

24 September 2018

Volume 7, Issue 6

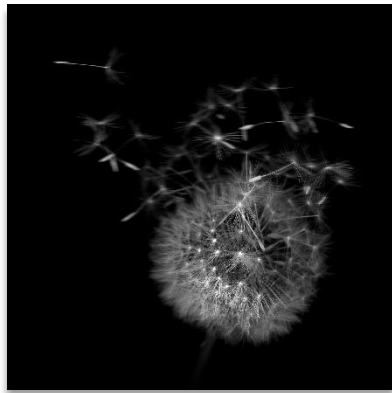


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## Diasporas and International Law

[Larissa van den Herik](#)\*

University of Leiden

### Introduction

As a very visible effect of globalization, migration is one of the great macro-issues of our time. The *Global Compact for Safe, Orderly and Regular Migration* underscores the importance of the international governance of migration.<sup>1</sup> A topical *AJIL Unbound* symposium framed *global migration law* as a field of scholarly inquiry that seeks “to understand the relationship between transnational human mobility and all levels of the law”.<sup>2</sup> It was suggested in the symposium that this field of global migration law should encompass the legal space beyond refugee law and cover root causes as well as practices of reception and integration, hence going beyond the act of moving as such. Nonetheless the connection to the act of migration and thus the centrality of movement as a starting point does imply a relatively short shutter speed of global migration law as a separate field of law.

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\* Prof. dr. L.J. van den Herik is Vice Dean of Leiden Law School and Professor of Public International Law at the Grotius Centre for International Legal Studies.

<sup>1</sup> Global Compact for Safe, Orderly and Regular Migration, adopted by UN Member States on 13 July 2018, building on the *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1, 3 October 2016.

<sup>2</sup> J. Ramji-Nogales and P.J. Spiro, ‘Introduction to Symposium on Framing Global Migration Law’ (2017) 111 *AJIL Unbound* 1.

Acknowledging that migration is not a new phenomenon, this Reflection takes a different perspective. It focuses on one specific upshot of migration that has largely been overlooked by international legal scholars, namely the creation of diasporas. The notion of diaspora is generally absent from international legal studies.<sup>3</sup> Diasporas are not recognized as legal actors, nor are they the subject of a concrete treaty protecting them. It is, however, inherent in the notion of “diaspora” that members continue to entertain a connection with their home/sending State. Given their transnational character, such connections may well have international law dimensions. Indeed, the relationship between a diaspora and its “homeland” is recognized in the recently adopted *New York Declaration for Refugees and Migrants* but only with respect to one of its dimensions, namely the contribution that diasporas can make to the development of their country of origins.<sup>4</sup> Traditionally, international law also recognizes the interests of home States to protect nationals abroad. However, separate interests of diasporas risk remaining under the radar, in particular if these do not align with State interests.

Drawing on other disciplines that have studied diasporas more rigorously, this Reflection makes the claim that diasporas have been permeating international legal practices for a long time. Mapping the terrain of how international law engages with diasporas, the Reflection will illustrate that international law is not agnostic towards diasporas but, being State-based in design, it has difficulty capturing the triangular relationship between a diaspora and its home and host States. International law also tends to turn a blind eye towards more negative relationships between a home State and its diaspora.

## **1. The Study of Diasporas in Other Disciplines**

The concept of “diaspora” is employed across disciplines to study trans-territorial identity claims and relations between States and their populations abroad.<sup>5</sup> Originating from the Greek words

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<sup>3</sup> Human rights law includes the protection of minorities which might also cover diaspora groups. Given the existence of various international treaties protecting minorities, the question regarding the need for an international convention on diasporas was answered in the negative by P. Shah, ‘Diasporas as Legal Actors: Implications for Established Legal Boundaries’ (2005) 5 *Non-State Actors and International Law* 153, 164.

<sup>4</sup> This contribution was mentioned as one of the elements that needed further elaboration in the Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/71/L.1, 13 September 2016, Annex II, part III, para. 8(t), resulting in objective 19 of the Global Compact for Safe, Orderly and Regular Migration of 13 July 2018 aiming to “create conditions for migrants and diasporas to fully contribute to sustainable development in all countries”.

<sup>5</sup> F. Ragazzi, ‘A Comparative Analysis of Diaspora Policies’ (2014) 41 *Political Geography* 74; F.B. Adamson and M. Demetriou, ‘Remapping the Boundaries of “State” and “National Identity”: Incorporating Diasporas into IR Theorizing’ (2007) 13:4 *European Journal of International Relations* 489. R. Bauböck and

δί (‘‘across’’) and σπείρω (‘‘I sow’’ or ‘‘I scatter’’), the term ‘‘diaspora’’ has biblical roots having first been used in Deuteronomy 28:25 and Psalm 147:2.<sup>6</sup> Hence the capitalized term ‘‘Diaspora’’ specifically refers to the Jewish diaspora and one of the older definitions by the scholar Safran builds on this paradigm.<sup>7</sup> Newer definitions are more flexible, capturing the great variety of diasporas and maintaining relevance in a world of accelerated globalization while also taking account of cyberspace and the digital dimensions of diasporic practices. Brubaker identifies three criteria, which together define a diaspora. The first constitutive criterion is dispersion in space. The second criterion is orientation to a real or imagined homeland as an authoritative source of value, identity and loyalty. The third criterion is called ‘‘boundary-maintenance’’ which involves the preservation of a distinctive identity from the host State or society.<sup>8</sup> Berns-McGown proposes similar criteria, although she sees diasporas as a space of connections and notes that the connection to elsewhere does not necessarily need to be positive in nature.<sup>9</sup> She also refers to Edward Said’s more literary understanding of diasporas as people who are ‘‘at bottom, always fighting a deep despair at having been uprooted, at having to justify their presence in an alien land, at having been deprived of the security of deep roots.’’<sup>10</sup> Diasporas are typically multi-identified with a bi-location of roots and presence.<sup>11</sup> Beyond offering definitions, scholars have also categorized diasporas. Reis distinguishes between classical (Jewish and Armenian), modern

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T. Faist (eds), *Diasporas and Transnationalism: Concepts, Theories and Methods* (Amsterdam University Press 2010).

<sup>6</sup> The Septuagint version of (part of) Deuteronomy 28:25 reads ‘‘thou shalt be a diaspora in all kingdoms of the earth’’. The King James version of Psalm 147, verse 2 reads, ‘‘The LORD doth build up Jerusalem: he gathereth together the outcasts of Israel.’’ The words ‘‘from the diaspora’’ have been erased over time. Other versions of this Psalm speak of outcast sinners, outlaws or exiles, to some extent underlining the initial pejorative connotation related to the word ‘‘diaspora’’.

<sup>7</sup> W. Safran, ‘Diasporas in Modern Societies: Myths of Homeland and Return’ (1991) 1:1 *Diaspora*, 83-84 (defining diasporas as ‘‘expatriate minority communities whose members share several of the following characteristics: 1) they, or their ancestors, have been dispersed from a specific original ‘‘center’’ to two or more ‘‘peripheral,’’ or foreign, regions; 2) they retain a collective memory, vision, or myth about their original homeland—its physical location, history, and achievements; 3) they believe that they are not—and perhaps cannot be—fully accepted by their host society and therefore feel partly alienated and insulated from it; 4) they regard their ancestral homeland as their true, ideal home and as the place to which they or their descendants would (or should) eventually return—when conditions are appropriate; 5) they believe that they should, collectively, be committed to the maintenance or restoration of their original homeland and to its safety and prosperity; and 6) they continue to relate, personally or vicariously, to that homeland in one way or another, and their ethnocommunal consciousness and solidarity are importantly defined by the existence of such a relationship.’’)

<sup>8</sup> R. Brubaker, ‘The ‘‘Diaspora’’ Diaspora’ (2005) 28:1 *Ethnic and Racial Studies* 1, 5-6.

<sup>9</sup> R. Berns-McGown, ‘Redefining ‘‘Diaspora’’: The Challenge of Connection and Inclusion’ (2007-2008) 63 *International Journal* 3.

<sup>10</sup> E. Said, ‘Reflections on Exile’, in *Reflections on Exile and Other Essays* (Harvard University Press 2003).

<sup>11</sup> On how each individual is multi-identified, see A. Sen, *Identity and Violence: The Illusion of Destiny* (W.N. Norton and Company 2006).

(slave and colonial) and contemporary globalization diasporas.<sup>12</sup> In turn, Cohen differentiates between victim, labor, imperial, cultural and trade diasporas.<sup>13</sup>

While many sociological and anthropological studies seek to understand diasporas as expressions of deterritorialized nationalism and collective identity that also reshape notions of citizenship and ethnicity, IR scholarship largely focuses more specifically on theorizing the sending State-diaspora relationship.<sup>14</sup> Building on comparative analyses, typologies of diaspora policies are established to capture and explain the “diaspora turn”<sup>15</sup> in policy discourse. For instance, Ragazzi identifies five types of diaspora-oriented policy: (i) the expatriate State pursuing cultural and educational policies to maintain links with high-income nationals abroad, such as the UK and Germany; (ii) the closed State that strongly regulates or seeks to restrict mobility of its population, such as Cuba and Iran; (iii) the global-nation State, which is interested in extracting economic and political resources from populations abroad, such as Mexico and Morocco; (iv) the managed labor States that are united by the provision of investment schemes for returnees, such as the Philippines; and (v) the indifferent State that largely ignores its people residing beyond its own boundaries, such as Lebanon.<sup>16</sup>

This brief multidisciplinary overview illustrates the polygonal nature of the notion of diasporas. In practice, diasporas may well be too heterogeneous and elusive for any type of legal recognition. Nonetheless, it is obvious that many of the transnational relations between a diaspora and its home State have ramifications that are relevant to international law.

## **2. Right to Protect Nationals Abroad**

Since diasporas have existed for centuries, certain traditional doctrines of international law have indeed developed to safeguard relationships between home States and their diasporas, and principally to enable States to protect their nationals abroad. These doctrines include first of all diplomatic protection and more controversially the “protection of nationals” doctrine as a basis to

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<sup>12</sup> M. Reis, ‘Theorizing Diaspora: Perspectives of “Classical” and “Contemporary” Diaspora’ (2004) 42 *International Migration* 47.

<sup>13</sup> R. Cohen, *Global Diasporas: An Introduction* (University of Washington Press 1997), 26.

<sup>14</sup> A. Delano and A. Gamlen, ‘Comparing and Theorizing State-diaspora Relations’ (2014) *Political Geography* 41, 43-53. Also see references in n 4.

<sup>15</sup> The term is introduced by D. Agunias (ed), *Closing the Distance: How Governments Strengthen Ties with Their Diasporas* (Migration Policy Institute 2009).

<sup>16</sup> Ragazzi (n 5) 80-82.

use force.<sup>17</sup> Yet, these doctrines are principally premised upon the formal category of nationality, which may exclude significant segments of a diaspora. In an effort to mitigate this effect however, the commentaries to the Draft Articles on Diplomatic Protection propose an inclusive approach to nationality, ignoring Nottebohm's genuine link requirement. In justifying this choice, the commentaries indicate that strict adherence to the Nottebohm requirement would exclude millions of persons from the benefit of diplomatic protection. The commentaries state,

Indeed, in today's world of economic globalization and migration, there are millions of persons who moved away from their State of nationality and made their lives in States whose nationality they will never acquire, or have acquired nationality by birth or descent from States with which they have a tenuous connection.<sup>18</sup>

Draft Article 8 also allows host States of stateless persons and refugees to exercise diplomatic protection on their behalf, only not against their State of nationality (home State). The Draft Articles thus navigate between traditional, more demanding requirements and present-day realities that take diaspora interests more fully into account.

To the disappointment of the Special Rapporteur on Diplomatic Protection, Professor John Dugard, the Draft Articles follow *Barcelona Traction* and conceptualize diplomatic protection as a discretionary power of a State, and not a right that individuals can invoke. Draft article 19 qualifies this discretion somewhat by offering some recommendations to States, proposing that they should give due consideration to the possibility of exercising diplomatic protection when a "significant injury" has occurred. Nevertheless, given the emphasis on discretion, the doctrine of diplomatic protection does presuppose a certain *positive* relationship between individuals abroad and their home State, which would inform a State's willingness to use its discretion and exercise diplomatic protection. The individual abroad thus largely remains surrendered to the goodwill of the State.

The Draft Articles on Diplomatic Protection exclude the use of force as a permissible means to exercise diplomatic protection<sup>19</sup> and the doctrine of "protection of nationals" as a justification to use force generally remains controversial. It is often labelled as being a form of "gunboat

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<sup>17</sup> See generally, T. Frank, *Recourse to Force; State Action Against Threats and Armed Attacks* (CUP 2002), chapter 6, and T. Ruys, 'The "Protection of Nations" Doctrine Revisited' (2008) 13(2) *Journal of Conflict and Security Law* 233.

<sup>18</sup> Commentary to Article 4, para. (5) *Draft Articles on Diplomatic Protection with commentaries*, 2006.

<sup>19</sup> Commentary to Article 1, para. (8) *Draft Articles on Diplomatic Protection with commentaries*, 2006.

diplomacy". Resistance against the doctrine is mainly motivated by fears of abuse and its openness to powerplay. Recent practices arguably underscore the reality that interests of diasporas are invoked for ulterior motives that relate to expanding spheres of influence rather than protection *per se*.

In sum, the traditional doctrines that exist to govern home State-diaspora relationships are largely State-centric and often disregard separate diaspora interests.

### **3. A Triangular Relationship**

Hence, the doctrine of diplomatic protection does not fully capture the triangular relationship between the home State, the host State and diaspora. It also has limited application in that it presupposes a harm done to the home State's national by the host State. It does not apply in the reverse situation in which a home States aims to govern or control its nationals extraterritorially (in the host State) with harmful consequences also for the diaspora. As identified by IR scholars, host States can and do reach out to diasporas for a number of reasons, including political, economic and cultural, and they can aim to foster, benefit from or instead control the diaspora.

Home states may for instance use their diasporas as part of their electorate. The question whether and to what extent long-term expatriates should retain their voting rights is generally a domestic matter,<sup>20</sup> which resonates with a State's identity and domestic politics. Yet, intensive home State alliances with their diasporas for electoral gain may have an impact on a host State and their own interests and relations with the diaspora concerned. Specifically, with a view to fostering integration, host States may attempt to limit home State outreach to their diaspora. Such situations gain an international law dimension when home State officials travel to the host State, for instance for the purpose of political rallies. In such situations, international legal questions arise about obligations of host States to allow (entry for) political rallies, including questions regarding the extent of diplomatic immunities for home State officials. By way of example reference can be made to the attempted July 2016 coup in Turkey which sensitized large Turkish diasporas residing in West-European States, hence providing an illustration of how internal political contestations can migrate along with diasporas or even follow them afterwards. Planned visits by Turkish State officials for the purpose of referendum rallies further reinforced these dynamics and they confronted host States of Turkish diasporas with complex international law

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<sup>20</sup> See for some general reflections in response the Canadian litigation on the restriction of expatriate voting rights, F. Mégret, 'Why Expatriates Should Be Able to Vote', *The Globe and Mail*, 2 April 2018.

questions, including the law of diplomatic relations. Such situations demonstrate more convoluted triangular relationships between diasporas, their home State and their host State. The triangularity of this relationship between a diaspora, the home and the host State may not always fit well within the strictures of international law.

#### **4. Under the Radar**

Situations involving more directly negative relationships, such as when a home State exploits its own people extraterritorially, risk remaining under the radar of international law altogether. Human rights law, the typical area of law that undertakes to protect individuals against arbitrary State behaviour, has limited reach given State reluctance to embrace extraterritorial applicability. Long arm practices of rogue regimes may consequently remain out of the human rights loop. Eritrean actions constitute an example of such largely ungoverned behaviour. Through spying networks, Asmara has created a culture of fear amongst parts of its diaspora. Informants are used to collect information on members of the Eritrean diaspora, and critics will not receive assistance from the Eritrean embassy. The ultimate retaliation is denial of family reunification, penalizing family members still residing in Eritrea, extinguishment of inheritance rights or threat of detention or denial of exit visa in the case of return to Eritrea.<sup>21</sup> In this system of close surveillance diaspora members are also subjected to the so-called diaspora tax.<sup>22</sup> These human rights-unfriendly practices, while acknowledged, were not fully addressed by the Commission of Inquiry established by the UN Human Rights Council because they fell outside the territorial breath of its mandate which was focused on Eritrea only.<sup>23</sup> Interestingly, UN monitoring groups, created in the context of the Somali-Eritrea sanctions regime under the remit of the UN Security Council, did extensively report on Asmara's extraterritorial exploitation of Eritreans.<sup>24</sup> The group mapped the illicit financial apparatus which included the collection of diaspora taxes, fundraising at specially-organized social and political diasporic events and illicit revenues generated through human smuggling and trafficking. As noted by the group, Asmara's engagements with the Eritrean diaspora extended to non-nationals, i.e. individuals of Eritrean descent that had acquired a

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<sup>21</sup> M. van Reisen and M. Mawere (eds.), *Ongoing Vulnerability of Refugees from Eritrea: A Crisis of Accountability*, EEPA Report, 2016.

<sup>22</sup> This extraterritorial income tax of two per cent is also called development and rehabilitation tax and payment thereof is a precondition for government services such as passport renewal or issuance of visa or services related to family reunification or inheritance matters.

<sup>23</sup> This point is made more extensively in L. van den Herik and M. van Reisen, 'A Diasporic Perspective on the Commission of Inquiry for Eritrea', *European Journal of International Law* (forthcoming).

<sup>24</sup> See for all reports of the Monitoring Group, the website of the UN Security Council.

different nationality.<sup>25</sup> Given the functional mandate of the monitoring groups and its very factual interpretation, they were not bound by such formal categories of nationality and could thus shed light on these practices regardless of the nationality of the victims.

Another example where the long arm of a home State over its diaspora remained out of the human rights loop is North Korea. In this case, North Korea had effectively created its own diaspora through longstanding and extensive practices of sending migrant workers abroad. This global system of overseas labour generates huge foreign cash flows to Pyongyang.<sup>26</sup> Despite allegations regarding poor conditions and slave-like circumstances, neither the Special Rapporteur nor the Commission of Inquiry for North Korea reported thoroughly on these practices.<sup>27</sup> In sharp contrast, the UN sanctions regime on North Korea was expressly amended to include provisions prohibiting issuance of new work authorizations and even repatriation.<sup>28</sup> Although these provisions were mainly functional in character, aiming to curb revenues flows of \$500 million annually (which are modest estimates), they were also to some extent inspired by human rights considerations, as illustrated by the UK representative's remarks upon the adoption of the relevant Resolutions,

Every year, the Democratic People's Republic of Korea sends thousands of ordinary workers overseas. They often endure poor conditions and long hours, and their toil serves to provide critical foreign currency for North Korean Government coffers. This is undoubtedly a form of modern slavery, and today we have taken the first step to ending it. The world will now monitor and curtail work authorizations for these desperate expatriates. And those who are already victims of this abusive system can trust that the United Kingdom will continue to work towards a complete end to North Korea's institutionalized modern slavery.<sup>29</sup>

The two situations are exemplary of long-arm relationships between a home State and its diaspora escaping in-depth scrutiny by human rights institutions. It is in some respects paradoxical that the more functional security regimes of the UN Security Council and its sanctions groups and panels of experts have spotlighted the adverse practices. These Security Council

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<sup>25</sup> Cf. Report of the Monitoring Group on Somalia and Eritrea, UN Doc. S/2012/545, 13 July 2012, para. 99.

<sup>26</sup> See also R. Breuker and I. van Gardingen, *People for Profit, North Korean Forces Labour on a Global Scale* (Leiden Asia Centre 2018).

<sup>27</sup> See e.g. reports of Special Rapporteurs for North Korea, UN Doc. A/72/394, 18 September 2017; UN Doc. A/HRC/31/70, 19 January 2016, UN Doc. A/70/362, 8 September 2015, UN Doc. A/HRC/28/71, 17 March 2015; UN Doc. A/69/548, 24 October 2014. And the report of the Commission of Inquiry, UN Doc. A/HRC/25/63, 7 February 2014.

<sup>28</sup> Security Council Resolutions 2371 (2017), para. 11, 2375 (2017), para. 17 and 2397 (2017), para. 8.

<sup>29</sup> UN Doc. S/PV.8019, 5 August 2017, p. 3.



regimes thereby offered some protection without necessarily aiming to do so, while the human rights machinery remained largely silent. More generally, the examples illustrate international law's bias against diasporas and its inability to monitor home State-diaspora relationships more structurally.

## **5. Concluding Thoughts**

Diasporas are generally seen as objects of State interests. States may invoke diaspora interests if these happen to align with their own interests, as illustrated in the Qatar-UAE case where the Convention on the Elimination of Racial Discrimination (CERD) is evoked to create ICJ jurisdiction with a view to litigating what is effectively a broader inter-State dispute. However, in such cases, the relationship is effectively flattened to the bilateral level, which ignores separate diaspora interests.

Overall, this Reflection aimed to set out that international law is not neutral or agnostic to the existence of diasporas, and that it does entertain a specific posture. It is worth further unveiling this implicit bias.

Cite as: Larissa van den Herik, 'Diasporas and International Law', ESIL Reflections 7:6 (2018).