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.¹

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

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, 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.³ 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.4

The German jurists were not lone heralds of such a transformation. Take 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.”5 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 upon which international law had hitherto been based. “These principles now 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.”6 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.7

Politis echoed many in his assessment that “at present international law is in a transition

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7 Ibid., 30-31.
period.”

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 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.” 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.

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10 Hersch Lauterpacht in the discussion following Vladimir R. Idelson, “The Law of Nations and the Individual,” Transactions of the Grotius Society 30 (1944): 66. Lauterpacht had in fact 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, no. 3 (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 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, no. 4 (1947): 384.
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.”\(^{11}\) 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 towards an anthropology of international law’s fictional persons. It aims at an historical thick description — rather than a normative discussion\(^{12}\) or a more biographical account\(^{13}\) — of the imagined community of international law as its frontiers and its zoning shifted in the 1920s and ‘30s. How were its horizons constructed, who lay beyond its


\(^{13}\) See 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). Nijman’s account, focusing on “great thinkers” like Kelsen and Scelle, might also be termed normative, as it is explicitly concerned with rescuing the individual as the subject of law.
vanishing point? 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, crucially, how did the mode of their personification establish their marginal status, their handicaps and deficiencies? 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 semi-personality or reduced capacity of these various non-states. The conceptual work of naming and hailing new persons in international law, I argue, 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,” then a spate of recent works in colonial and comparative law has focused more specifically on the historical production of “legal and unlegal subjects,” on “episodes in making and unmaking persons.” In analyzing “the sensibilities of humanness the law attempted to fashion,” 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:

15 Teemu Ruskola, Legal Orientalism: China, the United States, and Modern Law (Cambridge, Mass.: 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.
“extraneous persons”\textsuperscript{18} 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,\textsuperscript{19} or with the ideological divides (revisionist, reformist, and so forth) of the interwar years,\textsuperscript{20} than with metaphors of international subjectivity as illustrative of a certain imaginative or mythic subconscious of international legal thought.

After first surveying the reality of legal personality and the epistemic work of metaphor, I treat three different episodes playing out along this frontier between personality and its negation in interwar international law. All three explore different 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, 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).

**Metaphors for Fictions**

The law’s management of the real and the unreal, its world-making capability, is perhaps nowhere more conspicuous than in the construction of legal personality. In constituting abstract

\textsuperscript{18} Dayan, *The Law is a White Dog*, xi.


\textsuperscript{20} See Nijman, *The Concept of International Legal Personality*, 125ff.
or “fictional” persons as full-blooded juridical subjects, law “usurps” nature, thereby wielding a power both “limitless and magical.” Spurred especially by German interventions, debate raged in the early twentieth century 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. 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,” its own reality. 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. If it should seem as if a real person was present, when in fact none was there, then that 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. 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.

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21 Dayan, *The Law is a White Dog*, 25.
Law’s persons commanded their own reality, even if they remained invisible to those uninitiated into law’s ways. 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.”25 In extrapolating this “theory of the juristic truth of fictions,”26 legal scholars reached for alternate terms like “artificial” to describe the genre of reality that law created for itself. “A corporation cannot possibly be both an artificial person and an imaginary or fictitious person,” reasoned the American lawyer Arthur W. 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.”27 Or 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 indeed granted, that is, of having historical origin.”28

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25 Nékám, *The Personality Conception of the Legal Entity*, 34. As 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, no. 4 (1911): 263.


27 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.” Arthur W. Machen, Jr., “Corporate Personality,” *Harvard Law Review* 24, no. 4 (1911): 257. See also page 261: “If a corporation is fictitious, the only reality being the individuals who compose it, then by the same token a river is fictitious, the only reality being the individual atoms of oxygen and hydrogen.” See also Morris R. Cohen, “Communal Ghosts and Other Perils in Social Philosophy,” *Journal of Philosophy, Psychology and Scientific Methods* 16, no. 25 (1919): 673-690; and John Dewey, “The Historical Background of Corporate Legal Personality,” *Yale Law Journal* 35, no. 6 (1926): 655-673.

28 Miguel Tamen, “Kinds of Persons, Kinds of Rights, Kinds of Bodies,” *Cardozo Studies in Law and Literature* 10, no. 1 (1998): 15. For a recent use of “virtual” as the favored description, see Annelarieke Vermeer-Kunzli, “As If: The Legal Fiction in Diplomatic Protection,” *European Journal of International Law* 18, no. 1 (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.”
In contrast to the fine-grained distinctions of this jurisprudence on personality under municipal law, reflection on international personality lagged far behind. Long content with the seemingly axiomatic idea that only states could be persons in international law, scholarship on international personality dwelt primarily on the markers of sovereign statehood and its consecration through recognition, the possibility of divided or suspended sovereignty (for example in protectorates), and, centrally, its tight correlation with the circle of “civilized” states. The interwar years proved transformative in two fundamental ways. On the one hand, 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. On the other hand, as sketched above, jurists also confronted the prospect of non-state legal persons. Two central metanarratives of inclusion and exclusion in international law – one focused on the “standard of civilization” in the nineteenth century and the other on the rise of individuals, NGOs and multinational corporations as subjects of international law in the twentieth – thus intersected in the decades between the world wars, with scholars of the period compiling lists of candidates for international personality that included both kinds of non-sovereigns.

As the nature of the world described and regulated by international law lost the sheen of self-evidence, jurists exhibited a new consciousness of the law’s powers of creation. “As the

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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.”

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 – could invent its own natural world. Here was international law explicitly theorizing its own capacity for genesis.

The sections that follow depict international law amid the jejune flush of that creative power. Groping for legal landmarks in unexplored terrain, jurists experimented with a series of colourful metaphors that worked as shepherds or conductors, ferrying new sorts of persons into the domain of international law. Scholarly accounts of metaphor have highlighted its utility in precisely “those cases where there can be no question as yet of the precision of scientific statements.” Metaphors can serve as a mental tunnel between the known and the unknown – the sort of “calculated category mistake” or catachresis that introduces “theoretical terminology where none previously existed.” Small wonder 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 analysed metaphor as a lens or filter that “selects, emphasizes, suppresses, and organizes features of the principle subject.” 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.”

We 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.

If metaphors were useful for the exploration of virgin legal terrain, they were also perfectly adapted for the personification of law’s idiosyncratic abstract world. With jural relations playing out, “like mathematical relations, in a purely conceptual world, between conceptual persons (subjects of law) about conceptual interests (objects of law),” metaphors gifted flesh to this abstract anthropology, conjuring “a kind of picture, such as a verbal icon, or a

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physiognomy of discourse.” In Paul Ricoeur’s exposition, “tropes gave to discourse a quasi-bodily externalization. By providing a kind of figurability to the message, the tropes make discourse appear.” Metaphors made fictions pop. Yet the new persons of international law were linguistically birthed into bodies that all bore the cross of incompleteness or legal muteness: these figures were incapacitated, unfinished, or only half real. The particular metaphors chosen located the newcomers along a spectrum of legal being and non-being, which backhandedly affirmed the primacy and supremacy of international law’s indigenous population of states. Put differently: if these analogies invoked a kind of juridical netherworld that existed both “before” (like unborn children) and “after” (like ghosts) the “real life” of international law, then the zone of the real was clearly occupied by the state. The state possessed a juridical realism as against this host of legal halfpersons, who might be on their way to becoming states, but who by definition were not yet there, and consequently remained marred by a sense of the chimerical. They were temporally ajar from the state, and not contemporaneous with it. Between the state as the real, living “now,” on the one hand, and these non-synchronous, often ghostly halfpersons, 

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40 Importantly, a number of interwar jurists critiqued the orthodox notion of states’ monopoly on international personality precisely in order to attack the “reality” of the state itself. Georges Scelle, James Leslie Brierly, 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. See Nijman, *The Concept of International Legal Personality*, 131-149, 192-243; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001), 305-309; Bhuta, “The Role International Actors Other than States can Play in the New World Order,” 64-65. Those defending the traditional view correspondingly 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, *International Law: A Treatise*, ed. Arnold McNair, 4th ed., vol. 1 (London: Longman’s, Green and Co., 1928), 134.
on the other, theories of international legal personality constructed on a symbolic level what we could call a mythological lifecycle of international law.

**The Unborn: Lifecycles and Timescales 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 expert on international law. In the long discussion following Ebers’ paper, Fleischmann felt that his colleagues flitted too loosely between 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.\(^{41}\)

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 so long as they convincingly

aped 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 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.”42 The degree of their subjectivity reflected their proximity to statehood: this mode of argumentation led to the metaphorical characterization of such state-like communities as embryos, children born and unborn, caricatures and virtual entities, as we will see.

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.”43 Fleischmann thereby sketched normal and abnormal paths of legal subjectivity. The first led towards the state, and had its foundations in the normativity of the state, while 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.

42 “Der große Gedanke, der diese Gemeinschaften zusammenhält, erfüllt sie mit staatsähnlichen Geiste und führt notwendig zu ihrer staatsähnlichen Behandlung im Völkerrecht: sie kommen der Völkerrechtssubjektivität nahe.” Ibid.
43 “Das ist aber nicht eine normale Entwicklungslinie zur Rechtssubjektivität, sondern eine Ausnahme.” Ibid.
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 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 things
to come: varieties of subjectivity could be granted on the basis of a projection regarding what the
unit would one day become.

This quality of projection, or pre-figuration, or futurism, 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 usually understood as fulfilling functions delegated by the
“mother country,” and were thus legally subsumed within the latter. Yet one could hardly
assimilate the English or the Dutch East India trading companies, or the International
Association of the Congo (Kongogesellschaft) into such categories. As 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.\footnote{44 “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.}
The jurisprudence of international legal personality needed to operate as a crystal ball of future legal forms, squinting at the present to identify the future latent within it. At the same time, these future states needed to comport themselves as their grown-up selves, adopting the habitus of a state, like a game of legal dress-ups.

Assertions of latent, anticipated, and projected legal 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”? 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 that sovereignty until the population was able to exercise it themselves. Albert Millot, for example, wrote of the “virtual sovereignty” of the “B” and “C” mandates in Africa and the Pacific, while Jacob

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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.”

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. 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.” There was no evidence that sovereignty had ever been vested in the mandate territories, and that which never existed could hardly be suspended: one ended up in a mirror hall of negation. 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 independent States!” 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.”\(^{52}\) Lewis’s solution was neat if portentous: “Mandated territories are in fact international persons \textit{in posse} rather than \textit{in esse}.”\(^{53}\) 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 \textit{possible} persons, to mark out the space where a new subject \textit{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 independence in general: “the development towards an independent state entity [\textit{Staatswesen}] should be particularly emphasized at a moment in which they find themselves still in an embryonic condition [\textit{Embryonalzustand}], so that the sovereignty ascribed to them as such cannot be exercised.”\(^{54}\) In Marcus’ image, the new international regime – a giant sovereignty lab – 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 the 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 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 “nascitrus,” 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 “nascitrus” 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 nascitrus over to international law, and viewing the mandate territories, which
admittedly are not-yet fully-developed subjects of international law, as bearers of sovereignty?\textsuperscript{55}

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 pre-figured the pending arrival of the legal subject to wield them. On Pahl’s reckoning, international law need not ignore those still submerged in the womb of world history.

So were mandate territories subjects of international law? “Like civil law, international law knows different grades of legal subjectivity,” Pahl argued.\textsuperscript{56} There was a spectrum, a grey 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, while 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.” We can thus term them “international law nascituri” (völkerrechtliche nascituri), Pahl explained; that is, “as communities that find


\textsuperscript{56} “das Völkerrecht kennt, wie das Zivilrecht, verschiedene Grade der Rechtssubjektivität.” Ibid., 147. Emphasis added.
themselves still in the development towards [being a] subject of international law.”\(^{57}\) 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 we have seen, upon 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 (völkerrechtunmittelbare 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 their construction is also determined in order that they either transform into states or sink again into the mother state.”\(^{58}\) The legal status of insurgents worked like little doors in world order that opened towards full independent standing, before sealing over again if the opportunity was not seized. The legal personality of insurgents was contingent: either they became states or they shrank back into juridical invisibility. Only the state could command an order unfettered by temporal frontiers, an order whose norms stretched onwards into an open-ended history.

\(^{57}\)”als Gemeinwesen, die sich noch in der Entwicklung zum Subjekt des Völkerrechts befinden.” Ibid., 148.

\(^{58}\)”da sie ihrer Anlagen auch dazu bestimmt sind, sich entweder in Staaten zu verwandeln oder wiederum im Mutterstaate unterzugehen.” Verdross, Die Verfassung der Völkerrechtsgemeinschaft, 115.
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.59

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. Of course, it was the perpetuity of the state as a legal corporation 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.\textsuperscript{60} 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.”\textsuperscript{61}

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.\textsuperscript{62} Even unborn 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.

\textbf{Ghosts and Slaves}

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\textsuperscript{60} Ernst H. Kantorowicz, \textit{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.
\textsuperscript{61} Ibid., 311.
\textsuperscript{62} See also Aufricht, “Personality in International Law,” 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 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 on page 234).
\end{flushright}
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 – spent a significant portion of the interwar years considering 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 possessed international subjectivity “then the whole image of the community of international law would be essentially transformed.”

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

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seek the protection of a species of super-sovereignty.” 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.” 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.

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. In fact, the treaties referred only to people who belonged to a linguistic, ethnic, or religious minority. “Positive international 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.” Nowhere in the treaties did “a minority” as such possess a right. The League had gone to great trouble, Laun

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66 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.
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.\(^6^9\)

Minority protection was thus suspended between a collective legal subjectivity and an individual one. Formally, it pertained only to individuals, yet 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 off stage, just beyond view, yet 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 thus 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 they regulated.\(^7^0\) 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.”\(^7^1\) They were beneficiaries rather than parties. The status of minorities under the special German-Polish agreement for Upper

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\(^{7^1}\) “Die Interessen der Minderheit sind zwar das Schutzobjekt der Verträge.” Ibid., 16.
Silesia was an exception that proved the rule. Minorities were “not subjects in international law,” he concluded, but rather “only objects of international law making.”

While other jurists constructed more equivocal arguments, no one could not ignore the inability of minorities to act as proper international protagonists. In order to sketch the idiosyncratic status of minorities, many jurists thus 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.”

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,

72 Sie sind “keine völkerrechtlichen Subjekte”; “Sie sind nur Objekte der internationalen Rechtssetzung.” Ibid., 33-34.
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. In Schiffer’s analogy, minorities were 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 creative process going on behind the scenes in the theater of international law, the backstage workshop where new legal persons fought 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.” The League Council was clearly not a court, yet in relation to minorities it exercised a court-like function, and theoretical accounts of Parteifähigkeit should

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75 “es sich hierüberall nicht um festumrissene Rechtsfiguren handelt.” Ibid.
reflect procedures they encountered, and “extract their viewpoints and arguments from them.” 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.

More fundamentally, though, 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

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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 law-making and who appeals directly to the norms of the legal order.”\textsuperscript{78} To be a legal subject, one needed to be the fellow, the companion, 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.\textsuperscript{79}

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. For what might, at first sight, appear to be the rights

\textsuperscript{78} “daß Rechtssubjekt der Rechtsgenosse ist, der – so mittelbar auch immer – an der Rechtsetzung beteiligt ist und an die Normen der Rechtsordnung sich unmittelbar wenden.” Ibid., 764 (§143).

\textsuperscript{79} “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.
of an individual or a minority could in fact turn out to be the duties of others. The signs were reversed, and the ostensible subject vanished.

Strikingly, he also used the comparison to set up his account of what we 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, comrades, companions – 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.” The notion of their legal equality, their legal companionability, seemed to Wolgast as improbable or unnatural as love between species. His quasi-anthropological sketch of the community of international law drew its boundaries around a largely homogenous population of states.

Alfred Verdross, for his part, felt 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 duties but not rights, though usually these fell together. Further, some subjects, beyond having rights and duties, may be called upon to participate in the development of international law, while other subjects lacked the competence to do so. We can therefore distinguish, he asserted, between “active” and “passive” subjects of international law. The former category comprised states and other sovereign legal communities, while the latter housed the mandated territories and

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80 Laun offered a similar analysis concerning duties as against rights: Laun, Der Wandel der Ideen Staat und Volk, 279.
81 “nicht Rechtgenosse der Staaten.” Wolgast, Völkerrecht, 764 (§144).
82 The issue of the capacity to make law – the “jurisgenerative capacity,” as Bhuta refers to it (Bhuta, “The Role International Actors Other than States can Play in the New World Order,” 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.
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.83

Verdross thus favored an alternative analogy of diminished capacity, one that likened non-sovereign subjects to the disenfranchised inhabitants of absolutist or imperial states. Here, too, though, they were passive objects of protection, reliant upon 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 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 inbetweeness of the halfpersons had its argumentative analogue in the metaphorical register, both concrete and figurative at once. We might peg this style of reasoning as symptomatic of an interwar international legal order that was hyper-creative – even avant-garde or experimental – but risked remaining hypothetical.84

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83 “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 ohnen politische Rechte sind.” Verdross, Völkerrecht, 52.
Vacated Subjects

The figure of the individual was ubiquitous in this jurisprudence – we have 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 personality 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. ⁸⁵ For three hundred 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.” ⁸⁶ They 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,” ⁸⁷ 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. ⁸⁸ They were “passive” and disenfranchised, as we have seen, capable of entering the circle of international law only indirectly, at one remove. ⁸⁹ Small

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⁸⁵ See, for example, Oppenheim, International Law, 521.
⁸⁶ Politis, The New Aspects of International Law, 18.
⁸⁷ Rosalyn Higgins, “Conceptual Thinking about the Individual in International Law,” British Journal of International Studies 4, no. 1 (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.”
⁸⁸ 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 I. Hambro, “Individuals before International Tribunals,” Proceedings of the American Society of International Law at Its Annual Meeting 35 (1941): 23.
⁸⁹ In the wonderful German terminology, they were not völkerrechtsunmittelbar, visible instead only through a veil of mediation.
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.  

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

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rights are given to individuals which can be vindicated by individual action.” 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 ICJ stated that an international person is “capable of possessing international rights and duties, and […] has capacity to maintain its rights by bringing international claims.”

But the real legal significance of the petitions procedure remained anything but uncontested. 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.” On this question there were illusions at every turn: for the illusory right of petition had its correlate in an illusory author, as we will see.

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

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91 Ibid., 74.
92 Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), 1949 ICJ Reports 174, quotation from 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 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), 19-20, 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): 373-392.
standi and cannot be certain that his complaint will ever reach the Council.”\textsuperscript{94} 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.”\textsuperscript{95} In this way, the petitioner was 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. 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.\textsuperscript{96}

\textsuperscript{95} Ibid., 34. Stone contrasted this general procedure to the regional machinery which 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.
\textsuperscript{96} 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, 1 June 1926, LNA, R1646, 41/51406/7727.
Petitioners were not agents, protagonists, or “quasi-litigants” but 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.”

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.” 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.”

Juridically, petitions were authorless documents, speech without an orator. The disembodied, floating “information” served as a placeholder for the missing subject, a subject

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97 The phrase 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, 26 August 1925, and preceding Minute by E.C., 1 September 1925, LNA, R1646, 41/45945/7727.
98 Benes (Minister for Foreign Affairs) to President of the Council, forwarded to the Secretary General, 5 April 1923, LNA, R1648, 41/29051/7727.
99 R. N. Kershaw, Observations on certain points in Minorities Procedure, 16 April 1926, LNA, R1646, 41/51406/7727.
100 Ibid.
outside the purview of international law. Vampire-like, the League extracted the content but discarded the nonperson who had produced it.

“In instituting life, the law found subjectivity as a place, as sign or mark, from which the subject speaks,” wrote Peter Goodrich in his article “Specula Laws”: “In analytical terms, the subject is unconscious, for only through law does the subject gain a name and know its place, the space from which it came.”101 Here, the subject came from no place, and was thus no subject at all: that site of subjectivity was vacated, the veneer of unconsciousness undisturbed. 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: but 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.”102 In groping for these pigeon-holes, jurists

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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 longstanding residents.

In attempting a more anthropological account of the 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 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: any use of the first-person singular, any legal self-narrativization was amputated or distorted. As the philosopher Miguel Tamen wrote of the difficulties of legal personification: “the ‘I’ cannot remember what I cannot remember, cannot go beyond its origin”: 
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.103

Law’s new persons did not have unfettered access to the past tense or the future one: there was no continuously speaking and acting “I” to tie legal pasts to legal futures. Whether directly or indirectly, interwar jurisprudence thereby generally reaffirmed the state’s particular talent for international personhood. Against its prodigal command of the “real,” our new subjects lurked like bashful ghosts, or shimmered like future prospects, in different versions of the unreal or half-present. The new arrivals could be embryonic, graded, promissory, unborn, contingent, virtual, anticipated, silent, impermanent, unfinished, invisible, possible, emergent, 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.

103 Miguel Tamen, Friends of Interpretable Objects (Cambridge, Mass.: Harvard University Press, 2001), 85-86. Emphasis in original. See generally chapters 4 and 5 on “Persons” and “Rights,” respectively.