

# MAKING NATIONS INTO LEGAL PERSONS BETWEEN IMPERIAL AND INTERNATIONAL LAW: SCENES FROM A CENTRAL EUROPEAN HISTORY OF GROUP RIGHTS

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## Central Europe as an (Inter)National Legal Laboratory:

### A Saga in Three-and-a-Half Scenes

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### SETTING THE SCENE:

#### NON-STATE COLLECTIVES IN PUBLIC INTERNATIONAL LAW

Much new work on the making and unmaking of empires has exposed the pivotal role of companies and “private” actors with complex relationships to states and sovereigns.<sup>1</sup> Yet trading companies and other commercial entities were not the only “corporate” formations stalking imperial sovereignty and its dismantling.

When empires end, to whom or what do they pass sovereignty? The difficulties associated with this deceptively simple question are baked into

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1. For the making, see, e.g., STEVEN PRESS, *ROGUE EMPIRES: CONTRACTS AND CONMEN IN EUROPE’S SCRAMBLE FOR AFRICA* (2017); PHILIP J. STERN, *THE COMPANY-STATE: CORPORATE SOVEREIGNTY & THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA* (2011); ADAM CLULOW, *THE COMPANY AND THE SHOGUN: THE DUTCH ENCOUNTER WITH TOKUGAWA JAPAN* (2014); Andrew Fitzmaurice, *The Justification of King Leopold II’s Congo Enterprise by Sir Travers Twiss*, in *LAW AND POLITICS IN BRITISH COLONIAL THOUGHT: TRANSPPOSITIONS OF EMPIRE 109–26* (Shaunnagh Dorsett & Ian Hunter eds., 2010). For the unmaking, see, e.g., Susan Pedersen, *Getting Out of Iraq—in 1932: The League of Nations and the Road to Normative Statehood*, 155 *AM. HIST. REV.* 975, 975–1000 (2010); Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 *N.Y.U. J. INT’L & POL.* 513, 514 (2002).

the concepts used to describe and justify the process itself – especially the “right to self-determination.” An international right to self-determination presumes the existence of an international “person” to whom such a right can attach: yet the very premise of a claim to self-determination is that international personhood has been unjustly denied to the community in question up to that point. The right thus seems to imply the existence of a shadowy, pre-state, corporate thing with some sort of inchoate standing in international law, even as it is simultaneously premised on the non-existence of this same thing.<sup>2</sup>

When the Eurasian land empires collapsed at the end of the First World War, and a new order based on “self-determination” was proclaimed, this “thing” or juridical person was colloquially understood to be a “nation.” Were “nations” legal persons of a sort, capable of possessing international rights? However dubious in theory, this construction proved even less plausible when applied to the actual successor states of the Habsburg Empire, which emerged onto the international stage riddled with as much ethnic diversity as the empire itself.

To complicate matters further, the new states of Central and Eastern Europe were saddled at birth with international treaties that safeguarded the rights of ethnic, religious, and linguistic minorities residing within their borders. If the new minorities protection regime thus undermined the idea of a single, state-forming nation by acknowledging the fragmentation of the body politic, it re-introduced the question of the international legal personhood of ethnic groups on a sub-state scale.<sup>3</sup> Under the treaties, ethnic minorities seemingly possessed international rights: did that not imply that these collectives were corporate legal persons under international law, separate from the states in which they lived? Today we think of the interwar minorities regime as an era of innovative group rights which subsequently gave way to an alternate system built on individual rights in the wake of the Second World War.<sup>4</sup> Yet it was the very “groupness” of those interwar rights that aroused endless controversy and dissent while they were in operation.

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2. See generally Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51 (1988).

3. The connection between self-determination and minorities rights are more complex (both for actors at the time and historiographically) than I can discuss here. Some interwar jurists, for example, understood minority rights as compensation metered out in cases where full self-determining statehood was not possible. See, e.g., CARL GEORGE BRUNS, GRUNDLAGEN UND ENTWICKLUNG DES INTERNATIONALEN MINDERHEITENRECHTS: EIN UEBERSICHT 16 (1929); JACOB STOYANOVSKY, THE MANDATE FOR PALESTINE: A CONTRIBUTION TO THE THEORY AND PRACTICE OF INTERNATIONAL MANDATES 54 (1928).

4. On the mid-century tussle between individual and collective rights, see generally, among others, Mark Mazower, *The Strange Triumph of Human Rights, 1933-1950*, 47 HIST. J. 379 (2004); PHILIPPE SANDS, EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE” AND “CRIMES AGAINST

In what follows, I use the legal fogginess of these collective rights as an historical opening – a kind of historiographical sticky spot that leans in to a series of different conceptualizations and periodizations. It prompts us to think about minority rights not “forwards,” through a comparison with postwar international human rights, but “backwards,” through a deeper imperial genealogy. The whole question of the juridical subjectivity of ethnic groups was, it turns out, an old and weary theme in the Habsburg lands, one that knots the history of international law back into that of imperial constitutional law. This longer regional history changes both sides of the story, reciprocally: if it allows us to re-“place” or re-ground this chapter of the history of international law, and counter international law’s cultivated placelessness, it also exposes the experimental visions of “international” law coursing through the veins of imperial jurisprudence.

#### I. A MAGNA CARTA FOR EAST CENTRAL EUROPE (OR, THE PROBLEM WITH THE LEAGUE’S MINORITIES TREATIES)

Looking eastwards from his perch at the University of Vienna in 1937, Alfred Verdross thought he knew how to soothe the region’s unrest. A former Kelsen student, the distinguished Austrian jurist had made his name in the years after World War One by extending the monism of the Vienna School to the sphere of international law. Disquiet in East Central Europe, he now argued, was the inevitable result of categorical errors introduced by the Paris Peace Conference of 1919 and embedded in the international settlement it midwived: a regime with an invisible subject, or — a system of minorities protection in which “minorities” did not exist.

Verdross reminded his readers that the minorities treaties did not define the concept of minority and referred only to *members* of ethnic, linguistic, or religious minorities. “The positive international law of minority rights is thereby constructed individualistically, rather than universally. Not them, but those *belonging to* the minorities are awarded rights.”<sup>5</sup> Nowhere in the treaties did “a minority” *as such* possess a right. Small wonder, perhaps: genuine rights-bearing legal collectivities raised the specter of states within states, of unruly nested sovereignties, which representatives of the new states predictably resisted at all costs.<sup>6</sup> More philosophically, the construction of ethnic/national groups as unified legal persons in possession of international

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HUMANITY” (2016). On new ways of linking minority rights and group rights, *see* forthcoming work by León Castellanos Jankiewicz.

5. ALFRED VERDROSS, *VÖLKERRECHT* 226 (1937) (emphasis in original).

6. Some early proposals for the minorities treaties recognized minorities as “distinct public corporations.” *See* Nathaniel Berman, *The International Law of Nationalism: Group Identity and Legal History*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 41 (David Wippman ed., 1998).

rights would challenge the foundations of a state-centric international law. If minorities truly possessed international subjectivity, reasoned Rudolf Laun – another Austrian jurist of the period – “then the whole image of the community of international law would be essentially transformed.”<sup>7</sup>

It was this legal denial of the juridical subjectivity of the group that Verdross understood as a major geographical-categorical error. He argued that the premise of the treaties — that it was plausible (legally and otherwise) to understand minorities as a collected mass of individuals — may be well suited to West and Central Europe, but was dangerously misconceived for the “belt of mixed peoples of the European east.” His prescription was specific:

A pacification [*Befriedung*] of the European east can only be achieved if the principle of the *equal rights of ethnicities* [*Gleichberechtigung der Volksstämme*] laid down in article 19 of the old-Austrian constitution regarding the general rights of citizens (1867) is elevated to the *Magna Carta of Eastern Europe*.<sup>8</sup>

On the cusp of the Second World War, Eastern Europe cried out for the resurrection of Habsburg constitutional law — at least according to Verdross. The rights languages of the empire’s nationalities law were far better adapted to the prose of life in this region than the misconceived platform of individual rights cooked up and imposed through the new international settlement. Article 19 of Austria’s last major constitution could thus be recalled into service as a kind of supranational regional charter of rights indigenous to the region itself.

The peaceful coexistence of ethnic groups cohabiting in close proximity, he explained, could be achieved only if each group possessed an equal right to the protection and cultivation of their ethnicity and language. “But because culture is only possible in the community, mere individual rights are not sufficient, it is far more necessary to recognize *rights of the ethnic group* [*Volksgruppenrecht*]. Pursuant to this, the rights of minorities must be rebuilt into the *rights of ethnic groups*.”<sup>9</sup> In 1936, the nationalities

7. MITTEILUNGEN DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT: HEFT 7, 32 (1926), [http://digital.staatsbibliothek-berlin.de/werkansicht?PPN=PPN860664945&PHYSID=PHYS\\_0005&DMDID=DMDLOG\\_0001](http://digital.staatsbibliothek-berlin.de/werkansicht?PPN=PPN860664945&PHYSID=PHYS_0005&DMDID=DMDLOG_0001) (Rudolf Laun at the Siebente Jaherversammlung of the Deutschen Gesellschaft für Völkerrecht, in the discussion on 27 May 1926, following G. Ebers, “Sind im Völkerrecht allein die Staaten parteifähig?”). On international legal personality in this period, see generally Natasha Wheatley, *Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State*, 35 LAW & HIST. REV. 753 (2017).

8. VERDROSS, *supra* note 5, at 230–31 (emphasis in original).

9. *Id.* (emphasis in original). For a survey of the jurisprudence of “*Volksgruppenrecht*” in the 1920s and 30s, see Samuel Salzborn, ‘*Volksgruppenrecht*’: Zum Transfer(versuch) eines politischen Paradigmas in das Europäische Minderheitenrecht, in RECHTSTRANSFER IN DER GESCHICHTE / LEGAL TRANSFER IN HISTORY 44–63 (Vanessa Duss et al. eds., 2006).

Congress had come to the same conclusion, declaring their impatience with individual rights and the necessity of new corporate legal bodies. “All cultural work is communal work, all national rights are communal rights,” the congress declared in its resolutions that year. “For that reason, a true nationalities law that does not recognize national minorities as collective unities and legal subjects is unthinkable.”<sup>10</sup>

Verdross was not alone in comparing the minorities treaties unfavorably to article 19 of the old imperial Austrian Constitution.<sup>11</sup> He shared with other jurists of the period a frustration with the notion that his native region needed to take legal lessons on the rights of national minorities from the Allied powers. The Habsburg Empire had been a bustling laboratory for conceptions and schemes of nationality rights and group legal subjectivity. Yet as the empire collapsed at the fiery end of the world war, Austria had been rebranded a backward prison house of nations, and its former territories transformed into a different sort of laboratory – a testing ground and zone of tutelage for new international rights that withheld sovereignty’s full splendor. On the knife edge of war’s end, the region had gone from the *subject* of (inter)national legal innovation to its *object* – a site of disciplinary regulation and (perceived) humiliation.<sup>12</sup> Verdross tried to square the circle and reclaim the Habsburg lands as legal protagonists rather than guinea pigs in the twentieth-century history of rights.

Nor was he alone in arguing that the demographic particularities of the region required different ways of conceptualizing rights, personhood, and sovereignty. As the Austrian historian Harold Steinacker explained in 1934, “we have here an *over-one-another* rather than *next-to-one-another*, an *overlaying* [*Überschichtung*] of peoples [*Volkstümer*].”<sup>13</sup> What could the one-dimensional geographies of sovereignty, or an anemic, individualized minority regime mean in the world of this overlaying? What might

10. VERDROSS, *supra* note 5, at 231 (quoting Resolutions of the XII Nationalities Congress, held in Geneva in September 1936).

11. Hans Kelsen (for example) considered rights guaranteed in the new Austria through the *Minderheitenschutz* norms of the Treaty of St. Germain and observed that they did not go further than article 19, and in fact remained a little behind, “als die Einführung einer Staatssprache ausdrücklich zugelassen wird.” HANS KELSEN, *ÖSTERREICHISCHES STAATSRICHT: EIN GRUNDRISSEN ENTWICKLUNGSGESCHICHTLICH DARGESTELLT* 63 (1923).

12. See Jane Cowan, *Who’s Afraid of Violent Language?: Honour, Sovereignty, and Claims-Making in the League of Nations*, *ANTHROPOLOGICAL THEORY* 271, 271–91 (2003) (discussing the Foucauldian overtones of the minorities regime).

13. Harold Steinacker, *Die geschichtlichen Voraussetzungen des österreichischen Nationalitätenproblems und seine Entwicklung bis 1867*, in *DAS NATIONALITÄTENRECHT DES ALTEN ÖSTERREICH* 4–5 (Karl Gottfried Hugelmann ed., 1934) (“Hier haben wir große Schwankungen der Sprachgrenzen und des Zahlenverhältnisses in den Mischgebieten. Vor allem haben wir statt des Nebeneinander ein Übereinander, eine Überschichtung der Volkstümer.”)

international law look like if it was written *out* of that overlaying, rather than applied from the outside and after the fact, in a doomed attempt to sort its geological architecture into a flat legal geometry?

If we track the evolving jurisprudence of collective rights out of the cradle of Habsburg constitutional law and into the world of interwar minority protection, we glimpse how the problem of group legal personality repeatedly spurred visions of alternate versions of international law indigenous to East Central Europe. Time and again, conceptions of collective rights spiraled off into bold re-imaginings of the very idea of international law. If people were dispersed and mobile and layered, could law be so too? What did sovereignty mean in such circumstances? Or territory, for that matter? Could both be superseded? The sharp line between international and domestic jurisdictions itself seemed part of the problem, as a string of thinkers proposed different iterations of an “internal international law” or “internal supranational legal order.”

## II. (GROUP) RIGHTS WITHOUT SUBJECTS (AGAIN): THE EMPIRE’S CONSTITUTIONAL MYSTERIES

There was more than a little irony to Verdross’s impassioned recall of Austrian nationalities law as a model for true collective rights. His invocation depended on a certain forgetting of its own. For it was precisely the difficulties of recognizing nations or peoples as legal persons that had preoccupied generations of Austro-Hungarian jurists. Section 19 of the 1867 constitution had announced that all ethnicities were equal in their rights and possessed the inviolable right to cultivate their language and nationality. But these ostensibly collective rights lacked an obvious subject to wield them: the law did not name, define, or constitute “ethnicities” or “nations” as legal entities. It was precisely the gap between the formal fact of these rights and the legal opacity of their bearers that proved such thorny (if fertile) terrain for Habsburg legal thinkers.

Faced with this constitutional provision – which quickly became the basis for myriad regional claims and complaints<sup>14</sup> – many jurists threw up their hands. The prominent Graz professor Ludwig Gumplowicz shook his head: “‘ethnicities’ are neither physical nor juridical persons, and therefore

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14. In this way, imperial law ironically played a role in producing national communities, especially by spurring conceptions of nationality that focused on language use. See Pieter Judson, *THE HABSBERG EMPIRE: A NEW HISTORY* (2016); See Tara Zahra, *KIDNAPPED SOULS: NATIONAL INDIFFERENCE AND THE BATTLE FOR CHILDREN IN THE BOHEMIAN LANDS, 1900-1948* (2008).

as such can never assert what ever rights.”<sup>15</sup> He therefore classed this provision as a mere general principle that could never be implemented without further legislative elaboration. Edmund Bernatzik, another doyen of Habsburg constitutional law, argued in parallel that nationalities could not form legal persons because they did not have the necessary unified and organized will. Faced with the constitution’s vague formulation, he maintained, one must immediately ask “who then is the subject of such a celebrated, ‘inviolable’ right, if it cannot be the nationality as such?”<sup>16</sup> He offered no solution to the problem.

So, these constitutionally guaranteed rights were in need of a subject.<sup>17</sup> They populated constitutional law like ghosts: disembodied legal signs without “persons” to carry them. Georg Jellinek could only blame the drafting. “This article has a very unlegal style [*unjuristisch stilisirt*],” he complained in 1892, “in that ethnicities that do not possess personality and languages that could never become legal subjects are granted ‘rights.’” Further legislative elaboration was required “to designate the legal subjects who are to be granted an entitlement in this area.”<sup>18</sup> Adolf Exner, a scholar of Roman law and Rudolf von Ihering’s successor at (and future rector of) the University of Vienna, spoke on the subject at the Wiener Juristische Gesellschaft in 1892. “If one examines article 19, the absence of a legal subject is already apparent. Ethnicities are not juridical persons; in the first instance it is not even possible to objectively determine who belongs to an

15. Ludwig Gumplowicz, *DAS OESTERREICHISCHE STAATSRECHT (VERFASSUNGS- UND VERWALTUNGSRECHT): EIN LEHR- UND HANDBUCH 29* (Vienna: Manz’sche k. u. k. Hof-Verlags- und Universitäts-Buchhandlung, 1891).

16. Edmund Bernatzik, *DIE JURISISCHE PERSÖNLICHKEIT DER BEHÖRDEN; ZUGLEICH EIN BEITRAG ZUR THEORIE DER JURISTISCHEN PERSONEN* 100, n. 259 (Freiburg: Akademische Verlagsbuchhandlung von J. C. B. Mohr, 1890)

17. Gerhard Stourzh has argued that although nations were never organized into legal persons, the rights granted under Section 19 of the Constitution did have meaning and affect, because collective claims were brought by municipal organizations or voluntary associations, for example, that represented national interests in a particular area even if they did not represent the totality of members of that national group. Thus the binary between individual citizens and organized nationalities fitted out with representative organs does not capture the political reality of old Austria. See Gerald Stourzh, *Die Gleichberechtigung der Volkstämme als Verfassungsprinzip 1848-1918*, in *Die Habsburgermonarchie 1848-1918*, vol. 3., *Die Völker des Reiches*, part 2, 1149-57 (Adam Wandruszka & Peter Urbanitsch, eds., 1980). We could say that these were surrogate or placeholder legal personalities, that could treat the issues in a piecemeal fashion, local case by local case, rather than dealing with the question more structural legal terms for the empire as a whole. Of the new work on Habsburg nationalities law, see Börries Kuzmany, *Habsburg Austria: Experiments in Non-Territorial Autonomy*, 15 *ETHNOPOLITICS* 43, 43-65; Jeremy King, *The Municipal and the National in the Bohemian Lands, 1848-1914*, 42 *AUSTRIAN HISTORY YEARBOOK* 89, 89-109 (2011).

18. Georg Jellinek, *SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE* 94 (Freiburg: Akademische Verlagsbuchhandlung von J. C. B. Mohr 1892).

ethnicity.”<sup>19</sup> Its “true nature,” he argued, was that of a “promissory law [*Verheißungsgesetzes*].” The word “inviolable” already pointed one in that direction. “Every right can be violated. But if it says in the state fundamental law that a right is inviolable, then that is a self-limitation on the will of the state [*des Staatswillens*], not a guarantee of individuals against a legal injury.”<sup>20</sup> The state was speaking to itself, not ascribing rights to others. Exner’s solution to the specter of rights without subjects was to “discover” that the rights themselves did not exist in the first place: article 19 in fact housed the *duties* of the state rather than the rights of nations.

Others found the notion of ethnicities/nations as legal persons far less perplexing. The great proponent of national federation and Czech politician František Palacký considered the problem at length. He later recounted that already in his famous letter to the 1848 Frankfurt parliament he had interpreted “each of the peoples [*Völker*], in the genetic meaning of the word, as particular personalities [*besondere Persönlichkeiten*],” with the right of association (*Associationsrecht*) as their primary means of protection. “The ideas already existed; all difficulties concerned simply the embodiment [*Verkörperung*] and grouping of these into concrete and organic wholes.”<sup>21</sup> How were fluid and dispersed “peoples” to be solidified into singular subjects?

Palacký’s approach was both pragmatic and revealing. In 1866, he ruminated on the “reality” of national groups as distinct from states:

Is each nation, in its totality, a moral and legal person, or not? I think that at least among thinkers there can exist no controversy about that. Nations such as, for example, Bohemians, Poles, Hungarians, Germans and so on are genuine realities, are particular and dynamic wholes, of which each possesses its own particular consciousness, its will, its own interests and therefore also duties; in brief, they are real moral and legal persons.<sup>22</sup>

No one would deny, he felt, that Germans who lived in Austria, Prussia, Russia, and France had their own common national interests and friendly understanding, even as their respective governments may rage against one another. If Palacký foreshadowed the irredentism of the interwar years, he also hinted at a necessary fluidity or overlap between *imperial* and *international* law in Central Europe:

That the theory of international rights in the above described sense of the

19. Adolf Exner, *Subjective Rechte aus Artikel 19des Staatsgrundgesetzes über die allgemeinen Rechte der Staatsbürger*, 49 JURISTISCHE BLÄTTER 583 (1892).

20. *Id.* at 584.

21. František Palacký, POLITISCHES VERMÄCHTNISS 15 (Theodor Mourek ed., 2nd ed.1872) (“Die Ideen waren ziemlich früh vorhanden; alle Schwierigkeiten drehten sich nur um die Verkörperung und Grupirung [sic] derselben zu einem konkreten und organischen Ganzen.”).

22. *Id.* at 14.

different ethnicities has not yet been developed, must obviously be attributed to the circumstance that scholars working on these rights, Englishmen, Frenchmen, Dutchmen, Italians, and Germans, live in such lands in which the concepts “nation” and “state” more or less coincide.<sup>23</sup>

He mused that the intellectual energy of his countrymen had been caught up elsewhere — in Slavic philology and the exact sciences. Had they turned their minds to nationalism and legal theory instead, he speculated, there would be a far more developed jurisprudence on the *international rights of nationalities* — rights that transcended sovereignty and attached to human groups rather than state borders; rights that were jurisdiction-queer. As viewed from the multiethnic polities of central Europe, international law would (and should) look quite different. As the century drew to a close and even more so after the empire collapsed, Central European jurists would develop precisely such a nuanced jurisprudence of (inter)national rights.

### III. PERSONALITY EXPLODING GEOGRAPHY: WE NEED A NEW INTERNATIONAL LAW...

Visions of new sorts of national rights that attached to peoples rather than territories bubbling up from Habsburg jurisprudence achieved a global fame as the platform of the Austro-Marxists (especially Karl Renner and Otto Bauer) at the turn of the century. But such visions had in fact entered the bloodstream of imperial constitutional debate already at its inception moment in the wake of the 1848 revolutions. One of the earliest proposals for a re-ordering of the empire along national lines came from a Rumanian delegation collectively representing Rumanians living across provincial frontiers in Transylvania, Hungary, the Banat, and the Bukovina. In a March 1849 memoranda to the imperial government, the Rumanian delegation laid out a detailed plan for “the amalgamation of all Rumanians of the Austrian monarchy into a single independent nation, under the Austrian scepter, as an integral component of the unified monarchy.”<sup>24</sup> While stressing their loyalty to the monarchy, they sought an “independent national administration” so that they might exercise the right to free national development, as guaranteed by the crown.<sup>25</sup> This independence would pertain only to internal administration against the other nations of the monarchy. No nation should be subordinate to another. This principle meant that the realization of the national equality of rights would be possible only if

each particular nation is left to group itself into a single center over and

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23. *Id.*

24. EUGEN BROTE, DIE RUMÄNISCHE FRAGE IN SIEBENBÜRGEN UND UNGARN: EINE POLITISCHE DENKSCHRIFT 177 (1895).

25. *Id.* at 181.

against the remaining nations, roughly in the method of the ecclesiastical organization for the members of different confessions, without consideration of the previous provincial division, and without great consideration for territory in general.<sup>26</sup>

Genuine equality of national rights required the old provincial borders to be dissolved, the logic of minorities and majorities superseded and, portentously, territory itself to fade in importance. The tyranny of geography would no longer prevent a dispersed and intermingled population from appearing as a single administrative unit.

The associational logic of confessional communities was likewise invoked by the Austro-Marxists half a century later in their bold model for a reformed imperial political structure that superseded territory altogether. In their respective works *Die Nationalitätenfrage und die Sozialdemokratie* (1907) and *Staat und Nation* (1899), Otto Bauer and Karl Renner famously elaborated a federal vision for the empire built around the so-called “personality principle.” They argued that national collectives could be constituted non-territorially among co-nationals, wherever they happened to live, through a curia system analogous to church membership. For all its thickness and scope, the literature on Austro-Marxist cultural autonomy has focused less on its place within an imperial (and subsequently international) jurisprudence of legal personality. At its core, the personality principle in fact constituted a discourse on the art of having rights, on making (dispersed, overlaid) nations “visible” in law.

“As is well known,” Renner wrote, “the nations in Austria do not have juridical personality, nor any other sort of legally graspable collective presence. Current law does not know the nation, but rather only nationality as a distinctive characteristic of the individual.”<sup>27</sup> (Verdross ventriloquized this complaint in 1937.) Yet Renner, like his colleagues, eschewed the most obvious way of making a nation visible in law — that is, through a sovereign nation-state. They viewed an “international legal order” based on “national autonomy” to be a far superior model.<sup>28</sup> To achieve this, he elaborated the *legal* idea of a nation within a federally-organized *Nationalitätenstaat*. New legal forms and formations (*Rechtsformen*) needed to be constructed for this new “internal supranational legal order [*innerstaatliche überationale Rechtsordnung*].”<sup>29</sup> Few models were available for the craftsmen of these new *juristische Formen*. Scholars in the field should have been far more

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26. *Id.* at 179.

27. KARL RENNER, *DAS SELBSTBESTIMMUNGSRECHT DER NATIONEN IN BESONDERER ANWENDUNG AUF OESTERREICH* (1918).

28. *Id.* at 29ff.

29. *Id.* at 36.

inquisitive about the wide variety of forms that state and nation might take. It was time, Renner announced, for a new constitutional work.<sup>30</sup>

Crucially, this new work required moving beyond a liberal paradigm in which national particularities belonged only to the individual, *and* beyond a territorial understanding of jurisdiction.<sup>31</sup> Any solution based on individual rights was insufficient. “The national problem is not just and not in the first instance an economic-social or a language question, but a constitutional-political question that seizes the whole state organization.”<sup>32</sup> Nations sought a portion of the state’s functions, they wanted power. Nations must be “state legal factors [*staatliche Rechtsfaktoren*], constitutional potencies or, to utter the dreaded phrase, states within states, if peace and progress is to return to Austria.”<sup>33</sup> These states within states could not be built upon territorial foundations, not only because language groups did not inhabit discrete, hermetic areas, but also because such an approach misunderstood the nature of nationality: an individual did not “leave” the nation when he or she left the territory, nor did he or she “enter” it upon traversing a certain geographic domain.<sup>34</sup> A far more fluid solution was required, in which law attached to people rather than land — in which jurisdiction could roam with human bodies.

How were dispersed, mobile people to mimic the legal fixity of territory as a jurisdiction? A nation must be transformed into an “autonomous body, into a juridical person with its own actionable, judicially-protected subjective rights.” In other words, it was to become a “private and public law person, capable of acting in law, entitled to claim and to have claims [brought] against it.”<sup>35</sup> Renner viewed such subjecthood as the only method of making national rights meaningful. Like so many other Habsburg jurists before him, Renner critiqued the legal construction of Section 19 of the constitution that granted national rights without having organized “nations” as legal subjects. Rights without subjects were unenforceable and thus meaningless. In his words, the “question of the bearer of rights” lay at the core.<sup>36</sup>

In distributing law according to demography rather than geography, the Austro-Marxist program conjured the prospect of states without territory.

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30. *Id.* at 38–39.

31. *Id.* at 40–41.

32. *Id.* at 67.

33. *Id.* at 69.

34. *Id.* at 74.

35. RENNER, *supra* note 27, at 78.

36. RENNER, *supra* note 27, at 118, 136 (“die Nation als freie Einheit, als juristische Person des privaten und als Körperschaft des öffentlichen Rechtes organisiert werden muss, wenn ihr in Wahrheit die Rechte zukommen sollen, die ihr vermeint sind”).

What were rights without land? Commentators worried about the implications for legal theory and authority. The politician and erstwhile trade minister Joseph Maria Baernreither was quick to identify the radical stakes of the Austro-Marxist schema. Bauer and his colleagues, Baernreither observed in 1910, wanted to construe nationality as a “personal union” (*Personalverband*) rather than a “territorial body” (*Gebietskörperschaft*). If “the nation must become a legal subject” in this way, then “a relationship must be established between the individual national-comrade [*Volksgenossen*] and the nation which is like that existing today between a citizen and the state.”<sup>37</sup> What is more, “this new legal subject, the organized nation” must then possess organs so that it could make use of the rights granted to it; one would need judges who could preside over this new area of law. Such developments would amount to “a partial transvaluation of our state law [*Staatsrecht*] into a nations law [*Nationsrecht*].”<sup>38</sup> The whole basis of constitutional law would shift. They would be states within the state — if not *against* the state, Baernreither warned.

The wholesale transformation of the law of states — and the classical distinction between municipal and international law — was in fact precisely Renner’s point. In his own terms, this new legal order represented an “architectonic work.”<sup>39</sup> He conceived the autonomy program as hybrid blend of domestic and international law — a means of inviting supranational law into the imperial fold. As he put it in *The Self-Determination of Nations with Particular Application to Austria*, perhaps the most complete articulation of his program, published in 1918 (with a preface dated December 1917):

Incontestably, this country, despite its objectionable constitutional backwardness in all other things, has made in this area the first and most interesting attempts at an internal international law [*innerstaatlichen Völkerrechtes*], it can count as a field of experimentation for internal internationalism, and therefore has a high interest for legal research as well as political praxis.<sup>40</sup>

It was the international law of the empire. Palacký’s prophesy — that a theory of the international rights of nations would most obviously originate in a polity like Austria-Hungary — had in some senses come true.

Through the keyhole of this alternative pre-history to the jurisprudence of interwar minority rights, the history of international law need not necessarily start or end with international law. Scholars who analyze the

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37. JOSEPH MARIA BAERNREITHER, ZUR BÖHMISCHEN FRAGE: EINE POLITISCHE STUDIE 13–14 (1910).

38. *Id.*

39. RENNER, *supra* note 27, at 146.

40. *Id.* at Preface (this text was a much revised and re-titled second edition of his earlier work RUDOLF SPRINGER, DER KAMPF DER ÖSTERREICHISCHEN NATIONEN UM DEN STAAT (1902)).

interwar minorities regime solely within the frame and jurisdiction of international law understandably focus on the 1878 Treaty of Berlin as the pivotal precedent: a moment in which the Great Powers made the recognition of new Balkan states dependent on commitments to respect minorities (albeit of the religious rather than linguistic/national variety).<sup>41</sup> Yet for many jurists and public figures “on the ground” in Central Europe between the wars, the problems raised by the minorities treaties formed a continuity with longstanding Habsburg debates about how to turn sub-state ethnic/national groups into units protected by law — debates that were always also about the legal architecture and jurisdictional structure best suited to the region’s kaleidoscopic diversity. In 1918–19, in the wake of the empire’s collapse, that conversation migrated from the jurisdiction of imperial constitutional law to that of international law, and the Habsburg jurisprudence on nations as legal persons morphed into the “secondary literature” for theories of international minority rights.<sup>42</sup> Yet this jurisdictional mutation was not only sequential and historical: from its inception in the Habsburg constitutional debates of 1848–49, the question had always threatened to bend and break traditional conceptions of jurisdiction altogether, and blur any clear line between “domestic” and “international” domains. As Palacký and Renner had already suggested, the creation of ethnic/national corporate bodies in public law opened the door for those new persons to exist forever on the threshold between “internal” and “international” jurisdictions.

#### CODA

##### ...BUT NOT SO NEW AS THAT: THE NAZI CHALLENGE

The Central European story of the juridical subjectivity of nations has an unexpected and powerful sting in its tail. In the hands of Austro-Marxists like Renner and Bauer, the construction of non-territorial national legal persons (within the frame of a federal imperial state) served “progressive” ends. Yet such legal projects had no necessary political anchoring, and ended up featuring not only in attempts to forge the Versailles order, but also to dismantle it. While Adolf Hitler’s National Socialists may have disdained the “juridification” of the interwar order, they too shared the crucial assumption that an ethnic group, quite apart from any correlation with the borders of a state, could and should be a legal subject. For them, it was *the* legal subject. *Volkspersonlichkeit* structured the territorial map and legal imaginary; in rejecting the empty abstraction of the state, they “turned the

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41. See CAROLE FINK, *DEFENDING THE RIGHTS OF OTHERS: THE GREAT POWERS, THE JEWS, AND INTERNATIONAL MINORITY PROTECTION* (2004); Berman, *supra* note 6.

42. See, e.g., Josef L. Kunz, *Prolegomena zu einer allgemeinen Theorie des Internationalen Rechts nationaler Minderheiten*, 12 Z OFFENT. R, 221–72 (1932).

folk-group into a collective legal entity.”<sup>43</sup> Before Germany left the League, the German diplomat Friedrich von Keller explained their position before the League’s Sixth Committee in October 1933. Nations had “a natural and moral right,” he held, “to consider that all its members — even those separated from the mother country by State frontiers — constitute a moral and cultural whole.”<sup>44</sup> (The similarity of his statements to Palacký’s sentiments, quoted above, is striking.) All of a sudden, the state’s containment of legal personality — previously the bedbug of progressive projects one and all — seemed to be a comforting convention.

The following day, the British statesman William Ormsby-Gore — a man with paws all over the different facets of the interwar order — passionately refuted von Keller’s presentations, especially his sketch of an international relations founded on ethnic homogeneity, in which a state possessed the right and duty to concern itself with citizens of other states of the same ethnicity:

That will carry us very far. I tremble to think of the responsibilities of my Government in respect of every citizen of the United States who claims descent from those who went over in the Mayflower — and there are millions — if this idea were put into operation. We reject absolutely this conception put forward by the German delegate regarding the racial homogeneity of political units and States. How could we do otherwise?<sup>45</sup>

Edvard Beneš, Czechoslovakia’s Foreign Minister, readily agreed with Ormsby-Gore: “As I see it, this theory would, if carried to the extreme, overthrow all the legal conceptions upon which not only the Minorities Treaties, but also the international relations between States composed of two or more nationalities, are based.”<sup>46</sup> Unlike his Bohemian forbears within the Austro-Hungarian empire, Beneš already had sovereign rights, which seemed (at least until 1938!) quite hard and real. The Czechs had switched roles: his task was now to *defend* the traditional order of state relations, and the privileges of sovereignty, and certainly not to experiment with legal subjects floating fluidly beyond state and territory.

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43. Mark Mazower, *Minorities and the League of Nations in Interwar Europe*, 126 DAEDALUS 47, 55–56 (1997); see, e.g., NORBERT GÜRKE, VOLK UND VÖLKERRECHT (1935); Virginia L. Gott, *The National Socialist Theory of International Law*, 32 AM. J. INT’L L. 704 (1938).

44. Fifth Meeting (Oct. 3, 1933), Minutes of the Sixth Committee (Political Questions), *Records of the Fourteenth Ordinary Session of the Assembly*, League of Nations Official Journal, Special Supplement No. 120, 23 (1933).

45. Sixth Meeting (Oct. 4, 1933), Minutes of the Sixth Committee, *Records of the Fourteenth Ordinary Session of the Assembly*, League of Nations Official Journal, Special Supplement No. 120, 35 (1933).

46. Sixth Meeting (Oct. 4, 1933), Minutes of the Sixth Committee, *Records of the Fourteenth Ordinary Session of the Assembly*, League of Nations Official Journal, Special Supplement No. 120, 39 (1933).