
Statelessness: An Invisible Theme in the History of International Law

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The *Oxford Handbook*¹ is a welcome and necessary intervention in the history of international law. In the introduction, the editors signal their reformist programme: out with the progressive, triumphalist narrative; in with the dark side of international law and its side tracks outside the European experience. In addition to this programme, the project displays two further signs of its serious intent to change the field. First, the authors embarked on a truly collective project, including a week of face-to-face consultation, in a rare effort to define a reasonably unified agenda. Scholarly redirection is a social as well as an intellectual undertaking, and the community built around this volume marks its purposefulness. Secondly, the book's scope is massive: more than five dozen chapters, more than three dozen authors, and more than 1,000 pages of text provide the bulk necessary to accomplish the paradigm shift that the editors intend. The extensive range of the book, especially in its 'Regions' section, does what is necessary to transform globalizing intent into actuality. It is a foundational volume, and any scholarly edifice building upon it will have a broader footprint than was previously possible.

This book seems to be as comprehensive an account of the global history of international law as can reasonably be produced under current conditions. For this reason, it is a particularly valuable indicator of the characteristics and structures that presently define the field. The book shows that the history of international law is dominated by Europe, by states, and by ideas (especially the ideas of great men). Critique of Eurocentrism is a central feature of the *Handbook*, and the collective draws effectively on a variety of existing scholarship to trounce this tendency quite completely. It appears, however, that existing scholarship offers relatively fewer resources to tackle the centrality of states and of ideas in the historiography of international law. In this short review, I will offer some reasons why future histories of international law might wish to tackle the dominance of states and ideas in conventional accounts, and I will

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¹ B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2013).

imagine some ways in which historians might do this. Post-colonial and global histories have seen fit to displace the state, while law and society scholars have seen fit to look beyond ideas in explaining the workings of the law. Following these moves, I suggest, may be necessary if the global history of international law is to realize its critical potential.

In arguing for such a shift, I will use statelessness to think with. The question of statelessness sits at a scholarly disjuncture that illustrates some of the challenges involved in producing a global history of international law. Many of those who study statelessness seem to think that it is, or ought to be, part of international law.² Scholars of international law, however, do not seem to share this view. Despite its importance in the history of the modern world, statelessness is not a major presence in the *Handbook* – except for a few words in the ‘Protection of Individuals’ chapter – or in the history of international law. In the legal literature, statelessness is typically cast as a problem to be solved by nationality law.³ (Nationality law has been curiously occluded in international law, however, despite its prominence in an earlier period.) Two instruments, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, govern this problem, at least as far as international lawyers are concerned.⁴ Statelessness is an unfortunate consequence of public international law’s errors, rather than a phenomenon with its own weight.⁵ Insofar as it can be considered a matter outside state purview, it is a question of human rights.

So, is statelessness a theme of international law? In some ways, this is a moot point. In the *Handbook*, Anthony Carty writes that ‘the reason international legal history is almost impossible to write is that there is no consensus on what international law is’.⁶ The absence of statelessness is no doubt a result of the contingency of topical boundaries that Lydia Liu describes as ‘accidental’.⁷ According to the structure of the *Handbook*, it is not even clear whether statelessness would be a ‘Theme’ or whether the stateless would be an ‘Actor’. Anthony Anghie has called for studies from the perspective of the ‘victims of international law’, and the editors echo this call.⁸ Statelessness is a critical piece of the global human experience of international law, and so we ought to find the means to integrate it into the field. It offers material for a social history of international law, or *ius gentium* as if people mattered. The UNHCR estimates that at

² In her classic account of statelessness, Hannah Arendt noted with regret that ‘for the time being, a sphere that is above the nations does not exist’: H. Arendt, *The Origins of Totalitarianism* (new edn, 1973), at 298.

³ P. Weis, *Nationality and Statelessness in International Law* (2nd edn, 1979).

⁴ On these conventions and their limitations see L. Van Waas, *Nationality Matters: Statelessness Under International Law* (2008).

⁵ Thus, e.g., the failure of the 1954 and 1961 Conventions to eliminate statelessness is due to ‘low ratification rates’ and ‘the absence of a proper monitoring system’: Costamagna, ‘Statelessness in the Context of State Succession: An Appraisal Under International Law’, in S. Forlati and A. Annoni (eds), *The Changing Role of Nationality in International Law* (2013), at 39.

⁶ Fassbender and Peters, *supra* note 1, at 974.

⁷ Remarks at Rechtskulturen Workshop, ‘Towards a Global History of International Law’, 1 Feb. 2013, Magnus-Haus Berlin.

⁸ A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005), at 12; Fassbender and Peters, *supra* note 1, at 2.

least twelve million persons were stateless in 2011; they and their historical counterparts offer a quantitative bulge of experience of international law.⁹ But rather than arguing that statelessness should have been included, I want to explore what might be gained if we were to treat it as a theme of international legal history. The experiences of stateless persons encountering the deficiencies of international law offer a measure of the phenomenon at a site of broad and banal effect. This measure differs from the experiences of lawyers, treaty makers, and scholars, which highlight origins and turning points in international law. The theme of statelessness makes available two perspectives which might better advance the global history agenda: perspectives on international law beyond the state and perspectives on practice beyond concepts.

1 International Law beyond the State

At its best, global history is a critical project. It aims not merely to increase breadth of coverage (an admirable accomplishment of this book) but to disrupt the canon, the sources, and the methods of conventional history. It is a redistributive project, apportioning attention better to reflect the range of human experience. The means of achieving this objective are far from obvious, but transcending the nation-state frame has been the defining move for global history.¹⁰ Because the nation-state is so integral to international law, this move represents a huge challenge for any global history of international law.

In many ways, the *Handbook* does an admirable job of addressing Eurocentrism, not least with Arnulf Becker Lorca's essay on the topic and its many other efforts to describe non-European histories. But to my mind the book does not maintain a sufficiently sceptical attitude to the state. The summoning from elsewhere in the 'Regions' section of stories which resemble international law in its European incarnation is a worthy task. Often, as in the North African/Arab World chapter, the non-Western stories appear as little more than pale mimicry, however. In this chapter, the vast range of Islamic law is reduced to a single genre (*siyar*), which is further reduced to a single translation ('law of nations'). State-centred history obliges anti-Eurocentric accounts to define themselves in terms of 'appropriation', 'domestication', or divining signs of the countervailing 'influence' of the non-West over Western international law.¹¹ A nod to every region of the world is not sufficient to make history global. I do not wish to suggest that the study of non-Western regions or 'encounters' is without value. However, counter-hegemonic histories must continually refine their self-critique, and the state frame is a looming unacknowledged assumption constraining global histories of international law to dwell within a Western medium. A long tradition of post-colonial

⁹ 'UNHCR Stateless People Figures', available at: www.unhcr.org/pages/49c3646c26.html, accessed 20 Dec. 2013.

¹⁰ Global history and its companions – world history, transnational history, and international history – share this defining characteristic. For an orientation read Bayly *et al.*, 'AHR Conversation: On Transnational History', 111 *Am Historical Rev* (2006) 1441.

¹¹ Fassbender and Peters, *supra* note 1, at 5–7.

history explores the inescapable limitations of histories of the non-West, even those that embrace the ‘domestication’ of Western concepts by the ‘rest’.¹² Canada’s notion of ‘First Nations’, for example, is both a challenge and a capitulation to the Western nation.¹³ If the centre of gravity is to shift through global history, the conventional story told about the West must also change. It seems to me that the position of the state in the thematic section is too central to accomplish this aim. The ‘Themes’ section of the *Handbook* reflects rather than redefines the conventional thematic boundaries of International Law. In particular, public international law, here as elsewhere, is substituted for international law. The thematic section of this book is one of its most cautious sections, and it certainly fails to provide much material to respond to the more daring agendas of the introduction and the methodological section.

The editors’ aim to focus on ‘non-state actors’ is a difficult one to achieve.¹⁴ Nations, states, and para-state institutions and instruments dominate the *Handbook*’s eight ‘Actors’ chapters. The truly non-state actors who feature are exceptions. The chapter on ‘criminals against humanity’ – pirates, slavers, war criminals, and terrorists – concerns individuals of active interest to states. From the state perspective, such outlaws possess too much agency, and must be controlled through state or international action. The stateless are in a very different position. Unlike the ‘criminals against humanity’, their demands are rarely pressing; they are those whom the state ignores, excludes, or (in extreme cases) eliminates. They more closely resemble the minorities treated in the chapter by Janne Nijman. As Nijman shows, minorities and individuals were candidates for international legal personality in the interwar period.¹⁵ But it is not at all clear to what extent minorities were actors themselves, and to what extent they were avatars acted upon by other international law agents.¹⁶ This question is difficult to pose for the stateless, who did not form national advocacy groups similar to those of minorities. The celebrated Nansen passport, elicited during the interwar years by the plight of stateless elites (especially Russians), was an isolated case of response to a stateless lobby. Neglect, such as that endorsed by the Permanent Court of International Justice in the 1921 *Tunisia and Morocco* case, which established national rather than international jurisdiction over attribution of nationality, was more typical.¹⁷ The stateless were a number of individuals – not even a group – divested of a venue of action. But if they were not subjects of international law, where should they fit?

¹² Signal works include Spivak, ‘Can the Subaltern Speak?’, in G. Spivak, *Marxism and the Interpretation of Culture* (1988); D. Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (2000), who is cited in the Introduction; A.L. Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (2009).

¹³ Fassbender and Peters, *supra* note 1, at 790 and *passim*.

¹⁴ *Ibid.*, at 9.

¹⁵ *Ibid.*, at 117.

¹⁶ The history of minorities in the Middle East demonstrates the instrumentalization of local populations by external interests. See B.T. White, *The Emergence of Minorities in the Middle East: The Politics of Community in French Mandate Syria* (2011); S.D. Shields, *Fezzes in the River: Identity Politics and European Diplomacy in the Middle East on the Eve of World War II* (2011); Mahmood, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, 54 *Comp Studies in Society and History* (2012) 418.

¹⁷ *Nationality Decrees Issued in Tunis and Morocco*, 1923 PCIJ Advisory Opinion No. 4.

If we are to take on global history's methodological challenge, the question of statelessness can be a productive problem for the history of international law. Just as the international depends on the nation, statelessness is intimately bound up with the state, both semantically and legally.¹⁸ It is an effect of the state, and inconceivable without it, yet the state offers no resources of remedy. The reality of statelessness is in its effects. Law has not described it – it is a state of exception, and a site of law's failure. It is, like the criminals, pirates, and slavers, a gap, an exception. Unlike the range of actors presented in the *Handbook*, stateless actors are not positive agents; in the eyes of the law, they receive but do not produce action. But postcolonial theory has shown the perils of casting any subjects as supine 'victims'.¹⁹ The stateless individuals who experienced international law's effects present an intriguing knowledge problem: did they, like other non-state actors, also help to make the law?

2 Histories of Concepts and Histories of Practice

Of course, great men and their ideas are a more obvious ingredient in the literature on international legal history, and the *Handbook* is dominated by accounts of ideas about international law, men who produced them, and states that carried them out.²⁰ To ask the book to be something else is unnecessarily contrary. At the same time, the book's focus on 'events, concepts, and people' might mitigate against its global aspirations. In his contribution, Becker Lorca calls Eurocentrism 'a distortion that overemphasizes the centrality of Western contexts of practice'.²¹ But Western *definitions* of international law practice – as events, concepts, and people – also present an obstacle.

The events of international law – wars, treaties, trials – are far removed from the everyday experience of phenomena like statelessness. Meanwhile, there are structural limitations to the global conceptual history of international law. The Encounters section of the *Handbook* stresses 'influence', but so far this frame has elicited study of doctrine and not practice. The non-European range of ideas about that concept called 'international law' is a derivative discourse.²² Although there are ways to write the global history of ideas that validate rather than pathologize non-Western thought,²³ international legal thought is particularly thorny ground for such an approach

¹⁸ Art. 1 of the 1954 Convention Relating to the Status of Stateless Persons makes this clear: it is a 'State under the operation of its law' that has the power to make someone stateless.

¹⁹ The editors state that law from the 'victim's' perspective can endorse Eurocentrism: Fassbender and Peters, *supra* note 1, at 4.

²⁰ The outstanding example being M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2002).

²¹ Fassbender and Peters, *supra* note 1, at 1035.

²² This is the set of ideas drawn on by Anghie, *supra* note 8; A. Becker Lorca, *Mestizo International Law: a Global Intellectual History, 1850–1950* (2014). The classic account of colonial ideas about the nation-state as derivative discourse is P. Chatterjee, *Nationalist Thought and the Colonial World: a Derivative Discourse* (1986).

²³ E.g., Conrad, 'Enlightenment in Global History: A Historiographical Critique', 117 *Am Historical Rev* (2012) 999.

because it listens first to those who speak for and of states. As I suggested above, those who do not speak for states rarely meet the threshold of inclusion in conventional histories of international law, despite their evident participation in the world of international law.

It is striking that this history of international law does not draw on the rich literature on legal pluralism that has done much, over the last decades, to wrestle with the global diversity of legal practices. Scholars who have elsewhere considered legal pluralism have worked with the ‘weak’ legal pluralism that exists between formal legal institutions from different legal traditions rather than the ‘strong’ legal pluralism between normative systems that are not formalized.²⁴ The disconnection between international law and legal pluralism points to what we might call international law’s ‘standard of (legal) civilization’ and the limited range of actors that it admits. The history of human rights begins to engage some of the conundrums of this limit, showing how apparently universal standards meet their limits in the encounter with other normative systems. Statelessness is less easily conceived as a plural legal field, however, because the stateless do not possess or present a recognizable rival legal system.

Histories of non-state practice offer an avenue for the globalization of international law. In the context of statelessness, we find millions of examples of individuals interacting with international law. In most cases, this is a failure. The idiom and object of the claims of the stateless are obscure, and the outcome of the claims is typically indecisive. If some find an idiom in the form of refugee law, many more cannot in practice formulate a tangible claim, and they fade into invisibility. But that failure and that invisibility are also an essential feature of international law.

In my own research, which concerns late 19th century Alexandria (in Egypt), I find numerous stories of individuals experiencing surprising encounters with international law, when they discover that their own legal standing – what we might call their status in private international law – has changed due to shifts in public international law. After 1864, for example, Ionian Islanders in Egypt were no longer protected British subjects, while in 1881 Tunisians suddenly acquired French nationality. The international law textbooks used in Egypt in the early 20th century blend private and public international law, largely as a result of the practical experience of the people using them. The most prominent question in turn-of-the-century private international law texts was attribution of nationality.²⁵ The interwar expansion of the state system foreclosed on this line of private international law, however. By the middle of the 20th century, plural forms of membership were channelled into the single, apparently universal category of nationality. Statelessness, a normal situation only decades

²⁴ E.g., P.S. Berman, *Global Legal Pluralism: a Jurisprudence of Law Beyond Borders* (2012); Koskeniemi and Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden J Int’l L* (2002) 553. The strong/weak distinction is used by Griffiths, ‘What Is Legal Pluralism?’, 24 *J Legal Pluralism* (1986) 1.

²⁵ For instance, L. von Bar, *The Theory and Practice of Private International Law* (trans. G.R. Gillespie, 2nd edn, 1892); A.V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1908); J. Westlake and A.E. Topham, *A Treatise on Private International Law: With Principal Reference to Its Practice in England* (1905).

earlier, became an aberration, while nationality differences were managed through a streamlined system of conflict of laws. The problem of national affiliation was settled in the conceptual realm, and yet in the realm of practice the reality of statelessness endured.

This setting resembles countless other global settings, and it offers materials to consider international law in terms of its effects on human beings. The authorized thinkers in the 'Portraits' section use concepts in a fundamentally different way from ordinary people. These people are in a certain sense outside or above the law. Thinkers who, like Arendt, experienced statelessness and then wrote about it are a tiny minority. Meanwhile, the individuals of concern in the legal discourse on human rights are abstract individuals. But history's object is the concrete, the millions of human iterations of international law. What might a subaltern social history of international law look like? What is the place for real individuals, not abstract persons or great thinkers? Perhaps future volumes, building on the *Handbook*, will give us an answer. Global history is a lumping project, not a splitting project, and will tend (as this very thick book already shows) to make international law encompass ever more actors and concepts.

3 Conclusion

Could the *Handbook* survive without Grotius? He figures in more than a dozen chapters. For the most part, he appears as a reconstructed, global-minded Grotius, almost as south-east Asian as he is Dutch. But his ubiquity shows the limits of the global approach in the present moment. The suggestion I have made for a history of international law with less state, fewer concepts, fewer lawyers, and less Grotius is unrealistic in many ways. At the same time, it captures some of the stakes of global history. Statelessness can be cast as a question of law, and indeed of international law, but only if one reads between the lines – and that is perhaps the job of non-lawyers. Three features of statelessness obscure its visibility in thematic accounts of international law, such as the *Handbook*: it concerns ordinary people, not states; it concerns practice, not concepts; it concerns the weak, not the strong. When we consider the specific reasons why these features make statelessness invisible in the conventional history of international law, we see paths towards more global studies.