practical contingency planning and rapid crisis response.⁷⁷

The delivery of consular services is guided by two documents: the Consular Services Charter ('the Charter') and the Australian Consular Operations Handbook ('the Handbook'). These documents outline the framework for the assistance of Australian nationals and the protocols by which that assistance is delivered. The Charter is the public document that sets out the rights and responsibilities of travelling citizens and DFAT. As a public engagement tool, the Charter is designed to inform public expectations of the role that the Australian government will play in the provision of assistance and protection. The Handbook outlines the practical policies and procedures for the provision of consular services by consular posts.⁷⁸

Welfare as a protective value

Values help to guide the policy settings of different protective regimes. In Germany, constitutional protection of the right to life is central. In Mexico, the protection of Mexicans from systemic discrimination and the death penalty in the United States is paramount. In Australia, 'welfare' is the guiding value in the delivery of consular and protective action.

The Handbook emphasises the welfare of Australians abroad, stating that one of DFAT's aims is to 'give humanitarian assistance to Australian citizens and permanent residents whose welfare is at risk abroad [m]any issues are covered by the concept of welfare.'⁷⁹ While 'welfare' is not defined explicitly in either the Handbook or the Charter, the idea of the 'consular role' is defined in relation to each area of the

⁷⁷ Department of Foreign Affairs and Trade, *DFAT Annual Report 2012-2013*, 128.

⁷⁸ Department of Foreign Affairs and Trade, *Australian Consular Operations Handbook* (October 2014) <<http://dfat.gov.au/about-us/publications/corporate/australian-consular-operations-handbook/Pages/australian-consular-operations-handbook.aspx>>.

⁷⁹ Ibid.

Handbook (for example, the consular role in welfare of Australians abroad,⁸⁰ arrest or detention of an Australian,⁸¹ medical evacuations⁸² or the death of an Australian overseas.⁸³ The concept of welfare emphasises a facilitative or pastoral form of consular assistance. This is supported by the type of services that can be provided including the provision of a list of local lawyers, doctors and hospitals; assisting with contact of Australian agencies; assisting with contact of family members in cases of emergency; providing emergency financial loans and providing notarial services.⁸⁴

The consular role in relation to detentions and arrests envisages that detained Australians will have access to a consular officer to receive assistance; access to appropriate legal defence and a fair trial under local law; treatment that is no less favourable than locals would receive in similar circumstances; and humanitarian standards of prisoner welfare.⁸⁵ The Handbook refers to the *Vienna Convention*, noting the obligations in article 36 to inform and notify discussed throughout this thesis. It also refers explicitly to the obligations under the *International Covenant on Civil and Political Rights* (ICCPR) including articles 9(3), 9(4), 10, 14(3)(c), 14 (3)(f) and 14(7).⁸⁶ While international human rights standards are an important aspect of the delivery of consular services, the absence of a breach will not necessarily preclude increased attention. Situational matters, for example, the treatment of journalists, or personal attributes of the individual may attract more attention due to the circumstances.⁸⁷

Consular posts and DFAT's Consular Operations have a limited role in ensuring access to legal representation. Posts are required to compile a list of local lawyers offering services in English.⁸⁸ In contrast to the attorney lists prepared by Mexican consulates in

⁸⁰ Ibid at [4.1].

⁸¹ Ibid at [6.1].

⁸² Ibid at [7.1].

⁸³ Ibid at [8.1].

⁸⁴ Ibid.

⁸⁵ Ibid at [6.1].

⁸⁶ Ibid at [6.2]; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entry into force 23 March 1976).

⁸⁷ See, eg, Reko Rennie, 'Australian Mother Accused of Stealing Thai Bar Mat Faces Jail', *Sydney Morning Herald* (online), 19 May 2009 <<http://www.smh.com.au/world/australian-mother-accused-of-stealing-thai-bar-mat-faces-jail-20090518-bd68.html>>; Matt Brown, '14yo NSW Boy Arrested Over Drugs', *ABC News* (online), 7 October 2011 <<http://www.abc.net.au/news/2011-10-06/14yo-nsw-boy-arrested-in-bali-over-drugs/3318286>>.

⁸⁸ Department of Foreign Affairs and Trade, *Australian Consular Operations Handbook* (October 2014) at [6.3]; and Department of Foreign Affairs and Trade, *Consular Training Manual* (2014).

the United States, these lists do not attest to the quality of representation offered or the standard of the local lawyer's proficiency in English.⁸⁹

There are few references to protection as a distinct area of responsibility in the Handbook or the Charter. In the only general mention of 'protection' in relation to Australian citizens in the Handbook, it states that:

When travellers enter a foreign state, they become subject to its laws and are legally accountable for acts they commit on its territory. In the event of Australians finding themselves in difficulty, consular officers seek to ensure that they receive the benefit of the same laws, administration, protection and means of redress for injuries which the foreign state affords its own subjects.⁹⁰

In this reference to protection, the Handbook does not refer to protection provided by the Australian government, but rather domestic protections afforded by the foreign State. This emphasis on the need to respect local processes by showing deference for the national standard in the receiving State is also replicated in the Consular Training that DFAT officers receive prior to going on posting abroad. This concept of protection in the Handbook reflects a number of competing demands, particularly the need to respect the sovereignty of the foreign State while also ensuring appropriate due process standards are applied to the Australian national. However, they do not relate to a substantive right to protection, but to the facilitation of procedural standards in the foreign State.

As a concept, welfare remains vague. It provides a degree of regulatory flexibility, allowing the Australian government to determine which cases warrant the most attention. As the Handbook foreshadows, welfare can take on a range of meanings depending on the circumstances. However, there are also challenges attached to the adoption of such a general framing value. In an inquiry by the Senate Committee on Foreign Affairs, Defence and Trade in 1997, DFAT revealed that 'consular officers have been asked to procure opera tickets, to provide official cars, and in one case, to take a social security recipient to the bank to pick up a Department of Social Security (DSS) cheque.'⁹¹ While leaving the concept of welfare undefined enables the Australian government to determine what situations fall into the category of welfare and which do not, such a general concept also leaves scope for the public to adopt its own meaning, thereby increasing the pressure on government to provide consular services.

⁸⁹ Department of Foreign Affairs and Trade, *Australian Consular Operations Handbook* (October 2014) at [6.3].

⁹⁰ *Ibid* at [5.3].

⁹¹ Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Helping Australians Abroad: A Review of the Australian Government's Consular Services* (1997) [5.6].

Case classifications

The manner in which cases are classified and handled is an important aspect of how the Australian government identifies and addresses protection. Within DFAT, two Consular Operations Teams (part of the Consular Services and Crisis Management Division) are allocated regions of the world. Each team addresses requests based on the geographical location of the individual requesting assistance. Cases entering DFAT's case management system are classified in relation to the categories specified in its Annual Report.⁹² These classifications include hospitalisation, arrest or detention, crisis or evacuation, deaths abroad (including disposal of remains), detained Australians and general welfare and guidance.⁹³ Cases may receive an additional classification of 'special interest case' if it is anticipated that the matter will gain media or public attention, the matter involves the death sentence, it involves hospitalisations of several Australians, it relates to a celebrity, it involves the death of several Australians or unusual circumstances surrounding deaths (location or cause), and cases with national security implications.⁹⁴ While consular officers may choose to treat cases with more attention based on the circumstances, the case classifications, like the team structures, do not reflect a distinction between consular assistance and the protection of nationals abroad.

If a matter concerning a citizen abroad warrants more detailed attention from the government, an Inter-Departmental Committee (IDC) may be formed to address the issue.⁹⁵ This IDC or 'consular group' will include relevant agencies like DFAT, the Office of International Law (AGD), Australian Federal Police (AFP) and the Department of Defence. There are no formal guidelines for the establishment of the consular group IDC. The establishment of a consular group IDC is an *ad hoc* process instigated at the bureaucratic level and is contingent on the circumstances of the case and the stakeholders involved. The IDC can meet up to three times a day in order to address an issue facing a citizen abroad.⁹⁶ As a governance mechanism, IDCs function as strategic and expertise nodes. IDCs allow government officials to respond flexibly to problems that arise, addressing a citizen's situation from a number of agency

⁹² Roundtable with Consular and Crisis Management Division, Department of Foreign Affairs and Trade (Australia, May 2014).

⁹³ Department of Foreign Affairs and Trade, *DFAT Annual Report 2012-2013*, 135.

⁹⁴ Department of Foreign Affairs and Trade, *Australian Consular Operations Handbook* (October 2014) at [4.3].

⁹⁵ Interview with Australian Government Official #1 (Canberra, June 2014).

⁹⁶ *Ibid.*

perspectives. They also facilitate the formation of governmental networks that recruit actors across the government and beyond. These IDC's have a critical role in advising the political level of government about the courses of action available and the legal parameters surrounding any recourse Australia may take to assist or protect a citizen abroad.

There is no specific classification in the consular management system that labels breaches of international law, human rights or protection (to reflect different forms of consular action). Team structures and case classifications within the Australian bureaucracy do not substantively preference certain categories or injuries to Australians abroad, other than special interest cases attracting media attention. How behaviours that relate to breaches of international law against individuals are labelled is an issue debated among scholars. Philip Alston suggests that:

It is now widely accepted that the characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity.⁹⁷

I do not suggest that cases in the Australian system should be labelled as human rights claims in order to gain the elevation that Alston identifies, especially as labels may also inflame expectations. However, there is a point to be made about the declaratory value in structuring teams or classifying cases using language that embraces protection and its goals. Both Mexico and Germany government bureaucratic structures reflect elevated forms of consular services. By having specific teams addressing more complex cases related to the death penalty and human rights violations abroad, resources can be directed specifically to these areas, expertise can be built and retained, and protocols can be developed to provide consistency between cases.

Current developments

There is a perception that public expectations are changing in relation to the level of attention and the nature of the assistance being provided by States in their consular services.⁹⁸ Maaïke Okano-Heijmans notes that consular affairs have moved towards assisting citizens in distress, but that this change has been coupled with the increasing participation of political classes in the direction and decision-making related to

⁹⁷ Philip Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Yearbook* 3, 3.

⁹⁸ Maaïke Okano-Heijmans, 'Consular Affairs' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press, 2013) 473, 481.

protection.⁹⁹ She also notes that as public interest and expectations rise in relation to the treatment of nationals abroad, this can lead to *ad hoc* responses which are contingent upon the level of media attention a matter can generate.¹⁰⁰

An analysis of the Van Nguyen case combined with a review of the Australian consular system echoes Okano-Heijmans' finding. The dominant emerging value of Australia's consular and protection regime is political latitude. Without legislative or constitutional provisions related to the protection or consular access, there is space for maximum political judgment to be applied on a case-by-case basis by government and the political classes. There are two reasons to explain why this architecture emphasises regulatory flexibility. The first is the importance of Australian bilateral relations. Bilateral relations are expressly mentioned in the *Handbook* as a factor to be addressed by consular officers in the delivery of the consular function. Bilateral relations were also a feature of the Germany and Mexico case studies, however, the weight that bilateral relations carry is most evident in Van Nguyen's case, particularly given the timing of CHOGM and the trade sanctions suggested by members of Parliament.

The second issue relates to a concern from the Australian government that interventions create precedents in the public eye. Interventions raise public expectations about a State's performance in the protection of citizens abroad, therefore limiting political latitude and a government's ability to consider each matter on a case-by-case basis. The Australian government and its actors place greatest weight on ensuring that they can respond to cases flexibly and in accordance with the circumstances.

In response to the changing dynamics and expectations of consular affairs, DFAT instituted a broad review of Australia's consular policy. The *Consular Strategy 2014-2016* invited comment on consular service delivery by the Australian government, specifically DFAT.¹⁰¹ The review of Australian consular strategy began with a closed roundtable of stakeholders followed by public consultation on several questions, where the Minister for Foreign Affairs, Julie Bishop, invited submissions from interested persons and organisations. The Foreign Minister described the aim of the review:

Major issues for the Strategy are how to encourage Australians to be more self-reliant when travelling and reduce risks to themselves and their safety; how to direct consular resources to individuals in greatest need; whether to reduce

⁹⁹ Okano-Heijmans, 'Change in Consular Assistance and the Emergence of Consular Diplomacy', above n 31, 5.

¹⁰⁰ Ibid.

¹⁰¹ Department of Foreign Affairs and Trade, *Consular Strategy 2014-2016*,

consular services for some people or in certain circumstances; and how to deliver the best services with the resources available.¹⁰²

Some of the questions in the issues paper included ‘who should be able to access consular assistance?’ and ‘what consular services should continue to be delivered and what services could be reduced or withdrawn?’¹⁰³ There were a range of submissions from academics, individuals and organisations such as the Law Council of Australia. The Foreign Minister made public statements in early 2014 that the Australian government was actively considering cost-recovery options for the provision of consular assistance to citizens abroad, including charging a fee to citizens when they accessed consular services.¹⁰⁴

On 3 December 2014, the Australian government released its revised consular strategy for 2014-2016. It was presented in the form of a short report (the Report) and a revised *Consular Services Charter*. The Report outlines four themes that emerged from the public consultation: the need to encourage Australians to better help themselves abroad; a misconception by the public about the meaning of consular assistance; the need to access the expertise of other organisations; and the scope for modernising the delivery of consular assistance.¹⁰⁵ A significant outcome from the Report is that DFAT will develop a ‘vulnerability matrix’ that will assist the Department to identify cases that require the most attention.¹⁰⁶ The Strategy intends to better address trauma suffered by victims of crime and to address cases related to children and women.¹⁰⁷ The strategy also aims to improve ‘cooperation and dialogue with private sector groups to expand our messaging and to build better partnerships.’¹⁰⁸ A move towards public/private partnerships will facilitate participation from a broader range of actors in the protection of citizens abroad.

Civil society organisations, such as Australians Detained Abroad, are already providing services to Australian citizens that Australia cannot or does not provide within its consular regime.¹⁰⁹ A more networked approach to the protection of citizens abroad could help the Australian government with sharing the responsibilities of protection

¹⁰² Department of Foreign Affairs and Trade, ‘Invitation to Comment’ *Consular Strategy 2014-2016*, December 2013.

¹⁰³ Department of Foreign Affairs and Trade, ‘Issues Paper: Development of a New Consular Strategy 2014-2016’ *Consular Strategy 2014-2016*, December 2013.

¹⁰⁴ Georgie Stone and Robert Upe, ‘Julie Bishop Wants Aussies in Trouble Overseas to Pay for Government’s Help’, *Sydney Morning Herald* (online), 5 January 2014 <<http://www.smh.com.au/federal-politics/political-news/julie-bishop-wants-aussies-in-trouble-overseas-to-pay-for-governments-help-20140104-30arv.html>>.

¹⁰⁵ Department of Foreign Affairs and Trade, *Consular Strategy 2014-16*, (December 2014) 8.

¹⁰⁶ *Ibid* 11.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid* 14.

¹⁰⁹ Australians Detained Abroad, above n 38.

through consular services as well as supplement the existing pool of expertise available for protective actions.

IV. Conclusion

The Van Nguyen case demonstrates how State and non-State participation in the protection of citizens abroad can intersect, but still remain parallel in many respects. As a case study it illustrates some of the advantages of regulatory flexibility in a system of protection. Expertise can be harnessed within government based on the situation at hand. However, it also highlights some of the drawbacks: *ad hoc* decision-making in response to public scrutiny, media pressure or political interference.

Australia's consular system performs a general function for all Australians in need of assistance abroad. It does not structurally or morally preference specific situations, people or rights, instead focusing on welfare as its gauge. The bureaucracy and consular staff at the coalface may, in a perfect world, apply consistent approaches and preference the most serious situations that arise for Australian citizens abroad. However, with the increasing involvement of political figures in issues related to the treatment of Australian citizens by foreign States, there is space for political forces to thwart the bureaucracy's efforts. Political latitude is built into the system through a series of policies and practices that are not legal in nature, but rather create flexibility for consular officers, government officials and politicians to address matters on a case-by-case basis. The consular framework is only intended to be facilitative, leaving protective action to be taken by public lawyers, advocates and occasionally civil society.

Most protection will be resolved through consular action or negotiation, without the commencement of legal proceedings. Yet scholars have rarely examined practical examples where the line between protection and other forms of action not constituting protection may blur. As States move away from formal dimensions of international law,¹¹⁰ protection is even more likely to be delivered through mechanisms outside of international legal proceedings. While it may not be the case in Australia, there are more providers of consular services than just States.¹¹¹ As other actors compete with

¹¹⁰ Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 13, 15.

¹¹¹ Okano-Heijmans, 'Change in Consular Assistance and the Emergence of Consular Diplomacy', above n 31, 4.

the State to protect citizens abroad, where possible, States need to harness this expertise and incorporate it into existing protective strategies.

Chapter 7

Conclusion

This thesis has examined the nature of participation in the protection of citizens abroad and the significance of this practice for international law. It has challenged the State-centric view of protection by analysing the way in which other actors motivate, perform and influence the protection of citizens abroad. Each case study has presented the ways in which State and non-State actors interact with one another in networks, the power relations between them, and the mechanisms they employ. The purpose has been to understand the practice of protection not just in the form of international legal proceedings, but also as a range of legal and political actions. A micro international law analysis of the values, actors and actions, refined the concept of protection and its techniques in each case study. In Germany, the involvement of non-State actors, particularly civil society, in the generation of a legal case and its strategy was critical. Mexico's programmes challenge the notion of protection as a formal international intervention by the State and demonstrates how State and non-State nodes influence networks to protect. The Australian case study reveals the tension between consular assistance and protection, as well as how networks can reflect the traditional legal subjectivity of the actors. In this chapter, I analyse features of participation in the protection of citizens abroad drawn from the case studies. I then consider what a renewed idea of participation means for international law. I outline the limitations of existing accounts of participation in international legal scholarship and offer the concept of distributive sovereignty as a way to understand participation in the international legal system.

I. Features of Participation in the Protection of Citizens Abroad

Studies of protection have typically limited their concern to the way that States exercise diplomatic protection. However, the nature of participation in the protection of citizens abroad is diverse. Several features of participation stand out. The generation or delivery of protection, in whatever form, is not confined to the State. The enterprise of protecting nationals abroad can, in fact, be a joint endeavour between State and non-State actors. In shared or joint enterprises of protection, networks are a fundamental factor in determining the level and nature of actor participation. Networks with both State and non-State actors facilitate new technologies and techniques of protection,

including exercising classic forms of protection in new ways. Here, I analyse these developments.

Mechanisms of protection

Law and litigation

Litigation, or its prospect, appeared in each of the case studies. While historical and academic emphasis has been on international case law, litigation in the ICJ for the purpose of protecting the human rights of citizens abroad is infrequent. Moreover, the effectiveness of ICJ litigation in preventing or responding to violations of international law against individuals remains unclear. In the case studies, almost all the individuals seeking protection were executed.¹ However, complainant States in the ICJ cases received longer-term benefits other than saving the individual lives at stake. For example, since *LaGrand*, no German citizen has been executed abroad.² *Avena* achieved mixed results for the individuals nominated in the ICJ hearing, but the MCLAP has managed to produce a tangible reduction in the executions of Mexican nationals in the United States.³ Through ICJ litigation processes, Mexico and Germany publicly defined their values, gained legitimacy and secured long-term funding to address systemically the protection of citizens by litigating their nationals' interests. ICJ litigation therefore has an inconsistent record of success (if success is defined as saving lives or preventing violations of individual human rights) but it can deliver broader gains for complainant States.

The use of local or domestic litigation in the case studies modifies traditional ideas about the level of litigation in protection. Mexico's approach to protection exemplifies the use of targeted local litigation as a policy of protection. Other States, such as Indonesia, the Philippines and El Salvador, also use local litigation as a mechanism to protect their citizens abroad through similar funding programmes to Mexico.⁴ The technique of local litigation provides several advantages. The restrictive rules on participation in the international law of State responsibility do not apply as stringently at a local level, therefore enabling broader participation from a range of actors bringing

¹ Note that in *Avena* there were 52 Mexican nationals listed, some of whom have been executed. Others are at different stages of their criminal processes in the United States.

² Interview with German Official #3 (Berlin, July 2013).

³ Interview with Greg Kuykendall, Director of MCLAP (Telephone, April 2014).

⁴ See, eg, Philippines Overseas Workers Welfare Administration <<http://www.owwa.gov.ph/>>; *Law on Placement and Protection of Indonesian Workers Abroad* (Indonesia), Law No. 39/2004, (Statute Book of the Republic of Indonesia of 2004 No. 13).

cases. Multi-actor participation in local litigation can also mask the involvement of a State in the internal affairs of the host State prior to the exhaustion of domestic remedies, which is contrary to the rules of diplomatic protection.⁵

Distinct from litigation, actors used law as a mechanism of protection in a number of competing and sometimes contradictory ways. Some actors and networks deployed law as a mechanism to neutralise a moral claim or the politicisation of a claim. For example, the Australian Foreign Minister relied on law to establish parameters around the level of action available in Van Nguyen's situation while excluding the use of non-legal measures, such as trade sanctions. With a focus on whether or not jurisdiction for an ICJ case was present, it was 'law' that ultimately determined the threshold of action in Van Nguyen's case after the exhaustion of domestic remedies. The LaGrand brothers' case is another example of law's neutralising effect on a political decision. Germany cast its claim against the United States in *LaGrand* as a technical exercise under the VCCR. This technical dimension softened a perception that Germany's claim was a moral challenge to the United States' domestic laws on the death penalty. In both Van Nguyen's situation and *LaGrand*, government actors used law as a mechanism to neutralise politics and to preserve State bilateral relationships.

The case studies also illustrate how some actors engaged law and its discourse to mobilise action, particularly in relation to international human rights law. Civil society actors and legal scholars rely on human rights obligations enshrined in a range of international instruments to argue that there are legal and moral obligations on States to protect citizens abroad.⁶ Several examples arise in each of the case studies: civil society organisations such as Amnesty International in Germany used international law to persuade domestic constituencies of the illegality of the death penalty by the United States; Mexico's engaged the language of the VCCR and anti-death penalty to recruit international support for its citizens in the United States; and Australian lawyers Donald Rothwell and Christopher Ward's attempted to use the *ICCPR* to prompt an ICJ case.

Actors promoting human rights protection in the case studies were more likely to invoke international law. Those actors in favour of intervention used law to bolster their position through a claim of legal obligation to create pressure on detaining or

⁵ Non-intervention or non-interference in the internal affairs of a State is a general principle in international law. See *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (A/8082) GA Res 2625XXV, UN GAOR, 6th Comm, 25th sess, Agenda Item 85, Supp No 18, UN Doc A/Res/25/2625 (24 October 1970) annex I.

⁶ The Special Rapporteur on Diplomatic Protection's position on diplomatic protection as a mechanism of human rights is discussed in chapter 2. See *First Report on Diplomatic Protection*, 32.

injuring States to act in accordance with law or to convince a State to take action. The authority of law offers credibility for moral claims about human rights. David Kennedy describes the mobilising potential of international human rights law as an invocation of law's 'emancipatory vocabulary'.⁷ In the context of protection, an argument based on respect for human rights can be an influential tool for civil society organisations to mobilise public opinion or to pressure States to behave consistently with international values.

Structure and resources

A State's bureaucratic structures can influence the formation of networks and nodes of protection. For example, both Mexico and Germany have dedicated teams to deal with protection of citizens abroad as a separate service from routine consular assistance. Within the Mexican Foreign Ministry there is a 'Directorate of Protection' to deal with policy development, programme management (MCLAP and PALE) and the provision of legal advice.⁸ These teams target Mexicans in the United States' criminal justice system and they specialise in the application of the death penalty. Germany's Ministry of Justice has a team to provide legal advice on Germans detained abroad and the death penalty. There is an equivalent team in the German Foreign Office to deal with the consular and diplomatic aspects of those cases. Australia, by contrast, does not have specialised teams addressing detention or the death penalty.

Specialised teams can function as enabling nodes of protection in two ways. First, formal structures within the bureaucracy can depoliticise the decision to intervene in each case by embedding decision-making away from political actors. Specialised teams facilitate intervention on behalf of detained citizens as a matter of course, thereby building protective values into bureaucratic processes. A protection team can develop protocols for responding on behalf of citizens in situations of concern and build substantive expertise which can be circulated within the network. For example, Germany and Mexico's teams enable a structural response to the protection of citizens abroad, focusing on the detention of nationals and due process, whereas in the Australian context, the decision to elevate a matter beyond routine consular assistance is more likely to require approval from the political classes. The second way that a specialised team may function as an enabling node of protection is that non-State actors can identify a contact point within State structures to form a multi-actor network. Non-State actors focused on specific values (death penalty, freedom of speech, women's

⁷ David Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 101.

⁸ Roundtable with Directorate of Protection, SRE (Mexico City, February 2014).

rights, etc) can develop relationships with State actors with the aim of influencing the course of action to be taken and contribute to State efforts to protect citizens abroad, as was the case in Germany. State structures can provide consistency across cases, improve transparency and facilitate the formation of multi-actor networks.

State resources and regional power also influence the mechanisms available to protect and the networks that may form. For States facing global power imbalances and resource limitations, this may mean developing programmes targeted at the most significant national issues. For example, Mexico has concentrated its resources on a limited geographic scope (the United States) with emphasis on fewer international law violations (the death penalty and consular notification). Other States have adopted similarly targeted approaches. Indonesia and the Philippines have programmes to protect the labour rights of their nationals working abroad, focusing their attention, energy and resources on a specific class of rights. Smaller States also use networks to deliver better protective strategies, particularly by leveraging power and resources from transnational advocacy networks (labour rights, human rights and the anti-death penalty movements).⁹ A targeted protection programme enables less powerful States to borrow and build expertise and to protect specific rights within the national interest. This trend demonstrates how networked action can overcome issues related to power and resources.

Actors

Despite the fact that diplomatic and consular officers are at the coalface of interaction with citizens overseas, international lawyers play a crucial role in decision-making and norm generation in the area of protection. In each case study, international lawyers acted as enablers or disablers of action. In Mexico, a government lawyer motivated Mexico to bring a legal case. In Germany and Australia, non-government lawyers prompted State actors to consider litigation. Even in the absence of consular assistance offered by the State of nationality, civil society organisations staffed by lawyers have driven action to protect individuals.¹⁰ Moreover, these legal actors formed part of larger legal networks.

The idea of lawyers as norm entrepreneurs in international law is not new. Oscar Schachter described the network of international lawyers as a 'kind of invisible college

⁹ See John Braithwaite, 'Methods of Power for Development: Weapons of the Weak, Weapons of the Strong' (2004) 26 *Michigan Journal of International Law* 297, 317.

¹⁰ See, eg, *Reprieve* project on the death penalty <<http://www.reprieve.org.uk/topic/death-penalty/>>.

dedicated to a common intellectual enterprise'.¹¹ Schachter observed that international lawyers were equipped with the technical expertise required for developing international law: 'individually and as a group, [international lawyers] play a role in the process of creating new law and in extending existing law to meet emerging needs.'¹² Schachter's account emphasised the role of international lawyers in collecting and organising information, as well as providing scrutiny of developing international law.¹³ However, the role of international lawyers in the three case studies of protection does not correlate fully with Schachter's analysis. The invisible college model minimises the role of international lawyers to one of coordination and execution of technical tasks, with lawmaking and norm-generation emerging as a by-product.

Lucien Karpik and Terence Halliday have also engaged with the concept of lawyers as an epistemic community. They describe the 'legal complex,' which is comprised of a collective of legal actors, usually trained lawyers, academics, civil servants, private lawyers, judges and law firms.¹⁴ Karpik and Halliday attribute more political judgment to lawyers in networks than Schachter. In the legal complex, lawyers are connected through action, particularly the manner in which they mobilise for political action.¹⁵ While Schachter's invisible college emphasises educational background and values, the legal complex emphasises the networks that lawyers form and the way that lawyers 'mobilize on a given issue at a given historical moment, usually through collective action that is enabled through discernible structures of ties.'¹⁶

Collective action by networks of lawyers is a defining feature of protection in this thesis. In Germany, Mexico and Australia, lawyers in each case tried to instigate action on behalf of citizens abroad. Yet their capacity to manifest that action was based on their ability to recruit other actors into their networks. For example, in the Van Nguyen case Donald Rothwell and Christopher Ward brought the Australian government's attention to the idea of ICJ litigation, however, they were not able to enrol government actors in their network of non-government lawyers. In Mexico, Juan-Manuel Gomez Robledo and Joel Hernandez generated the idea of international proceedings following Germany's success in *LaGrand*. They recruited other actors into a network focused on protecting the rights of Mexicans in the United States and inculcated the actors in the

¹¹ Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review* 217, 217.

¹² *Ibid* 223.

¹³ *Ibid* 224.

¹⁴ Lucien Karpik and Terence C Halliday, 'The Legal Complex' (2011) 7 *Annual Review of Law and Social Science* 217, 220.

¹⁵ *Ibid* 221.

¹⁶ *Ibid*.

network with values of international justice. In Germany, lawyers in the Ministry of Justice argued in favour of legal proceedings in the ICJ because there was a legal basis to do so under the VCCR. These lawyers formed part of a broader political movement invested in ICJ litigation as the best course of redress for advancing international human rights law standards.

Nodes function as a site for lawyers to exercise power and influence action. In nodes, lawyers transform their technical expertise into moral authority.¹⁷ Halliday describes this phenomenon:

...the exercise of moral authority in the name of expert, technical advice works best when it is out of the public glare ... [a]lso it works more readily when the law itself is highly technical.¹⁸

Another technique that international lawyers use is to convert moral concern, typically about human rights, into a technical exercise. The conversion of technical matters to moral issues, and vice versa, occurs in the two ICJ cases. In both *LaGrand* and *Avena*, the cases appeared to be technical legal exercises related to a breach of the VCCR. However, both these cases embodied Germany and Mexico's opposition to the death penalty. International lawyers in decision-making nodes translated the moral concern about human rights into technical legal cases about the application of a treaty. Lawyers in nodes can also influence which values or legal principles are to be pursued or protected. The work of the Special Rapporteur on Diplomatic Protection, John Dugard, exemplifies this: Dugard transformed the task of codification into a normative concern about the application of diplomatic protection as a human rights remedy.¹⁹ The conversion between the moral and the technical occurs because there is an assumption that the law is neutral, but in the hands of lawyers it becomes a device for translating values into action or inaction.

Values

The practice of protection of citizens abroad operates as a litmus test: it can illustrate the values a State, network or group of actors possess, and the characteristics of individuals worthy of protection.

¹⁷ Terence C Halliday, 'Politics and Civic Professionalism: Legal Elites and Cause Lawyers' (1999) *Law and Social Inquiry* 1013, 1033.

¹⁸ *Ibid* 1034.

¹⁹ *Draft Articles on Diplomatic Protection with Commentaries*, 25 [4].

The case studies in this thesis reveal some patterns in the values and principles that actors are most interested in protecting. Civil and political rights were the objects of protection. Thus, all the case studies involved application of the death penalty. Other interventions follow this pattern. Australia, for example, recently mounted interventions on behalf of three nationals in relation to the death penalty, due process and freedom of speech rights. As discussed in chapter six, an Australian journalist tried without proper due process in Egypt and two Australian nationals who faced the death penalty for drug smuggling convictions in Indonesia, received protection from the Australian government.²⁰ Australia requested Indonesia to accept the jurisdiction of the ICJ in order to bring an action for an alleged breach of the *International Covenant on Civil and Political Rights*.²¹ This pattern of protecting civil and political rights signals the absence of protection for other kinds of rights and for other kinds of victims.²²

Action on behalf of citizens abroad showcases the friction between different legal, political, and moral values in practice. An area where such a collision occurs is between the legal principles of diplomatic protection and new techniques of intervention, specifically the requirement to exhaust all domestic remedies prior to intervention. The case studies exemplify how States and other networked actors are active in the exhaustion of domestic remedies phase. Formal representations in domestic courts (Germany) or funding and designing a domestic legal challenge (Mexico) are examples. The pre-ICJ narratives of *LaGrand* and *Avena* suggest that protective networks do not wait for individuals to exhaust domestic remedies before intervening in one form or another, particularly where the matter relates to national interests or a network's values.

This approach to the exhaustion phase suggests that the values underpinning protection are shifting from remediation to prevention. Mexico's approach displays this shift. Mexico's programmes combine consular efforts with local litigation to protect Mexican nationals. Mexico's approach is not foreseen by or susceptible to the framework of diplomatic protection in international law because it is embedded in the

²⁰ 'Australian Journalist Peter Grete Among Al Jazeera Reporters Detained by Egyptian Police', *ABC News* (online), 31 December 2013 <<http://www.abc.net.au/news/2013-12-30/australian-journalist-peter-greste-among-al-jazeera-reporters-d/5179070>>; 'Bali Nine: Andrew Chan and Myuran Sukumaran executed by Indonesian Firing Squad', *ABC News* (online), 29 April 2015 <<http://www.abc.net.au/news/2015-04-29/andrew-chan-and-myuran-sukumaran-executed/6426654>>.

²¹ 'Law Experts Say Indonesian Death Penalty is Illegal', *ANU News* (online), 27 April 2015 <<http://www.anu.edu.au/news/all-news/law-experts-say-indonesian-death-penalty-is-illegal>>.

²² Responses to sexual violence, for example, do not consistently attract the same response from protection networks as the death penalty. There have, however, been instances of robust responses: 'Austria Brings Home Rape Case Woman from Dubai', *Reuters Online*, 31 January 2014 <<http://in.reuters.com/article/2014/01/31/austria-dubai-idINDEEA0U07J20140131>>.

domestic system of the United States. Yet Mexico's policies and suite of measures are deeply protective and preventative in their nature.

The inclusion of a wider variety of protective actions challenges aspects of the legal regime governing diplomatic protection. Activity prior to the exhaustion of domestic remedies is not regarded as diplomatic protection under the *Draft Articles on Diplomatic Protection*.²³ Scholars have treated consular assistance and other kinds of preventative actions as falling outside the category of protection precisely because they are exercised before the exhaustion of domestic remedies.²⁴ However, this legal position does not reflect consular and diplomacy literature, which attests to the blurring of boundaries between consular and diplomatic action, or the case studies. In essence, this means that the rules of diplomatic protection are not fully aligned with the practice of States in this area.

II. The Significance of Networked Participation for International Law

The examination of protection in this thesis shows that the relationship between State and non-State actors is complex and their participation is intertwined. The protection of citizens abroad functions as a site for actors to form and join networks to achieve their goals. Different actors enhance their participation through networked action to secure resources, gain legitimacy and capitalise on expertise. Yet there is no way of capturing this activity through a macro international law lens, which would ultimately focus on rules and only the practice of States.

One of the challenges for international legal scholars is how to account for new modes of cooperation and participation beyond traditional legal forms.²⁵ International legal scholarship has framed cooperation between State and non-State actors narrowly. By limiting analyses of shared or joint action to violations of international law, as the liability literature has done, considerable area of international legal behaviour is overlooked.²⁶ Lawmaking, as discussed in chapter three, has also been an area in which legal scholars have tried to understand joint participation in the creation of legal rules,

²³ *Draft Articles on Diplomatic Protection with Commentaries*, 27.

²⁴ See generally, Annemarieke Künzli, 'Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance' (2006) 66 *Heidelberg Journal of International Law* 321.

²⁵ Philipp Dann and Marie von Engelhardt, 'Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority, and Global Administrative Law Compared' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 106, 106.

²⁶ See, eg, André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press, 2015).

standards or norms. However, performance and participation in the international legal system are not limited to liability and lawmaking. Joint or shared enterprises between State and non-State actors are also part of the fulfilment of international rights, duties and the pursuit of claims.

Some scholarship contemplates the significance of increased actors and cooperation for the concept of sovereignty in international law. The relationship between these changes and sovereignty has been understood in two ways. The first is that increased participation by non-State actors diminishes the classical sovereign model of State power. The second is that the increased participation of other actors in the international system occurs by virtue of the consent of States, thereby affirming State sovereignty.²⁷ These approaches leave a gap in thinking about the relationship between participation and sovereignty. I argue that multi-actor participation in the global order, particularly in the form of networked cooperation, is a part of the evolution of sovereignty.

Sovereignty debates

Derived from the Peace of Westphalia in 1648, the Westphalian concept defines sovereignty as ‘supreme authority within a territory.’²⁸ Louis Henkin described sovereignty as the ‘oldest subject in international law.’²⁹ Ian Brownlie distinguished between jurisdiction (powers, rights and claims of the State) and sovereignty (legal competence or legal personhood).³⁰ Recognising that these terms were often used interchangeably, Brownlie criticised the inconsistent usage of terms related to sovereignty.³¹ Henkin, however, rejected the term sovereignty, opting instead for the phrase ‘political independence’ to describe the status of States in international law.³² Despite rejecting the term, Henkin described sovereignty as:

... status, personhood, rights and duties, equally with other States. Its rights include, notably, autonomy – the legal power to consent, to assume and receive obligations, to make treaties and contracts and therefore to make law, as well as the power to acquire, own and dispose of territory and other forms of property. The State retains

²⁷ Luigi Condorelli and Antonio Cassese, ‘Is Leviathan Still Holding Sway Over International Dealings?’ in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 14, 14.

²⁸ Samantha Besson, ‘Sovereignty’ in in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press Online, 2011) [1].

²⁹ Louis Henkin, ‘The Mythology of Sovereignty’ in Ronald St John MacDonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff Publishers, 1993) 351.

³⁰ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 106.

³¹ *Ibid* 106-107.

³² Henkin, ‘The Mythology of Sovereignty’, above n 29, 352.

its internal autonomy, its ‘privacy,’ its right to be let alone by other States, its territorial integrity and its political independence...³³

A central aspect of sovereignty – what it takes to be a State – is the set of legal conditions required for an entity to qualify for Statehood. This legal concept, what I refer to as sovereign conditionality, has been a primary concern of legal scholars in international law.³⁴ Another area international legal scholars show interest is the status of Westphalian sovereignty in relation to State consent and lawmaking. This has taken shape in inquiries about the ability of States to express absolute authority over their affairs in the context of globalisation and the creation of regional, intra-State and international organisations.³⁵

Rosalyn Higgins observes that since the *Montevideo Convention* the concept of statehood has not been seriously revised, however she suggests: ‘it should not be thought that, because the formal definition of statehood has remained unchanged, the concept of statehood is rigid and immutable.’³⁶ While Higgins focuses on the conditions for statehood, particularly political independence, there seems to be a more pressing issue that flows from a mutable concept of the State: the natural corollary of a changing concept of statehood is an evolving concept of sovereignty.

Sovereignty is hotly contested, especially in the fields of political science and critical international law.³⁷ International legal scholars from the post-colonial school of thought, such as Antony Anghie, argue that the sovereignty concept in international law serves to perpetuate colonial and imperial impulses, therefore reproducing and maintaining power structures of disadvantage.³⁸ Jean Cohen contemplates changing discourses of sovereignty in international law, particularly arguments that sovereignty

³³ Ibid 355.

³⁴ See Brownlie, above n 30, 105-110; James Crawford, ‘The Criteria for Statehood in International Law’ (1977) 48(1) *British Yearbook of International Law* 93, 93.

³⁵ See, eg, Virginie Guiraudon and Gallya Lahav, ‘A Reappraisal of the State of Sovereignty Debate: The Case of Migration Control’ (2000) 33(2) *Comparative Political Studies* 163.

³⁶ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 39: *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).

³⁷ As noted in chapter three, political scientists and some international legal scholars have adopted a wider lens for analysing sovereignty. See generally, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Harvard University Press, 2009); Steven D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999); Saskia Sassen, *Losing Control: Sovereignty in the Age of Globalization* (Columbia University Press, 2013); Carl Schmitt and George Schwab, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago University Press, 1985); Andrew Heywood, *Political Theory* (Palgrave Macmillan, 3rd ed, 2004).

³⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 6.

ought to be jettisoned in favour of legal cosmopolitanism.³⁹ Cohen argues that a concept of sovereignty is critical to a counter-project to empire and a system of human rights.⁴⁰ These views on sovereignty, while approaching the idea from different fields, respectively contemplate the effect of sovereignty and the conditions or content of sovereignty.

Timothy Endicott defines the content of sovereignty as ‘a complex of various forms of power and independence that is complete for the purposes of states.’⁴¹ It is this idea of ‘various forms of power’ that raises questions about the way that sovereignty is expressed or manifested, not just its content or effect. Endicott’s observation implies that various forms of power constitute sovereignty and that therefore, it can be expressed differently. One of those powers is the capacity to regulate, a form of power I will refer to as ‘regulatory sovereignty’. This idea of the various powers of regulatory sovereignty is coupled with a rejection of the absolutist model of sovereignty and the notion of absolute power of the State.⁴² Many scholars, including Endicott, reject an absolutist form of sovereign power, noting that such a concept is incompatible with international law.⁴³ In recognising that sovereign power is not absolute, Cohen suggests that modern sovereignty is ‘associated with arbitrary and rapacious power politics’.⁴⁴ Thus, as various forms of power change, so too does the sovereignty concept.

Douglas Howland and Luise White suggest that there can be no single definition of sovereignty which spans all places and all times.⁴⁵ Two things stand out in Howland and White’s study of sovereignty. First, they contemplate sovereignty as a set of practices. Second, they acknowledge that there are numerous entities that practice sovereignty.⁴⁶ Howland and White set out the purpose of their approach:

we want to move beyond contested meaning ... and demonstrate that sovereignty consists of unfixed practices within States - practices that are struggled over, just as the international relations of states are struggled over. Sovereignty is contested

³⁹ Jean L Cohen, ‘Whose Sovereignty? Empire Versus International Law’ (2004) 18(3) *Ethics and International Affairs* 1, 3.

⁴⁰ *Ibid* 4.

⁴¹ Timothy Endicott, ‘The Logic of Freedom and Power’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 246, 252.

⁴² Jean L Cohen, ‘Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 261, 263.

⁴³ *Ibid* 264.

⁴⁴ *Ibid*; Endicott, above n 41, 252.

⁴⁵ Douglas Howland and Luise White, ‘Introduction: Sovereignty and the Study of States’ in Douglas Howland and Luise White (eds), *The State of Sovereignty: Territories, Laws Populations* (Indiana University Press, 2009) 1, 1.

⁴⁶ *Ibid*; John Jackson, ‘Sovereignty-Modern: A New Approach to an Outdated Concept’ (2003) 97(4) *American Journal of International Law* 782, 802.

because it is continually negotiated on the ground - over what a state does, to whom, and where...⁴⁷

Slaughter argues that one practice of sovereignty is the disaggregation of a State's power. Slaughter posits that as the sub-units of States take on governance responsibilities, they exercise a level of State sovereignty.⁴⁸ Additionally, she argues that disaggregated sovereignty provides sub-units of States with the 'capacity to enter into international regulatory regimes of different types, rather than as the negative right to be left alone.'⁴⁹ Slaughter's gaze falls upon lawmaking capacities of State sub-units to dismantle the centrality of State sovereign power. While disaggregated sovereignty engages with the idea of interdependence and cooperation, its scope is limited to understanding those interactions between States only. Disaggregated sovereignty, along with Slaughter's theory of transgovernmentalism discussed in chapter three, focus on State-to-State interactions without fully acknowledging that non-State actors influence and contribute to the shape of the international order. It may be the case that in some areas of international law a State may express its sovereignty in a disaggregated and transgovernmental form. However, there are many ways in which sovereignty can be manifested: Slaughter's model presents one such expression.

Multi-actor participation in the global order, particularly in the form of delegation and cooperation, can be seen as part of the evolution of sovereignty. For example, non-State actors can perform or contribute to State functions in international law.⁵⁰ States can coopt non-State actors into formal State-based processes.⁵¹ Non-State actors may also assume functions traditionally characterised as State functions, like making representations on behalf of an individual to protect them from State harm. The case studies of protection in the preceding chapters demonstrate that within multi-actor networks actors delegate their functions, rights and responsibilities to one another. The Mexico case study exemplifies this behaviour. States perform their obligations by recruiting other actors to assist them, and in most circumstances non-State actors achieve their goals with varying levels of cooperation from State actors.

⁴⁷ Howland and White, above n 45, 2.

⁴⁸ Anne-Marie Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks' (2004) 39 *Government and Opposition* 159, 186.

⁴⁹ Ibid 163-64.

⁵⁰ Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) *European Journal of International Law* 733, 739. Note that Pauwelyn et al, confine their idea of contribution to lawmaking only.

⁵¹ Anne Peters, Lucy Koechlin and Gretta Fenner Zinkernagel, 'Non-state Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion' in Anne Peters et al (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 6.

Shared action and multi-actor networks can frustrate lines between the conduct of State and non-State entities. Susan Marks suggests that the distinction between State and non-State actors is artificial. She argues that:

phenomena that are enmeshed are made instead to appear separate. ... [w]hen we counterpose the non-state to the state, we tend to obscure the extent to which each is already present within the other, governing its existence and defining its meaning.⁵²

With networks blurring the line between the formal statuses of actors, a network may express the power that is traditionally associated with State actors.

Many international legal scholars are preoccupied with preserving the State and its power in a traditional form, perhaps because they fear that adjusting the conceptual framework might cause the entire system to collapse. This scholarly scrambling around the edges of Westphalian sovereignty attempts to fit non-State actor participation in the international system around an out-dated idea of the State. Like Cohen, I argue that the sovereignty concept is necessary for understanding changes in the global order.⁵³ In this respect, an analysis of how non-State actors may contribute to and shape sovereignty in international law has yet to receive scholarly attention.

Distributive sovereignty and participation

A micro international law approach can facilitate an examination of sovereignty as a set of practices by a range of entities, as Howland and White suggest above. What can the practices of networks explored in this thesis illustrate about the expression of sovereignty?

The existence of multi-actor networks in Germany and Mexico reflect a high level of strategic coordination and cooperation between State and non-State actors in relation to the fulfilment of duties or the pursuit of rights in international law. Particularly in the area of protection, a core sovereign right of intervention, the participation of State and non-State actors signals a shift in the way that sovereign power may be manifested.

I propose a model of distributive sovereignty to explain collaborative activity and the distribution of regulatory power between a range of actors. Distributive sovereignty is an expression of sovereign power where rights and duties in international law are

⁵² Susan Marks, 'State-Centrism, International Law and the Anxieties of Influence' (2006) 19(2) *Leiden Journal of International Law* 339, 341.

⁵³ Cohen, 'Whose Sovereignty?', above n 39, 24.

delivered through highly integrated plural participation of State and non-State actors in networks. Distributive sovereignty has three elements. First, action must relate to the fulfilment of duties or the pursuit of rights in international law. Second, multi-actor nodes, composed of State and non-State actors, develop strategy and influence the behaviour of networks. Third, the nature of the relationship between the actors in the nodes and associated networks reflects aligned objectives or interests manifested in a high level of integrated behaviour or task delivery.

Distributive sovereignty enables an account of how State and non-State actors interact with one another to produce outcomes and share responsibility in international law. The tasks associated with pursuing a claim, such as protection, or compliance with international duties, often involves both State and non-State actors. Distributive sovereignty explains how States engage actively with non-State actors to strengthen, diversify and perform different actions in international law. It clarifies the participation of non-State actors in State enterprises, projects, policies and activities. In this expression of sovereignty, the manner in which State and non-State actors enrol one another to complete tasks related to rights and obligations in international law are in full view.

The existence of multi-actor nodes is a critical component of a model of distributive sovereignty. Specifically, nodes combining State and non-State actors develop strategy and policy, allocate tasks and enrol actors. Decision-making power of the State (regulatory sovereignty) is vested in the node, which may have access to resources and to networks of other actors.⁵⁴ An example of this kind of multi-actor node is the MCLAP node (the Mexican SRE and the Director of the MCLAP in the United States, discussed in chapter five). In this node, the actors influence and direct the policies and objectives of Mexico's protection regime. It has carriage of financial resources and allocates tasks to other networks and actors. The formal status of the actors in this node is of less importance: their expertise and capacity to influence the course of events is central to their interaction. Unlike a contractual relationship where an external entity fulfils a task determined by the State alone, distributive sovereignty embodies strategic alliances where multi-actor nodes determine the course of action to be taken.

Finally, the relationships between the actors must reflect a level of aligned objectives or interests. Collaboration between State and non-State actors can illustrate a deeper networked relationship, one in which goals can be set, tasks shared, and objectives aligned. The relationship between civil society actors like Amnesty International and

⁵⁴ Scott Burris, Peter Drahos and Clifford Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30, 37-8.

German diplomatic and consular officials prior to *LaGrand* provides an example of this kind of integrated relationship. During the clemency and appeal proceedings of the LaGrand brothers in the United States, State and non-State actors met to strategise, allocate tasks and speaking responsibilities. The actors involved were united by the goal of protecting the LaGrand brothers from execution.

Distributive sovereignty emphasises how international law functions are performed and by whom. Most performance or conduct in the international order, for example standard setting, violation of norms, fulfilment of obligations or securing rights and remedies, is the product of joint enterprise between State and non-State actors. The concept of distributive sovereignty can explain the quality of a network formed between State and non-State actors. It reveals the mechanisms used by different actors and distinguishes between communication and when sovereign functions are manifested as a multi-actor phenomenon.

The nature of how States operate is complex: sovereignty is formed and reformed by the relationships that States and non-State actors embrace, reject and nurture. Distributive sovereignty is one expression of how actors engage in networks to produce shared outcomes in the international legal order. It reflects the changing forms of sovereignty and rejects that sovereignty is a static concept.

Protection, sovereignty and allegiance

The protection of citizens abroad today is, in many ways, an allegiance-building act. Citizens owe allegiance to their States and in return, States offer them protection. However, globalisation has contributed to the rise of many communities and movements that contest State power. States are competing with these communities for loyalty from citizens. The activities and goals of non-State actors can challenge traditional State sovereignty and thereby contribute to a 'collision of loyalties and allegiances.'⁵⁵

There are numerous organisations and entities that provide protection to citizens. Private security companies provide protection services.⁵⁶ Companies provide 'consular services' to fee-paying clients. Organisations and corporations have insurance policies in relation to the treatment of their members or employees abroad. Civil society

⁵⁵ Diane E Davis, 'Non-State Armed Actors, New Imagined Communities, and Shifting Patterns of Sovereignty and Insecurity in the Modern World' (2009) 30 *Contemporary Security Policy* 221, 238.

⁵⁶ Control Risks, *Managing Security Risks* <<https://www.controlrisks.com/en/services/security-risk>>.

organisations litigate, run global campaigns on behalf of individuals, and provide consular and legal training to States.⁵⁷ Non-State actor armed groups in different regions provide protection for groups and individuals by military or violent means. The participation of other actors can also provide regulatory relief to States, however, it can also limit the ability of the State to protect its interests through its citizens. Diane Davis notes that '[w]hen citizens bypass state channels and turn to non-state actors ... the state itself loses a key function and some of its legitimacy'.⁵⁸ Where States fail to intervene or the protection strategy used is not successful, it can contribute to an allegiance deficit, where citizens experience a shortfall of trust. The protection of citizens abroad becomes a site where allegiance is fought for by a range of actors.

It is within this contestation to secure allegiance and loyalty that distributive sovereignty emerges as a governance tool. Multi-actor networks function as a mechanism for sustaining and obtaining power. States can minimise the challenge to their power and centrality in international law by enrolling non-State actors into their activities. Conversely, non-State actors can achieve their goals through cooperation with the State and set themselves apart from a wider contestation for power with other non-State actors. The reciprocity of legitimacy and power between actors suggests that the protection of citizens abroad is more likely to take its form as a joint enterprise between State and non-State actors in the future.

III. Conclusion

While cases of protection are politically and legally complex, they reveal the values underlying action, and even give a flavour for some of the values populating the international order. The starting point of this thesis was that micro-processes, individual actors and values are important for an analysis of international law. While a macro international law approach focusing on macro actors and rule development is fundamental, micro international law can reveal the constitutive aspects of the international legal order and where power resides. A micro international law approach that maps the narrative of law, its events, and the actors that bolster and defeat certain values, is critical to a balanced understanding of the international system.

In the area of protection, where contestations of allegiance, legal battles and competition between entities in the international legal order occur, there are individuals who face, or have faced, serious harm. Exposing an array of participants in

⁵⁷ Interview with Reprieve UK (London, August 2013).

⁵⁸ Davis, above n 55, 238.

protection helps to identify who to reach out to and the avenues available when instances of protection arise. A more careful study of protection will, I hope, enhance responses to serious violations of international law against individuals.

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