# RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

## BOOK REVIEW

*Nationals Abroad: Globalization, Individual Rights, and the Making of Modern International Law*. By Christopher A. Casey. New York: Cambridge University Press, 2020. Pp. xii, 298. Index.
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*Nationals Abroad* considers the historical consequence of nationality and how the state has mediated the relationship of the individual to modern international law. The allocation of individuals among states once resulted in high levels of interstate friction, a fact that has gotten lost in more recent times. Christopher A. Casey, an analyst of international trade and finance in the Foreign Affairs, Defense, and Trade Division of the Congressional Research Service, delivers a lively doctrinal and intellectual history that significantly contributes to our understanding of a core element of international law's past, if not its future.

The tie between states and individuals takes the form of nationality. During the early modern period, nationality was of little consequence insofar as individuals were largely sedentary. The very term "nationality" was not in wide usage until the middle of the nineteenth century. Before then, individuals were of course tied to their sovereign. Subjects owed allegiance to their sovereign, in return for which sovereigns afforded protection to their subjects. But that was a matter of natural law. In the absence of movement, the status of subjecthood was largely static for international purposes. There was little need to address international legal aspects of a person's connection to the state. This remained true even with first moves toward global mobility in the eighteenth century, to the extent much of that mobility was within imperial parameters. A British subject who moved to the American colonies remained a British subject within the coverage of British law. That movement did not implicate international law.

This changed with American independence and a huge increase in cross-Atlantic migration in the middle of the nineteenth century. More individuals found themselves on the territory of states in which they did not hold nationality. States aspired to extend protection to their nationals in other sovereign domains. Casey nicely captures how political leaders from virtually every Atlantic country looked to transpose the classical mantra, "*civis Romanus sum* [I am a Roman citizen]," to their own nationalities, sharing "the aspiration that their nationality would both command respect and provide protection beyond their borders in an age when many of their nationals traveled or resided far beyond the protective laws of the state" (p. 25). This priority reinforced the principle of diplomatic protection, first fully theorized by Vattel on the fiction that an injury to a national of a state comprised an injury to the state itself.

The protection of nationals became a central concern of foreign ministries; by the last decade of the nineteenth century, for example, more than 70 percent of France's diplomatic correspondence came through the consular directorate. Where claims could not be peaceably resolved, they were put to work to justify the use of force. Of the seventy-five instances in which the United States employed military force between 1830 and 1900, nearly sixty were triggered by the protection of American nationals or their property. Of course, diplomatic protection often supplied a pretext for intervention otherwise motivated, hence Carlos Calvo's

formulation of the "national treatment" standard under which foreigners should be entitled to expect host country treatment no better than that delivered to its own nationals. Other prominent commentators turned their sights to lengthy refinements of the terms of diplomatic protection.[1]

But diplomatic protection was hardly a one-way street. Many European migrants to the United States were naturalized as U.S. citizens at the same time that their European homelands refused to recognize the legitimacy of expatriation.[2] A large population of dual nationals resulted. Newly minted Americans returned to their homelands often only to find themselves subject to conscription or other exactions by their country of origin. Sometimes these U.S. citizens were the victims of their homeland's refusal to recognize a genuine transfer of allegiance. In other cases, U.S. citizenship was instrumentalized for purposes of diplomatic protection. In 1910 remarks at the American Society of International Law, former Secretary of State Elihu Root highlighted several thousand native-born Turkish citizens who "had in one way or another secured naturalization in the United States and had gone home to live with the advantage over their friends and neighbors of being able to call upon the American embassy whenever they were not satisfied with the treatment they received from their own government" (p. 71). Egyptian nationality was put to similar use, bundled as it was with British protection.[3]

In any event, nationality emerged as a chronic source of bilateral difficulties. As Casey notes, "nearly every trans-hemispheric conflict in the nineteenth century [independence movements aside] involved the protection of nationals abroad"[4] (p. 49). As the prominent French jurist André Weiss observed in 1887, nationality-related problems occupied a "great place in the preoccupations of jurists and statesmen" (p. 73). The U.S. diplomat George Bancroft negotiated a series of treaties with major European powers to resolve conflicting national claims to individuals. Both the Institute of International Law and the International Law Association drafted resolutions and held major conferences on the subject. And yet there was no easy fix. "It is extraordinary," lamented British jurist Francis Piggott in 1907, "that so important a subject as nationality should still be in a state of confusion" (p. 76). When international legal elites looked to codify certain international law subjects under the auspices of the League of Nations, nationality was "the most prominent, by far" (p. 101). And yet the primary result of those efforts—the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law—was as modest as its title, working from the premise, in its first article, that "it is for each State to determine under its own law who are its nationals."

The flashpoint of diplomatic protection was tempered through other channels. *Nationals Abroad* includes a parallel narrative on nationality in the commercial realm. Business entities also of course enjoyed diplomatic protection and were often at the center of the most serious conflicts. At the turn of the century, however, states drew back from intervening in business disputes. The nationality of artificial persons was more removed than of individuals, especially with the advent of

[1] Most familiar to U.S. scholars of the subject will be Edwin Borchard, who published a magisterial treatment of diplomatic protection in 1915. EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD: OR THE LAW OF INTERNATIONAL CLAIMS (1915). This book, uniquely among other contemporary treatments, also considers important continental sources, working from the author's apparent command of French, German, and Italian.

[2] The naturalization rate was much lower in Latin America. *See* DIEGO ACOSTA, THE NATIONAL VERSUS THE FOREIGNER IN SOUTH AMERICA: 200 YEARS OF MIGRATION AND CITIZENSHIP LAW 53 (2018).

[3] Casey tells the interesting story of how, at least before the adoption of the League of Nations mandate system, imperial subjects enjoyed protection on par with their metropolitan overlords. "In the international realm there was a theoretical legal equality that was impossible domestically" (p. 65).

[4] For other more narrowly framed, historical treatments of these disputes, see LUCY E. SALYER, UNDER THE STARRY FLAG: HOW A BAND OF IRISH AMERICANS JOINED THE FENIAN REVOLT AND SPARKED A CRISIS OVER CITIZENSHIP (2018) and NATHAN PERL-ROSENTHAL, CITIZEN SAILORS: BECOMING AMERICAN IN THE AGE OF REVOLUTION (2015).

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complex corporate ownership structures. States came to understand the moral hazard of deploying diplomatic resources, much less military ones, with respect to risky investments gone bad. Business entities themselves grew leery of depending on discretionary state intervention, and so "business interests sought to extricate themselves from the problems of nationality and to make themselves less reliant upon states for protection" (p. 136). The International Chamber of Commerce emerged as an active, independent force in the League of Nations and various interwar conferences relating to trade and commerce. Business successfully cemented the cornerstones of a state-supported international arbitration regime, including the 1924 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Enforcement of Arbitral Awards. These agreements still centered nationality, limiting their coverage to cases involving diversity of citizenship. It took the postwar UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) to fully internationalize arbitration. Business no longer had to enlist direct state assistance on the way to securing justice at the international level.

Individuals, meanwhile, were bound to the state in new ways. Before World War I, transboundary travel was largely unobstructed. "Everyone could go where he wanted and stay there as long as he liked," eulogized the Austrian Stefan Zweig in his 1942 autobiography *The World of Yesterday*. "I am always enchanted by the amazement of young people when I tell them that before 1914 I travelled to India and America without a passport. Indeed, I had never set eyes on a passport. . . . [Y]ou crossed borders as unthinkingly as you can cross the meridian in Greenwich"[5] (p. 118). Notwithstanding major League conferences in 1920 and 1926 aimed at restoring passport-free travel, the new border formalities were to become a permanent feature of the international mobility.

As for statelessness, the lack of national status was a rarity through the mid-nineteenth century, given the refusal of states to expatriate the native-born. "Stateless" did not appear in the *Oxford English Dictionary* until 1890. Statelessness became a major concern only with the collapse of the Russian Empire and the Soviet Union's denationalization of hundreds of thousands of Russians who had left the country after the October Revolution. The League of Nations famously responded with the innovation of the Nansen Passport (named for the celebrated explorer Fridtjof Nansen), a travel document for those who had been deprived of Russian nationality. But, as Casey highlights, Nansen Passports remained tied to states in two ways. First, the documents were issued by states of residence, not by the League. (Even their format varied by state, the German versions, for example, set in characteristic Gothic typeface.) Second, eligibility was conditioned to former national status. At first, only former Russian nationals were able to secure the travel pass. The program was next extended to those of Armenian origin, but only those who had been subjects of the Ottoman Empire. Only in 1927 were Nansen Passports extended without reference to prior nationality, though they remained bounded by ethnicity (the case of Syrians and Kurds). The League's Council rejected Nansen's request to generalize eligibility. In the end, the Nansen passport regime "entered the international consciousness as a more robust document than it would ever end up being" (p. 117). This was not a proto-international citizenship.

The concept of world citizenship remains unrealized. The individual's relationship to international law remains largely mediated by states. Even the 1951 Refugee Convention, which finally generalized the status of those fleeing persecution, requires that a person be "outside the country of his nationality" by way of activating treaty protections. Individuals still have no direct access to some international tribunals. Neither real nor legal persons can bring claims to the

[5] As Casey notes, this perspective was "selective," given existing controls on putatively undesirable immigrants (p. 119). The late nineteenth century saw the imposition of racist immigration measures in the United States in the form of the Chinese Exclusion laws.

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International Court of Justice. And states remain mostly free to set the terms of nationality. That said, with the advent of human rights, international law has clearly moved to an individualist paradigm. Business interests can directly avail a robust global infrastructure for resolving commercial and investment disputes. Although states continue to look after the interests of external citizens, it tends not to be on a formal or conflictual basis. "[W]hile nationality is still an important part of international life," writes Casey, "it's hardly the point of international consternation that it had been" (p. 190). *Nationals Abroad* delivers a valuable treatment of an era in which national attachment dictated international status.

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