Introduction

> The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort as that by their own industry and by the fruits of the earth they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will.
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> Thomas Hobbes, *Leviathan*, 1651

People move. That might seem to be a rather self-evident statement with which to begin, but it's the central fact of this book. We are creatures capable of traveling substantial distances at a rapid pace. And it is fair to say that our ability to walk (and run) extraordinarily long distances is one of our defining traits as a species, along with our technological augmentations of that ability.[1] Despite its obviousness, this fact is often obscured from the central narratives of international politics and the development of international law.

States, at least in the modern era, tend not to move (at least not much). Borders are adjusted, or some states disappear. But if they do reappear they seldom move to entirely new geographic positions.[2] It wasn't always true that states, state-like formations, or political communities didn't move. The nomadic empires of the steppes of Asia moved a great deal. Also, it wasn't always true that states were defined by reference to geographically defined spaces. Sovereignty over physical space has often been relational and relative and conceived of as rights to seasonal migration routes, sea lanes, or, more often, the spaces inhabited by kith and kin wherever they happened to be.[3] Nor has the territory of the state and its law always been homologous and coterminous. Overlapping, mobile, and nonterritorial jurisdictions were common in Europe through the eighteenth century.[4] Even more common was law that attached to a person regardless of where on the planet she roamed (a kind of law that still exists). But, at some point in the nineteenth century, defined territory

became an essential element of the definition of a legitimate state or sovereign political community in international law.

According to the most widely adopted legal description in the nineteenth and twentieth centuries, a state has four elements: a population, a territory, a government, and the capacity to enter into relations with other states.[5] That description, while not explicitly hierarchical, has an implicit order. People are more essential than territory.[6] Territory is more essential than a government. A government is more essential than the capacity to enter into international relations.[7] It's the first two elements with which this book is concerned, specifically with the tension between people, who move, and territory, which doesn't.

The title of this book, *Nationals Abroad*, highlights this problem of incongruence in the modern era. To be abroad requires one to be beyond the spatial boundary of one's political community. The French, Spanish, and German equivalents of the word abroad – *À l'étranger*, *en el extranjero*, and *ausland* – are more literal renderings of the same idea and have the same requirements. And, as would be expected in a global age, the use of all four words increased dramatically in the nineteenth century.[8] To be outside of the literal and metaphorical walls of one's village, town, city, or state – to be outside of one's own political community in the European context – was certainly not a new phenomenon.[9] But it was one that became far more prevalent in the nineteenth century. With the collapse of European empire in the Americas, dozens of new republics lined the Atlantic's western shores. The American subjects of the kings of England, France, and Spain gained new political identities as citizens of Virginia, Haiti, and Mexico. Migration across the Atlantic from Europe now almost always entailed leaving one's political community and entering another – going abroad. Changes in the relative cost of transportation led to massive levels of migration both within Europe and without. By the latter half of the nineteenth century, a significant proportion of the European population began to spend significant amounts of time outside the political community of its birth. It was also a time of intense trade and investment. While international commerce had never been entirely restricted, the mercantilist impulses of the seventeenth and eighteenth centuries ensured that international investment and international trade – that is, investment or trade between different legal systems, in different jurisdictions, subject to different sovereigns – were relatively rare.[10] However, by the second half of the nineteenth century, it was common. Goods, money, and corporations, like their livelier human counterparts, found themselves increasingly abroad.

At least one of the central purposes of the state, or so its proponents have claimed, is to provide security for the lives, liberty, and property of its residents.[11] Sovereigns robe their subjects in their protection and demand allegiance in exchange. That protection often came in the form of a literal or metaphorical wall – of stone, of wood and canvas, of men, of steel – enclosing a country, town, village, or keep. Protection was usually territorially limited. But protection was also needed at times when subjects ventured beyond their sovereign's realms and walls. When a subject was abroad, protection came in the form of a threat. The sovereign declared to others, "this man is mine; harm him and you insult me; insult me and you will answer for it."[12] Just how far that threat could legally travel was a subject of debate. But, by the eighteenth century, it was well accepted among legal theorists and sovereigns that "[w]hoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety."[13] War, it seemed, could be carried out to protect subjects (or nationals) abroad.

But just who were those subjects? Who were those nationals whom a sovereign had a right (and perhaps a duty) to protect while abroad? While the relationship between communities and their constituent parts has, perhaps, never been simple to define, in the nineteenth century, it became nearly impossible.

The legitimacy of European and American states was increasingly defined by direct reference to people.[14] Democratization and nationalism altered the locus of sovereignty in Europe away from the literal and metaphorical person of the monarch and toward "the people" (however that collective noun might be defined) or, even more problematically, toward "the nation."[15] New technologies of rail, road, steam, and electricity along with new practices of mass conscription, newspaper consumption, industrial manufacturing, travel, and schooling formed diverse peoples into nations and bound them to powerful political centers – Paris, Berlin, London, Rome.[16]

The infrastructural and administrative logics of the new regime produced a historical irony in which states that increasingly based their legitimacy on representing a people also became increasingly territorial in their definition and governance. According to Charles Maier, the premise of this territorial age was that "a nation's 'identity space' was coterminous with its 'decision space.'"[17] Governance turned inward, and "[t]erritory

[was] envisaged not just as an acquisition or as a security buffer but as a decisive means of power and rule."[18]

Law, one of the primary instruments of governance, increasingly became defined territorially, and many of the vestiges of personal and feudal law supposedly faded away. As a leading scholar noted near the start of the twentieth century,

> The history of the legal relation between the state and individuals, its own citizens and aliens, is largely a history of the transition from the system of personal laws to the territoriality of law, accompanied both by a growing control of a central power over the individuals within its jurisdiction and by the appearance of certain characteristics, territorial independence and sovereignty, as essential qualifications for admission of a state into the society of states.[19]

That is, law increasingly went from something that applied *to* the French or *to* the Italians to being something that applied *in* France or *in* Italy.[20] This became all the more true as democracy accelerated the pace of lawmaking and the growth of centralized administration.[21]

But the idea of a homologous and coterminous "identity space" and "decision space" (a term for which we might substitute jurisdiction) is precisely the premise that was challenged by human mobility in an increasingly global age. Nationalism, as Ernest Gellner succinctly defined it, is a "political principle that holds that the political and the national unit should be congruent."[22] Yet, the technologies and practices that formed peoples into nations rarely stopped at the frontier. The age of national rail was quickly the age of international rail. The technologies that built nations were the same technologies that challenged the spatial coherence of nations. Steam helped to forge a unified Italy, but it also helped to send millions of Italians abroad. Print capitalism may have helped make Bavarians and Prussians feel German, but it also enabled millions of ethnic Germans living abroad to read daily news from the Fatherland.[23] Were Germans who had lived outside Germany for years, or even decades, entitled to Germany's protection? Was a state's right to protect its nationals limited only to temporary sojourners? Or did it apply to its emigrants everywhere?

In the nineteenth century, then, political units were increasingly defined by reference to territory and legitimated by reference to people or nations. It was an age that idealized the nation-state. Yet, it was an age when nation and state – when people and territory – were increasingly incongruent. Dealing with that incongruence has been the central problem of international politics during the past 200 years and, as such, the central problem of international law.

Could a state make a claim to protect a national thousands of miles away in space and several generations away in time? Just what were the limits of the relationship between a sovereign and her protected subjects? While protection abroad might have made sense for merchants and ministers (who were limited in number), what about for the millions of others who found themselves far from home in the nineteenth century? Nineteenth-century legislators, jurists, and political theorists may have idealized territorial sovereignty, but they couldn't escape the reality that millions of people were living outside the territory of their sovereign.

The relationship between states and persons was in flux. The assumption that states would serve as champions of individuals as they invested, traded, and resided abroad – far beyond their sovereign's walls – began to change at the turn of the twentieth century. The causes and consequences of that change is the subject of this book. This book tells the story of how the tension between mobile people and immobile states created "modern" international law; that is, an international law that attempted to include among its subjects more than just states and provides some limited avenues for individual human beings to make claims for the protection of their person or property themselves, rather than relying upon their sovereign to do it for them.

Now, a brief aside to define two terms around which this books revolves.

The first and most important term to define for our story is nationality. Nationality, like citizenship, denotes a relationship between a polity, usually a state, and a person.[24] The primary difference between citizenship and nationality is that the former denotes a political relationship between a citizen and her state, one in which the citizen is invested with rights. The latter denotes a relationship between a national and her state, one in which there is no implied set of rights, merely an explicit claim of "belonging" to the state. Citizenship is an internal status, nationality external. To use an extreme example, American Indians in the nineteenth century were American nationals, but they certainly weren't citizens. Such uses are historically specific, and their origins are discussed at length in Chapter 2. But for the most part, this book will hew close to that use for clarity. "Nationality" and "subjecthood" and their related nouns "national" and "subject" will be used to denote individual human persons and, occasionally, juridical persons, who are claimed as belonging to a sovereign state.

The other important term, which will be discussed at great length in Chapter 1, is "diplomatic protection." Diplomatic protection is the term used to describe the international legal process through which nationals are protected abroad. It does not, contrary to its awkward phrasing,

involve the protection of diplomats or the immunity of diplomats. It is the term that is used to describe the cloaking of a person (either real or juridical) in the protection of their sovereign state.

This book argues that changing ideas about political belonging and state legitimacy fundamentally altered what nationality meant in international law and politics. The right of a state to send a gunboat to protect its nationals and their property abroad became untenable when millions of a state's nationals lived or owned property abroad. And the duties of states toward foreigners became difficult when no sovereign would claim them—when they became stateless. As such, individuals gradually became subjects (of a sort) of international law because of the inability of the international system to reconcile two essential elements of the state – population and territory – in an age of nationalism, democratization, mass migration, global trade, and foreign investment.

In doing so, this book finds the protection of property and investments, in addition to traditional humanitarian concerns, at the center of the effort to give international rights to individuals and to establish international courts and tribunals to vindicate those rights. Capitalists and merchants used the language and institutional aims most associated with human rights movements to protect their property and investments abroad.

This book, to be clear, is *not* about human rights (not entirely). Rather, it is about the emergence of a set of international legal theories and practices that focus on protecting individuals rather than just regulating relationships between states – such protection has often been expressed in the language of law and could be described as individual international rights.[25] If this description sounds like human rights, that's because much (although certainly not all) of the human rights regime, as it has emerged in the past half-century, has been expressed in a juridical mode and in the terms of international law. The idealized central institutions of the proponents of human rights are often international courts – the European Court of Human Rights, the International Criminal Court, the Inter-American Court of Human Rights. And the documentary basis of human rights are often international declarations and treaties – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights.

I chose to avoid the use of "human rights" to escape its connotations. In the past two decades, historians have turned the history of human rights into a cottage industry, churning out tome after tome on the phenomenon.[26] Whether critical, celebratory, or hagiographic, these books

and articles explore human rights as a program for protecting the classically oppressed – minorities, dissidents, women. The primary spin-off subject, the history of humanitarianism, has been concerned with why we care for those who are distant, for those who are close, and for those who are different. But again, they explore the phenomenon of care for the classically oppressed – slaves, colonial subjects, refugees. The substantive human rights at the heart of recent scholarship have been those that traditionally fell under the Lockean categories of "life" and "liberty" – freedom of religion, freedom from arbitrary arrest or detainment, freedom of speech, freedom from torture.[27] Absent from most of the narratives has been the Lockean category of "property."[28] When property is discussed, it is almost always in the context of the failure of international social and economic justice rather than the successful internationalization of private property and investment protection.[29]

The Universal Declaration of Human Rights provides, "No one shall be held in slavery,"[30] "No one shall be subjected to torture,"[31] and "All are equal before the law,"[32] among other celebrated rights. The declaration even includes the explicit and familiar statement "Everyone has the right to life, liberty and . . . "[33] but chooses to finish that invocation of Locke and Thomas Jefferson with "security of person" rather than "property" or "the pursuit of happiness." Nevertheless, property is not absent. Article 17 declares, "No one shall be arbitrarily deprived of his property."[34] Freedom from torture, equal protection under the law, and the right to life and liberty are discussed by historians of human rights ad nauseam – the same cannot be said for the right to private property. And the Universal Declaration's liberal intellectual predecessors likewise included property rights. Fedor Martens, one of the leading international legal minds of the late nineteenth century, included the rights to property and to contract in his enumeration of the "international rights of man."[35] The 1929 Declaration of the International Rights of Man produced by the prestigious Institute of International Law and one of the direct inspirations of the Universal Declaration, likewise declared in its first article that all individuals had "an equal right to life, liberty, and property."[36] Yet historians have been obsessed with the trajectories of life and liberty.

In part, this has been because of the isolation of scholars in both history and law who work on human rights from historians and lawyers working on trade, investment, or the trendy "history of capitalism."[37] But it also owes much to the development of human rights as a field of historical inquiry. First, academic historians rarely write celebrations, beatifications, and hagiographies (at least explicitly) on people and

institutions focused on the maintenance of property rights. Rights like freedom of speech, religion, and conscience are generally beloved within the academy. The rights to private property or to the enforcement of a contract debt, in contrast, generate significantly less sympathy. Moreover, mainstream human rights activists have rarely placed much emphasis on the right to property in the past fifty years and have said very little on the subject. The result is that many of the historical analyses of human rights that have been crafted in the past decade have focused on life and liberty, and ignored property.[38]

Second, those critical of histories of human rights have cast themselves as naysayers, concerned with countering Panglossian and Pollyannaish narratives of the origins of the current human rights moment. For example, Samuel Moyn observed, "when people imagine global justice, most often they picture a courtroom."[39] In reviewing two recent works[40] on the origins of international criminal courts, Moyn argued "it is obvious that strong and wealthy nations are never going to legally mandate their own loss of superiority and money . . . ."[41] The reason to study their past, he continued, was "not just to register their heroic possibilities but also to acknowledge their humbling limitations."[42] That's fair. The International Criminal Court has a mixed record, and the United States has refused to submit itself to its jurisdiction. But Moyn's comments demonstrate the limitations of the field itself. Scholars of human rights have cultivated narratives about the emergence of the international protection of life and liberty; their critics have usually met them on that plain. Critics of the histories themselves point to the lack of precision in the deployment of the term.[43] Critics of human rights themselves – usually working in a postcolonial tradition – have focused on cultural imperialism, racism, and other contradictions they see as inherent in a universalist and individualist project.

When we shift our gaze down from the sacred rights of life and liberty and toward the more profane right of property, the picture looks different. If, as Moyn noted, global justice looks like a courtroom, then plenty of strong and wealthy nations have legally mandated their own loss of superiority and money in trade and investment courts and arbitral tribunals. Through contract, states all over the world, including the ever-protective-of-its-sovereignty United States, have given power to international tribunals to adjudicate disputes between themselves and individual investors. Many states have likewise agreed to allow others to execute those contractual awards, should they be unwilling to comply, by seizing their assets. Today, traders' and investors' utopian visions of global justice and international rights are much closer to reality than the

visions of those seeking justice for the tortured, arrested, or censored. Commerce, today, is increasingly sovereign.

How and why did we end up with international investment and trade courts? How did we end up with a system, known increasingly as investor-state dispute settlement (ISDS), which permits individual human beings to bring sovereign states before private tribunals who render decisions that are enforceable around the world? These are some of the questions this book answers. As Moyn and Stefan-Ludwig Hoffmann have both argued, human rights sat alongside other rights regimes that were at times more pervasive and more salient. Internationalism, international socialism, anticolonial nationalism, economic liberalism, human rights, and other "utopias" existed alongside one another, and the partisans of each paradise often found themselves in conflict with each other (as the unevenly ratified International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights illustrate).[44] International rights, as one of the utopias, has also come in different flavors, like international minority rights, international labor rights, and others.[45] This book, in part, explores different conceptions of international rights as they emerged in the interwar period to better understand the relationship between the modern individualistic rights regime and other international rights regimes – minority rights, refugee rights, national rights, and others. In doing so, it exposes the role that international business organizations and their interests played in the creation of international rights regimes, of which the part of human rights has become the most visible, but hardly the most significant, instantiation.[46] Many of these international committees and treaties used international law and international courts as the instruments of their realization. Including international courts and international rights, in all their guises, in this story reveals the interrelated origins of the modern global investment regime, minority rights, human rights, and others. After all, wealthy foreign investors and Chechens alleging violations of human rights share the desire to hale the Russian government before an international court. While the rights claims of the investor and the torture victim are different, they rely upon similar institutions and similar ideas about the place of the individual in the international order. Those similarities have often been overlooked and should be investigated further.

I also chose to focus on the place of the individual in international law because this book takes as its primary legal subject the rights of foreigners under international law. Human rights connotes a regime whose law applies to everyone, regardless of their nationality. Human rights ideally

will protect the French from the French government or the Germans from the German government. In contrast, the rights and law discussed in this book apply only (although there are exceptions) to foreigners – migrants, refugees, the stateless, foreign investors, foreign traders, foreign corporations. These are the rights that protect Italians living in the United States from the U.S. government, and the rights that protect Canadian investors from the Californian government. The rights of aliens and the rights of states to protect nationals abroad are the legal topics at the heart of this project.

Geographically, this book centers on the Atlantic and is Eurocentric for much of its analysis. International law was but one system of European rule in the mid-nineteenth century – the others being formal empire, which Europeans exercised in much of Africa and South Asia, and explicit extraterritorial jurisdiction, which they exercised in North African, Ottoman, Chinese, and Japanese territories. International law applied between states recognized by Europe as belonging to what they termed "international society" – a single, coherent, legal space including all of Europe, and by 1850, most of the North and South American mainlands. In the twentieth century, as formal empire gave way, international society expanded. International law, in sum, replaced formal empire as the means of overcoming legal difference. And so the geographic scope of this book expands – to a degree – with the geographic scope of international law. It tracks changes to the law that accompanied the collapse of empires in the early nineteenth century as well as in the interwar and postwar periods.[47]

The narrative of this book is broken up into three parts (divided here with three *Mises-en-scène* that introduce various actors, institutions, and legal principles). The first part begins in the latter half of the nineteenth century and ends with the First World War. The second covers the interwar period, and the third section covers the period following the Second World War.

The first part of this book (Chapters 1 and 2) details the development, rules, context, and complications in a system of legal protection based upon the right of states to protect their nationals abroad. Chapter 1 details the origin and development of the system in the first age of globalization. States could and did intervene on behalf of their nationals. But just who were those nationals? Who was a state entitled to claim as its national or subject? Chapter 2 excavates the problem created when millions of people moved from one country, one continent, or one hemisphere, to another. States had every right to define their nationals, but what did that mean for human beings born thousands of miles beyond

the territory of the state that laid claim upon them? When a woman married a foreigner, what did that mean for her separate legal identity and her claim to the protection of her native land? A system that was predicated upon a reciprocal and mutually exclusive relationship between nationals and their state was increasingly unstable when legal identities were in flux in an age of migration.

The second part of the book (Chapters 3, 4, and 5) looks at alternative conceptions of sovereignty and international rights from the 1850s to the 1930s. Chapter 3 looks at the attempt to put the nation, rather than the state, at the center of international law and its expression in the form of minority protection regimes. Chapter 4 explores the interwar refugee crisis and both practical and theoretical developments to put the individual at the center of international law. Chapter 5 traces the efforts to remedy the problems faced by merchants and investors, primarily to create an individual right for a merchant or investor to bring complaints against sovereign states. In all cases, nationality continued to complicate the international order.

The third part of the book (Chapter 6) looks at the emergence of individual international rights as the primary alternative conception of international order and the one that was least reliant on nationality as a fundamental category.

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In the nineteenth century, the Atlantic world entangled itself in a web of legal obligations. The states of Western Europe saw their nationals sail and steam across the Atlantic to newly independent states. They also saw their nationals invest heavily in Eastern Europe, the Americas, and elsewhere. Whereas in the eighteenth century it was exceptional to wander beyond the protective walls of the state; in the nineteenth century, it was common to find oneself a stranger in the keeping of another sovereign. At first the conflicts were easily handled through diplomatic channels, through ad hoc international arbitrations convened whenever a serious dispute arose. States asserted their right to protect the life, liberty, and property of their nationals abroad. During the late nineteenth century, however, the relationship between states and their nationals was also in flux. Nationalism challenged traditional legal identities and increasingly enabled states to lay claim to peoples who had never lived within the territorial boundaries of the state, but who, through kinship, were part of the national community the state claimed to represent.

Entangled in knots of obligation, the international legal system began to try and untie itself in the decades after the First World War. Scholars, lawyers, activists, humanitarians, and diplomats proposed fundamental alterations to the international legal order, most of which were predicated on freeing individuals from their reliance upon their states or their nations to defend their rights. In this, business interests and international humanitarians found common cause but not common outcomes. This book tells that story.