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PRIVATE INTERNATIONAL LAW'S AMBIVALENT HUMANISM

Karen Knop's fresh reading of James Lorimer's The Institutes of the Law of Nations *(1883) recovered the image of what she termed 'the private citizens of the world.' She introduced this figure from Lorimer's forays into private international law in order to investigate to what extent the attributes of private citizens of the world are restored or refracted through public international law doctrines and theories. But how should private international law re-engage with the private citizens of the world? I caution that, by reference to this familiar figure, one may too easily ascribe either an inherent humanism or an inherent agnosticism to private international law. Neither would be in line with Karen's critical project. By contrast, I suggest that Karen's revival of the private citizens of the world should prompt private international law scholars to look carefully into their field's past and present and reckon with the field's more ambivalent humanism. This article travels past Lorimer's writings into the inter-war period to reveal the fragility of sustaining the private citizens of the world via private international law in Europe, Latin America, and the British Empire. It suggests that those historical puzzles at the root of private international law's ambivalent humanism continue to this day.*

Keywords: conflict of laws, humanism, private international law, public international law, imperialism

When Karen Knop wrote her article on 'Lorimer's Private Citizen of the World,'[1] I was in my final year of the doctoral program at the University of Toronto under Karen's remarkably inspirational supervision. I remember being incredibly struck by this piece. On the one hand, I was struck by it because this was quintessential Karen Knop. She had the unique ability to cross between disciplines in a way that generated insights in all the ones she explored.[2] In 'Private Citizen of the World,' Karen sought to revive James Lorimer's image of what she called 'the private citizen of the world' (an individual whose private rights are recognized in another country than that of his citizenship or residence) as a counterpoint to what she often thought was a relatively empty notion of the 'human' under international human rights law. Unlike what Karen called 'the citizen of humanity,' who is a member of humanity under universal natural law, 'the private citizen of the world' was an 'amalgam of national private law relations.'[3] The recognition of

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1 James Lorimer, 'Lorimer's Private Citizen of the World' (2016) 27 Eur J Intl L 447 [Knop, 'Lorimer's Private Citizen'].

2 See also Karen Knop, 'Citizenship, Public and Private' (2008) 71 Law & Contemp Probs 309 [Knop, 'Citizenship, Public and Private'] (where Karen reconstructed the notion of domicile in private international law as a potentially more cosmopolitan version of citizenship under public international law and constitutional law).

3 Ibid at 450.

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his private rights was achieved – through private international law – as a corollary to 'the state's right to have its private law recognized by other states insofar as the interests of their citizens were affected.'[4] It is striking how Karen could pick a concept that was very intuitive in private international law – especially under vested rights theories – and carry it over to public international law, where it could function as an addition, an alternative, or a concretization of international human rights law. Situated by Karen at the cross-roads of two disciplines, the 'private citizen of the world' suddenly seemed new and interesting to both private and public international law.

On the other hand, I was struck by Karen's article because I had wondered whether the normative intervention that she was aiming for in recovering the private citizen of the world would strike the same chord in private, as opposed to public, international law. Borrowing the private citizen of the world from private international law and offering him as a lens in public international law was an important critical move in Karen's work. In a field where only the 'human' of human rights law is known, perhaps the private citizen of the world may open up ways of thinking that are less normatively empty and more democratic than the international human rights discourse often couched in highly abstract and acontextual language.[5] Yet, for Karen, the private citizen of the world was not where all the hopes of international human rights advocates can be stored.[6] Rather, she referred to the private citizen of the world as 'a lens' that unveils a variety of 'otherwise unrelated theories, critiques, proposals and developments [that] restore or refract such attributes.' She used the lens as an entry-point for a questioning in public international law about 'what is inside and outside our frames of analysis, what do we foreground and what recedes, whom do we privilege and whom do we miss?'[7] As David Kennedy outlines so wonderfully in his contribution to this issue, Karen was fascinated by the fluidity, paradoxical nature, and ambivalence of legal concepts. The 'private citizen of the world' could be no different. In some contexts, we might celebrate him and his attempt to 'energize freely,' and, in others, we might be horrified by his attempt to exercise private power to dominate or constrain someone else's liberty.[8] At times, we may criticize a state for failing to recognize private rights across borders, and, at other times, we may perceive this as a legitimate and democratic weighing of competing – national/international and public/private – interests. In the end, the private citizen of the world may be a useful lens or may be irredeemable, at least in

4 Ibid at 455.

5 For a critique of international human rights law on similar lines, see Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Northhampton, MA: Edward Elgar, 2019).

6 For a very helpful self-reflection on Karen's seeking an alternative to human rights law, see her interview 'Turn on the Light: Sparking Critical Energy in International Law Research' Institute for Global Law and Policy, 'Turn on the Light: Sparking Critical Energy in International Law Research Panelists' (6 May 2021), online: *Facebook* <www.facebook.com/HLS.IGLP/videos/turn-on-the-light-sparking-critical-energy-in-international-law-researchpanelist/304447251132923/>.

7 Knop, 'Lorimer's Private Citizen,' supra note 1 at 453.

8 James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, vol 1 (Edinburgh: William Blackwood and Sons, 1883) at 438.

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part. All of this is up for grabs in Karen's account precisely because she was not one to evade the ambivalence of legal concepts.

But when the lens is brought back into private international law, the reactions may be different, and, at times, they may elude a critical stance. In private international law, we may lose track of Karen's insistence on the paradox and ambivalence of legal terminology as a form of critique. On the one hand, bringing back the figure of the individual travelling with rights across borders may create the illusion that private international law had an inherent virtue in sustaining him or at least that it had a deep commitment to this figure, whoever he was. This would be a type of genealogical argument portraying certain private international law strands of thought or theorists as precursors to human rights law. For example, on the eve of the drafting of the Universal Declaration of Human Rights, Ben Atkinson Wortley noted in a speech before the Grotius Society of International Law that, while public international law was 'becoming increasingly reconciled to the emergence of the human person as a subject of public international law, having rights and duties of his own,' private international law 'had always been accustomed to deal with human rights on an international plane.'[9] In private international law 'statelessness does not mean rightlessness.'[10] Liberty, argued Wortley, was secured all the way through in English private international law – foreign penal restrictions were not recognized; courts will not assist foreign states in extending their criminal jurisdiction to England to punish rebels or to expropriate; restrictions to marriage based on race, caste, colour, or nationality would not be enforced. Wortley was frustrated that, in the quest for a conceptualization of international human rights, nobody had engaged with the proper 'jurisprudential basis of rights' which he thought was best illustrated in the common law tradition of private international law.[11] Nobody had realized that the subject of human rights law (Wortley's 'concept of man') was well and thriving in private international law long before the post-war awakening of public international law. This type of argument about a humanist core in private international law would occasionally reoccur in different variations.[12]

On the other hand, perhaps at the opposite pole, one might think that private international law has a neutral stance toward the mobile individual, neither

9 Ben Atkinson Wortley, 'The Concept of Man in English Private International Law' (1947) 33 Transactions of the Grotius Society 147 [Wortley, 'Concept of Man'] ('[t]he merest glance into the origins of private international law discloses principles governing an age-old struggle by lawyers for the protection of human rights against unreasonable and unjust claims even of the highest civil power'). *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).

10 Wortley, 'Concept of Man,' supra note 9 at 154.

11 Vladimir Idelson, 'The Law of Nations and the Individual' (1944) 30 Grotius Society of International Law 50 at 76. Joanna Langille makes a similar argument from a different angle. See also Joanna Langille, 'Frontiers of Legality: Understanding the Public Policy Exception in Choice of Law' (2023) 73 UTLJ 216.

12 For more recent genealogical arguments or arguments about functional equivalents, see Eric Jayme, 'Menschenrechte und Theorie des internationalen Privatrechts' in Erik Jayme, ed, *Internationales Privatrecht und Voelkerrecht* (Munich: C.F. Mueller, 2003) 95; Leon Castellanos-Jankiewicz, 'Harnessing the Adjacent Possible: From Nationality to Early International Rights,' *Journal of the History of International Law* (30 January 2024) at 1.

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celebrating nor restricting any rights across borders. A common view might be that private international law simply chooses an applicable law, regardless of the substantive outcome and regardless of the broader geopolitical and imperial context in which it operates. In this vein of thinking, the field's core is not humanism but, rather, agnosticism. For example, in his review of Wortley's speech, the German scholar Paul Heinrich Neuhaus seemed surprised by Wortley's proposition that private international law, 'seemingly so impersonal and abstract,' can be associated with the universal normative project of international human rights law.[13] The risk of shifting from a genealogical argument to one of attributing humanism or neutrality as such to private international law is particularly high because – even by contrast to public international law – very little intellectual, social, and cultural history is written about private international law, and a postcolonial critique is still largely missing.[14] We do not yet have a good picture of how the concepts of private international law (including the private citizen of the world) were used by international tribunals, administrative bodies, colonial officials, consuls, non-governmental organizations, and so on. Even as we begin to unpack the field's intellectual history, we have not yet appreciated how much the nuances in framing the private citizen of the world by different scholars mattered.

I believe Karen's revival of the private citizen of the world should be an invitation for private international law scholars to dig deep and thoughtfully into their past and present so that they can appreciate what this figure meant for their field, when and why he was sustained or ignored, and how the various techniques of the field (characterization, renvoi, incidental question, and so on) and its different branches (jurisdiction, choice of law, recognition of judgments) 'restored' or 'refracted' his different attributes. In this article, I take a first step in this direction. I follow Karen's cue of searching for ambivalence and paradox and travel alongside three different scholars and three different contexts to explore the fragility of sustaining the private citizen of the world via private international law in times of crises. Continuing the line of iterations of the private citizen of the world in private international law beyond Lorimer circa 1870 and into the interwar period helps us appreciate private international law's ambivalent humanism, one that continues more or less on the same premises today.

I *Antoine Pillet: internationalism by elimination*

The first context is a moment of transition from the universalist doctrines of the late nineteenth century to the period of World War I. In the nineteenth century, private international law was deeply connected to public international law. In the classical universalist understanding, exemplified most clearly by the French scholar Antoine Pillet (who had borrowed quite a bit from Lorimer),

13 See Paul Heinrich Neuhaus, 'Review of the Concept of Man in English Private International Law' (1949) 15 Zeitschrift für ausländisches und internationales Privatrecht 183 at 183 [Neuhaus, 'Review']. I am grateful to Ralf Michaels for pointing out this review to me.

14 Note that private international law is yet to connect with the body of scholarship on legal pluralism in the empires.

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private international law included questions of nationality and the status of foreigners. Furthermore, one of the presumed goals of private and public international law was to secure equal treatment of nationals and foreigners and a high degree of liberty in engaging in cross-border activity. After World War I, part of the cohort of universalist scholars, most prominently Pillet, backtracked those nineteenth-century premises. In an article translated by Ernest Lorenzen and published in the *Yale Law Journal* in 1917, Pillet, the main figure of an 'almost unlimited cosmopolitanism' in the nineteenth century was writing to announce that 'the spirit of cosmopolitanism is dead' and to retract 'the pages in my writings to which I would no longer subscribe.'[15] In the nineteenth century, the European powers had been lulled into a calm period of theorizing:

> It was assumed that the mission of this science [private international law] was not only to aid in the good administration of private justice among the nations, but that it should lower also, by degrees, the barriers separating subjects from aliens, so as to make of all inhabitants of the civilized countries one people with a view to subjecting them gradually to the same institutions. Hence, the tendency to favor changes of nationality; hence the avowed determination to supress all differences in the civil status of aliens and subjects; hence, also, the growing frequency of those great conventions which aim to establish, to an appreciable extent, uniformity of legislation.[16]

By the start of World War I, wrote Pillet, 'equality between subjects and aliens is with us no longer a dogma.' Policing the rights of residence of aliens needed to be increased significantly;[17] immigration needed to be curbed to avoid the 'crowding out of certain branches of industry or commerce'; the acquisition of property by foreigners may be forbidden; lists of more or less desirable aliens had to be made based on their nationality; the most-favoured-national principle needed to be eliminated;[18] indeed, the whole of Article 11 of the French Civil Code should have been replaced with a proposition that 'aliens enjoy in France all the private rights which are not denied to them by law, and then, by special provisions, to indicate the rights which shall be denied to aliens or those which are to be granted to them.' Perhaps, argues Pillet, the notion of 'denizenship' should be reintroduced from medieval English law.[19]

Written by the quintessential universalist of the late nineteenth century, Pillet's remarks would appear surprising. But half-way through the paper, Pillet shifts register: none of the nationalistic policies he had outlined belonged to private international law. They belonged to 'the legitimate jurisdiction of the state,' which is 'in full conformity to the law of nations' provided individuals are left with 'those elementary rights, without which existence is impossible. … Beyond that lies the sphere of Private International Law.'[20] It was now time to effectuate

15 Antoine Pillet, 'Some Observations on the Private International Law of the Future' (1917) 26 Yale LJ 631 at 633 [Pillet, 'Some Observations'].
16 Ibid.
17 Ibid at 634.
18 Ibid at 636.
19 Denizenship was a status in between that of a subject and an alien. Denization occurred by the exercise of royal prerogative and was subject to a fee.
20 Pillet, 'Some Observations,' supra note 15 at 638.

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a 'complete separation' between questions of the 'status of aliens' and 'the solutions of the conflict of laws.' The status of aliens, argued Pillet, was never really 'a part of our international science, at least not an essential part.'[21]

This was an attempt to rescue by elimination universalism in private international law or the field's perceived neutrality. It was possible to maintain that private international law was still universal and politically neutral and that equality between 'civilized' states 'was the only rational point' in private international law as long as matters of nationality and the status of aliens were excluded from private international law.[22] There was only one right remaining, perhaps in the spirit of Hannah Arendt's 'right to have rights' that Ralf Michaels develops so wonderfully in his article in this issue:[23] whatever modicum is left to a foreigner, 'he should be allowed to assert it in our court upon the same conditions as a subject,' something to which Pillet thought French, as opposed to Anglo-American, practice was not fully committed.[24]

But internationalism by elimination proved to be doubly dangerous. From one angle, it contributed, I think, to the erasure from the memory of private international law of more ambitious ways of thinking about its role in safeguarding rights without being overly individualistic.[25] From another angle, it sometimes introduced a mirage that, because private international law was not itself granting substantive rights to foreigners, it did not have a role in shaping them. It made the alleged neutrality of private international law seem plausible. But this was always a myth, one that in the inter-war period no one dared to maintain. Depending on how one defined 'domicile,' more or fewer foreigners were classified as 'enemy aliens';[26] depending on how one settled the 'incidental question' of nationality in a conflict between the *jus soli* and the *jus sanguinis* principles, more people were viewed as stateless or as deserters;[27] depending on the connecting factor applied to contracts, economic warfare and blockade could be extended to neutral countries,[28] and one could encourage merchants to 'choose' one private law or another to help their state pursue economic warfare with the understanding that the application of public policy considerations would be muted in their favour.[29]

21 Ibid at 633.
22 Ibid at 643.
23 See Ralf Michael, 'The Right to Have Private Rights' in this issue.
24 Pillet, 'Some Observations,' supra note 15 at 642.
25 I have argued elsewhere that we have lost track of a more relational (rather than individualistic or state-centric) understanding of several nineteenth-century private international law theories. See Roxana Banu, *Nineteenth Century Perspectives on Private International Law* (Oxford: Oxford University Press, 2018).
26 Thomas Baty, 'Trade Domicile in War' (1908) 9 Journal of the Society of Comparative Legislation 157; John Westlake, 'Trade Domicile in War: A Reply' (1908) 9 Journal of the Comparative Society of Comparative Legislation 265.
27 Estanislao Zeballos, *La nationalité au point de vue de la legislation comparée et du droit privé humain* (Paris: Sirey, 1914), vol. 2 at 245–58 [Zeballos, *Nationalité au point de vue*].
28 See Estanislao Zeballos, *A Critical Study of the Emergency Legislation of Warring Nations: Its Effect upon the Sovereignty and Commerce of Neutral Nations, and upon Private International Law* (Cleveland, UH: Penton Press, 2016) [Zeballos, *Critical Study*].
29 Jean-Paulin Niboyet, 'Les transports Rhénans et les conflits de loi' (1921) 17 Revue de droit international privé 205 at 209.

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II *Estanislao Zeballos: competing for humanism – private international law and migration policy*

Was this backtracking of universalism particular to the war-torn European continent, such that a humanist core in private international law would have survived elsewhere? Three times minister of foreign affairs in Argentina and private international law scholar Estanislao Zeballos argued this fervently until his premature death in 1923.[30] While humanism in European private international law was fragile, it was thriving and, argued Zeballos, had in fact originated in Argentina, 'the country of immigration and commerce par excellence.'[31] It was in Argentina where the most instructive and most radical progress had been made by joining constitutionalism, private international law, and immigration policy in what Zeballos called the 'human private law.' It would be hard to find a more detailed image of the 'private citizen of the world' than in Zeballos's work. His private human law was also premised on the pre-eminence of one's freely chosen sphere of action and on the 'right to energize freely,' to change and choose nationality, and to freely undertake emigration and commerce.[32]

But to bring Zeballos into conversation with Lorimer is to realize that Lorimer's 'anomalous' case of the presence of large numbers of Germans in the duchies of Schleswig and Holstein (which in Lorimer's view would entitle Germany to an invasion, leading to a change of sovereignty) was in fact the classical scenario in the 'New World.' In the period of its economic boom between 1870 and 1914, Argentina was the second destination for migrants after the United States. According to Zeballos, 'in the narrow horizons where European publicists [such as Pillet] live,' many cases of conflicts of nationality may seem 'unlikely,' whereas from the vantage point of the 'New World,' they were the daily bread and butter of private international law.[33] Zeballos was in effect holding this enormous influx of migrants as a test case for private international law's humanistic premises where only the 'New World' could show its true commitment to the liberty of the mobile individual.[34] Zeballos's conclusions for Argentina were the exact opposite of Lorimer's conclusions for Schleswig and Holstein. European countries could not engage in propaganda or make political claims via their citizens living in Argentina, much less take over the country as Lorimer suggested of Schleswig-Holstein (although this peril was constantly contemplated).[35] But neither could Argentina impose its citizenship

30 Zeballos, *Critical Study*, supra note 28 at 3–4.

31 Estanislao Zeballos, 'L' enseignement du droit international privé dans la République Argentine' (1903) 1 Bulletin Argentin de droit international privé 19 at 34.

32 Zeballos's main body of work is included in five volumes on nationality. For a discussion of his work, see Pilar González Bernardo de Quirós, 'Estanislao Zeballos and the Argentine Doctrine of Human Private Law: A Micro-Social Approach to the History of Private International Law' (2020) 5 Jus Gentium 529.

33 Zeballos, *Nationalité au point de vue*, supra note 27, vol. 3 at 667.

34 For Karen's reflections on the way in which immigrants experience nationality differently, see Karen Knop, 'Relational Nationality: On Gender and Nationality in International Law' in Alexander Aleinikoff & Douglas Klausmeyer, eds, *Citizenship Today: Global Perspectives and Practices* (Washington, DC: Carnegie Endowment for International Peace, 2001) 89 [Knop, 'Relational Nationality'].

35 For a discussion of Argentina's place in Britain's informal empire, see HS Ferns, 'Britain's Informal Empire in Argentina, 1806–1914' (1953) 4 Past and Present 60.

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on its immigrants. Even stateless people who had lost their European nationality because of their long residence in Argentina had the option to go back and naturalize rather than accept Argentinian citizenship. Equality in the private domain could not be held hostage to an acceptance of naturalization, as he believed was the case in the United States.

But just as this idealism was impossible to sustain in Europe, it was already hard to sustain in the 'New World' by the start of World War I. Zeballos's 'human private law' was situated in a broader context in which Argentina was competing for the 'right kind' of migrants (although it never officially excluded any ethic group) to sustain its economic expansion, coupled with a need to signal its enlightenment to foreign creditors, especially the United Kingdom.[36] Once the foreign credit ran out, the wave of migrants diminished, and Argentina entered a depression, it was less of a priority to continue Zeballos's plea for the 'private human law.' Humanism in the new world proved to be as difficult to maintain as in the old world. Many started to doubt whether it had been a good strategy to compete for a seat in the circle of 'civilized states' primarily through the 'human private law.'[37] The split between social and political status (since immigrants had been allowed to remain in Argentina indefinitely without naturalizing) had caused a lack of national identity.[38] By the start of World War II, Zeballos's theory seemed utopian and out of touch.[39] Contrary to Zeballos's intuitions, by World War II, Argentina would join the 'impulse which was born and gained vigorous momentum' to exclude questions of nationality, the status of foreigners, and vested rights from the purview of private international law.[40] These issues would instead be included either in what Russian exiled scholar Boris Mirkin-Getzevich called 'international constitutional law'[41] or in public international law, without a sense that something of essence had been lost to private international law.[42]

As we have seen, in the inter-war period, European scholars were trying to salvage a universalist doctrine by taking humanistic premises out of private international law and shifting responsibility elsewhere. In contrast, Latin American scholars were competing for humanism as a way of recentring the universalist doctrine from Europe to Latin America. Both projects, however, proved fragile.

36 Blanca Sánchez Alonso, 'Making Sense of Immigration Policy: Argentina 1870–1930' (2013) 66 Economic History Review 601.

37 For an account of the way in which immigration policy was a source of competition in the new world, see Carl A Solberg, 'Peopling the Prairies and the Pampas: The Impact of Immigration on Argentine and Canadian Agrarian Development, 1870–1930' (1982) 24 Journal of Interamerican Studies and World Affairs 131. See also Carl Solberg, *Immigration and Nationalism: Argentina and Chile 1890–1914* (Austin: University of Texas Press, 1970).

38 See James R Scombie, *Argentina: A City and a Nation* (New York: Oxford University Press, 1964) at 190.

39 Victor N Romero del Prado, *Manual de Derecho Internacional Privado* (Buenos Aires: La Ley, 1944), vol. 1 at 123–4 [Romero del Prado, *Manual*].

40 Ibid at 140.

41 Boris Mirkin-Guetzevich, *Droit constitutionnel international* (Paris: Sirey, 1933).

42 Romero del Prado, *Manual*, supra note 39 at 140–4. With the loss of these aspects from private international law, an awareness of the role played by private international law within the broader context of migration policy was also lost.

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III *A.V. Dicey: what is a country – private international law in a colonial context*

How inclusive were even those fragile humanistic premises of private international law? Lorimer, of course, was upfront about limiting the private citizens of the world to the circle of 'civilized' states. So was Pillet. And, for Zeballos, the 'human private law' was precisely Argentina's gateway into that circle. It would secure Argentina's constant progress through a homogenous population 'consisting of pure-blooded European or mestizos produced by the crossing of more than three centuries.'[43] Was the private human law inherently exclusionary? This depended on whether it could be compatible with imperialism, including with Argentina's own expansionist ambitions, which Zeballos fully supported.[44] Zeballos thought such a possibility could be seen in the British Empire because the British presented themselves to the conquered races as 'their best friends' helping them 'live, progress, and enrich themselves' by allowing them to govern themselves by their own laws and giving them autonomy; private international law was allegedly sustaining this model.[45]

We know virtually nothing about the role that private international law played in constructing the legal infrastructure of empires.[46] But we find surprising hints in a taxonomy that A.V. Dicey offered in his work on domicile and later included in his digest of private international law.[47] Dicey premised the entire fabric of private international law on the cross-border recognition of rights. Together with his co-editor during the inter-war period, Arthur Berriedale Keith, Dicey was, at one point, one of the most important figures in both private international law and imperial constitutional law. His theory is therefore an important place to search for the way in which the figure of the private citizen of the world featured in a colonial context. According to Dicey, rights vested in the territory of a country are recognized through private international law because of 'a duty of justice.' But what is a country? Dicey argued that one had to distinguish – for private international law purposes – between a country in a geographical, legal, and political sense. In the political sense, a country means 'the whole of the district or territory, subject to one sovereign power'; in a geographical sense, it is 'a separate part of the physical world, as in a newly discovered country'; in a historical sense, it is 'a land inhabited or supposed to be inhabited by one race or people.' All these senses, argued Dicey, had to be distinguished from the one sense that really mattered for private international law – a legal one – meaning

43 Estanislao Zeballos, 'The Rise and Growth of the Argentine Constitution' (Lecture to the St Andrew's Debating Society, Buenos Aires, 29 September 1906) at 29. 'Theodore Roosevelt, y la Politica Internacional Americana" (1913) 46 Revista de Derecho, Historia y Letras 545, cited in Ricardo D Salvatore, 'The Making of a Hemispheric Intellectual-Statesman: Leo S. Rowe in Argentina (1906–1919) (2010) 2 Journal of Transnational American Studies 1.

44 See Estanislao Zeballos, *La Conquista de quince mil leguas: Ensayo pana la ocupación definitiva de la Patagonia*, edited by Alberto Pérez (Buenos Aires: Continente, 2008).

45 Zeballos, *Nationalité au point de vue*, supra note 27, vol. 1 at 15.

46 I am currently working on a project exploring the role of private international law within the legal infrastructure of the British Empire. Roxana Banu, 'The Private International Law Side of the Imperial Constitution' [draft on file with author].

47 AV Dicey, *The Law of Domicil as a Branch of the Law of England, Stated in the Form of Rules* (London: Stevens and Sons, 1879) at 31–4; AV Dicey, *A Digest to the Law of England with Reference to the Conflict of Laws* (London: Steven and Sons, 1896) [Dicey, *Digest*].

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'a district or territory, which (whether it constituted the whole or a part only of the territory subject to one sovereign) is the whole of a territory subject to one system of law.'[48] How did this relate to Lorimer's grades of civilization for states? This was a puzzle since Dicey remarked that the term 'civilized' is 'necessarily a vague one.'[49] Turkey and China were allegedly 'not civilised within the rule,' but 'any country colonised or governed by such European state, at least in so far as it is governed on the principles recognized by Christian states of Europe' was included under the term 'civilised.'

Separating the legal from the historical, political, and geographical senses of the term 'country' had both an empowering and disempowering function for the subject of private international law. On the one hand, unlike Lorimer, Dicey could not exclude the possibility of the recognition of rights vested in uncivilized or even barbarous countries but simply stated that the extent of this recognition is uncertain and 'a subject of some perplexity' and, therefore, is excluded from the purview of his digest.[50] However, separating the legal from the political and historical senses of a 'country' also proved remarkably disempowering. For one, it provided two irreconcilable perspectives on the right to energize freely. Within the 'political' unit of the British Empire, there was in principle (subject to resources and frequent racial restrictions) a certain degree of mobility, whether for work, study, investment, or family reasons. But in a 'legal' sense, individuals were confined – via their domicile – to their respective areas of the empire.[51] In this context, domicile seemed constraining and out of tune with the lived experiences of imperial subjects.[52] Multiple generations of Britons living in India were considered English domiciliaries based on a faint intention to return on retirement; men could claim an intention to return to a prior domicile of choice or not and thus control the possibility of women asserting a right of divorce (based on the notion of dependent domicile) in different jurisdictions of the British Empire.[53] Many subjects of the British Empire who had assumed that their travelling throughout the empire allowed them to travel with their laws as much as Englishmen had travelled with the common law were utterly disappointed, and those who claimed the application of English law suddenly realized that their travelling did not amount to domicile.[54] Travelling within the 'political unit' of

48 Dicey, *Digest*, supra note 47 at 66–7.
49 Ibid at 29.
50 Ibid at 30, n 2.
51 On the position of British Indians in the former dominions, for example, see 'Minutes of the Imperial Conference, presented to both houses of the General Assembly of New Zealand' 23 May – 20 June 1911) at 394–400, online: <paperspast.natlib.govt.nz/parliamentary/AJHR1911-I.2.1.2.8>.
52 In a review of Ben Atkinson Wortley's article, Paul Heinrich Neuhaus argued that domicile could at times be inhibiting rather than sustaining freedom. See Neuhaus, 'Review,' supra note 13.
53 Berriedale Keith, 'Some Problems in the Conflict of Laws' (1935) 16 Bell Yard: Journal of the Law Society's School of Law 4.
54 Gail Savage, 'More Than One Mrs Mir Anwarudin: Islamic Divorce and Christian Marriage in Early Twentieth-Century London' (2008) 47 Journal of British Studies 348.

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the empire was different from travelling with rights in a legal sense between the 'law units' of the empire.[55]

Furthermore, the separation of the legal from the political dimensions of the relationship between the metropole and the colonies allowed for an artificial withdrawal of responsibility for colonial abuses. Once private international law constructed different parts of the empire as akin to foreign states, the metropole could avoid taking responsibility for racist immigration and deportation policies in the British dominions.[56] Furthermore, in *Phillips v Eyre*, a tort case brought in English courts against the governor of Jamaica for the violent repression of the Morant Bay rebellion, the Court applied the local indemnity law passed by the governor with the assent of the Crown in Council as 'foreign law' on the argument that 'not recognizing the local law of Jamaica and applying English tort law would have been an unprecedented and mischievous violation of the comity of nations.'[57]

Dicey – and Wortley – celebrated *Phillips v Eyre* as demonstrating that a suit can be brought even against a governor in English courts. The private citizen of the world, in other words, had a right of action, a right to claim rights against the governor. But what remained unspoken was that the extent of the right was limited by a separation between the legal, political, and historical links between the metropole and the colonies, a separation which was part of private international law theory. In the *Mau Mau* litigation, redress for the brutal suppression of the rebellion against colonial rule in Kenya was recently made possible only after a large amount of archival material was discovered, countering the legal separation of the metropolitan from the Kenyan legislature by showing the political influence exercised from London.[58]

IV *Seeking the private citizen of the world*

Overall, it seems difficult to locate historically a humanistic core in private international law and, therefore, a predisposition to sustaining the private citizen of the world, much less a private citizen of the empire and its aftermath. Pillet's attempt to push responsibility for securing (or denying) equality between citizens and foreigners outside of the purview of private international law (whether foreign relations law, war emergency legislation, or constitutional law) makes it difficult

55 Mitra Sharafi, 'The Marital Patchwork of Colonial South Asia: Forum Shopping from Britain to Baroda' (2010) 28 L & Hist Rev 979.

56 See Renisa Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Durham, NC: Duke University Press, 2018); Peter Prince, 'Australia's Most Inhumane Mass Deportation Abuse: *Robtelmes v Brenan* and Expulsion of the "Alien" Islanders' (2018) 5 Law and History 117.

57 *Phillips v Eyre*, (1869) LR 4, 225 (QB); *Phillips v Eyre*, (1870) LR 6, 1 at 31 (QB) (Ex Ch).

58 *Mutua & Others v Foreign and Commonwealth Office*, [2012] EWHC 2678 (QB). See David M Anderson, 'Mau Mau in the High Court and the "Lost" British Empire Archives: Colonial Conspiracy or Bureaucratic Bungle?' (2011) 39 Journal of Imperial and Commonwealth History 699.

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to construct a simple narrative about the connection or separation between private international law and human rights law.[59] Zeballos's failed attempt to sustain the alignment between constitutionalism, private international law, and immigration law in a humanist spirit raises the question whether private international law can ever construct an image of the individual to counteract the vulnerability that comes with a migrant or refugee status or whether it in fact reinforces that vulnerability.[60] Dicey's taxonomy of countries highlights the artificiality of talking about an enlightened cross-border recognition of rights without an account of the broader geopolitical context of inter-state relationships of political and economic dependency.

These puzzles remain largely unresolved. Coming back to Pillet's puzzle about whether private international law or some other field (such as international human rights law) should be tasked with providing remedies to foreigners, we find ample parallels in recent English decisions on *forum non conveniens*. In *Lubbe v Cape*, the House of Lords reiterated the view once held by Wortley that English private international law doctrine (in this case, the *forum non conveniens* doctrine) is inherently compliant with (indeed, in its Scottish variant, predates) human rights norms of access to justice and, thus, that no human rights analysis is necessary to supplement classical private international law doctrine.[61] But it also clarified that no 'public interest' considerations could feature in the *forum non conveniens* analysis, raising questions about how the humanistic premise of private international law can be defined in individualistic terms without accounting for the broader distribution of adjudicatory authority that is produced by *forum non conveniens* rules and which impacts the development of countries in the global South.[62] A century after Zeballos's writing, the European Parliament commissioned a study on the challenges and potential of private international law in the context of increased international mobility,[63] and we ask once again what role private international law plays in global migration policy.[64]

59 See James Fawcett et al, *Human Rights and Private International Law* (Oxford: Oxford University Press, 2016).

60 For that argument, see Nicole Stybnarova, 'Recognition of Marriage under Migration Law and Private International Law: A Marxist-Feminist Analysis' (PhD dissertation in progress, Faculty of Law, University of Helsinki) [unpublished; on file with author].

61 *Lubbe v Cape*, (2000) UKHL 41. In *Lubbe v Cape*, over three thousand plaintiffs brought claims in English courts in tort for personal injury suffered as a result of exposure to asbestos in South Africa. The House of Lords refused a stay of proceedings in England on the assumption that no funding was available to achieve justice in South African courts.

62 On the discussion of public interest in the case, see Christopher Morse, 'Not in the Public Interest – *Lubbe v Cape PLC*' (2002) 37 Tex Intl LJ 541. For a discussion of the *forum non conveniens* analysis (in its American variant) in relation to countries in the global South, see Emile KM Yakpo, 'Application of *Forum non Conveniens* in the United States: *Bhopal* and Its Lessons for Developing Countries' (1989) 1 African Journal of International and Comparative Law 139.

63 'Private International Law in a Context of Increasing International Mobility: Challenges and Potential' (June 2017), online: *European Parliament* <www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU(2017)583157_EN.pdf>.

64 Sabine Corneloup, 'Can Private International Law Contribute to Global Migration Governance?' in Horatia Muir Watt & Diego P Fernandez Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014) 301.

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We have also made little progress in providing an accurate picture of private international law's role in constructing imperial legal authority in ways that have disempowered British subjects. A century and a half after *Phillips v Eyre* in 2018, the same reasoning resurfaced in the tort case emerging from the violent repression of the rebellion against British colonial rule in Cyprus from 1956 to 1958. The Court of Appeal ruled against the application of English law which would have ensured compensation and applied the law of Cyprus as 'foreign law' based on the argument that 'it makes no difference whether the relevant territory is a colony (whose laws are made by the Queen in Council) or a colony or dominion with its own home-grown legislature. The law of the colony in Cyprus is as much a foreign law for the purposes of the double actionability rule as the law of France or the United States.'[65] A historical whirlwind is therefore doubly instructive. On the one hand, it moves us away from idealizing the image of the private citizen of the world as the core of private international law and brings us back to Karen's ambivalence and paradox of legal concepts. On the other hand, it allows us to see contemporary law as one iteration of deep-seated historical puzzles. The struggle remains to construct a humanist core in private international law that is not overly individualistic and that registers the colonial history of dispossession and violence which informs the current socio-economic and geo-political landscape in which private international law operates.[66]

But is this whirlwind too far removed from Karen's specific intervention in bringing us back to a particular scholar and a particular concept? In the remaining paragraphs, I suggest not. Her recovery of the private citizen of the world, as I see it, is situated within a broader set of insights and intuitions, which are just as valuable for private international law as her reconstruction of the notion of the private citizen of the world across disciplines. The three contexts I have unravelled connect to a set of methodological and historical insights in Karen's broader body of work. First, in 'Foreign Relations Law: Comparison as Invention,' Karen invited us to take the boundaries between legal fields seriously, but not too seriously, since they are no more than 'inventions' and, therefore, contingent and malleable.[67] They are nevertheless important in that they tell us something about the commitments and structure of a legal field at various times for

65 *Athanasios Sophocleous & Ors v Secretary of State for the Foreign and Commonwealth Office & Secretary of State for Defence*, (2018) EWCA Civ 2167. See also Roxana Banu, 'Teaching by Historicizing Private International Law' (2022) 18 International Journal of Law in Context 383.

66 For an account of the role of the public policy exception in development policies for newly independent African states which does not seem to engage properly with the colonial background, see Phocion Franceskakis, 'Problèmes de droit international privé de l'Afrique noire indépendante' (1964) 112 Rec des Cours 270. For a critique, see Emile KM Yakpo, 'The Public Policy Doctrine in African Interlocal Conflict of Laws' in Emmanuel G Bello & Prince Bola A Ajibola, eds, *Essays in Honour of Judge Taslim Olawale Elias*, vol 2 (London: Nijhoff, 1992) 861.

67 Karen Knop, 'Foreign Relations Law: Comparison as Invention' in Curtis Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) 45.

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various purposes. Therefore, it seems extremely valuable to consider the crucial moment when matters of nationality and the status of foreigners were no longer seen as essential aspects of private international law. Karen would have invited us to ask what it tells us about the commitments of private international law and its later (in)ability to reconnect with human rights law that these topics were voluntarily relegated to the field of international constitutional law, foreign affairs, or public international law.

Second, Karen had already connected questions of immigration to broader debates on nationality in public international law in 2001 in two articles: 'Relational Nationality: On Gender and Nationality in International Law'[68] and 'Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law,' the latter co-authored with Christine Chinkin.[69] Seven years later, Karen brought her themes of cross-border movement and citizenship into conversation with private international law in 'Citizenship: Private and Public.'[70] There, she argued that private international law (especially its concept of domicile) should be seen as the private side of citizenship. An engagement with Zeballos's work straddles both her work on relational nationality as a rapporteur for the International Law Association (ILA)[71] and her later work on domicile and the private citizen of the world. At the ILA, Zeballos was both a fervent supporter of gender equality in matters of nationality and a champion of the cosmopolitan features of the notion of domicile. Karen might have invited us to ponder on the connection between these two roles and to think of gender as an indispensable lens in any account of the private citizen of the world.

Finally, the colonial space was interesting to Karen from at least two angles. First, in her project on foreign relations law, she noted that British colonial laws operated as outward-facing constitutional law from the various parts of the empire toward the metropole or toward foreign states.[72] She intimated that surveying a connection between colonial law, international law, and constitutional law leads to a kaleidoscope of different conceptualizations of the state. I think she would have been fascinated to learn about the way in which private international law constructed a different version of statehood for the different parts of the British Empire from those of either constitutional or public international law. Furthermore, in one of her last pieces on 'Gender and the Lost Private Side of International Law,' Karen was interested in the way in which colonial subjects (especially women) travelling throughout the empire with different claims to rights shaped the law and 'the very nature of the metropole' but, at the same time, complicated a respect for plurality which might otherwise 'be equated

68 Knop, 'Relational Nationality,' supra note 34.
69 Karen Knop, 'Remembering Crystal Macmillan' (2001) 22 Mich J Intl L 523.
70 Knop, 'Citizenship, Public and Private,' supra note 2.
71 Christine Chinkin and Karen discovered Zeballos's work in their archival research at the International Law Association. Zeballos was a fervent supporter of gender equality in matters of nationality.
72 See her prospectus for the workshop on 'The Lost Public Side of International Law,' cited in Martti Koskenniemi, 'The Law of International Society: A Road Not Taken' in this issue.

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positively with openness, tolerance or cosmopolitanism.'[73] She would have appreciated, I think, Dicey's puzzles about the extent to which colonial subjects could travel with vested rights within the British Empire when imperial interests, or, as Karen put it, the 'legal and moral fabric of the metropole,' were at stake.

It seems to me that Karen paved the way for an analysis of private international law that would resist both idealizing private international law and reinstating the field's self-professed neutrality. She did not start with an assumption that the private citizen of the world is inherently a more contextual and cosmopolitan figure than the human of human rights law or even that private international law was always committed to this figure. Rather, she offers us an extremely rigorous and contextual mapping of the ways in which this concept was used by a historical figure – for both good and bad – leaving us to ponder on how much of it should be salvaged and repurposed today. For me, her work is and will always remain a unique and exciting invitation to travel to different contexts and different historical periods and alongside different disciplines in order to uncover the normative work done by private international law concepts in all their fluidity, ambivalence, and paradox. The private citizen of the world is one of many such concepts.

73 Karen Knop, 'Gender and the Lost Private Side of International Law' in Annabell Brett, Megan Donaldson & Martti Koskenniemi, eds, *History, Politics, Law: Thinking through the International* (Cambridge, UK: Cambridge University Press, 2021) 357.

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