

# Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State

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That spirits and gods, devils and idols, should be endowed with legal rights and enjoyments is again a practice as common as it seems to be ancient.<sup>1</sup>

Perhaps you will go to the length of saying that much the most interesting person that you ever knew was *persona ficta*.<sup>2</sup>

In May 1926, the German Society for International Law discussed the foundational question of the subjects of international law. “Who can appear independently before international forums? only states? or also others,

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1. Alexander Nékám, *The Personality Conception of the Legal Entity* (Cambridge, MA: Harvard University Press, 1938), 25.

2. Frederic William Maitland, “Moral Personality and Legal Personality,” *Journal of the Society of Comparative Legislation* 6 (1905): 194.

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particularly individuals?” asked the speaker, Godehard Josef Ebers, a professor at the University of Cologne. The topic possessed a strange novelty. “In the nineteenth century one hardly even considered the problem,” Ebers noted incredulously.<sup>3</sup> Now it appeared both neglected and pressing. The society’s resolutions that year recognized that ever more non-state “factors”—including groups such as minorities as well as individuals—were emerging as the bearers of international rights and duties. The appearance of these new subjects suggested a transformation in the deep conceptual substructure (*Grundauffassung*) of international law, which had hitherto recognized states alone as international persons.<sup>4</sup>

The German jurists were not lone heralds of such a transformation. Consider two other assessments from the same year. The Austrian international lawyer Alfred Verdross wrote of the old dogma that only states could be subjects in international law as if it were a myth or spell now being sapped of its force: “the magic of this erroneous theory began to dwindle only in recent times.”<sup>5</sup> The legal scholar and former Greek Foreign Minister Nicolas Politis, for his part, asserted that specialists in international law now generally shared the view “that there is at present a striking contrast between the living conditions of nations” and the principles on which international law had hitherto been based. “These principles now

3. “Wer kann vor internationalen Instanzen selbstständig auftreten? nur die Staaten? oder auch andere, insbesondere Individuen?” “Man hat sich im 19. Jahrhundert mit dem Problem so gut wie gar nicht befaßt.” Godehard J. Ebers, “Sind im Völkerrecht allein die Staaten parteifähig?” *Mitteilungen der Deutschen Gesellschaft für Völkerrecht* 7 (1926): 7. On Ebers, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3, *Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur, 1914–1945* (Munich: C. H. Beck, 1999), 276, 282–83.

4. “Die Anzahl der Einzelvorgänge legt den Gedanken nahe, daß neben oder vielleicht entgegen der prinzipiellen Auffassung von der alleinigen Völkerrechtssubjektivität der Staaten ein geänderte Grundauffassung für das Völkerrecht zum Durchbruch kommt.” See Rolf Knubben, *Die Subjekte des Völkerrechts: Allgemeine Lehre von der vollen und beschränkten völkerrechtlichen Rechts- und Handlungsfähigkeit*, *Handbuch des Völkerrechts*, vol. 2, part 1 (Stuttgart: Verlag von W. Kohlhammer, 1928), v. Knubben similarly noted that the subject had only emerged as an important area of inquiry in recent times.

5. “Gleichwohl began erst in der letzten Zeit der Zauber dieser Irrlehre zu schwinden.” Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna and Berlin: Verlag von Julius Springer, 1926), 116. One of the twentieth century’s most important international jurists, Verdross (1890–1980) has more recently been resurrected as an early exponent of human “dignity” as a fundamental legal value. See Bruno Simma, “The Contribution of Alfred Verdross to the Theory of International Law,” *European Journal of International Law* 6 (1995): 33–54; and, for the latter point, Samuel Moyn, “The Secret History of Constitutional Dignity,” *Yale Human Rights and Development Journal* 17 (2014): 39–73.

seem to be too tight a fit for a body that has grown larger, and there is an instinctive conviction that they should be amplified.”<sup>6</sup> New facts chafed at the narrowness of old ideas; as the latter faded, “a new international law” would emerge, one that was as much a law of individuals as a law of states.<sup>7</sup> Politis echoed many in his assessment that “at present international law is in a transition period.”<sup>8</sup> If the final form of things remained indistinct, the social cosmos of international law seemed both empirically and conceptually in flux.

By the time of the Second World War, it was clear that something fundamental had changed. When the subject of subjects was discussed at the American Society of International Law in 1941, the speaker, Frederick Dunn, called the old orthodoxy—which understood international law as a law between states, where “individuals have no rights and no personality”—a “legal fossil” and a “remnant of legal animism.”<sup>9</sup> When the Grotius Society did the same in 1944, the eminent jurist Hersch Lauterpacht cast his gaze back over the interwar years: “I suppose that twenty-five or thirty years ago every respectable writer on international law had little hesitation in stressing emphatically that States only, and no one else, were the subjects of international law. I doubt whether this is to-day the pre-eminently respectable doctrine.”<sup>10</sup> The dissolution of the state’s stranglehold on international personhood began well before the ostensible legal breakthroughs

6. Nicolas Politis, *The New Aspects of International Law: A Series of Lectures Delivered at Columbia University in July 1926* (Washington: Carnegie Endowment for International Peace, 1928), v.

7. *Ibid.*, 30–31.

8. *Ibid.*, 30. See also Henri Rolin’s assessment that, in this area, “positive international law is still in a transitory and contradictory stage.” Henri Rolin in the discussion following Vladimir R. Idelson, “The Law of Nations and the Individual,” *Transactions of the Grotius Society* 30 (1944): 75.

9. Frederick S. Dunn, “The International Rights of Individuals,” *Proceedings of the American Society of International Law at Its Annual Meeting* 35 (1941): 14.

10. Hersch Lauterpacht in the discussion following Idelson, “The Law of Nations and the Individual,” 66. Lauterpacht had already argued for the expiration of the old view in 1927. See Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (London: Longmans, Green and Co., 1927), 74–79. Lauterpacht’s wartime assessment was shared by countless others. As just two other examples from around the time of the second world war, see Hans Aufricht’s 1945 view that interwar innovations in the area were clear indicators of the future shape of international law: “[P]rogress in international law will presumably follow the general trend of the inter-war period”: “new persons or personal units—States, individuals and supranational agencies—will emerge as legal entities.” Hans Aufricht, “On Relative Sovereignty: Part II,” *Cornell Law Quarterly* 30 (1945): 346; or Philip Jessup’s 1947 observation that “there has welled up through the years a growing opposition to this traditional concept [of states as the only subjects of international law].” If resistance to a new order persisted, it nevertheless seemed to him a sensible intellectual endeavor to start “with the

—especially the 1948 Universal Declaration of Human Rights and the rise of international criminal law—that followed the conclusion of the Second World War.

Yet the nature of this transformation remained highly uncertain. Lauterpacht himself struggled to explain the shift given that there were painfully few unambiguous examples of non-states stepping into the fold of international law as fully fledged protagonists. “When we wish to refute the orthodox view of States only being the subjects of international law, we have to fall back upon such exotic examples as pirates, blockade runners, carriers of contraband, recognized belligerents, and so on.”<sup>11</sup> These “exotic,” marginal subjects dwelt at the outskirts of legal detectability and respectability, like residents of some far-flung gulag of international law. The examples favored by other authors—especially individuals, minorities, and mandated populations—were marginal in another sense: most jurists argued that to the extent that they possessed international personality (if they did at all), this personality was limited or qualified in significant ways. These “new subjects” were fringe dwellers then, too, straddling the line between legal visibility and invisibility, between international agency and its absence. Like all border residents, they brought the frontiers of the community of international law, and its logics of inclusion and exclusion, clearly into view.

This article works toward an anthropology of international law’s fictional persons. I approach the formal community of international law—its roll call of abstract legal personae—as an anthropologist might a “real” community, attentive to its cultures of belonging and techniques of marginalization, its grounding of hierarchy and its arrangement of time, its rules of interaction and habits of sociability, its understanding of birth and its regulation of death, its anxieties and aspirations, and its haunting and its sublime. Elsewhere I have studied the participation of non-state actors in the interwar order, uncovered their use of new interwar institutions, and analyzed their role in shaping doctrines of legal personality.<sup>12</sup> Here, by contrast, I displace the social history of international law

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hypothesis that a change in the old fundamental doctrine has been accepted”: Philip Jessup, “The Subjects of a Modern Law of Nations,” *Michigan Law Review* 45 (1947): 384.

11. Lauterpacht in the discussion of Idelson, “The Law of Nations and the Individual,” 66–67.

12. Clearly, for many of those bound up in these legal structures, conflicts over legal abstractions such as personality had very real, material, even violent consequences: see, for example, Natasha Wheatley, “Mandatory Interpretation: Legal Hermeneutics and the New International Order in Arab and Jewish Petitions to the League of Nations,” *Past and Present* 227 (2015): 205–48; Natasha Wheatley, “The Mandate System as a Style of Reasoning: International Jurisdiction and the Parceling of Imperial Sovereignty in

onto the theoretical plane of interwar jurisprudence, surveying the abstract “social” world that jurists built.<sup>13</sup> By what conceptual mechanisms could new subjects be birthed into the domain of international law? What rules governed the coexistence and interaction of this enlarged troop of international legal persons? And how did the mode of their personification furnish them with legal attributes and qualities (especially handicaps and deficiencies)? In short, how did international law “make up people”?<sup>14</sup> Strikingly, the evolving demographic map of interwar international law featured a set of legal archetypes or analogical allusions—including slaves, ghosts, and unborn children—designed to capture the semipersonality or reduced capacity of these various non-states. The conceptual work of naming and hailing new persons in international law, I show, relied heavily on metaphors and analogies, making any anthropology of the fictional persons of interwar international law simultaneously an anthropology of metaphors.

This article thus explores law’s subject-making and world-making capabilities. If Clifford Geertz and others highlighted long ago how law is “constructive of social realities rather than merely reflective of them,”<sup>15</sup> a spate of recent works on colonial and comparative law has focused more specifically on the historical production of “legal and illegal subjects,”<sup>16</sup> on “episodes in making and unmaking

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Petitions from Palestine,” in *The Routledge Handbook of the History of the Middle East Mandates*, ed. Andrew Arsan and Cyrus Schayegh (Abingdon: Routledge, 2015), 106–22. For an exploration of how mandate and minority populations themselves reflected on—and helped shape—the theory of international legal personality, see Natasha Wheatley, “New Subjects in International Law and Order,” in *Internationalisms: A Twentieth-Century History*, ed. Patricia Clavin and Glenda Sluga (Cambridge: Cambridge University Press, 2017), 265–86.

13. Such an inquiry doubles as a case study of law’s capacity to construct its own “virtual facts”: like other sciences (social and otherwise), law treats a range of abstractions or categories *as if* they were facts, although they are only “*indirectly* connected to empirical phenomena.” Law’s “persons” are the classic example. Geoffrey Samuel, “Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences,” in *Epistemology and Methodology of Comparative Law*, ed. Mark van Hoecke (Oxford and Portland: Hart, 2004), 44 (emphasis in original). See also Annelise Riles, “Is the Law Hopeful?” *Cornell Law Faculty Working Papers*, Paper 68. [http://scholarship.law.cornell.edu/clshops\\_papers/68](http://scholarship.law.cornell.edu/clshops_papers/68) (accessed September 22, 2016).

14. See Ian Hacking, “Making Up People,” *London Review of Books* 28 (2006): 23–26.

15. See Clifford Geertz’s classic essay “Local Knowledge: Fact and Law in Comparative Perspective,” in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 167–234, quoted here at 232.

16. Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge, MA: Harvard University Press, 2013), 23. Ruskola employs “a thicker notion of law as a social technology that produces in part the world in which it exists and the subjects whom it disciplines,” 36.

persons.”<sup>17</sup> In analyzing “the sensibilities of humanness the law attempted to fashion,”<sup>18</sup> Samera Esmeir’s evocative study of colonial law in Egypt shares with the works of Teemu Ruskola and Colin Dayan a keen sensitivity to the conceptual proximity of legal personhood and nonpersonhood. In naming their subjects, legal regimes simultaneously generated various ways of being juridically incomplete and deficient: “extraneous persons”<sup>19</sup> came into being alongside their more properly endowed cousins. Drawing the insights of this body of work into the field of international law, I am less concerned with the theoretical viability of international legal personality as a concept today<sup>20</sup> than with metaphors of international subjectivity as illustrative of a certain imaginative or mythic subconscious of international legal thought.

In what follows, I treat three different episodes playing out along this frontier between personality and its negation in interwar international law. All three explore distinct kinds of candidature for international subjecthood: first, those whose presence in international law was explained on the basis of a projected, future statehood (especially mandate territories, but also insurgents); second, those deemed half-real or incapacitated, devoid of agency, and likened to slaves and ghosts (especially minorities, but also individuals); and third, those I call “vacated subjects,” which were analyzed as mere placeholders or objects rather than real subjects (mostly individuals, especially in their guise as petitioners). To begin, however, I explain how the issue of international personhood became a site of legal contestation in the first place. If debate about law’s capacity to invent “fictional” legal persons and make them “real” had long thrived within the frame of municipal law, it was

17. Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton: Princeton University Press, 2011), xii.

18. Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford: Stanford University Press, 2012), 3.

19. Dayan, *The Law is a White Dog*, xi.

20. See, for example, Nehal Bhuta, “The Role International Actors Other than States Can Play in the New World Order,” in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 61–75; Anthony Carty, “International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law,” *Melbourne Journal of International Law* 6 (2005): 534–52; Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010); and Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: T. M. C. Asser Press, 2004). For an important overview of and critical intervention in the theory of international personality, see Rose Parfitt, “Theorizing Recognition and International Personality,” in *The Oxford Handbook of International Legal Theory*, ed. Anne Orford and Florian Hoffman (Oxford: Oxford University Press, 2016), 583–99. For a useful compendium of classic statements on the subject, see Fleur E. Johns, ed., *International Legal Personality* (Farnham: Ashgate, 2010).

only the cataclysmic ruptures wrought by the First World War that turned personality into a pressing preoccupation for international law and order.

### Making Up People, Making New Orders: Metaphors Dead and Alive

How real are law's persons? The question has its own intellectual history. In early twentieth century *municipal* law, debate raged on the status of *persona ficta* between legal fact and legal fantasy. Directed against Savigny's view of the fictitiousness of corporate legal persons, Otto von Gierke's influential defense of their "reality" resonated well beyond the German-speaking realm thanks, in no small part, to Frederic Maitland, who introduced the German discussion to a broader audience.<sup>21</sup> As many scholars pointed out then and since, any simple dichotomy between truth and fiction miscast law's power to determine and create its own (albeit conceptual) "facts," that is, its own reality.<sup>22</sup> Precisely for this reason, in his classic 1908 study of juridical personality, the German jurist and eminent administrative lawyer Otto Mayer deemed the term "fictional" poorly chosen. True, positing the presence of a real person in its actual absence would be a fiction "because the legal order is not master over nature." "Yet it is master to determine what should count for it as a legal subject," he reasoned. "When it says: that [thing] should *be treated* as if it was one, then that has the same value as if it said: that *is* one. To this extent the juridical person is a *reality* for jurists: for others too, they just don't see them."<sup>23</sup> Law's persons commanded their own reality, even if they remained invisible to those uninitiated into law's ways.<sup>24</sup> Legal scholars reached

21. See, especially, Otto Gierke, *Das deutsche Genossenschaftsrecht*, 4 vols. (Berlin: Weidmannsche Buchhandlung, 1868–1913); Frederic William Maitland, "Translator's Introduction," in *Political Theories of the Middle Age*, ed. Otto Gierke, trans. Frederic William Maitland (Cambridge: Cambridge University Press, 1900), vii–xlv; Harold Laski, "The Personality of Associations," *Harvard Law Review* 28 (1916): 404–26.

22. See, for example, Lon Fuller on the "theory of the juristic truth of fictions": Lon L. Fuller, "Legal Fictions," *Illinois Law Review* 25 (1930): 378.

23. "Wohl aber ist sie Meisterin zu bestimmen, was vor ihr als Rechtssubjekt gelten soll. Wenn sie sagt: das soll *so behandelt werden*, als wäre es eines, so hat das den gleichen Wert, als wenn sie sagt: das *ist* eines. Insofern ist die juristische Person für den Juristen eine *Wirklichkeit*; für andere auch, sie sehen sie nur nicht." Otto Mayer, *Die juristische Person und ihre Verwertbarkeit im öffentlichen Recht* (Tübingen: Verlag von J. C. B. Mohr, 1908), 17.

24. Law's capacity to conjure new subjectivities as legal beings had few limits: this kind of "reality" could be ascribed to most anything in a given case, argued Alexander Nékám in an interwar study: "matter or spirit, existing or fancied, living or deceased. Any of these, if regarded as a unit requiring social protection, will become a subject of rights." Nékám, *The*

for alternate terms such as “artificial” to describe this genre of the real: the fact that law’s persons had been constructed or made—and remained products of law rather than nature—did not impinge on their subsequent “reality.”<sup>25</sup> As philosopher Miguel Tamen phrased it more recently, fictional legal persons—whether under the category of *nomina juris*, *universitas*, or corporations—“are fictional only in the sense of being formed and granted, that is, of having historical origin.”<sup>26</sup>

Until the interwar years, this sophisticated municipal jurisprudence on created legal persons had no correlate in international law. Scholarship on international personhood had been sheltered from comparable theoretical introspection thanks in part to its tight tethering to sovereignty. Long content with the seemingly axiomatic idea that only states could be persons in international law, jurists dwelt primarily on the markers of sovereign statehood and its consecration through recognition, the possibility of divided or suspended sovereignty (for

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*Personality Conception of the Legal Entity*, 34. As the American lawyer Arthur J. Machen likewise wrote: “even a purely imaginary being may have legal rights. For example, our law recognizes and enforces trusts for the benefit of unborn children. So, a heathen code might recognize a right of Jupiter or Apollo to enjoy the sweet savour of a hecatomb or a burnt offering, and might enforce this right by judicial proceedings instituted in the name or on behalf of the divinities in question; and yet those deities, although ‘subjects of rights,’ would not be real persons.” Arthur W. Machen, Jr., “Corporate Personality,” *Harvard Law Review* 24 (1911): 263.

25. “A corporation cannot possibly be both an artificial person and an imaginary or fictitious person,” reasoned Machen in 1911: “That which is artificial is real, and not imaginary: an artificial lake is not an imaginary lake, nor is an artificial waterfall a fictitious waterfall. So a corporation cannot be at the same time ‘created by the state’ and fictitious.” He continued: “If a corporation is ‘created,’ it is real, and therefore cannot be a purely fictitious body having no existence except in the legal imagination. Moreover, a corporation cannot possibly be imaginary or fictitious and also composed of natural persons. Neither in mathematics nor in philosophy nor in law can the sum of several actual, rational quantities produce an imaginary quantity.” Machen, “Corporate Personality,” 257. Note also Morris R. Cohen, “Communal Ghosts and Other Perils in Social Philosophy,” *Journal of Philosophy, Psychology and Scientific Methods* 16 (1919): 673–90; and John Dewey, “The Historical Background of Corporate Legal Personality,” *Yale Law Journal* 35 (1926): 655–73.

26. Miguel Tamen, “Kinds of Persons, Kinds of Rights, Kinds of Bodies,” *Cardozo Studies in Law and Literature* 10 (1998): 15. For a recent use of “virtual” as the favored description, see Annemarieke Vermeer-Kunzli, “As If: The Legal Fiction in Diplomatic Protection,” *European Journal of International Law* 18 (2007): 43: “Yet, the fictive element in ‘legal personality’ is not so much that it is an express twist of reality or an assimilation of one thing to something it is not, but rather its non-tangible nature. ‘Legal personality’ is virtual rather than fictitious.” For a highly stimulating recent account of law’s particular use of fictions, see Riles, “Is the Law Hopeful?”: “The truth value of the legal fiction is not simply ambiguous or subjunctive; it is actually quite irrelevant.”



example in protectorates), and, centrally, its close correlation with the circle of “civilized” states.<sup>27</sup>

This constellation shifted dramatically after the First World War, as a raft of new problems in international law and order drove the development of a vibrant jurisprudence on international personality. While the distinction between “civilized” and “uncivilized” states slowly began to lose its self-evidence and plausibility, raising the prospect of a more diverse cast of recognized sovereign communities,<sup>28</sup> the crisis in the Eurasian order of states introduced the specter of international persons that were not states at all.<sup>29</sup> The collapse of the Habsburg, Hohenzollern, Ottoman,

27. If those beyond the pale of civilization self-evidently lacked international personhood, nineteenth century international law massaged the rules of admission as instrumentally and unsystematically as one might expect. As Antony Anghie has shown, African chiefs, for example, were both excluded non-sovereigns and capable of signing treaties with European states that renounced their patrimony: “outside the scope of the law and yet within it,” they had just enough personality to give away their rights. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 76–77, 81. For old and new work on the boundaries of the community of international law, see Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon, 1967); Jennifer Pitts, “Empire and Legal Universalisms in the Eighteenth century,” *American Historical Review* 117 (2012): 92–121; Umut Özsu, “The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory,” in *The Oxford Handbook of International Legal Theory*, 123–37; Andrew Fitzmaurice, “The Equality of Non-European States in International Law,” in *International Law in the Long Nineteenth Century*, ed. Randall Lesaffer and Inge van Hulle (Leiden: Brill, 2018), forthcoming.

28. See Arnulf Becker Lorca’s tracking of Lassa Oppenheim’s changing position on this standard of civilization in the different editions of his classic work *International Law: A Treatise* between 1905 and 1948: Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge: Cambridge University Press, 2014), 35–36, and the graph at 362. See, more generally, Gerrit W. Gong, *The Standard of “Civilization” in International Society* (Oxford: Clarendon Press, 1984); and Anghie, *Imperialism, Sovereignty and the Making of International Law*. As Rose Parfitt shows in a wonderful article on Ethiopia, many of those states newly admitted into the domain of international law possessed only “hybrid” legal personality; “both sovereign and less-than-sovereign at the same time”: Rose Parfitt, “*Empire des Nègres Blancs*: The Hybridity of International Personality and the Abyssinia Crisis of 1935–1936,” *Leiden Journal of International Law* 24 (2011): 849–72.

29. There are many examples of non-states—especially imperial trading companies—that had enjoyed some kind of international legal standing in previous eras. However, these instances largely failed to produce scholarly reflection on international personality; a substantial jurisprudence on the question emerged only in the interwar years. As Hedley Bull wrote in 1979, what had been widely asserted “about European international relations from the time of Vattel in the mid-eighteenth century until the end of the First World War was the *legal fiction* of a political universe that consisted of states alone, the doctrine that only states had rights and duties in international law.” But the assertion of this doctrine, he cautioned, should not be mistaken for an adequate account of the “actual course of

and Romanov empires dissolved the sovereign landscape that had structured the region for centuries. Sovereign casings cracked open, the contents of these empires—colonies, nations, populations mixed and unmixed—spilled over into the international domain, and jurists as well as peacemakers were forced to reckon with the fallout. Minority—nation-state—world: heterogeneous populations needed to be sorted and categorized; that is, made legally legible. The unremitting difficulty of that sorting—the gap between a chaotic reality and the clean distinctions of legal theory—exerted enormous pressure on legal categories themselves. Like conceptual remainders, a series of non-state subjects pressed against the outer parameters of international personhood: some were the unwilling consequences of wartime dislocation (refugees, the stateless); others were the byproducts of creative efforts to becalm and secure the new European order (treaty-protected minorities). Still others, such as the territories to be governed by international mandate, came into being because the Allied victors could stomach neither the genuine independence of Central Powers' colonial possessions nor their return to their former rulers, whereas public opinion could not stomach their unabashed annexation. Therefore, the territories dangled awkwardly in international law, attached to their new Allied masters but not subsumed into the latter's legal personhood. The complexity of this postwar sorting process was such that even new categories like "mandate" needed to be broken down into subcategories, with "A mandates" in the Middle East topping a sliding scale of relative autonomy that stretched through "B mandates" in Africa to (annexation-lite) "C mandates" in the Pacific Ocean.<sup>30</sup> Had these various genres of legal surplus, sprouting above, below, and between sovereign states, and crowding into the peripheral vision of international law, acquired international standing?

The hesitating, eccentric answers to this question, which lie at the heart of this article, are symptomatic of the volatility and plasticity of the new order and law's place within it. The inventiveness of the Versailles

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international political events," which had always involved actors other than states. Hedley Bull, "The State's Positive Role in World Affairs," *Daedalus* 108 (1979): 112. Of the new literature on the trading companies, see, especially, Philip J. Stern, *The Company State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (New York: Oxford University Press, 2011); and Adam Clulow, *The Company and the Shogun: The Dutch Encounter with Tokugawa Japan* (New York: Columbia University Press, 2014).

30. On the mandates system and its effect on the colonial order, see Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (New York: Oxford University Press, 2015).

Settlement appeared to many as “the inauguration of an era of bold legal experimentation.”<sup>31</sup> University professors wrote new constitutions and rewrote world order: “In that heady first post-war decade the jurist was king.”<sup>32</sup> Not for nothing have scholars such as Nathaniel Berman and Paul K. Saint-Amour connected interwar jurisprudence to the simultaneous rise of modernism in other cultural domains. Legal thinking, too, was marked by an anticipatory and restless creativity that embraced contradictions and the era’s challenges with what Berman called “a mixture of desire and terror.”<sup>33</sup> A new cognizance of law’s powers of creation seeped into formal reflection on international personality. “As the municipal law of civilized countries has advanced to the recognition of collective personalities, the creation of law not of nature,” reasoned prominent American legal scholar Quincy Wright in 1930, “so international law is advancing to the recognition of collective personalities, the creation of international law not of municipal law, capable of entering into most of the transactions of states.”<sup>34</sup> Rather than accepting the products of municipal law (i.e., states) as its pre-given and natural units, international law could fashion its own persons; that is, it could invent its own natural world. Here was international law explicitly theorizing its own capacity for genesis.

How did interwar international law birth these new personalities? Interwar jurists lacked a ready-made language for such genesis. Strikingly, many experimented with a series of colorful metaphors as a result. Groping for legal landmarks in unexplored terrain, they turned to metaphors and analogies as a means of conceptualizing the appearance of unfamiliar international persons. Like shepherds or conductors, such images ferried these new persons into the domain of international law.<sup>35</sup> Scholarly accounts of metaphor have highlighted its utility in precisely “those cases where there can be no

31. Nathaniel Berman, “Modernism, Nationalism, and the Rhetoric of Reconstruction,” *Yale Journal of Law and the Humanities* 4 (1992): 366.

32. Mark Mazower, *Dark Continent: Europe’s Twentieth Century* (London: Penguin, 1998), 5.

33. Nathaniel Berman, “‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law,” *Harvard Law Review* 106 (1993): 1805; and Paul K. Saint-Amour, *Tense Future: Modernism, Total War, Encyclopaedic Form* (New York: Oxford University Press, 2015).

34. Quincy Wright, *Mandates Under the League of Nations* (Chicago: University of Chicago Press, 1930), 303.

35. Metaphor’s etymological root—in notions of bringing across or transferring—is thus palpable in these usages: jurists used metaphor to transfer the meaning of personality onto new kinds of subjects, and, at the same time, to forge paths of passage that shipped would-be persons into international law.

question as yet of the precision of scientific statements.”<sup>36</sup> Metaphors can function as a mental tunnel between the known and the unknown: the sort of “calculated category mistake”<sup>37</sup> or *catachresis* that introduces “theoretical terminology where none previously existed.”<sup>38</sup> One can see the string of metaphors running through interwar jurisprudence as linguistic artefacts of the production of new legal knowledge: markers of the anthropological extension and reinvention of international law.<sup>39</sup> They proliferated as symptoms of a

36. Max Black, *Models and Metaphors: Studies in Language and Philosophy* (Ithaca and London: Cornell University Press, 1962), 37.

37. Nelson Goodman, *Languages of Art: An Approach to a Theory of Symbols* (Indianapolis: Hackett Publishing, 1968), 73.

38. Richard Boyd, ‘Metaphor and Theory Change: What is “Metaphor” a Metaphor for?’ in *Metaphor and Thought*, 2nd ed., ed. Andrew Ortony (Cambridge: Cambridge University Press, 1993), 482. See also Keith Holyoak and Paul Thagard’s argument that analogy “requires taking a kind of mental leap. Like a spark that jumps across a gap, an idea from the source analog is carried over to the target.” Keith Holyoak and Paul Thagard, *Mental Leaps: Analogy in Creative Thought* (Cambridge, MA: The MIT Press, 1995), 7. Jean-Jacques Rousseau articulated something similar in his “Essay on the Origin of Languages” where he argued that languages are “vital and figurative” before they are “systematic and rational”: “That is how the figurative word is born before the literal word, when our gaze is held in passionate fascination.” Jean-Jacques Rousseau, “Essay on the Origin of Languages,” in *On the Origin of Language: Two Essays*, ed. Jean-Jacques Rousseau and Johann Gottfried Herder, trans. John H. Moran and Alexander Gode (Chicago: University of Chicago Press, 1966), 11, 13. It is small wonder that recent studies have stressed not only the cognitive function of metaphor but also its epistemic force. Understood as a “conceptualization process,” metaphors make knowledge as well as meaning. In a now classic essay, the philosopher Max Black analyzed metaphor as a lens or filter that “selects, emphasizes, suppresses, and organizes features of the principle subject” (Black, *Models and Metaphors*, 44–46). By requiring the use of a “system of implications,” metaphors invite readers or listeners into a particular way of imagining a problem, thereby “creating or calling forth the similarities upon which its function depends”: Thomas S. Kuhn, ‘Metaphor in Science,’ in *Metaphor and Thought*, 2nd ed., ed. Andrew Ortony (Cambridge: Cambridge University Press, 1993), 533. On metaphor’s epistemic force, see also: Theodore L. Brown, *Making Truth: Metaphor in Science* (Urbana and Chicago: University of Illinois Press, 2003), 29, 32; and generally, George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago and London: University of Chicago Press, 1980); Brian F. Bowdle and Dedre Gentner, “The Career of Metaphor,” *Psychological Review* 112 (2005): 193–216; and Dedre Gentner, Keith J. Holyoak, and Boicho N. Kokinov, eds., *The Analogical Mind: Perspectives from Cognitive Science* (Cambridge, MA: MIT Press, 2001). For a recent survey of philosophical approaches, see Elisabeth Camp and Marga Reimer, “Metaphor,” in *The Oxford Handbook of Philosophy of Language*, ed. Ernest Lepore and Barry C. Smith (Oxford: Oxford University Press 2006), 845–63.

39. In this sense we can liken metaphors to legal fictions more broadly, which have often played a role in the development of new legal doctrines. As Lon Fuller wrote in a classic series of articles, “fictions are, to a certain extent, simply the growing pains of the language of the law.” Lon L. Fuller, “Legal Fictions,” *Illinois Law Review* 25 (1930–31): 379. He characterized “exploratory fictions” as “constructions ‘feeling the way’ towards some

conceptual impasse (in the failure of old theory to capture new realities) and a means of solving it, distending and elongating the original category of international personality to make space for new sorts of subjects.

The metaphors themselves were telling. The analogies chosen—including human embryos, slaves, and silhouetted specters—filtered the newcomers through the prism of more familiar genres of incomplete or deficient personhood: international law’s new persons were linguistically birthed into damaged and disenfranchised bodies that signposted their secondary status. The implied opposite of these images—the normal, enfranchised, seemingly unmetaphorical legal person against which these deficiencies were visible—was the state. If law is saturated in metaphors, and they simply grow invisible as law becomes settled, then the state formed (and forms) the archetypal dead metaphor. “Truths are illusions which we have forgotten are illusions,” in Friedrich Nietzsche’s phrasing; “they are metaphors that have become worn out and have been drained of sensuous force”<sup>40</sup>—or, in an alternate translation, become powerless to affect the senses. In the interwar scholarship on non-state international persons, by contrast, the law was unsettled, the metaphors live, and the senses still activated, sensitive to metaphor’s artifice and the contrivance of personality. These figures of personhood were never metabolized into literalness: vital, visible metaphors distinguished the standing of the new persons from the self-evidence of the state.

To be sure, that self-evidence was under pressure in the 1920s and 30s, materially and conceptually. New claimants (such as minorities) pressed the state from below as new international impositions pressed from above, while mass democracy and authoritarianism vied for prominence in a multisided crisis of legitimacy. In a period in which “the memory of one world war was already joined to the spectre of a second, future one, framing the period in real time as an *interwar* era,” theories of sovereignty and statehood, too, bore “the watermark of that time’s geopolitical suspense.”<sup>41</sup> Many blamed the deification of state sovereignty for the carnage

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principle,” akin to “scaffolding.” Fuller, “Legal Fictions,” 527–29. In Maksymilian del Mar’s phrasing, fictions capture the law in a “plasticine” moment at the “coalface of legal change.” Maksymilian del Mar, “Legal Fictions and Legal Change,” *International Journal of Law in Context* 9 (2013): 444. (Note also del Mar’s suggestion that there are also analytical reasons to keep metaphors and fictions separate, at 451). For a parallel exposition, see Benjamin L. Berger, “Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text,” *Court Review: The Journal of the American Judges Association* 39 (2002): 30–38; and Riles, “Is the Law Hopeful?”

40. Friedrich Nietzsche, “On Truth and Lies in a Nonmoral Sense,” in *Philosophy and Truth: Selections from Nietzsche’s Notebooks of the early 1870’s*, trans. and ed. Daniel Breazeale (Atlantic Highlands, New Jersey: Humanities Press, 1979), 84.

41. Saint-Amour, *Tense Future*, 8, 314.

of the war; a cohort of reformist jurists sought the salvation of their discipline in a new international law that took the individual, and not the state, as its true and inviolable subject.<sup>42</sup> Scholars such as Politis, for example, sought to reveal, critique, and ultimately discard the mystical “theological remainders” of state sovereignty.<sup>43</sup> Such efforts attempted to undeaden the metaphor of the state, to unsettle it, to drag it back into the land of the living, and to expose its artificiality and the fallacy of personified collective will. “Now the personality of States is a pure fiction, which has ceased to be useful,” Politis argued in 1926, trying to reawaken the reader’s senses to law’s reverie. “Reality shows that what we call the will of the State is the will of the men who govern it. The personality of the State is only a metaphor to make people understand that the acts of Governments are distinct from their private acts. But the metaphor itself is useless.”<sup>44</sup>

If the metaphor of the state proved more durable, and more dead, than Politis would have liked, his injunctions, like the countless examples that follow, are indicative of the interwar struggle over what was (and should be) “real” in international law; that is, who formed part of international law’s reality. Old pieties and old metaphors were coming unstuck as new ones proliferated. Struggles over the law of personhood document more than an international order in transition: they show law experimenting

42. Georges Scelle, James Leslie Brierly, Nicholas Politis, and others emphasized that the state itself was a fiction or abstraction, and in so doing looked to establish the individual as the only *real* subject of law. For a thorough overview of this tradition, see Nijman, *The Concept of International Legal Personality*, 126–243. See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001), 305–9; Bhuta, “The Role International Actors Other than States,” 64–65. One can connect this tradition to simultaneous debates in a nascent international criminal law regarding the international liability of individuals; see Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (New York: Oxford University Press, 2014). Against the revisionism of jurists such as Scelle and Politis, those defending the traditional view of international personality looked to defend the inimitable “reality” of the state. See, for example, the 1928 edition of Lassa Oppenheim’s classic text: “In contradistinction to sovereign States which are real, there are also apparent, but not real, International Persons—such as Confederations of States, insurgents recognised as a belligerent Power in a civil war, and the Holy See. All these are not, as will be seen, real subjects of International Law, but in some points are treated as though they were International Persons, without thereby becoming members of the Family of Nations.” He maintained that international personality could not be attributed to chartered companies, monarchs, churches, diplomatic envoys, private individuals, “nor to organized wandering tribes.” Lassa Oppenheim, ed. Arnold McNair, *International Law: A Treatise*, 4th ed., vol. 1 (London: Longman’s, Green and Co., 1928), 134.

43. For a recent account of these remainders, see Wendy Brown, *Walled States, Waning Sovereignty* (Brooklyn: Zone Books, 2010).

44. Politis, *The New Aspects of International Law*, 13–14.

with different techniques for remaking its world. Figuring out how non-state subjects might coexist with international law's indigenous population of states, for example, prompted some jurists to order or arrange these different legal persons in time: mandates, minorities, or insurgents might be granted forms of promissory personhood on the basis of a projected, normative-futuristic relationship to statehood; individuals, conversely, could be deemed ill-equipped to interact with states in law because of their comparatively brief, biologically bound duration. In elaborating temporally graded typologies of personhood that located new persons along a spectrum of legal being and nonbeing relative to the state, theories of international legal personality constructed on a symbolic level what could be called a mythological lifecycle of international law.

### **The Unborn: Life Cycles and Time Scales of International Law**

Among those present at that same 1926 meeting of the German Society of International was Max Fleischmann, a German law professor in Königsberg, then Halle, and an expert on international law. In the long discussion following Ebers' paper, Fleischmann felt that his colleagues flitted too loosely among different sorts of examples of possible international persons. He argued that one could not place "state fragments" (*Staatsfragmente*) "on the same level as individual personalities": "That such state fragments have acquired a kind of legal subjectivity, like insurgents or colonial societies and now minorities or even the League of Nations, originates in the same developmental tendency that welcomed states only gradually to international law subjectivity."<sup>45</sup>

This gradual path into full subjectivity (striking enough on its own, given more standard accounts of the doctrine of recognition and the creation of states as a "factual" matter outside the workings of law) placed certain kinds of non-state collectives in a continuum with states. They could gain a foothold in this evolutionary chart of legal personality as long as they convincingly mimicked a state. Whereas international law had hitherto recognized only states with their territorial foundations, it now also concerned other "communities of persons that are fastened together on a

45. "Daß solcherlei Staatsfragmente eine Art Rechtssubjektivität erlangt haben, wie Aufständische oder Kolonialgesellschaften und jetzt die Minderheiten oder aber der Völkerbund, entspringt nur dem gleichen Entwicklungsgange, der auch die Staaten erst allmählich zur Völkerrechtssubjektivität zugelassen hat." Max Fleischmann at the Siebente Jaherversammlung of the Deutschen Gesellschaft für Völkerrecht, in the discussion on May 27, 1926, following Godehard J. Ebers, "Sind im Völkerrecht allein die Staaten parteifähig?" 35.

different basis”: “The general principle that holds these communities together suffuses them with a state-like spirit [*staatsähnlichen Geiste*] and necessarily leads to their state-like treatment in international law: they approach international law subjectivity.”<sup>46</sup> The degree of their subjectivity reflected their proximity to statehood: this line of argumentation led to the metaphorical characterization of such state-like communities as embryos, children born and unborn, caricatures, and virtual entities, as will be discussed.

Fleischmann felt that this mode of approximating a state needed to be clearly distinguished from the status of individual persons whose legal situation may be regulated by international law. It was telling, he observed, that for a century it was virtually only claims for damages that had ushered individuals into international law in this way. “Here merely isolated and individualized rights are granted. One cannot infer a legal subjectivity out of these procedures.” Such sporadic cases were mere products of the necessity of some sort of reduced, passive procedural capacity, like that attached to associations when they were not *rechtsfähig* under German procedural law. “But this is not a normal line of development towards legal subjectivity, but rather an exception.”<sup>47</sup> Fleischmann thereby sketched normal and abnormal paths of legal subjectivity. The first led toward the state, and had its foundations in the normativity of the state, whereas the other represented a stopgap concession: if individuals acquired some kind of international standing, it was neither universalizable nor normative, but simply a pragmatic clutch, a disposable legal mask.

The temporal imagination involved in Fleischmann’s construction melded the demography of international law into a philosophy of history. It placed potential collective subjects (whether minorities, insurgents, or colonial societies) on a timeline, or a time-linear scale relative to statehood. It took the state not only as the goal, but also as the proper beginning of true international subjectivity. Present facts needed to be interpreted as the seeds and germs of future forms: varieties of subjectivity could be granted on the basis of what the unit would *one day* become.

This quality of projection, or pre-figuration, in the identification of international subjects received many different articulations in interwar jurisprudence. Ebers had spoken in terms of *anticipation*. In past eras, colonial trading companies and international commissions, he recounted, were

46. “Der große Gedanke, der diese Gemeinschaften zusammenhält, erfüllt sie mit staatsähnlichen Geiste und führt notwendig zu ihrer staatsähnlichen Behandlung im Völkerrechte: sie kommen der Völkerrechtssubjektivität nahe.” Ibid.

47. “Das ist aber nicht eine normale Entwicklungslinie zur Rechtssubjektivität, sondern eine Ausnahme.” Ibid.



usually understood as fulfilling functions delegated by the “mother country,” and were thus legally subsumed within the latter. However, one could hardly assimilate the English or the Dutch East India trading companies, or the International Association of the Congo (*Kongogesellschaft*), as they had appeared in previous centuries, into such categories, he argued. Because these bodies were not dependent on a state, and concluded treaties that must be considered treaties under international law, they needed to be “presupposed” (*voraussetzen*) as subjects of international law: “The dominant theory must, to do them justice, reach towards daring constructions: here it concerned an *anticipation of the character of a state*; because the International Association of the Congo fulfilled the requirements of a state, it could thus also be treated like a state.”<sup>48</sup> If Ebers spoke retrospectively of the trading companies of the past, the normative implications of his characterization were clear. The jurisprudence of international legal personality needed to be daring in its prophetic identification of future legal forms, squinting at the present to detect the future latent within it. At the same time, future states needed to comport themselves as their grown-up selves, adopting the habitus of a state, like a game of legal dress-up.

Assertions of latent, anticipated, and projected personality featured particularly prominently in legal analyses of the mandate system. The sovereign status of the mandate territories had engendered endless juridical controversy: was the mandatory power, the mandated population, or the League sovereign in the territories infamously held under a “sacred trust of civilization”?<sup>49</sup> One way of combining these different attributions involved arranging them alongside each other in time. A number of jurists developed theories of the “virtual sovereignty” (*souveraineté virtuelle*) of mandated territories, which framed sovereignty as “actually” vested in the population, with the mandatory power granted the right only to *exercise*

48. “Die herrschende Lehre muß, um dem gerecht zu werden, zu gewagten Konstruktionen greifen: es habe sich hier um eine Antizipation der staatlichen Eigenschaft gehandelt; weil die Kongogesellschaft die Voraussetzungen eines Staates erfüllt habe, so hätte sie auch wie ein Staat behandelt werden können.” Ebers, “Sind im Völkerrecht allein die Staaten parteifähig?,” 12. Emphasis added.

49. On this debate, see, for example, Quincy Wright, “Sovereignty of the Mandates,” *American Journal of International Law* 17 (1923): 691–703; James C. Hales, “Some Legal Aspects of the Mandate System,” *Transactions of the Grotius Society* 23 (1937): 85–126; E. L. Matthews, “International Status of Mandatory of League of Nations,” *Journal of Comparative Legislation and International Law* 6 (1924): 245–51. For a landmark assessment of the mandates system in the history of sovereignty, see Pedersen, *The Guardians*. For an attempt to think about damaged mandate sovereignty as a political and argumentative practice, see Wheatley, “Mandatory Interpretation.”

that sovereignty until the population was able to exercise it themselves.<sup>50</sup> Albert Millot, for example, wrote of the “virtual sovereignty” of the “B” and “C” mandates in Africa and the Pacific,<sup>51</sup> while Jacob Stoyanovsky argued that “it is the peoples submitted to the régime of the mandate which are their own virtual sovereigns according to the spirit of article 22 of the pact.”<sup>52</sup>

Like the denotation “virtual,” the idea of “suspended” sovereignty interpreted the not-quite-there personality of the mandates as a temporal irregularity pending chronologic realignment. “I suggest that the sovereignty of a Mandated area is in suspense pending the creation of a new State,” wrote D. Campbell Lee in 1921.<sup>53</sup> The German jurist and pacifist Hans Wehberg scoffed at such characterizations. “It must be said that a sovereignty that is not at all existing cannot be regarded as suspended.”<sup>54</sup> There was no evidence that sovereignty had ever been vested in the mandate territories, and that which never existed could hardly be suspended. In a 1923 article on the international standing of mandated territories, Malcolm M. Lewis concluded as much in writing ruefully that “theirs is a case of international personality reduced to vanishing point.” This always-already vanished or receded sovereignty made the mandated territories “truly caricatures of

50. Paul Pic, who used the terminology “virtual,” explained such a distinction by way of analogy: neither a family council nor a tutor had private rights in the property of a pupil whom they controlled. Paul Pic, “Le régime du mandat d’après le traité de Versailles; son application dans le Proche Orient,” *Revue générale de Droit International Public* 30 (1923): 321–71.

51. Albert Millot, *Les Mandats internationaux: Étude sur l’application de l’article 22 du Pacte de la Société des Nations* (Paris: Émile Larose, 1924), 117–18 and passim.

52. Jacob Stoyanovsky, *La Théorie générale des mandats internationaux* (Paris: Presses Universitaires de France, 1925), 82–83.

53. D. Campbell Lee, *The Mandate for Mesopotamia and the Principle of Trusteeship in English Law* (London: St. Clements Press, 1921), 19.

54. Hans Wehberg, “Die Pflichten der Mandatarmächte betreffend die deutschen Schutzgebietenanleihen,” *Weltwirtschaftliches Archiv* 25 (1927): 156. Wehberg’s reasoning is interesting: he compares the mandates to the suspended sovereignty over the Saar. “Den Widerspruch dieser Theorie von der Souveränität der Mandatländer mit den tatsächlich bestehenden Verhältnissen suchen einige Autoren dadurch aus der Welt zu schaffen, daß sie zwar grundsätzlich dem Mandatlande die Souveränität zusprechen, diese Souveränität aber als zur Zeit ruhend betrachten. Es ist zuzugeben, daß die Ausübung der Souveränität sehr wohl örtlich wie zeitlich suspendiert werden kann, wie das z. B. gemäß Art. 49 V. V. hinsichtlich der deutschen Souveränität über das Saargebiet zutrifft. Aber im vorliegenden Falle muß gesagt werden, daß eine Souveränität, die gar nicht vorhanden ist, auch nicht als suspendiert betrachtet werden kann. Die Behauptung von dem Ruhen der Souveränität setzt den Nachweis voraus, daß die Souveränität den Mandatländern zukommt. Da dies, wie oben dargetan, nicht der Fall ist, kann auch von einem Ruhen der Souveränität nicht die Rede sein.”

independent States!”<sup>55</sup> Easy to mock and hard to take seriously, mandate territories were the cartoons of the international legal order. As such, any attempt to assign them international personality pushed the latter concept to the outer edge of its utility and integrity: “The foregoing analysis of the international status of the three types of mandated territory reveals the fact that it is only by stretching the conception of international personality almost to breaking-point that they can be described as international persons at all.”<sup>56</sup> Lewis’s solution was neat if portentous: “Mandated territories are in fact international persons *in posse* rather than *in esse*.”<sup>57</sup> They exhibited a potential to exist, the possibility of existence, but lacked it in actuality.

What did it mean for international law to recognize a class of *possible* persons, to mark out the space where a new subject *might* one day appear? More creative minds immersed themselves with the problem of this futuristic demography. Some jurists looked to make that future tense, that glint of possibility, legally meaningful. The German philosopher and jurist Ernst Marcus experimented with one possible metaphor in 1929. He argued that the “provisional independence” ascribed to “A” mandates by the League’s covenant referred more to their relative independence from the mandatory power rather than to independence in general: “the development towards an independent state entity [*Staatswesen*] should be particularly emphasized at a moment in which they find themselves still in an embryonic condition [*Embryonalzustand*], so that the sovereignty ascribed to them as such cannot be exercised.”<sup>58</sup> In Marcus’ image, the new international regime—a giant sovereignty laboratory—had conceived a crop of embryo states.

The image was productive because it drew on a familiar precedent for how one might accord legal personality on the basis of a projected teleological development. Rudolf Pahl took up the metaphor more seriously in his 1929 book *Das völkerrechtliche Kolonial-Mandat*. The difficulty with the governing theories of sovereignty, he mused, was that they held

55. Malcolm M. Lewis, “Mandated Territories: Their International Status,” *Law Quarterly Review* 39 (1923): 464.

56. *Ibid.*, 472.

57. *Ibid.*

58. “Die Entwicklung zu selbständigen Staatswesen soll in einem Zeitpunkt besonders betont werden, in dem sie sich noch im Embryonalzustand befinden, also die ihnen an sich zustehende Souveränität nicht ausüben können.” Ernst Marcus, *Palästina – ein werdender Staat: Völker- und staatsrechtliche Untersuchung über die rechtliche Gestaltung des Mandatslandes Palästina unter besonderer Berücksichtigung des Rechtes der nationalen Heimstätte für das jüdische Volk* (Leipzig: Universitätsverlag von Robert Noske, 1929), 31. Samuel D. Myres analyzed Mandate Palestine in similar terms: “Though not a state in the full sense of the word, it is in the process of becoming such.” S. D. Myres, Jr., “Constitutional Aspects of the Mandate for Palestine,” *Annals of the American Academy of Political and Social Science* 164 (1932): 3.

that only states could be its bearers (*Träger*). This construction may work for the “A” mandates, but it presented far greater theoretical difficulties when applied to the “B” and “C” mandates. Undeterred, Pahl generated his own creative solution. He began with first principles: “Certainly, every right needs a bearer.” And if, in accordance with the dominant theory, sovereignty was viewed as a right (as the “embodiment of the *Hoheitsfunktionen* of a fully developed” state), then sovereignty, too, required a protagonist:

The bearer of a right or an embodiment of rights is generally a physical or juridical person. According to the dominant theory, only states are recognized as bearers of rights in international law. Yet in other legal disciplines the notion is not unknown that also a person who does not yet even exist can already be the bearer of rights. Thus civil law, for example, has the institution, touching upon a juridical fiction, of the “nasciturus,” that is, a physical person who has been conceived but not yet born is already recognized by the legal order as a bearer. That the “nasciturus” naturally cannot dispose over the rights to which it is entitled has nothing to do with the question of whether it can be viewed as the bearer of rights. One must then distinguish between the capacity to be a bearer of rights, and the capacity to exercise those rights. What prevents us from transferring the fictive construction of the nasciturus over to international law, and viewing the mandate territories, which admittedly are not-yet fully-developed subjects of international law, as bearers of sovereignty?<sup>59</sup>

In this formulation, “backward” populations in the mandated territories could possess sovereignty as a fetus possessed rights prior to birth: in both cases, rights announced or prefigured the pending arrival of the

59. “Gewiß bedarf jedes Recht ein Trägers. Wenn wir also die Souveränität im Sinne der herrschenden Lehre als ein Recht, nämlich als den Inbegriff der einem vollentwickelten Staatswesen immanenten Hoheitsfunktionen betrachten, dann bedarf auch die Souveränität eines Trägers. Träger eines Rechtes oder eines Inbegriffes von Rechten ist in der Regel eine physische oder juristische Person. Als Träger von Rechten werden im Völkerrecht nach der herrschenden Lehre nur Staaten anerkannt. Nun ist aber anderen Rechtsdisziplinen die Vorstellung nicht unbekannt, daß auch eine noch gar nicht entstandene Person bereits Träger von Rechten sein kann. So kennt z. B. das Zivilrecht die auf einer juristischen Fiktion beruhende Institution des ‘nasciturus,’ d. h. eine physische Person, die zwar erzeugt, aber noch nicht geboren ist, wird von der Rechtsordnung bereits als Träger anerkannt. Daß der ‘nasciturus’ naturgemäß über die ihm zustehenden Rechte nicht verfügen kann, hat mit der Frage, ob er als Träger der Rechte angesehen werden kann, nichts zu tun. Man hat demnach zu scheiden zwischen der Fähigkeit, Träger eines Rechtes zu sein, und der Fähigkeit, das Recht ausüben zu können. Was hindert uns, die fictive Konstruktion des nasciturus auch auf das Völkerrecht zu übertragen und die Mandatsgebiete, die ja noch nicht voll entstehende Subjekte des Völkerrechts sind, als Träger der Souveränität anzusehen?” Rudolf Pahl, *Das völkerrechtliche Kolonial-Mandat* (Berlin: Otto Stollberg Verlag, 1929), 51–52.

legal subject to wield them. On Pahl's reckoning, international law need not ignore those still submerged in the womb of world history.

Were mandate territories subjects of international law? "Like civil law, international law knows different *grades* of legal subjectivity," Pahl argued.<sup>60</sup> There was a spectrum, a gray zone, a cast of characters that had one foot within the domain of international law, and one beyond it. Some subjects possessed the capacity for all international law functions, whereas others lacked that for proper *Handlung*, amounting to "restricted international law participation." The latter category included the "A" mandates. Beneath even this diminished personality lay the "B" and "C" mandates as "virtual bearers of rights." One can, therefore, term them "international law nascituri" (*völkerrechtliche nascituri*), Pahl explained; that is, "as communities that find themselves still in the development towards [being a] subject of international law."<sup>61</sup> The futuristic personality of unborn states gave international law a pre-history, or even a spiritual life: it extended the imaginary of international law into the murky but miraculous zone of genesis prior to the "real life" of the state.

This promissory legal personality relied, as has been mentioned, on the projection of things to come, upon the presumption of a certain, state-shaped path into the future. Correspondingly, the absence of this future tense could be fatal to the prospects of other would-be subjects, especially insurgents and individuals. The Viennese law professor Alfred Verdross, for example, divided the legal communities that fell directly under international law (*völkerrechtsunmittelbare Rechtsgemeinschaften*) into those that were "permanent" and those that were not (*ständig/nicht ständig*). They were permanent "if the validity of their order is unlimited." States, as well as the Holy See, fell into this category. By contrast, legal communities should be characterized as impermanent "if their order itself is administered not as a permanent but rather as a temporary [*vorübergehende*] order." His key example for the latter were insurgents recognized by belligerent parties, because "they either transform into states or sink again into the mother state."<sup>62</sup> The legal status of insurgents worked like little doors in the world order that opened toward full independent standing, before sealing over again if the opportunity was not seized. Their personality was contingent: either they became states or they shrank

60. "das Völkerrecht kennt, wie das Zivilrecht, verschiedene Grade der Rechtssubjektivität." *Ibid.*, 147. Emphasis added.

61. "als Gemeinwesen, die sich noch in dr Entwicklung zum Subjekt des Völkerrechts befinden." *Ibid.*, 148.

62. "da sie ihrer Anlagen auch dazu betstimmt sind, sich entweder in Staaten zu verwandeln oder wiederum im Mutterstaate unterzugehen." Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, 115.

back into juridical anonymity. Only the state could command an order unfettered by temporal frontiers, an order whose norms stretched onwards into an open-ended history.

The assumption that the real subjects of international law were unending ones also told against the international standing of individuals. In his 1930 textbook of international law, Alexander Hold-Ferneck, another Viennese law professor, mocked the idea that individuals could be the subjects of international law for precisely this reason: “Individual people, Mr. Y, Mrs. Y, Miss Z, should be positioned as ‘subjects of international law’ next to states and the Catholic Church, for the reason, only for the reason, that they perhaps, once in their lives, were able to appear before a mixed court of arbitration. An international law subject is supposedly thinkable that has a single right—an international mayfly [*internationale Eintagsfliege*], as it were.”<sup>63</sup> A single moment of international capacity, or a single international right, was hardly enough to perform the alchemy of conversion into an international subject. Hold-Ferneck’s characterization echoed Fleischmann’s, with the isolated, particular rights of individuals juxtaposed with the ongoing, perpetual rights and standing of the state. As against the latter, individuals appeared as mere seasonal ephemera, mayflies buzzing for a brief instance only, and dying all too quickly. It was the perpetuity of the state as a legal corporation, we recall, that Ernst Kantorowicz famously cast as the key intellectual innovation underpinning the emergence of the state in its modern guise as a legal person distinct from its ruler. The corporation’s “mystical body” comprised not only a “horizontal” plurality of contemporaneous men living together in a community, but also a “vertical” plurality in the successiveness of its members over time.<sup>64</sup> This “plurality in Time” proved the essential factor: “the most significant feature of the personified collectives and corporate bodies was that they projected into past and future, that they preserved their identity despite changes, and that therefore they were legally immortal.”<sup>65</sup>

63. “Deshalb, nur deshalb sollen einzelne Menschen, Herr X, Frau Y, Fräulein Z, als ‘Subjekte des Voelkerrechts’ den Staaten und der katholischen Kirche an die Seite gestellt werden, weil sie vielleicht, einmal in ihrem Leben bei einem gemischten Schiedsgericht auftreten duerfen. Es soll ein Voelkerrechtssubjekt denkbar sein, das ein einziges Recht hätte, zosuzagen eine internationale Eintagsfliege.” Alexander Hold-Ferneck, *Lehrbuch des Voelkerrechts*, vol. 1 (Leipzig: Felix Meiner Verlag, 1930), 251.

64. Ernst H. Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1997 [1957]), 309. The terminology of “vertical” and “horizontal” appears on page 312.

65. *Ibid.*, 311.

If international law had emerged as a law between states, then it also reflected their temporality and structures of duration: it was a castle designed for those with everlasting life, and therefore ill-equipped to house other mortal subjects, or so some jurists felt. Some would-be or future states might have convincingly aped the future tense of state life, but it was difficult for individuals or insurgents to do the same, when they blatantly possessed no capacity, as such, to carry rights and duties indefinitely through time.<sup>66</sup> Even prenatal states could command a greater “reality” in international law than individuals, because they were adapted to the prose of its temporal order: they persisted, potentially carrying law perpetually, unlike the individual whose subjective law was constrained by the cycle of biological human life. The latter were out of joint, lacking synchrony with international law. The unending and unchanging present of the state was the normal, real, living time of international law: outside this temporal order, subjects appeared as contingent, restricted, or embryonic.

### Ghosts and Slaves

Temporal deformity was not the only ailment held against potential subjects. One of the most pressing and sensitive cases, especially in Central and Eastern Europe, was that of the status of minorities, brought tentatively into the fold of international law via the new minorities treaties guaranteed by the League of Nations. The jurist Rudolf Laun—recently recovered as a key figure in the development of the mid-century field of human rights<sup>67</sup>—spent a significant portion of the interwar years studying the status of “peoples” or nations in international law. He, too, was present at the annual meeting of the German Society of International Law in 1926. National minorities, he argued there, remained politically the most important unresolved case (*Zweifelsfall*) when it came to the question of *Parteifähigkeit* (the capacity to be a party) in international law. If minorities truly

66. See also Hans Aufricht, “Personality in International Law,” *American Political Science Review* 37, no. 2 (1943): 229, where he observes that part of the difficulty of ascribing international personality to individuals was that “those criteria which are inherent in the state’s corporate personality cannot be shown as characteristic of the private individual.” The latter does not have the character of an institution, even if he or she represents it. Often “the corporate structure of the state is deemed the ‘normal’ one, while the private individual is seen as an extraordinary legal phenomenon in international legal relations” (latter quotation at 234).

67. See, for example, Lora Wildenthal, “Rudolf Laun and the Human Rights of Germans in Occupied and Early West Germany,” in *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffmann (Cambridge: Cambridge University Press, 2011), 125–44.

possessed international subjectivity “then the whole image of the community of international law would be essentially transformed.”<sup>68</sup>

Laun was not wrong about the political importance of the question. For the new states of Central and Eastern Europe, many of whom had large German minorities, the idea that segments of the population might have the formal capacity to reach over the umbrella of state sovereignty and pursue their own international prerogatives represented an intolerable injury to the majesty of their sovereignty. A Polish submission to the League argued forcefully against any interpretation of the minorities regime in which a minority “would have the right to overstep the limits of constitutional procedure, to act as he chose against the sovereignty of the State, and to seek the protection of a species of super-sovereignty.”<sup>69</sup> Sitting on the League’s Sixth Committee in 1932, Czechoslovakia’s Foreign Minister, Edvard Beneš, warned gravely that “care must be taken not to give the impression that a minority constituted a personality in law.”<sup>70</sup> With the ethnic Germans strewn throughout Central Europe serving as a permanent reminder of Germany’s loss of territory and power, German jurists conversely emerged as the foremost interpreters and defenders of the new minorities system.<sup>71</sup>

If the rights of minorities were guaranteed by international legal treaties, why were minorities not subjects of international law? Two characteristics in particular featured repeatedly in arguments for the illusory nature of this presence in international law. The first concerned the “groupness” of the subject itself. As Verdross observed, the minorities treaties did not define the concept of minority. The treaties referred only to people *who belonged* to a linguistic, ethnic, or religious minority. “Positive international

68. “so würde sich das ganze Bild der Völkerrechtsgemeinschaft sehr wesentlich ändern.” Rudolf Laun at the Siebente Jahversammlung of the Deutschen Gesellschaft für Völkerrecht, in the discussion on May 27, 1926, following Godehard J. Ebers, “Sind im Völkerrecht allein die Staaten parteifähig?” 32.

69. Proposals Submitted by the Polish Government Regarding the Procedure in Connection with Minority Petitions, January 24, 1923, League of Nations Archive, Geneva (hereafter LNA), R1648, 41/25727/7727 (memorandum from the Polish government dated January 16, 1923).

70. Seventh Meeting (October 6, 1932), Minutes of the Sixth Committee, Records of the Thirteenth Ordinary Session of the Assembly, *League of Nations Official Journal*, special supplement No. 109 (1932): 44.

71. See, especially, Carole Fink, “Defender of Minorities: Germany in the League of Nations, 1926–1933,” *Central European History* 5 (1972): 330–57; Peter K. Steck, *Zwischen Volk und Staat: Das Völkerrechtssubjekt in der deutschen Völkerrechtslehre (1933–1941)* (Baden Baden: Nomos Verlagsgesellschaft, 2001). For an account of the minorities system more broadly, see Carole Fink, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878–1938* (Cambridge: Cambridge University Press, 2004).



minority law is thereby constructed not universally, but individually. Therefore minorities are not recognized as juridical persons. Not them, but rather the *members* [*Angehörigen*] of the minorities are granted rights.<sup>72</sup> Nowhere in the treaties did “a minority” *as such* possess a right. The League had gone to great trouble, Laun concurred, to “divest” (*entkleiden*) minority protection of its “national character” and turn it into an administrative provision akin to those concerned with hygiene or trafficking.<sup>73</sup>

Minority protection was thus suspended between a collective legal subjectivity and an individual one. Formally, it pertained only to individuals; however, those individuals were preselected according to a collective attribute. It hailed individuals *in their capacity as members of groups* that did not exist before the eyes of the law, or existed merely descriptively rather than constitutively. The collective subject was just offstage, just beyond view; however, it remained the necessary prerequisite for the legal transactions in place. The moment an individual raised a claim, the group fell away from the domain of law. The laws therefore required a group subject and obliterated it at the same time: individuals belonging to minorities entered international law on the basis of a characteristic that had always already disappeared.

The second common feature of arguments against the standing of minorities concerned the agency they lacked. The analysis of Otto Junghann, President of the German League of Nations Union, was representative in this regard. He emphasized that the treaties existed between states and the League, and that minorities did not acquire rights from them, but rather gained the benefits of the protection that they regulated.<sup>74</sup> Minorities could not initiate proceedings before the League, nor represent themselves in international forums: “The interests of the minority are merely the object of protection [*Schutzobjekt*] of the treaties.”<sup>75</sup> They were beneficiaries rather than parties. The status of minorities under the special German–Polish agreement for Upper Silesia was an exception that proved the

72. “Das positive völkerrechtliche Minderheitenrecht ist somit nicht universalistisch, sondern individualistisch aufgebaut. Daher sind die Minderheiten nicht als juristische Personen anerkannt. Nicht ihnen, sondern den *Angehörigen* der Minderheiten werden Rechte verliehen.” Alfred Verdross, *Völkerrecht* (Berlin: Verlag Julius Springer, 1937), 226. Emphasis in original.

73. Rudolf Laun, *Der Wandel der Ideen Staat und Volk als Äusserung des Weltgewissens: Eine völkerrechtliche und staatsrechtliche Untersuchung auf philosophischer Grundlagen* (Berlin: Verlag von Bruno Cassirer, 1933), 282.

74. Otto Junghann, *Das Minderheitenschutzverfahren vor dem Völkerbund* (Tübingen: Verlag von J. C. B. Mohr, 1934), 7.

75. “Die Interessen der Minderheit sind zwar das Schutzobjekt der Verträge.” *Ibid.*, 16.

rule. Minorities were “not subjects in international law,” he concluded, but rather “only objects of international law making.”<sup>76</sup>

Although other jurists constructed more equivocal arguments, no one could ignore the inability of minorities to act as proper international protagonists. In order to sketch the idiosyncratic status of minorities, many jurists therefore invoked a range of analogies that suggested legal presence without legal agency. In the 1926 discussion of the German Society for International Law, the jurist and former German Minister for Justice, Eugen Schiffer, observed that the minorities treaties had taken great pains to avoid even the appearance of minorities possessing “an independent personality.” “But despite all juridical dialectics, the minorities increasingly assert themselves as distinct entities [*Eigengebilde*],” he argued. As evidence, he cited the evolving petition procedure at the League: “In this the minorities do not yet confront us as full personalities, but rather as specters [*Schemen*], that already possess the silhouette of personality. It unfolds in international law something like it does on the stage in Pirandello’s ‘Six Characters in Search of an Author.’”<sup>77</sup> Minorities loomed in international law as ghosts or shadows: they were only dimly visible in legal terms through an impressionistic sketch of their personalities that still lacked full body, specificity, and three-dimensionality.

Schiffer’s reference to Italian playwright Luigi Pirandello’s 1921 drama is all the more striking for the detail of the analogy. There, a group of “unfinished” characters burst in on rehearsals for a different Pirandello play, demanding to have their drama staged: abandoned by their original author in an intermediate stage of development, they sought a new author to bring them to full realization. “Imagine what a disaster it is,” says the unfinished character “Father” to the producer and actors, “for a character to be born in the imagination of an author who then refuses to give him life in a written script.” The characters, “left like this, suspended, created but without a final life,” come to challenge the “reality” of the actors and producer as a result.<sup>78</sup> In Schiffer’s analogy, minorities were

76. Sie sind “keine völkerrechtlichen Subjekte”; “Sie sind nur Objekte der internationalen Rechtssetzung.” Ibid., 33–34.

77. “Aber aller juristischen Dialektik zum Trotze setzen die Minderheiten mehr und mehr sich als Eigengebilde durch.” “Die Minderheiten treten uns in ihm noch nicht als volle Persönlichkeiten entgegen, wohl aber als Schemen, die bereits die Umriss der Persönlichkeit aufweisen. Es vollzieht sich im Völkerrecht etwa dasselbe wie auf der Bühne in Pirandellos ‘Sechs Personen suchen einen Autor.’” Eugen Schiffer at the Siebente Jaherversammlung of the Deutschen Gesellschaft für Völkerrecht, in the discussion on May 27, 1926, following Godehard J. Ebers, “Sind im Völkerrecht allein die Staaten parteifähig?” 42.

78. Luigi Pirandello (trans. John Linstrum), *Six Characters in Search of an Author* (London: Methuen, 1979), 53, 54.

unfinished legal persons impatient to be written into the drama of international law, and taking matters into their own hands despite their lack of character development. If Pirandello dramatized his own creative process through the difficulties of his unfinished characters, Schiffer's analogy drew attention to the backstage workshop of international law, where new legal persons jostled for their right to perform.

Theoretical models must respond with sensitivity to these spectral juridical persons, Schiffer argued. The speaker, Ebers, had defined *Parteifähigkeit* as the capacity to be a party before a court. This definition may exhaust the matter in private law, Schiffer contended, but seemed too narrow and limited for international law, because "everywhere here we are not dealing with clear cut legal figures."<sup>79</sup> The League Council was clearly not a court; however, in relation to minorities it exercised a court-like function, and theoretical accounts of *Parteifähigkeit* should reflect procedures that they encountered, and "extract their viewpoints and arguments from them."<sup>80</sup> Jurisprudence must take its cues from the actually existing legal relationships emerging at the League. It needed to codify, not ignore, the shadowy legal figures haunting the community of international law.

In his 1934 work *Völkerrecht*, the German law professor Ernst Wolgast invoked a more precise metaphor of incomplete legal personhood. The lack of agency lay at the heart of his portrait of an international legal order composed of profoundly unequal subjects. The whole question of international subjectivity was highly contested, he noted. Part of the problem resulted from the fact that tests for legal personality had been imported from municipal law: in this construction, any bearer of rights and duties constituted a legal subject. According to such logic, international subjects could include individuals (if they appeared as parties before an international court, as under the prize court convention of 1907) or minorities (if they were granted international rights), but an error existed in this "equal qualification" (*Gleichqualifizierung*) of individuals and states. The individual, Wolgast mused, lacked the majesty and charisma of the state as a bearer of rights and duties; in comparison, the standing of individuals seemed technical and unnatural.<sup>81</sup>

79. "es sich hierüberall nicht um festumrissene Rechtsfiguren handelt." Schiffer in the discussion following Ebers, "Sind im Völkerrecht allein die Staaten parteifähig?" 42.

80. "und die Frage der Parteifähigkeit muß deshalb auch für das Verfahren geprüft werden, das vor ihm stattfindet, und aus ihm Gesichtspunkte und Argumente entnehmen." Ibid.

81. "Zu verschieden sind beide unter den Aspekten des Internationalen. Dem Individuum in einer solchen Parteirolle od. dgl. fehlt der Anspruch auf Ehre und Würde, das Schicksalverworbene 'jener großen dunklen Wesen voll Geheimnis,' d. i. der Staaten, von dem die Fähigkeit, Träger konkreter Rechte und Pflichten zu sein, nur wie eine technische und denaturierte Ausstrahlung anmutet." Ernst Wolgast, *Völkerrecht* (Berlin: Verlag von

More fundamentally, however, the essential inequality between states and individuals had not been properly appreciated. Wolgast attributed the muddled juridical thinking to certain “presupposed ideas” that had until now remained unarticulated. The construction of the legal subject in domestic law presumed certain things that were not formally included in the definition, especially that “the legal subject is a legal comrade [*Rechtsgenosse*], who—however indirectly—is involved in lawmaking and who appeals directly to the norms of the legal order.”<sup>82</sup> To be a legal subject, one needed to be the fellow, the companion, or the associate, of the other subjects of that order. “The example of a legal order that knows slaves is illuminating here,” Wolgast explained: “The free, i.e., the comrades in law, can issue norms, as in Islamic law, for example, that a slave should be treated well. Thereby the slave does not as such have the legal entitlement to good treatment; he is not the direct addressee of the norm, not legal comrade and legal subject. Rather, the legal comrades are the free alone. As legal comrades, they are obligated to treat [the slave] well. They are the norm addressees, the legal subjects.”<sup>83</sup> Minorities and individuals, in Wolgast’s rendering, were the slaves of interwar international law. The analogy worked along numerous axes simultaneously: like slaves, they were present in law, known to law, yet less than human in its eyes, suspended awkwardly between legal being and nonbeing. More fundamentally still, Wolgast used the analogy to stage his argument that rights were not reliable indicators of subjectivity, because what might, at first sight, appear to be the rights of an individual or a minority could in fact turn out to be the duties of others.<sup>84</sup> The signs were reversed, and the ostensible subject vanished.

Strikingly, he also used the comparison to set up his account of what one could call the sociability of international law. Legal subjects needed to be able to associate with one another, to look each other in the eye, as friends,

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Georg Stille, 1934), 763 (§143). On Wolgast and his *Völkerrecht*, see Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3, 296–97, 384, 392, 398.

82. “daß Rechtssubjekt der Rechtsgenosse ist, der—so mittelbar auch immer—an der Rechtsetzung beteiligt ist und an die Normen der Rechtsordnung sich unmittelbar wenden.” Wolgast, *Völkerrecht*, 764 (§143).

83. “Die Freien, d. i. die Rechtsgenossen, können Normen erlassen, wie nach islamischem Recht z. B. diese, daß ein Sklave gut zu behandeln sei. Damit hat der Sklave nicht etwa als solcher einen Rechtsanspruch auf gute Behandlung; er ist nicht unmittelbar Normadressat, nicht Rechtsgenosse und Rechtssubjekt. Vielmehr sind die Rechtsgenossen allein die Freien. Sie sind als Rechtsgenossen zu guter Behandlung verpflichtet. Sie sind die Normadressaten, die Rechtssubjekte.” *Ibid.*

84. Laun offered a similar analysis concerning duties as against rights: Laun, *Der Wandel der Ideen Staat und Volk*, 279.

comrades, companions; that is, compatriots in the community of international law. This sociability presupposed a basic equality or uniformity: it could not arise between slaves and freemen. Similarly, an individual could hardly be “the legal comrade of states.”<sup>85</sup> The notion of their legal equality, their legal companionability, seemed to Wolgast as improbable or unnatural as love between species. His quasianthropological sketch of the community of international law drew its boundaries around a largely homogenous population of states.

Alfred Verdross, for his part, felt that Wolgast’s slavery metaphor had slightly missed the mark. His own sketch of the spectrum of international personality folded over the distinction between “active” and “passive” subjects rather than that between slaves and freemen. Some international persons, he reasoned, may have rights but not duties, and others may have duties but not rights, although usually these fell together. Further, some subjects, beyond having rights and duties, may be called upon to participate in the development of international law, whereas other subjects lacked the competence to do so.<sup>86</sup> One can therefore distinguish, he asserted, between “active” and “passive” subjects of international law. The former category comprised states and other sovereign legal communities, whereas the latter housed the mandated territories and individual people, “to the extent that they are granted international law subjectivity at all.” Together, this cast of characters represented the “legal comrades of the community of international law; at the same time, the passive subjects of international law are not equated with slaves, as Wolgast believes. Their standing is in fact similar to those people in a state who are subjects [*Untertanen*, cf. citizens] without political rights.”<sup>87</sup>

Verdross, therefore, favored an alternative analogy of diminished capacity, one that likened nonsovereign subjects to the disenfranchised inhabitants of absolutist or imperial states. Here, too, however, they were passive objects of protection, reliant on the benevolence of others, and visible only in the mirror reflection of the latter’s duties. And like Wolgast, he too reached for illustrations or images from other legal orders that might illuminate the status of the new figures that were ostensibly creeping

85. “nicht Rechtsgenosse der Staaten.” Wolgast, *Völkerrecht*, 764 (§144).

86. The issue of the capacity to make law—the “jurisgenerative capacity,” as Bhuta refers to it (Bhuta, “The Role International Actors Other than States,” 62)—has served as a long-standing sticking point for arguments concerning the international personality of non-states. See Portmann, *Legal Personality in International Law*, 9 and passim.

87. “Nur jene sind die Rechtsgenossen der Völkerrechtsgemeinschaft; gleichwohl sind auch die passiven Völkerrechtssubjekte nicht den Sklaven gleichgestellt, wie Wolgast meint. Ihre Stellung ist vielmehr jenen Menschen in einem Staate ähnlich, die Untertanen ohne politische Rechte sind.” Verdross, *Völkerrecht*, 52.

over the border into the domain of international law. As in so many other accounts, analogies enabled a particular purchase on the way in which certain legal persons could be both present and absent simultaneously: the in-between-ness of the half-persons had its argumentative analogue in the metaphorical register, both concrete and figurative at once. One might peg this style of reasoning as symptomatic of an interwar international legal order that was hypercreative—even avant-garde or experimental—but that risked remaining hypothetical.<sup>88</sup>

### Vacated Subjects

The figure of the individual was ubiquitous in this jurisprudence; the reader has already encountered him or her as mayfly and slave. By way of conclusion, I would like to trace some of the other mechanisms by which individuals appeared and disappeared in interwar international law, their personalities evacuated or vacated. The standard characterization of individuals in international law relied on the linguistic logic of “subjects” itself: individuals were deemed not subjects but objects of the law of nations.<sup>89</sup> For 300 years, as Politis described it, an individual could be “neither a member nor a subject of the international community. Like the territory, he could be only the object of international law, and could neither appeal to it nor be governed by it.”<sup>90</sup> Individuals were the matter or material onto which law was projected and applied, “like ‘boundaries’ or ‘rivers’ or ‘territory’ or any of the other chapter headings found in traditional textbooks,”<sup>91</sup> structurally analogous to the physical givens of the natural world that waited for a true subject to ascribe them legal meaning.

This formulation attracted much critical attention between the wars. Crucial to its logic was that individuals were unable themselves to initiate international claims and appear as parties in the defense of international rights.<sup>92</sup> They were “passive” and disenfranchised, as has been mentioned,

88. On the modernist, avant-garde nature of the interwar order, see Berman, “‘But the Alternative is Despair.’”

89. See, for example, Oppenheim, *International Law*, 521.

90. Politis, *The New Aspects of International Law*, 18.

91. Rosalyn Higgins, “Conceptual Thinking about the Individual in International Law,” *British Journal of International Studies* 4 (1978): 3. Higgins presents a key critique of the notion of international legal personality in general, favoring instead a less formal model that proceeded on the basis of “actors” or “participants.”

92. As Edvard Hambro put it in 1941, there existed at least two primary aspects to the personality question, often distinguished, but in fact bound up together: whether individuals were direct subjects of rights protected under international law, and then whether they possessed “the competence to bring an international action to defend these rights.” Edvard

capable of entering the circle of international law only indirectly, at one remove.<sup>93</sup> It is a small wonder, then, that the experimental new petitions procedures developed by the League provoked so much debate. These institutionalized procedures allowed individuals under the jurisdiction of the mandates and minorities regimes to complain directly to the international organization if their internationally guaranteed rights had been violated. For the legal scholar (and Attorney-General of Mandate Palestine throughout the 1920s) Norman Bentwich, these petitions procedures negated the old dichotomy of subjects and objects. “I am not sure whether I correctly appreciate the difference between the objects and the subjects of international law, or whether minorities are at present regarded only as objects of international law,” he ventured before the Grotius Society:

If the difference is that, to be a subject of international law, you must have some direct means of enforcing your rights, I suggest that under the minorities treaties, and under the provisions of the League instruments, the individuals were made *subjects* of international law. Minorities had the opportunity of bringing their grievances over violation of their rights before an international body, that is to say, before the Council of the League, which had special committees to deal with the question of minorities; and it was possible for those questions to be referred on their behalf to the Permanent Court.<sup>94</sup>

The same opportunity existed for “persons and groups in mandated territories,” he continued, where the Permanent Mandates Commission examined and reported on the petitions at each of its sessions. “I suggest then that already in international institutions of modern times definite rights are given to individuals which can be vindicated by individual action.”<sup>95</sup> The capacity for “individual action,” especially as manifest in the petitions procedures, saturated the interwar debate; it echoes clearly in what remains the only authoritative definition of international legal personality—from the *Reparation for Injuries* case of 1949 (and the year is telling) — in which the International Court of Justice stated that an international person is “capable of possessing international rights and duties, and . . . has capacity to maintain its rights by bringing international claims.”<sup>96</sup>

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I. Hambro, “Individuals before International Tribunals,” *Proceedings of the American Society of International Law at Its Annual Meeting* 35 (1941): 23.

93. In the wonderful German terminology, they were not *völkerrechtsmittelbar*, visible instead only through a veil of mediation.

94. Norman Bentwich in the discussion of Vladimir R. Idelson, “The Law of Nations and the Individual,” 73.

95. *Ibid.*, 74.

96. *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 1949 ICJ Reports 174, quotation at 179. In recent years, the League’s petition procedures have found a new champion in Judge A. A. Cançado Trindade, who marks them as a

The real legal significance of the petitions procedure remained anything but uncontested, however. Most jurists would have deemed Bentwich's reading willfully naïve. Henri Rolin, responding to him directly at the Grotius Society, asserted that even if one accepted that the state was "not the only subject of an interest which is protected by international law," one must also acknowledge how rudimentary such protection remained: "It is well known how illusory is the mere right of petition which did not allow the man who sent the petition to be represented before any Commission at Geneva. That is certainly not a real and full vindication of individual rights."<sup>97</sup> On this question, there were illusions at every turn, because the illusory right of petition had its correlate in an illusory author, as will be discussed.

Julius Stone's sober analysis of League petitioning can be taken as broadly representative. Under the general minorities procedure, he wrote, the "petitioner has no *locus standi* and cannot be certain that his complaint will ever reach the Council."<sup>98</sup> It could hardly be termed a "right" to petition at all: rather, individuals (just like any organization or state) were enabled to send information to the League. Crucially, such letters did not initiate a legal procedure: "information in the form of a petition has no legal consequences. Any steps of a legal character are taken, not on the petition as such, but on the information which it contains."<sup>99</sup> In this way, petitioners were cut out of the chain of legal causation: their words entered the machinery of international order, but no operative mechanism connected subsequent actions to the personhood of the writer.

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necessary precondition for the human rights revolution: the mandates and minorities regimes, he writes, were some of the "first international experiments to grant procedural capacity directly to individuals and private groups," which was essential for the "historical rescue of the individual as subject of international human rights law." A. A. Cançado Trindade, *The Access of Individuals to International Justice* (Oxford: Oxford University Press, 2011), 19–21. Emphasis in original. He casts the right of petition as a heroic victory over positivism. See also A. A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century," *Netherlands International Law Review* 14 (1977): 373–92.

97. Rolin in the discussion following Idelson, "The Law of Nations and the Individual," 75.

98. Julius Stone, *Regional Guarantees of Minority Rights: A Study of Minorities Procedure in Upper Silesia* (New York: The Macmillan Company, 1933), 23.

99. *Ibid.*, 34. Stone contrasted this general procedure to the regional machinery that existed under the special German–Polish Geneva Convention for Upper Silesia. Under the latter regime, equipped with a mixed commission with broad powers, petitioners *did* have a *locus standi*: petitioners were juristic persons under the Convention, and their petitions triggered legal procedures. This legal personality represented a "novel and even revolutionary situation." *Ibid.*, 61 and *passim*.



Stone's account followed the League's official position. "In principle everybody is free to petition the League in minorities matters," stated a 1926 note by the secretary-general: "But the petitioner, according to the Minorities Treaties and the procedure in force, is not a party to a lawsuit between himself and the interested Government. His petition is only a source of information for Members of the Council, to enable them to exercise their rights and duties under the Treaties."<sup>100</sup> Petitioners were not agents, protagonists, or "quasi-litigants,"<sup>101</sup> but rather anonymous producers of information, which in turn required a real legal subject to transform the informational content into legally meaningful interactions. Their juridical nonappearance affected the sociability of international law, as is evidenced in the seemingly inconsequential question of whether or not petitioners should receive replies to their submissions. At a symbolic level, this question dramatized who was speaking to whom in international law: "As petitions are not 'charges' in the technical sense of the word, the observations submitted by the Governments interested are not replies to the petitions, but merely reports upon them for the use of Members of the Council."<sup>102</sup> There was no juridical call and response, no conversation. Petitioners were not comrades in law.

Instead, they were ghosted out of authorship altogether. In the words of a minorities section memorandum from 1926 (itself part of the same debate about replying to petitioners), "juridically the petitioner does not exist except as a source of information. The important thing, in other words, is not the petitioner but the petition."<sup>103</sup> Petitions existed as evidence of life—like droppings or footprints, carefully recorded—whose source remained irrelevant or uninteresting. Petitions, the memorandum continued, should be considered "as legally detached from the petitioner."<sup>104</sup> Juridically, petitions were authorless documents, speech without an orator. The disembodied, floating "information" served as a placeholder for the missing, vacated subject, a subject outside the purview of international law. Vampire-like, the League extracted the content but discarded the nonperson who had produced it.

100. C.312 M.118. 1926. I., Note by the secretary general concerning the present practice with regard to replies sent to private petitioners in the matter of protection of minorities, June 1, 1926, LNA, R1646, 41/51406/7727.

101. The phrase is from a note by Eric Colban, head of the minorities section, refuting the reasoning of a memorandum written by Lucian Wolf: Lucian Wolf to the British Foreign Office, August 26, 1925, and preceding minute by Eric Colban, September 1, 1925, LNA, R1646, 41/45945/7727.

102. Benes (Minister for Foreign Affairs) to President of the Council, forwarded to the Secretary General, April 5, 1923, LNA, R1648, 41/29051/7727.

103. R. N. Kershaw, Observations on certain points in minorities procedure, April 16, 1926, LNA, R1646, 41/51406/7727.

104. *Ibid.*

Through the League's new and idiosyncratic petitions procedures, interwar international law ostensibly heard the "voices" of subjects who remained strictly voiceless; their speech was ventriloquized, made anonymous through institutional procedure, and emptied of the markers of subjectivity like intention and agency, cause and effect. Sonically, the community of international law had grown to include new members; however, it was an intentional illusion, or a willful kind of haunting, as those disaggregated sounds remained unpersonified speech, emanating from invisible bodies.

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Who was present in the house of international law, and by what conceptual door or window had they gained entry? Interwar jurists were busy identifying nooks and crannies, or even undiscovered rooms that might house new international subjects. As Vladimir Idelson put it in 1944, "While theoreticians thus tried to find in the existing structure of international law room (or pigeon-holes) for the new phenomena referred to above, these were hailed by some writers as evidence of 'transformation' of international law."<sup>105</sup> In groping for these pigeonholes, jurists both contested and policed admission into the community of international law, articulating their understanding of what sorts of identification and proof were required for entry, how long the newcomers might stay, and how they should interact with the long-standing residents.

In attempting a more anthropological account of the formal community of international law, I have focused on the conceptual process of birthing new subjects. How did law conceive new life, in both senses of the term? What kind of intellectual work was required to generate new genres of legal personality? Interwar jurisprudence proved a bustling workshop for such projects. As I have tried to show, metaphors and analogies played a key role in this midwifery. Borrowed illusions and figures were not only signs of the creativity required to conjure new international persons into being; they also provided typologies of personhood that escaped the conceptual hegemony of the state, thereby gifting international law an expanded imaginative horizon. Trading in analogies that spanned slaves and unborn children, interwar jurists labored to uncover (or create) conceptual space around the edges of state sovereignty. In so doing, they generated a remarkable catalogue of new legal species.

Perhaps inevitably, these new legal persons were branded by their late or partial arrival into international law: the reasons for their prior absence

105. Vladimir R. Idelson, "The Law of Nations and the Individual," *Transactions of the Grotius Society* 30 (1944): 61.

could not but be coded into their legal identity. That catalogue of new persons was thus, at the same time, a catalogue of handicaps, a library of subjects who had not fully escaped the indignity of their prior anonymity. The metaphors of their partial personification denied them access to the unity and stability of the self possessed by the state, thereby frustrating their ability to tie legal pasts to legal futures.<sup>106</sup> This library of handicaps backhandedly revealed the immense normative and analytic weight of the traditional assumption that only states possessed full subjectivity. Against the hesitating, unformed, or transient bodies of international law's new subjects, the legal personality of the state remained a dead metaphor, despite the best efforts of Politis and his colleagues. The new arrivals could be embryonic, graded, promissory, unborn, contingent, virtual, anticipated, silent, impermanent, unfinished, invisible, possible, disembodied, mediated, sporadic, non-normative, unfree, suspended, detached, ephemeral, disenfranchised, passive, state-like, unequal, or abnormal, but they all represented new ways of not being a state.

106. That ruptured or discontinuous legal self is neatly captured by Miguel Tamen's reflections on the difficulties of legal personification. "The 'I' cannot remember what *I* cannot remember, cannot go beyond its origin," Tamen writes: "My literal autobiography of a former nonperson would be a story whose initial chapter would be about how my own story is permeated by the possibility, to which I am now quite foreign, of not being able to tell it at all. One should like to ask: who was the first to have had the brilliant idea of personifying us? But then again the answer could only be 'some other person.' Only someone else could have had that idea." Miguel Tamen, *Friends of Interpretable Objects* (Cambridge, MA: Harvard University Press, 2001), 85–86. Emphasis in original. See, generally, Chapters 4 and 5 on "Persons" and "Rights," respectively.