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A New History for Human Rights: Conflict of Laws as Adjacent Possibility

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Abstract

The pivotal contributions of private international law to the conceptual emergence of international human rights law have been largely ignored. Using the idea of adjacent possibility as a theoretical metaphor, this article shows that conflict of laws analysis and technique enabled the articulation of human rights universalism. The nineteenth-century epistemic practice of private international law was a key arena where the claims of individuals were incrementally cast as being spatially independent from their state of nationality before rights universalism became mainstream. Conflict of laws was thus a vital combinatorial ingredient contributing to the dislocation of rights from territory that underwrites international human rights today.

Keywords

private international law – human rights – adjacent possible – conflict of laws intellectual style – nationality – alienage

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> … private international law can sometimes be more cosmopolitan than public law, and in illuminating ways.
>
> KAREN KNOP[1]

1 Overture: Status as Right

When desperate Russians fled the Bolshevik Revolution and sought refuge across western Europe, all of them – aristocrats, industrialists and workers alike – were faced with the same problem: how would their rights be determined? With an estimated two million displaced individuals by 1921, the problem quickly became acute: in December of that year, everyone who had fled the country was stripped of their citizenship.[2] Mass denationalization was followed by land and property seizures without compensation. Facing indigence at home, refugees pinned their hopes on surviving abroad on savings or investments. But by abolishing private property and inheritance, the Bolsheviks also deprived the refugees of access to their material possessions. And although financial stability could be regained in theory through hard work and the right contacts, the loss of their citizenship sealed the fate of the departed: without a nationality, property and other rights could not be recognized at home or abroad. To make matters worse, citizenship deprivation potentially entailed the loss of civil status everywhere, jeopardizing not only real estate and material holdings, but also entitlements deriving from marriage and kinship.

Lawyers and policymakers turned to this problem with great urgency. To avoid total indigency, they first sought to ensure the continuity of the refugees' legal personality. Domestic courts in Europe and the United States achieved this by resorting to the public order exception in private international law, which incorporates policy considerations of the forum to avoid unjust outcomes.[3]

1 Knop, Karen. 'Citizenship, Public and Private'. *Law & Contemporary Problems* 71 (3) (2008), 309–341, 311.

2 Williams, John Fischer. 'Denationalization'. *British Yearbook of International Law* 45 (1927), 45–61, 45.

3 Habicht, Max. 'The Application of Soviet Laws and the Exception of Public Order'. *American Journal of International Law* 21(2) (1927), 238–256. See also Verhoeven, Joe. 'Relations internationales de droit privé en l'absence de reconnaissance d'un Etat, d'un gouvernement ou d'une situation'. *Recueil des cours de l'académie de droit international de La Haye* 192 (1985), 19–232, 115 and 126–130.

This enabled expatriates with western bank accounts to access their funds and gave officials some leverage to pressure the Bolsheviks into releasing refugee assets.[4] But instead of invoking the already-famous 'rights of man' doctrine, the technique of private international law was embraced by governments and international agencies to mitigate denationalization and its economic disabilities. Embracing this approach, the League of Nations Secretary General called for an international conference to settle the legal status of the refugees and furnish them with identification papers – new legal identities – which would safeguard their rights.[5] This solution would eventually lead to the first-ever agreements designed to confer refugees with a 'distinct legal status' and 'a certain minimum of "personality"' through a series of initiatives which included the famous Nansen certificates.[6]

To survey the legal difficulties faced by refugees and outline a response, the League Secretariat enlisted the help of André Mandelstam, a former Russian diplomat with conflict of laws expertise, to draft a memorandum.[7] In his report, Mandelstam devised a way to protect the rights of his compatriots by safeguarding their status through the public order exception in conflict of laws.[8] Validating Mandelstam's approach, the League Secretariat also framed the legal difficulties in the register of private international law with an

4 Vichniac, Marc. 'Le statut international des apatrides'. *Recueil des cours de l'académie de droit international de La Haye* 43 (1933), 115–246, 178.

5 League of Nations, Memorandum of the Secretary General, 'Russian Refugees: General Statement on the Question', Geneva, 17 August 1921, 5. I thank Christopher Casey for bringing this document to my attention.

6 Jennings, Robert. 'Some International Law Aspects of the Refugee Question'. *British Yearbook of International Law* 20 (1939), 98–114, 98. See Arrangement with respect to the issue of certificates of identity to Russian Refugees, 5 July 1922, League of Nations Treaty Series vol. XIII no. 355. Further provisions guaranteeing family position, civil status and rights recognition were incorporated into the Arrangement Relating to the Legal Status of Russian and Armenian Refugees, 30 June 1928, League of Nations Treaty Series, vol. LXXXIX, no. 2005.

7 On Mandelstam (1869–1949), see Aust, Helmut Philipp. 'From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights'. *European Journal of International Law* 25(4) (2014), 1105–1121; Kévonian, Dzovinar. 'André Mandelstam and the Internationalization of Human Rights', in *Revisiting the Origins of Human Rights*, eds. Pamela Slotte and Miia Halme-Tuomisaari (Cambridge: Cambridge University Press, 2015), 239–266.

8 Mandelstam's conflict of laws knowledge was vast. He wrote his 1900 doctoral thesis on the Hague Conference on private international law which had begun its work in the 1890s. In 1899, he was posted to the Russian Embassy in Constantinople, where he would remain until the outbreak of World War I. During this time, he published an important volume on the status of foreigners in the Ottoman Empire. See Mandelstam, André. *La justice ottomane dans ses relations avec les Puissances etrangères* (Paris: Pedone, 1911); Mandelstam, André. *Les conférences de La Haye relatives au droit international privé* (St Petersburg, 1900).

introductory note.[9] By first establishing that the Russian refugees were arguably stateless, the memorandum concluded that their status was governed by the law of domicile, that is, the law of their new countries of residence. This otherwise unwelcome presumption of statelessness was advanced to circumvent the notorious nationality rule, which held that the status of foreigners was determined by the legal system of their country of origin. Following this rule, Mandelstam observed, 'would result practically in denationalizing them as regards many aspects of civil life' including marriage, inheritance and private property. Instead, 'the exigencies of public order would prevent [any State] from applying this [Bolshevik] legislation to Russian refugees'. By using the analytical framework of private international law, Mandelstam thus overrode the Bolshevik provisions and secured the recognition of the refugees' status and rights abroad.[10]

What of inalienable rights and freedoms? Could human rights have played an effective role in protecting the refugees from becoming destitute? And why did Mandelstam and the League focus on private law to address a humanitarian catastrophe? These questions are relevant given that there was no shortage of proponents advocating for the rights of man in other contexts, and Mandelstam would even draft the first modern human rights declaration some years later.[11] However, aside from sporadic appearances in nineteenth-century doctrinal works, the rights of man enjoyed little acceptance as a justification for making claims across borders during the 1920s and throughout the interwar period.[12] Similarly, transnational social movements premised on humanitarianism were fraught with moral and political contradictions stemming from imperialism

9 League of Nations, 'Legal Position of the Russian Refugees. Memorandum by M. André Mandelstam, with an introductory note by the Legal Section of the Secretariat' (16 August 1921), 2: 'Difficulties seem to have arisen in various countries which involve troublesome questions of private international law.' I thank Momchil Milanov for bringing this document to my attention.

10 Ibid., 3, 4.

11 See Mandelstam, André. 'New York Declaration on International Human Rights' in *Annuaire de l'Institut de Droit International*, 2 (1929), 298–300; Kévonian, Dzovinar. *La danse du pendule: Les juristes et l'internationalisation des droits de l'homme, 1920–1939* (Paris: Editions de la Sorbonne, 2021).

12 Bluntschli was perhaps the first international lawyer to write systematically about fundamental rights in *Das moderne Völkerrecht* (1872), but he did so in a doctrinal register and 'humanity was not itself a law'. Röben, Betsy Baker. 'The Method behind Bluntschli's "Modern" International Law'. *Journal of the History of International Law* 4(2) (2002), 249–292, 264.

and colonialism, making them unlikely harbingers of human rights.[13] Instead, private international law mediated the transnational recognition of individual rights up until World War I through an epistemic style that projected personal status abroad, facilitated international commerce and was deferential to nation-states.[14] The question remains, however: why did Mandelstam avoid resorting to fundamental rights theories when crafting legal solutions for refugees? After all, he later published pioneering studies giving human rights a self-standing character in positive law that decoupled them from nationality.[15] And yet, although it is impossible to know what Mandelstam thought about the rights of man in 1921, he clearly found more persuasive force in conflict of laws reasoning to propose his international solutions. This begs asking two questions which are addressed here: why did conflicts provide the vital mud for cosmopolitan thinking in the nineteenth century? And how did this discipline's techniques offer new conceptual adaptations for international law that supported the emergence of human rights law later on?

2 Private Histories and Their Adjacencies

This article shows how the nineteenth-century epistemic community of private international lawyers developed a new style of reasoning in Europe which created the adjacent possibility for international human rights universalism to flourish. Crucially, conflict of laws offered a reliable form of transnational rights recognition that inalienable rights theories did not. This 'conflicts style'

13 Green, Abigail. 'Humanitarianism in Nineteenth-Century Context: Religious, Gendered, National'. *The Historical Journal* 57(4) (2014), 1157–1175; Milanov, Momchil. 'One Hundred Years of Soli(dari)tude: The Creation of the Refugee Regime and the Politics of Humanitarianism', in *Politics and the Histories of International Law*, eds. Raphael Schäfer and Anne Peters (Leiden: Brill, 2021), 84–112.

14 This observation applies to Anglo-European states and their nationals. Private international law was generally not applied in colonies between native inhabitants and colonizers. Instead, these relations were mediated by consular jurisdictions rooted in unequal treaties or, in the case of the Ottoman Empire, the so-called capitulations system. See Harata, Hisashi. 'L'extraterritorialité, la juridiction consulaire et le droit international privé', in *Constructing International Law: The Birth of a Discipline*, eds. Luigi Nuzzo and Miloš Vec (Frankfurt am Main: Klostermann, 2012), 331–361.

15 See Mandelstam, André. 'La protection internationale des droits de l'homme'. *Recueil des cours de l'académie de droit international de La Haye* 38 (1931), 129–232, 129–130; Mandelstam, André. 'La généralisation de la protection internationale des droits de l'homme'. *Revue de droit international et de législation comparée* 11 (1930), 698–713.

was characterized by the use of highly technical yet malleable formulas which were adaptable to the needs of many actors. Once established within a community of practice, this form developed a discourse that opened new rhetorical possibilities for dislocating rights from territory at the doctrinal, discursive and practical levels. This section frames the argument with some definitional and methodological remarks, and situates it within the existing literature.

The contributions of private international law to the conceptual emergence of international human rights have been largely ignored.[16] Save for notable exceptions such as the work of Alex Mills, scant literature addresses the place of conflict of laws in the history of public international law and its branches dealing with individual rights.[17] And yet, human rights forerunners such as André Mandelstam and René Cassin were steeped in the conflicts epistemic tradition before penning their famous human rights declarations.[18] Furthermore, early human rights lawyers readily recognized the treatment of aliens – a classic conflicts topic – as 'a desideratum for States in their relationships with their own nationals' which would later permeate human rights.[19]

In addition to Mills' work, a growing literature pioneered by the late Karen Knop suggests that conflict of laws and private law were key in problematizing subjective rights in an inter-national register during the nineteenth century.[20]

16 This article uses the terms private international law, conflict of laws and conflicts interchangeably.

17 Mills, Alex. *The Confluence of Public and Private International Law* (Cambridge: Cambridge University Press, 2009). See also Wai, Robert. 'Occupying the International: Liberal Internationalist Visions and Policy Argumentation in Private International Law'. *Hague Yearbook of International Law* 13 (2000), 65–68; Wortley, Ben Atkinson. 'The Interaction of Public and Private International Law Today'. *Recueil des cours de l'académie de droit international de La Haye* 85 (1954), 239–342; Nussbaum, Arthur. 'Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws'. *Columbia Law Review* 42(2) (1942), 189–206. An unpublished text by Martti Koskenniemi includes sections titled 'The Unity of Public and Private International Law' and 'Break of Public and Private International Law', Koskenniemi, Martti. 'Nationalism, Universalism, Empire: International Law in 1871 and 1919' (unpublished paper 2005, on file with the author).

18 For Mandelstam's conflict of laws expertise, see (n 8), above. For Cassin's conflicts proficiency, see Sluga, Glenda. 'René Cassin: *Les droits de l'homme* and the Universality of Human Rights, 1945–1966', in *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffman (Cambridge: Cambridge University Press, 2011) 107–124; Cassin, René. 'La nouvelle conception du domicile dans le règlement des conflits de lois'. *Recueil des cours de l'académie de droit international de La Haye* 34 (1930), 655–809.

19 García-Amador, Francisco V., Louis Sohn and Richard Baxter. *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry: Oceana Publications, 1974), 144.

20 Knop, Karen. 'Lorimer's Private Citizens of the World'. *European Journal of International Law* 27(2) (2016), 447–475; Knop, *Citizenship* 2008 (n. 1). See also Marglin, Jessica M.

This article embraces that idea by showing how the iterative recognition of status through nationality and alienage enabled private international lawyers to distil a baseline of standards bearing a family resemblance to non-derogable rights. This new reading of human rights histories takes Knop's insight that 'private international law can sometimes be more cosmopolitan than public law' as its starting point.[21] To be sure, nineteenth-century nationality, citizenship and alienage were inward-looking categories charged with nativism and, when deployed in colonial contexts, racism. And yet, the nineteenth-century nationalism that underwrote nationality was also a cosmopolitan idea that justified the conferral of cross-border rights, as Samuel Moyn has shown.[22] The idea that nationalism enabled transnational exchanges of values and resources can be illustrated with the extraterritorial effect of foreign legislation and judgements that municipal laws developed during the nineteenth century in deference to other nations.[23] With their inbuilt receptiveness to foreign elements predicated on conflicts rules, domestic legal systems in Europe were fitted with an open code enabling the recognition of international normative possibilities – a first in modern times.

This article therefore follows Knop, Mills and others in the understanding that private international law is 'an international system, even if it is operationalized by national courts through national law'.[24] Moreover, Mills takes private international law rules to be primarily 'secondary rules concerned with the allocation of regulatory authority between states'. This leads him to conclude that they 'are not concerned with private rights, but with public powers'.[25] This publicity in private international law is precisely what suggests its adjacency to human rights: by giving international public validity to the private realm, conflict of laws scholars working in the nineteenth century unwittingly created a

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'La nationalité en procès: droit international privé et monde méditerranéen'. *Annales. Histoire, Sciences Sociales* 73(1) (2018), 83–117; Banu, Roxana. 'From the Law of Nations to the Private Law of Mankind'. *Cornell International Law Journal Online* 51 (2018), 101–111; Mills, Alex. 'The Private History of International Law'. *International and Comparative Law Quarterly* 55(1) (2006), 1–49.

21 Knop, *Citizenship* 2008 (n. 1), 311.

22 Moyn, Samuel. 'Giuseppe Mazzini in (and beyond) the History of Human Rights', in *Revisiting the Origins of Human Rights*, eds. Miia Halme and Pamela Slotte (Cambridge: Cambridge University Press, 2015), 119–139, 122.

23 Knop, *Citizenship* 2008 (n. 1), 312. See also Basile, Marco. 'Private International Law's Origins as a Branch of the Universal Law of Nations', in *Blurry Boundaries of Public and Private International Law: Towards Convergence or Divergent Still?*, eds. Poomintr Sooksripaisarnkit and Dharmita Prasad (Berlin: Springer, 2022), 15–29, 28.

24 Mills, *Confluence* 2009 (n. 17), 12.

25 Ibid., 20.

transnational discursive space which could later be populated by new categories to solve novel problems.

Private international lawyers have debated the place of human rights in conflicts theory for over two decades, with a central question being whether the public order exception can contribute to global human rights norms.[26] Public international lawyers, by contrast, have largely overlooked the contributions of private international law to the history of their field.[27] In this respect, Martti Koskenniemi has noted that international legal histories 'have paid much less attention – virtually no attention – to the private law relations that undergird and support state action'.[28] Historical studies linking the protection of private property in nineteenth-century international law to future human rights have until recently been similarly absent.[29] Moreover, the study of early modern economic thought and its reception in nineteenth-century legal doctrine has only begun to be addressed.[30] And more research is needed to examine the role which conflicts most certainly played in the protection and propagation of commerce during the era of capital and imperial ascendancy.[31] But this article's

26 Mills, Alex. 'The Dimensions of Public Policy in Private International Law'. *Journal of Private International Law* 4(2) (2008), 201–236; Hirschboeck, Mark. 'Conceptualizing the Relationship between International Human Rights Law and Private International Law'. *Harvard International Law Journal* 60(1) (2019), 181–199; Muir-Watt, Horatia. 'Private International Law Beyond the Schism'. *Transnational Legal Theory* 2(3) (2011), 347–428, 402; Akkermans, Bram. 'Public Policy (Ordre Public): A Comparative Analysis of National, Private International Law, and EU Public Policy'. *European Property Law Journal* 8(3) (2020), 260–300; Hammje, Petra. 'Droit fondamentaux et ordre public'. *Revue critique de droit international privé* 86(1) (1997), 1–31.

27 Michaels, Ralf. 'Private Lawyer in Disguise? On the Absence of Private Law and Private International Law in Martti Koskenniemi's Work'. *Temple International & Comparative Law Journal* 27 (2) (2013), 499–521.

28 Koskenniemi, Martti. 'Expanding Histories of International Law'. *American Journal of Legal History* 56 (2016), 104–112, 109. For some exceptions, see Koskenniemi, Martti. 'Empire and International Law: The Real Spanish Contribution'. *University of Toronto Law Journal* 61 (2011), 1–36; Fitzmaurice, Andrew. *Sovereignty, Property and Empire 1500–2000* (Cambridge: Cambridge University Press, 2014); Koskenniemi, Martti. *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (Cambridge: Cambridge University Press, 2021).

29 Christopher Casey's excellent monograph has now filled this gap. See Casey, Christopher. *Nationals Abroad: Globalization, Individual Rights and the Making of Modern International Law* (Cambridge: Cambridge University Press, 2020).

30 García-Salmones Rovira, Mónica. *The Necessity of Nature. God, Science and Money in 17th Century English Law of Nature* (Cambridge: Cambridge University Press, 2023).

31 On the need for further research, see Tzouvala, Ntina. 'Book Review: Casey, Christopher A. *Nationals Abroad,* Cambridge: Cambridge University Press 2020'. *Heidelberg Journal of International Law* 81 (1) (2021), 271–275.

focus on conflicts as epistemic style does not aim to comprehensively capture its political economy, worthy as that pursuit may be. Instead, it examines the praxis that certain protagonists used to ensure the recognition of personal status and rights across borders and the sequential interpretative moves between their reasoning techniques and latter human rights.[32]

Within the burgeoning field of human rights histories, teleological accounts have often presented placeless human rights as the ideal types of an ever-present normative universalism.[33] But the revisionist studies following Samuel Moyn's lasting intervention have shown that rights can also be meaningful when they are anchored to national political communities.[34] This article further explores the role of nationalism as a cosmopolitan force to understand its mediating function between the domestic and foreign arenas in which international rights were discussed.

To frame the conceptual translation from conflict of laws to human rights – two distinct branches of law – the idea of adjacent possibility is used here as a theoretical metaphor. The theory of the adjacent possible was introduced by biologist Stuart Kauffman in the 1990s to describe evolutionary potential in the biosphere and the development of system complexity.[35] Kauffman coined the term to explain how trillions of organic composites emerged from the mere hundred thousand compounds which 'almost certainly' constituted the entire molecular diversity of the Earth's primordial soup.[36] Thus understood, the adjacent possible gestures towards the unpredictable new products that can result from incrementally combining existing stuff: 'this web of life, the most complex system we know of in the universe, breaks no law of physics, yet is partially lawless, ceaselessly creative'.[37] Others have described the notion

32 As a consequence, the doctrine of vested rights has been excluded from this study because its incorporation would inevitably require a more extensive discussion of private law, which is beyond the scope of this article.

33 Teitel, Ruti. *Humanity's Law* (Oxford: Oxford University Press, 2011); Hunt, Lynn. *Inventing Human Rights: A History* (New York: W.W. Norton, 2007); Martinez, Jenny. *The Slave Trade and the Origins of International Human Rights Law* (Oxford: Oxford University Press, 2012).

34 Moyn, Samuel. *The Last Utopia: Human Rights in History* (Cambridge: Belknap Press, 2010); Duranti, Marco. *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford: Oxford University Press, 2017); DeGooyer, Stephanie, Alastair Hunt, Lida Maxwell and Samuel Moyn, eds. *The Right to Have Rights* (London: Verso, 2018).

35 Kauffman, Stuart A. *At Home in the Universe* (London: Penguin, 1996).

36 Kauffman, Stuart A. *Reinventing the Sacred. A New View of Science, Reason, and Religion* (New York: Basic Books, 2008), 64.

37 Ibid., xi. As an example of adjacent possibility within the biosphere, Kauffman cites the evolution of swim bladders that regulate buoyancy and underwater breathing in fish from ancestral lungs in lungfish. In engineering, he points to Gutenberg's adaptation of a wine

of adjacent possibility as 'a kind of shadow future' and 'a map of all the ways in which the present can reinvent itself'.[38] Given its explanatory power as 'a remarkably simple combinatorial model for technological change', the adjacent possible has also been used to theorize innovation and disruption in various academic fields including economic history,[39] business administration[40] and education.[41]

Taking after Kauffman's idea, the new claim presented here is that the theory, practice and style of private international law in the nineteenth century, together with ethno-nationalism, state-based codification and transnational expertise networks, provided a new set of combinatorial conditions which created the adjacent possibility for international human rights law to flourish. In other words, I invite the reader to think about human rights as a theoretical innovation which solved a distinct set of problems during a particular time frame as opposed to retrofitting them with our contemporary ideologies. This proposition should not be taken to suggest that private international lawyers were human rights lawyers *avant la lettre*. Instead, these individuals implemented conflicts rules to novel situations without being self-aware that their contributions would lead to a paradigmatic shift in legal thought.[42] Simply put, the paradigm of rights universalism would not replace the paradigm of private rights, nor penetrate the core of the discipline of international law, until much later. This, notwithstanding the fact that universalist discourse was readily available at the time, and despite the prevalence of private and individual rights theories in international law.[43] Oppenheim, for instance, extensively

press to make the printing press. See Kauffman, Stuart. 'Breaking the Galilean Spell: An Open Universe'. *National Public Radio* (30 December 2009), available at: https://perma.cc/K5ZZ-3NNJ (last accessed on 13 November 2023).

38 Johnson, Steven. 'The Genius of the Tinkerer'. *Wall Street Journal* (25 September 2010), available at: https://perma.cc/2J83-VUKW (last accessed on 13 November 2023).

39 Koppl, Roger, Abigail Deveraux, James Herriot and Stuart Kauffman. 'The Industrial Revolution as Combinatorial Explosion'. ArXiv:1811.04502 [econ.GN] (2018), available at: https://doi.org/10.48550/arXiv.1811.04502 (last accessed on 13 November 2023).

40 McQuivey, James L. 'Finding Your Next Big (Adjacent) Idea'. *Harvard Business Review* (9 August 2011), available at: https://perma.cc/3AXV-CKZA (last accessed on 13 November 2023).

41 Tsui, Amy B. M. Carol K. K. Chan, Gary Harfitt and Promail Leung. 'Crisis and Opportunity in Teacher Preparation in the Pandemic: Exploring the "Adjacent Possible"'. *Journal of Professional Capital and Community* 5(3/4) (2020), 237–245.

42 My reference to the idea of paradigmatic here comes from Kuhn, Thomas S. *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 3rd ed. 1996).

43 To provide an analogy from the field of commercial aviation, autopilot systems and artificial intelligence have not yet replaced the two-pilot cockpit that has long been premised on the paradigm of crew resource management. This is still the case even though autopilot systems are now technically able to taxi, take off, and land autonomously in

discussed the rights of individuals in the first edition of his landmark international law textbook, but he deferred to the prevalent paradigm and treated the subject in the register and style of the status of aliens and stateless persons, two standard topics of private international law.[44] Human rights, therefore, were not recognized as being a distinct class at the very moment they were being theorized because of the paradigmatic hold that private international law and private law had on the concept of rights.[45]

The idea of conflict of laws as intellectual style discussed here was put forward by Karen Knop, Ralf Michaels and Annelise Riles in an article pointing to the counterintuitive ability of this seemingly technical discipline to address cultural challenges.[46] According to these authors, conflict of laws does not overtly foreground questions of values, relying instead on formulaic rules applied in sets of predetermined steps.[47] This technical mindset involves a number of elements which can be found in other epistemic communities of legal knowledge: ideologies of instrumentalism and managerialism, a network of experts and scholars who 'treat the law as a kind of tool or machine', a problem-solving paradigm, and practices of reasoning and argumentation.[48] Counterintuitively, the very formulaic nature of conflicts style enables adjacent innovations in substance because of its ability to process complexity and acknowledge pluralism through a common language of rules and procedures. Paying attention to conflicts as style can therefore help us pinpoint micro-theoretical shifts that are not necessarily paradigmatic in themselves, but which are meaningful nonetheless. As Andrea Bianchi reminds us, style is receptive to play and tinkering and as such greatly supports the scientific enterprise.[49] This brings us back to the adjacent possible and its own emphasis on tinkering with stuff which is lying around as a serious scholarly pursuit.

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addition to being capable of controlling aircraft during climb, cruise and descent. See Kingsley-Jones, Max. 'Airbus Completes Two-Year Autonomous Systems Trials'. *FlightGlobal* (29 June 2020), available at: https://www.flightglobal.com/systems-and-interiors/airbus-completes-two-year-autonomous-systems-trials/139044.article (last accessed on 13 November 2023).

44 Oppenheim, Lassa. *International Law*, vol. 1 (London: Longmans, 1905), 341.

45 According to Kuhn, '[a]nomaly appears only against the background provided by the paradigm'. Here, the background of private law had yet to recede. See Kuhn, *Structure* 1996 (n. 42), 65.

46 Knop, Karen, Ralf Michaels and Annelise Riles. 'From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style'. *Stanford Law Review* 64(3) (2012), 589–656.

47 Ibid., 594.

48 Ibid., 595.

49 Bianchi, Andrea. *International Law Theories* (Oxford: Oxford University Press, 2016), 298–301.

Tinkering and creativity are also important ingredients in Kauffman's theory, and he is skeptical of the high premium that we often place on natural laws to explain causal relations. Kauffman rejects scientific laws that attempt to prestate the regularities of a process partly because they are unable to account for the irruption of agency in the biosphere and, related to this, due to technology's inability to predict future outcomes based on agent-intervention.[50] Instead, Kauffman relies on 'ceaseless creativity' and a stance that he calls 'emergence' to spell out what physics alone are unable to explain, because 'we do not know beforehand what adaptations may arise in the evolution of the biosphere'.[51] Similarly, it is argued here that the intellectual and discursive moves made by the scholars who generated the epistemic adjacency between conflicts and human rights lacked a clear intention to do so. In short, they could not have known that their creative legal solutions were contributing to future paradigmatic shifts in real time.[52]

This article therefore stops short of being explicitly genealogical due to its reliance on tinkering and creativity to explain the open code of conflicts style, and because conflicts scholars lacked awareness that their work would find new adaptations in future human rights. To paraphrase Kauffman: 'particular causes influenced the timing and locations of the [human rights revolution], but not whether it was going to happen or not. Thus, there is an important sense in which the [human rights revolution] has no cause'.[53] This skeptical stance towards genealogy might open new ways of conducting research in the ever-expanding field of the history of human rights and international law more generally.

Creativity is boundless and imaginative. And the intellectual style of private international law allowed for inventive conceptual adaptations that the more monolithic and state-centric public law was unable to provide.[54] Indeed, conflicts was embedded in the Roman private law tradition held as universal

50 Kauffman, *Reinventing* 2008 (n. 36), 4: 'In physics, there are only happenings, no doings. Agency has emerged in evolution and cannot be deduced by physics'.

51 Ibid., 5.

52 Samuel Moyn has used the notion of real time in the study of human rights histories to argue that national welfare was the most salient ideological feature of rights-speak in 1948 and not the Universal Declaration. Moyn, Samuel. 'The Universal Declaration of Human Rights of 1948 in the History of Cosmopolitanism'. *Critical Inquiry* 40(4) (2014), 365–384, 369.

53 Koppl et al., 'Industrial Revolution' 2018 (n. 39), 1. I have replaced the words 'Industrial Revolution' which appear in the original text with 'human rights revolution' in the brackets.

54 Siegelberg, Mira. *Statelessness. A Modern History* (Cambridge: Harvard University Press, 2020), 69.

by Europeans. This facilitated a 'style of thought' premised on the intellectual puzzle of imagining comprehensive systems and rules in spite of the state, to which we now turn.

3 The Heritage of Nationalism

After the French Revolution and throughout the nineteenth century, subjective rights were inextricably bound to the concept of nationality in its social, ethnic and statist dimensions.[55] The brand of nationalism trailing the upheavals of 1789 sought to translate the ethical and moral ideals held by peoples into the conduct of their corresponding states. This idea of nations-as-peoples-with-states (nation-states, for short) can be found in the *Déclaration du droit des gens* penned by Henri Grégoire, a French bishop and revolutionary leader of the Third Estate, which he presented to the Constituent Assembly in 1793.[56] Grégoire's declaration was never formally adopted, but although it was denounced as an outrageous idea detracting from the Revolution's political gains, its proclamation of equality among nation-states contributed to the notion among legal and political theorists that international relationships between peoples were predicated on their belonging to a nation.[57] In other words, the idea that nations and their corresponding states were henceforth the legitimate mediators of natural persons on the international plane began to take hold.

Grégoire went on to frame the newfangled rights of man in the register of individual rights with an eye towards the privatist heritage of natural law.[58] His approach was not entirely original, for he had merely laid down for states what the French National Assembly had proclaimed for its people in the *Déclaration des droits de l'homme*. Like Grégoire, members of the Third Estate had linked

55 Halpérin, Jean-Louis. *Entre nationalisme juridique et communauté de droit* (Paris: Presses universitaires de France, 1999).

56 Grégoire's declaration is reproduced in Chevalley, Lucie. *La Déclaration du droit des gens de l'Abbé Grégoire, (1793–1795): Étude sur le droit international public intermédiaire* (Cairo: Imprimerie Paul Barbey, 1912), 4–5.

57 See Degan, Vladimir-Djuro. 'L'affirmation des principes du droit naturel par la révolution française: Le projet de Déclaration du droit des gens de l'abbé Grégoire'. *Annuaire français de droit international* 35 (1989), 99–116. See also Redslob, Robert. *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la vieille de la grande guerre* (Paris: Rousseau, 1923), 415, 416.

58 Grégoire in Chevalley, *Déclaration* 1912 (n. 56), 13.

individual rights to nationality.[59] The close relationship between entitlements and the national body-politic is also illustrated in the caveat to the famous proclamation that men are born and remain free and equal in rights (article 1): 'Social distinctions may be founded only upon the general good.' The notion of common well-being was therefore ever-present in the Assembly's deliberations, likely owing to the influence of Saint-Simon, for whom 'the individual right to property can be based only on the common and general utility of the exercise of this right'.[60] The French Declaration was founded on the French nation, and individual rights were to be exercised within the latter's limits. This much is stated in article 3 of the *Déclaration*: 'The principle of all sovereignty resides essentially in the nation.' The nation was therefore antecedent to the state, the latter merely being an instrument for the actualization of society.[61] In this vein, the lesser-known 1795 Declaration of the Rights and Duties of Man places less emphasis on individual rights and turns to the idea of obligations.[62] For the revolutionaries, then, rights had a solidarist purpose that was premised on devolving individual enfranchisement to the collective social body. Similarly, the reformist Prussian Civil Code of 1794 also contains a clause that grounds the conferral of rights on collective solidarity through the promotion of the 'common good',[63] as does the Austrian Civil Code of 1811.[64] The identification of rights with the collective would continue as nationalism advanced and culminated in the minorities treaties adopted after World War I.[65] The interwar minorities treaties, in turn, made an important contribution to the system of human rights after World War II,[66] which carried

59 Halévi, Ran and François Furet, eds. *Orateurs de la Révolution Française*, vol. I (Paris: Gallimard, 1989), 280.

60 Carr, Edward Hallett. 'Saint Simon: The Precursor', in *Studies in Revolution*, ed. Edward Hallett Carr (London: Macmillan, 1950), 1–14, 11.

61 Duguit, Léon. *Traité de droit constitutionnel*, vol. 1 (Paris: Fontemoing, 1911), 607: 'The "person" of the nation is … distinct from the State, and is anterior to it'.

62 Troisième déclaration des droits et devoirs de l'homme et du citoyen, 1795, Préambule à la Constitution du 5 fructidor, an III.

63 The General Law Code for the Prussian States, proclaimed on 5 February 1794, effective on 1 June 1794, para. 74.

64 Halpérin, Jean-Louis. 'The Age of Codification and the Modernization of Private Law', in *The Oxford Handbook of European Legal History*, eds. Heikki Pihlajamäki, Markus D. Dubber and Mark Godfrey (Oxford: Oxford University Press, 2018), 907–926.

65 On interwar nationalism, see Berman, Nathaniel. *Passion and Ambivalence. Colonialism, Nationalism, and International Law* (Leiden: Brill, 2012).

66 Mazower, Mark. 'The Strange Triumph of Human Rights, 1933–1950'. *The Historical Journal* 47(2) (2004), 379–398. For interwar scholars addressing the same dynamic, see Kunz, Josef. 'The Future of International Law for the Protection of National Minorities'. *American*

forward the standard of equality before the law that had been enshrined in the multilateral minority protection system.[67] As French ideas influenced rights-speak in nineteenth-century Europe,[68] the notion that individual rights ultimately resided in the nation also meant that the idea of nationality was fluid and could mean both ethnic nationalism and citizenship at the same time.[69]

By the 1870s, the influence of the nationality principle in continental Europe underpinned a core minimum of private rights for nationals and foreigners premised on the mutual extension of national treatment and equality among the 'civilized nations'.[70] In addition to being enshrined in influential domestic legislations such as in the Italian and Swiss civil codes, nationality would later be canonized as the main referent of individual treatment in the Hague Conventions of Private International Law adopted in 1902 and 1905, which created a multilateral rights regime based on reciprocal treatment.[71]

As discussed in sections 4 and 5 below, private international law had an important role in justifying incipient international protections because it was sensitive to national law, and nationalism was the mantle under which kin-states guaranteed the rights of their co-nationals and co-religionists abroad, regardless of whether they were citizens. Extensive treaty practice attests to the relevance of nationalism in protecting individual group members up until the Great War, especially in colonial spaces.[72]

Journal of International Law 39(1) (1945), 89–95; Robinson, Jacob. 'From Protection of Minorities to Promotion of Human Rights'. *Jewish Yearbook of International Law* 1 (1948), 115–151.

67 See Castellanos-Jankiewicz, León. 'Negotiating Equality: Minority Protection in the Versailles Settlement', in *Peace through Law: The Versailles Peace Treaty and Dispute Settlement after World War I*, eds. Michel Erpelding and Hélène Ruiz-Fabri (Baden-Baden: Nomos, 2019), 123–155.

68 For the transatlantic iterations of revolutionary rights-speak, see Hunt, *Inventing Human Rights* 2007 (n. 33).

69 The classic text reflecting this position is Redslob, Robert. 'Le principe des nationalités'. *Recueil des cours de l'académie de droit international de La Haye* 37 (1931), 1–82.

70 In his treatise of 1874, Bluntschli wrote: 'Dans le monde civilisé, on respecte envers les étrangers les droits d'humanité, et sur tous les points importants du droit privé, ils sont complétement assimilés aux nationaux'. Bluntschli, Johann Caspar. *Le droit international codifié* (Paris: Guillaumin, 1874), 25.

71 See, e.g., Convention du 12 juin 1902 pour régler les conflits de lois en matière de mariage; Convention du 17 juillet 1905 concernant l'interdiction et les mesures de protection analogues.

72 On humanitarian interventions made on behalf of Europeans under nationalist and religious pretexts, see Klose, Fabian, ed. *The Emergence of Humanitarian Intervention: Ideas and Practice from the Nineteenth Century to the Present* (Cambridge: Cambridge University Press, 2015).

By 1900, no international instrument defined a common standard of treatment for stateless individuals or aliens. Moreover, an attempt at concluding a convention on the rights of foreigners at the League of Nations failed in 1929.[73] This led Alfred Verdross to remark in 1931 that 'le droit international des étrangers se réduit pour certains auteurs à un problème de droit interne comparé.'[74] This comparatist rationale, itself adjacent to private international law, used nationality as the starting point of any analysis to determine rights abroad.

Nationalism was also used to extend international protection above the state at the *Institut de Droit International* during the efforts that culminated in the Declaration of International Human Rights of 1929 prepared by Mandelstam.[75] Arguably the first international human rights declaration, this text was originally designed to enhance the protection of national groups by consolidating the minorities treaties adopted after World War I.[76] In this sense, the draft Declaration on the Rights and Duties of Nations presented at the *Institut* by Albert de Lapradelle in 1921 preceded Mandelstam's Declaration in some important conceptual respects.[77] That earlier document was the European answer to the 1916 American Declaration on the Rights and Duties of Nations, and to a similar proclamation issued by the *Union juridique internationale* in 1919.[78] The texts put forward by the American Institute and the *Union Juridique* were steeped in the nineteenth-century tradition that translated individual rights to the conduct of states in an effort to substitute the old *raison d'état* for a more humane statecraft. To some observers, however, the idea was ornamental: Heinrich Triepel remarked in 1899 that applying the theory of 'so-called fundamental rights' to entire nations was 'an idle speculation'.[79] But de Lapradelle innovated by listing certain legal duties that states owed to their inhabitants,

73 League of Nations. Proceedings of the International Conference on Treatment of Foreigners, First Session, Paris, November 5th–December 5th, 1929, C.97.M.23.1930.II. [C.I.T.E. 62], 1929.

74 Verdross, Alfred. 'Règles internationales concernant le traitement des étrangers'. *Recueil des cours de l'académie de droit international de La Haye* 37 (1931), 323–412, 328.

75 Institut de Droit International, 'New York Declaration' 1929 (n. 11).

76 Sohn, Louis. 'How American International Lawyers Prepared for the San Francisco Bill of Rights'. *American Journal of International Law* 89(3) (1995), 540–553. To Sohn, the 1929 Declaration was chiefly concerned with minorities, and he criticizes other authors downplaying this.

77 'Déclaration des Droits et Devoirs des Nations' in *Annuaire de l'Institut de Droit International* 28 (1921), 207–208.

78 'Projet de déclaration des droits et devoirs des etats de l'Union juridique internationale', in *Annuaire de l'Institut de Droit International* 32 (1925), 243–245.

79 Triepel, Heinrich. *Droit international et droit interne* (Paris: Pedone, 1920 [1899]), 209.

thus creating the adjacent possibility for Mandelstam to jump conceptually from nationalism to human rights in the 1929 New York declaration.

Although de Lapradelle's declaration was never formally adopted by the *Institut*, this text was the first to systematically recognize international obligations owed by states to individuals. Crucially, the document broadened its beneficiaries to interwar minorities on the basis of the 'principle of nationalities'.[80] The idea of nationalism loomed large in de Lapradelle's proclamation, which opened with an affirmation of the right of nations to become states, in line with a robust understanding of the nationalities principle.[81] Governments had a duty to ensure the observance of the right to life and freedom of religion for national minorities as had been done in the minorities treaties.[82] Later on, in the 1948 Universal Declaration of Human Rights, the protection of ethnic nationals retained its prominence, with 'national origin' listed in article 2 as a category not admitting of discrimination in respect to ethnic nationality in the interwar sense – but not in reference to citizenship.[83]

Due to its association to ethnic origin during the nineteenth century, nationalism also enfranchised aliens and non-nationals before human rights skyrocketed to prominence in the 1970s.[84] The contribution of the rights of aliens to international human rights protection was acknowledged by early proponents of human rights Louis Sohn and Richard Baxter, who identify their close relationship in their explanatory notes to the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens.[85] Similarly, Charles de Visscher made the same observation while presenting his 'Declaration on International Human Rights' of 1947 at the *Institut de Droit International*: 'C'est surtout dans la condition et dans le traitement des étrangers que la doctrine des droits de l'homme, liée au droit naturel, s'apparente le plus étroitement

80 De Lapradelle was well aware of Henri Grégoire's work, having supervised a dissertation dedicated to the churchman's declaration. See Chevalley, *Déclaration* 1912 (n. 56).

81 Institut de Droit International, 'Déclaration des Droits et Devoirs des Nations' 1921 (n. 77), 207.

82 Ibid., 208 (art. 6).

83 This interpretation was supported by the American, Chinese, Soviet, Australian, Iranian, British, and Indian delegates. See Summary Record of the Fifth Meeting, UN Doc. E.CN.4/Sub.2/SR.5 of 27 November 1947, 7, 9, 10.

84 For the 1970s pivot, see Moyn, *Last Utopia* 2010 (n. 34).

85 'Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens', explanatory note to Art. 1 in García-Amador/Sohn/Baxter, *Recent Codification* 1974 (n. 18), 144: 'Holding States to a certain standard of conduct in their treatment of aliens has long been the one really effective way in which international law has been able to protect human rights'.

au développement du droit des gens'.[86] This equivalence – all but obsolete to contemporary human rights lawyers – between the rights of aliens mentioned by de Visscher and human rights, points further towards nationalism as a justification for international entitlements. Indeed, during the drafting of the interwar minorities treaties, which provided the first multilateral safeguards for individuals, protected persons were understood to include both citizens and aliens belonging to national minorities.[87] The Romanian government, for instance, offered to extend the rights and liberties of minorities to alien residents, so that the latter could freely develop 'their language, education and worship'.[88] International protection therefore hinged on nationality in the ethnic, cultural and religious sense as opposed to being premised on formal citizenship. The rights of aliens prevailing in the nineteenth century were developed in deference to the foreigners' bond of nationality on the basis of reciprocity. The following section thus turns to the nineteenth-century rationale of reciprocity which was developed to attain cross-border rights recognition.

4 Reciprocity and the Territoriality of Rights

This section presents the theories of comity and reciprocity that justified the conferral of private rights to alien individuals. These theories would become increasingly obsolete as the discoursive practice of rights recognition intensified through private international law, as shown in section 5. Developments on the treatment of non-nationals during the nineteenth century inaugurated the debates about the desirability of common standards of treatment for individuals and groups almost one hundred years before the universal human rights instruments were commonplace. Paradoxically, the nationalism that tracked nineteenth-century state building played a prominent role in developing these international standards, as deference to the nation was a sure way of appealing

86 Visscher, Charles de. 'Les droits fondamentaux de l'homme, base d'une restauration du droit international'. *Annuaire de l'Institut de Droit International* 41 (Paris: Pedone, 1947), 1, 3–4.

87 'Observations by Italian Delegation concerning the Proposals of M. Veniselos relative to Reciprocal and Voluntary Emigration of Minorities', Annex (c) to Fifty-Ninth Meeting, November 13, 1919, in Miller, David Hunter. *My Diary of the Conference at Paris*, vol. 13 (New York: Appeal Printing, 1925), 523–524, 523: 'in order to avoid all ambiguity, it would be preferable to retain, for all alien minorities, the same expression that we find in the treaties for the protection of minorities. It would thus be preferable … to say: Minorities of race, religion, or language'.

88 Baritano to Berthelot, in Miller, ibid., 89.

to cosmopolitan values without questioning the authority of the state. This *problématique* was examined under the heading of comparative and private international law by scholars whose theories on the private rights of aliens were heavily influenced by the nationalities theory.[89]

The private rights of aliens that matured during the second half of the nineteenth century have not always been understood to have contributed to the development of international human rights, but both regimes provide an international baseline of protection to individuals.[90] According to this view, alien status was a precondition to the extraterritorial enjoyment of fundamental rights before the advent of the UN Charter in order to override potentially detrimental treatment in the forum state.[91] The proposition put forward here, however, is that human rights developed not in opposition to the state but out of it, as prolongations of citizens' rights across borders on the basis of their citizenship, but also through their national identity. This offers a new understanding of the ruptures and continuities found in the trajectories of international rights.

As the eighteenth century ended, states began to conclude agreements governing the treatment of their nationals on the basis of reciprocity. After the French Revolution, the individual was increasingly roped into the authority of the national state and the law of nations became more definitely identified with the sovereign as a single political entity rather than with subnational groups and feudal allegiances.[92] When the nation-state consolidated itself as the exclusive rights-giver and guarantor in western Europe during the nineteenth century, the distinction between nationals and non-nationals became more pronounced. During this period, nationality fully replaced religious, feudal and other affiliations as a precondition to entitlements or privileges. Status relations and manorial rights were successively set aside by the French Revolution, the Napoleonic wars, and their 1848 codas.[93]

89 Lillich, Richard. *The Human Rights of Aliens in Contemporary International Law* (Manchester: Manchester University Press, 1984), 1: 'Rather than recognising that individuals as such were entitled to a certain range of rights *vis-à-vis* States in general (including, incidentally, their own States), traditional international law 'solved' the problem by subsuming individuals into the nation-State network through the bond of nationality'.

90 The relationship is discussed in Casey, *Nationals Abroad* 2020 (n. 29), chapters 5 and 6 from the standpoint of the international minimum standard.

91 United Nations, First Report on International Responsibility by Francisco V. García-Amador, *Yearbook of the International Law Commission* (1956), vol. II, UN Doc. A/CN.4/96, 203, 20 January 1956.

92 Wortley, 'Interaction' 1954 (n. 17), 251, 255.

93 Schroeder, Paul W. 'The 19th-Century International System: Changes in the Structure'. *World Politics* 39(1) (1986), 1–26, 5.

This centralization of state authority dissolved the intricate web of private allegiances and the status system that had facilitated cross-border relations during the *ancien régime*. In pre-revolutionary France, for instance, mercantilist monarchs had progressively extended commercial patents to foreigners throughout the eighteenth century and the distinctions between *français* and *étranger* was not altogether relevant for the purposes of enjoying these rights. After the Revolution, however, the development of citizenship sharpened the distinction between nationals and non-nationals and the treatment of foreign nationals became an inter-state issue.

The reciprocal treatment of nationals on the basis of bilateral treaties became widespread in the eighteenth century and persisted throughout the nineteenth. The system generally took one of two forms: national treatment (*l'assimilation aux nationaux*) or most favored nation treatment.[94] Many of these instruments addressed the commercial interests of nationals abroad,[95] but some were concerned with personal and civil status.[96]

However, reciprocity alone allowed for too differentiated a treatment to foreign nationals. By the 1850s, its underlying logic was viewed with apprehension and attempts were made to replace it with the transnational recognition of rights acquired on the basis of nationality. The leading proponents of these extraterritorial rights theories were private international lawyers hailing from states that were consolidating themselves along national lines. The rhetorical deployment of the nationalities theory to secure private rights for aliens attests to the early associations between nationalism and international rights.

After 1900, reciprocity fell into disuse in western states and was replaced by a baseline of private or civil rights, but some Soviet and Latin American countries continued to use reciprocal agreements during the interwar years.[97] This was the same reciprocal system that had been in use before the French Revolution.[98] In France, this resulted in the widespread recognition of the rights of aliens after the storming of the Bastille. But when Napoleon swept into power, a restrictive approach to reciprocity was codified in article 11 of the

94 Niboyet, Jean-Paulin. 'La notion de réciprocité dans les traités diplomatiques de droit international privé'. *Recueil des cours de l'académie de droit international de La Haye* 52 (1930), 253–363, 286–287.

95 Such as the Franco-Bolivian Treaty of 9 December 1833, Art. 2: 'Les citoyens respectifs pourront réciproquement, et, en toute liberté, entrer avec leurs navires et cargaisons comme les nationaux eux-mêmes'.

96 Treaty between France and Belgium of 8 July 1899, Art. 1: 'En matière civile et en matière commerciale, les Français en Belgique et les Belges en France sont régis par les même règles de compétence que les nationaux'.

97 Italo-Soviet Treaty of 7 February 1924, art. 10.

98 Brubaker, William Rogers. 'The French Revolution and the Invention of Citizenship'. *French Politics and Society* 7(3) (1989), 30–49, 32.

1804 Civil Code: 'L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités de la nation à laquelle cet étranger appartiendra'.[99]

Accordingly, the civil rights of aliens in France were not absolute, but operated insofar as the corresponding foreign statute conferred analogous rights to French citizens. Being premised on a web of bilateral commitments, the reciprocal system carried the potential of differentiated treatment to aliens everywhere and disallowed the blanket guarantee of basic civil rights across European borders. As far as the French Civil Code was concerned, this guarded attitude towards foreign nationals has been attributed to Napoleon himself.[100] For some critics, however, the Code's reciprocal approach was too liberal and expansive, for it encouraged 'international vagabondage'.[101]

Nations abiding by the reciprocity rule guaranteed a baseline of private rights for French citizens abroad and vice-versa, an idea that had the potential of spreading the Revolution's liberal gains through steady state practice. But the Napoleonic Code's drafters also disabled foreigners from obtaining certain prerogatives that Frenchmen could enjoy. According to articles 14 and 15, for example, French courts had exclusive jurisdiction over the claims of French citizens originating in France or abroad. This exorbitant jurisdiction also applied *a contrario* to the detriment of aliens: French courts declined jurisdiction if neither party to the dispute had French nationality.[102] Justifications for these decisions were varied, but their main rationale was that French courts only dispensed justice for French subjects whereas aliens had their own tribunals to seek redress. Thus, an 1852 judgment in respect of Maltese parties from the *Chambre des requêtes* of the *Cour de cassation* stated that:

> L'action ... formée étant purement personnelle, et ... les demandeurs et les défendeurs étant étrangers, aucune loi n'obligeait un tribunal français à juger des parties qui n'étaient point ses justiciables; qu'en se déclarant incompétente, la cour d'appel d'Alger s'est conformée aux principes de la matière.[103]

99 *Code Civile des Français* (Paris: Imprimerie de la République, 1804).

100 Lobingier, Charles Sumner. 'Napoleon and His Code'. *Harvard Law Review* 32(2) (1918–1919), 114–134, 123.

101 Hubbard, Arthur. *Patrie: Essai de politique légale* (1872), cited in Pasquale Fiore, *Le droit international privé* (Paris: Pedone, 1907), xiii.

102 Kinsch, Patrick. 'La confrontation aux droits de l'homme des règles de droit international privé'. *Recueil des cours de l'académie de droit international de La Haye* 318 (2005), 9–164, 38.

103 Req., 26 juillet 1852, DP, 1852, 1, 249, cited in Kinsch, ibid.

This system excluded the possibility for aliens to seek redress in the French courts.[104] This state of affairs is reflected in the major textbooks of international law of the time, with Henry Wheaton remarking in his *Elements of International Law* of 1836 that 'there is no uniform and constant practice of nations as to taking cognizance of controversies between foreigners', whereas it was 'the duty as well as the right of every nation to administer justice to its citizens'.[105] More than any revolution, civil codes were quickly replacing the *ancien régime* by making political nation-states the sole guarantors of private rights.

Through Napoleon's conquests, the French Civil Code was introduced to Belgium, Spain, Austria and the Netherlands. Later, the revolutionary Spring of Nationalities of 1848 anticipated the emergence of further codes in continental Europe, each with their own approach to the recognition of foreigners' status and rights.[106] Later on, the 1864 Civil Code of Romania took two-thirds of its articles from the French Civil Code, and the 1867 Portuguese Civil Code integrated civil liberties following the French tradition.[107]

With each new codification, novel standards of treatment sprang up, thus complicating the application of the reciprocity rule. This drew the attention of jurists associated with the *Revue de droit international et de législation comparée* and the *Institut de Droit International*. Among the early discussants of this problem was Geneva law professor and *Institut* member Charles Brocher, who made a plea for an international baseline of recognized rights in a serialized treatise of private international law published in the *Revue* between 1871 and 1873.[108] Brocher, a disciple and friend of Savigny's, saw the sudden irruption of national civil codes with their varying standards of treatment as an unruly development. Nation-states, he cautioned, were creating new and

104 Another 1820 judgment from the *Cour de cassation* dismissed a case *in limine litis* on the sole basis of the claimants' foreign nationality, cited in Kinsch, ibid.

105 Wheaton, Henry. *Elements of International Law* (Philadelphia: Carey, Lea & Blanchard, 1836), 122. In England and America, the situation was different: all actions could be brought in the place in which the property lied.

106 Hesselink, Martijn. *The New European Private Law: Essays on the Future of Private Law in Europe* (The Hague: Kluwer, 2002), 12; Lesaffer, Randall. *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2009), 456–457.

107 Halpérin, 'Age of Codification' 2018 (n. 64), 917–918.

108 Brocher, Charles. 'Théorie du droit international privé'. *Revue de droit international et de législation comparée* 3 (1871), 412–439, 540–567; Brocher, Charles. 'Théorie du droit international privé'. *Revue de droit international et de législation comparée* 4(1) (1872), 189–220; Brocher, Charles. 'Théorie du droit international privé'. *Revue de droit international et de législation comparée* 5(1) (1873), 137–168; 390–420.

idiosyncratic ways of ascribing rights on the basis of the distinction between nationals and aliens.[109] Justifying rights through citizenship created dissonance in cross-border private law relations: citizenship had different meanings and degrees across continental Europe, and was uneven in central and eastern Europe, especially in Habsburg crownlands pockmarked by a mixture of historical, feudal and constitutional rights.[110] Moreover, the reciprocal approach increasingly excluded stateless persons from the purview of the law and allowed pernicious officials to take discriminatory measures against national minorities, as was the case of the Jews in Romania.[111]

The question soon arose as to how nation-states would recognize the rights of aliens – a chief concern among jurists such as Brocher[112] – and whether any general principles of law could fulfill the role that religious and other affinities could no longer play. Foelix, a French private international lawyer and author of an influential treatise on the subject, had stated this problem as early as 1843: 'La question est uniquement de savoir si les nations reconnaissent ou non, l'autorité de principes communs et conformes.'[113]

Naturally, the introduction of foreign standards of treatment required states to relinquish the territorial exclusivity that their national legal systems enjoyed. Deference towards foreign laws could not easily be assumed, continued Foelix, given that states were hesitant to recognize a supranational authority trumping their own.[114] Such expansive interpretations of state sovereignty prevented the invocation of the higher legal ground that is the salient feature of international human rights law today. This led Brocher to formulate the immutability of legal capacity and rights derived therefrom in a private international law key:

109 Brocher, 'Théorie' 1873 (n. 108), 417.

110 Wheatley, Natasha. 'Legal Pluralism as Temporal Pluralism: Historical Rights, Legal Vitalism and Non-Synchronous Sovereignty', in *Power and Time: Temporalities in Conflict and the Making of History*, eds. Dan Edelstein, Stefanos Geroulanos and Natasha Wheatley (Chicago: University of Chicago Press, 2020), 53–79, 65.

111 Brustein, William I. and Ryan D. King, 'Anti-Semitism as a Response to Perceived Jewish Power: The Cases of Bulgaria and Romania before the Holocaust'. *Social Forces* 83(2) (2004), 691–708, 692.

112 Brocher, 'Théorie' 1873 (n. 108), 412: 'Comment la loi pourra-t-elle … garantir à chaque individu les moyens d'agir librement et sûrement dans des contrées diverses et souvent très éloignées?'.

113 Foelix, Jean Jacques Gaspard. *Traité du droit international privé, ou, du conflit des lois de différentes nations en matière de droit privé* (Paris: Joubert, 1843), vi.

114 Ibid.: 'chaque nation est trop jalouse de son indépendance pour reconnaître une puissance supérieure'.

> Tout État qui ne reconnait pas la capacité juridique des étrangers, ou qui lui impose des restrictions exceptionnelles, se place nécessairement, par cela même, en dehors des exigences du droit international privé.[115]

These ideas ran counter to the doctrine of comity, which grounded the recognition of foreigners' rights on the 'dignity' of their state of nationality.[116] Comity's state-based justification left an ample margin to the forum state to decide whether the interests of the individual were aligned with domestic laws. Comity was popular because many writers associated state sovereignty with absolute jurisdiction on all persons and property situated within the state, regardless of their status as citizens or aliens. Most of these authors believed that states had no obligation whatever to recognize foreign laws and that comity did not create precedent. This was the position of prominent scholars active during the second half of the nineteenth century, including Phillimore,[117] Twiss,[118] Wheaton,[119] Bluntschli,[120] and Fiore.[121]

Other writers took the opposite position: if states restricted their justifications to recognize aliens' rights to reciprocity and comity alone, any political or military tension among sovereigns could trigger mistreatment insofar as the private rights of foreigners were concerned – an issue which would eventually crystallize the concept of 'enemy aliens' during World War I. Tobias Asser made this point in the inaugural issue of the *Revue de droit international et de législation comparée* of 1869, when he highlighted the dangers of using reciprocity as the sole yardstick for determining the rights of nationals abroad.[122] The same sentiment was expressed by Wheaton in his *Elements* published in 1866.[123] The reciprocal system could easily play into the hands of politics, especially as regards the treatment of national minorities at home, including Jews, and the fate of irredentist kin-populations abroad. This led Bluntschli to insist on the continued codification of reciprocal standards: 'Egalité réciproque de

115 Brocher, 'Théorie' 1873 (n. 108), 413.

116 Yntema, Hessel E. 'The Comity Doctrine'. *Michigan Law Review* 65(1) (1966–1967), 9–32.

117 Phillimore, Robert. *Commentaries upon International Law* (London: Butterworths, 1879), 216.

118 Twiss, Travers. *The Law of Nations considered as Independent Political Communities. On the Rights and Duties of Nations in Time of Peace* (Oxford: Clarendon Press, 1884), 257–258.

119 Phillipson, Coleman. *Wheaton's Elements of International Law* (London: Stevens, 1916), 131.

120 Bluntschli, *Droit International* 1874 (n. 70), 222, 228.

121 Fiore, Pasquale. *Le nouveau droit international public* (Paris: Durand, 1885), 408.

122 Asser, Tobias. 'De l'effet ou de l'exécution des jugements rendus à l'étranger en matière civile et commerciale'. *Revue de droit international et de législation comparée* 1 (1869), 82–98, 83.

123 Wheaton, Henry. *Elements of International Law* (Oxford: Carnegie Endowment, 1936 [1866]), 112, para. 79.

droits dans des cas identiques, voilà ce que réclame le droit international et ce qui mérite d'être consacré par les traités'.[124]

5 Private International Law as Adjacent Possibility

To follow the evolution of reciprocity and comity towards the development of an international baseline of private rights, this section focuses on the doctrinal output of the *Institut de Droit International* and its quasi-official mouthpiece, the *Revue de droit international et de législation comparée*, which were established in 1873 and 1869, respectively, and were populated largely by the same actors.[125] These professional venues launched a liberal-reformist agenda that would both harness and temper the forces of ethnic nationalism.[126] Their programme, which was articulated in the professional registers of comparative, civil and private international law – legal branches sharing 'common origins'[127] – sought to theorize the interpenetration of national laws and the extension of extraterritorial state authority, thus fueling later discussions about the desirability of extending transnational rights to individuals.

The potentially uneven treatment of individuals across borders was perhaps more glaring in the interactions between European states and non-Christian polities. Because they were beyond the purview of European public law, non-Christian states were not treated on the basis of reciprocity.[128] To Borcher, private international law, although relevant, was ill-equipped to meet this challenge and the task involved developing international rules that would receive cross-border recognition:

124 Bluntschli, Johann Caspar. 'De la qualité de citoyen d'un état au point de vue des relations internationales'. *Revue de droit international et de législation comparée* 2 (1870), 107–120, 110.

125 Eyffinger, Arthur. *The* Institut de Droit International*: Cradle and Creed of the City of Justice and Peace* (Oisterwijk: Wolf Legal Publishers, 2019), 11–18.

126 Koskenniemi, Martti. *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2003).

127 Koskenniemi, Martti and Ville Kari. 'A More Elevated Patriotism: The Emergence of International Law and Comparative Law (Nineteenth Century)', in *The Oxford Handbook of European Legal History*, eds. Heikki Pihlajamäki, Markus D. Dubber and Mark Godfrey (Oxford: Oxford University Press, 2018), 974–999, 977. See also Bar, Ludwig von. *The Theory and Practice of Private International Law* (Edinburgh: W. Green & Sons, 1892), viii: 'private international law stands in very close connection with public international law, the law of nations'.

128 Renault, Louis. *Introduction à l'étude du droit international* (Paris: Larose, 1879), 20–21.

> [Le droit international privé] a besoin de règles communes, nées de la science et se propageant avec liberté sans être arrêtées par les frontières des États; or la codification tend à individualiser certains principes, en les fixant diversement sur les territoires reconnaissant à des souverainetés distinctes. Le seul moyen de combattre une telle tendance est d'arriver, sans trop tarder, à une doctrine assez puissante pour triompher de cet obstacle et aboutir à un ensemble de traités diplomatiques s'élevant au-dessous de l'individualisme national.[129]

Although the preceding passages might read as a plea for human rights understood in the modern sense, the idea of supranational legislation was out of the question. The solution, it was argued, was a system that would allow for the extraterritorial recognition of personal status and private rights.

Private international lawyers writing in the second half of the nineteenth century witnessed the state's increasing monopolization of legislative authority and jurisdictional competence first hand. It is therefore natural that every major treatise written during this period treats the old problems of reciprocity by accounting for new national legislations through solutions in the register of private international law. This debate is instructive because of the arguments put forward to recognize the private rights of non-nationals, which conceptually preceded international rules that would become necessary to guarantee human rights beyond the state. Savigny's communitarian notions of inter-national legal relationships were precursors in the formation of a collective interest in the international sphere. They were followed by Pasquale Mancini's theory of acquired non-derogable rights that were grounded on the principle of nationalities. Put together, their theories enabled the application of foreign standards beyond the system of reciprocity.

Italy's Mancini was particularly aware that the reciprocal system could hardly result in the unconditional recognition of a person's rights across borders. His contribution was to put nationality forward as a justification for the international recognition of rights. This intervention coincided with the decline of the theory of domicile, as a flurry of civil codes adopted the nationality rule in the Napoleonic Code's wake. Indeed, a heated doctrinal debate among private international lawyers during the mid-nineteenth century hinged on whether the law of nationality or the law of domicile should determine the personal status of individuals involved in cross-border activities.[130] Reciprocity had

129 Brocher, 'Théorie' 1873 (n. 108), 418.

130 Batiffol, Henri. 'Principes de droit international privé'. *Recueil des cours de l'académie de droit international de La Haye* 97 (1959), 431–573, 498.

solved the problem by guaranteeing equal treatment, but when no agreements existed, there was considerable uncertainty as to which forum should determine the status of a foreign individual. The core of status rights was usually limited to so-called personal laws associated with the Roman (Christian) tradition of family law: adoption, marriage, divorce, annulment, guardianship, and succession.[131] The function of personal law answered to the need of applying reasonably expected legal rules to matters most closely affecting the family and, by implication, commercial life. At stake was whether individuals coming into contact with a foreign legal system retained their personal status rights acquired though nationality, and, conversely, whether states could apply their national laws to determine the status of aliens and their property. Within this framework, personal rights were civil rights belonging to the body of private law. After 1900, private international lawyers also paid increasing attention to the law of torts and delicts, thus broadening their jurisdictional methodologies on choice of law from family relations to commercial transactions more systematically.[132]

Before the nineteenth century, however, it was generally accepted in continental Europe that the personal status of individuals was connected to their domicile. After the French Revolution, however, personal status came increasingly under the influence of the state of nationality. The Napoleonic Civil Code is often credited with enshrining the nationality rule in article 3: 'Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger.' This preference for the law of nationality over the law of domicile in matters concerning the status of citizens at home as well as abroad was unprecedented.[133] By propounding to extend its effects outside the territorial jurisdiction of the home state, this approach disregarded foreign laws that could be applicable to French nationals residing abroad. At the same time, this provision transposed the old principle whereby the peasant was tethered to the soil from the late feudal system to the larger canvas of the nation-state. As noted by Graveson: 'The adoption of nationality as the basis of the personal law meant that the conflict of laws became a system based not on differences

131 Graveson, Ronald H. 'Comparative Aspects of the General Principles of Private International Law'. *Recueil des cours de l'académie de droit international de La Haye* 109 (1963), 1–164, 59.

132 McClean, David. '*De conflictu legum*: Perspectives on Private International Law at the Turn of the Century'. *Recueil des cours de l'académie de droit international de La Haye* 282 (2000), 41–227, 52.

133 Winter, Louis I. de. 'Nationality or Domicile? The Present State of Affairs'. *Recueil des cours de l'académie de droit international de La Haye* 128 (1969), 347–503, 367.

between territorial legal areas but between national legal areas.'[134] Seen this way, the possession of a nationality would become a precondition to the enjoyment of personal status rights everywhere. The resulting effect is paradoxical: nationalism, seemingly parochial and inward-looking, became a vessel for the recognition of an individual's rights throughout the so-called 'civilized' world. Territoriality and reciprocity began to erode and nationality heralded the ultimate justification for rights.

It was the Prussian scholar Friedrich Carl von Savigny who laid the groundwork of modern theories on transnational rights recognition. In his classic treatise, *System of Modern Roman Law*, Savigny presupposed the existence of a legal community of peoples that mediated cross-national views on private law.[135] As others before him, he admitted to the existence of an international community premised on Christian values, but, unlike his predecessors, he argued that the nations were bound by international law to apply the appropriate rules in cases involving other members of the international community.[136] For Savigny, private law is distinct from the will of legislators, and could offer flexibility to the rigidity of reciprocity. He thus tried to carve private international law outside the community of sovereigns and within a community of nations in the ethnic sense.[137] As a Romanist, moreover, Savigny was in principle opposed to codification which would centralize the authority of private legal relationships within the state.[138] His theory was influential because it limited the prominence of territorial jurisdictions to account for the rights of individuals, and presupposed an interstitial legal space whose mere existence attenuated the competence of the territorial state in favor of functional legal relations, including those obtained through nationality.[139]

Savigny's ideas were carried forward by Pasquale Mancini, the first president of the *Institut de Droit International* and professor of international law in Turin. Mancini took Savigny's international legal community as his starting

134 Graveson, 'Comparative Aspects' 1963 (n. 131), 64: 'The conflict has moved away from an inter-provincial conflict to an international one'.

135 Savigny, Friedrich Carl von. *System des heutigen römischen Rechts* (Berlin: Veit, 1840).

136 Nussbaum, 'Rise and Decline' 1942 (n. 17), 192; Kegel, Gerhard. 'Story and Savigny'. *American Journal of Comparative Law* 37(1) (1989), 39–66, 65.

137 Michaels, Ralf. 'Public and Private International Law: German Views on Global Issues'. *Journal of Private International Law* 4(1) (2008), 121–138, 127.

138 Savigny, Friedrich Carl von. *De la vocation de notre temps pour la legislation et la science du droit* (Paris: Presses universitaires de France, 2006).

139 Opertti Badán, Didier. 'Conflit de lois et droit uniforme dans le droit international privé contemporain: Dilemme ou convergence?'. *Recueil des cours de l'académie de droit international de La Haye* 359 (2013), 9–86, 37.

point and assumed its existence over and above the interests of territorial sovereigns.[140] In his inaugural lecture at the University of Turin, Mancini contributed more than anyone to infusing nationalism into the spirit of public international law by positing that nationality was the ultimate source of international rights.[141] Private international lawyers later applied Mancini's nationalist approach to their discipline.[142] Moreover, Mancini's ideas mirrored those of Guiseppe Mazzini, his world-famous contemporary and main ideologue of the nationalities principle.[143] For Mancini, since national legal systems were an outgrowth of their constituents, each national legislation must apply exclusively to national subjects and these rights remained fastened on the citizens wherever they might be. With this proposition, Mancini sought to debunk reciprocity and comity as the sources of an individual's entitlements abroad.

Mancini's most important contribution was to assert the presumption that rights deriving from nationality admitted of no derogation. Further, their immanent nature did not derive from mere comity, but from the recognition of nationality understood as a status that created acquired rights. Crucially, Mancini believed that principles conforming to just treatment could be adopted though the growth and development of private international law.[144]

Mancini remained influential during his lifetime and incorporated his theory to the preambular articles of the Italian Civil Code of 1865, which he helped draft during his tenure in the Italian Chamber of Deputies. The main provision was article 6, which provided that the status, capacity and family relations of individuals were governed by the laws of the nation to which they belonged.[145] This placed foreigners in Italy on an extremely favorable footing in comparison

140 Diena, Giulio. 'La conception du droit international privé d'après la doctrine et la pratique en Italie'. *Recueil des cours de l'académie de droit international de La Haye* 17 (1927), 343–447, 350.

141 Mancini, Pasquale S. *Della nazionalità come fondamento del diritto delle genti* (Torino: Eredi Botta, 1851).

142 Esperson, Pietro. *Il principio di nazionalità: Applicato alle relazioni civili internazionali e riscontro di esso colle norme di diritto internazionale privato* (Pavia: Fratelli Fusi, 1868).

143 Nuzzo, Luigi. 'Da Mazzini a Mancini: Il principio di nazionalità tra politica e diritto'. *Giornale di storia constituzionale* 14(2) (2007), 161–183. On Mazzini's advocacy for the concept of rights, see Moyn, 'Mazzini' 2015 (n. 22).

144 Mancini, Pasquale S. 'De l'utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales du Droit international privé pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles'. *Journal de droit international privé* 1 (1874), 221–239 (part 1) and 285–304 (part 2).

145 Codice civile del regno d'Italia, 1865, art. 6.

to other European countries.[146] The law of a person's nationality also governed their movable property (article 7) and succession rights (article 8).

As Minister of Foreign Affairs between 1881 and 1885, Mancini would later instruct Italian legations abroad to lobby for an international agreement codifying common rules of private international law on the 'civil condition of aliens' in order to guarantee their rights in foreign jurisdictions.[147] Mancini left office before any agreement could be reached, however. Undeterred, he spearheaded the adoption of an 1880 resolution at the *Institut de Droit International* which affirmed that personal status everywhere was governed by nationality.[148] This marked the triumph of the nationality theory within the epistemic community of international and comparative lawyers, and, by implication, of alienage as the controlling force behind the recognition of rights in the latter decades of the nineteenth century. Ten years after the promulgation of Mancini's Italian Civil Code, the Turin Court of Cassation endorsed equal treatment as the standard for civil rights recognition to the detriment of reciprocity: foreigners no longer needed to prove that their national state offered equal protection to the citizens of the forum state. The court went further, adding that equal treatment between nationals and foreigners was presumed in *all nations* in respect to civil rights.[149]

As national civil codes continued to be enacted across Europe, legal scholars noted that their cross-referential interrelations would contribute to the growth of general principles. Charles Demangeat who, along with Mancini, was a founding editor of the *Journal du droit international privé*, acknowledged this in 1874. His essay, which appeared in that publication's inaugural issue, recognized the potential for developing international principles on the basis of national civil codes:

> [L]a conséquence est qu'il existe déjà en dehors et au-dessous des Codes promulgués pour chaque pays par les différents gouvernements, un certain

146 Jayme, Erik. 'Considérations historiques et actuelles sur la codification du droit international privé'. *Recueil des cours de l'académie de droit international de La Haye* 177 (1982), 9–101, 40.

147 For a selection of this diplomatic correspondence, see 'Négociations diplomatiques du Gouvernement italien avec les différentes Puissances relativement à la fixation par traité de certaines règles de droit international privé et à l'exécution des jugements étrangers'. *Journal du droit international privé et de la jurisprudence comparée* 13 (1886), 35–56.

148 Institut de Droit International, 'Principes généraux en matière de nationalité, de capacité, de succession et d'ordre public: Session d'Oxford, 1880'. *Annuaire de l'Institut de Droit International*, vol. 5 (Bad Feilnbach: Schmidt Periodicals, 1994 [1881/82]), 57.

149 Norsa, César. 'Revue de la jurisprudence italienne en matière de droit international'. *Revue de droit international et de législation comparée* 6 (1874), 247–274, 261.

> nombre de principes généraux dont la force obligatoire est également reconnue et dont l'application est également faite chez tous les peuples.[150]

Demangeat's statement went beyond suggesting the development of an international civil law writ large; his was a manifesto to deduce common international standards that were independent from the content of national civil laws, thus foreshadowing the adoption of latter international rights.

By 1880, Tobias Asser could observe that civil disabilities saddling aliens had been progressively dismantled due to legislative developments across Europe, and singled out private international law as the medium to safeguard these guarantees.[151] That same year, the Institute of International Law adopted its Oxford resolution on nationality which recognized the principle of absolute equality between nationals and aliens in respect to 'civil rights'.[152] During the drafting process, the rapporteurs Westlake and Arntz declared that 'civil rights' meant the full spectrum of personal entitlements known as 'fundamental private rights'.[153] This text also established that the status and capacity of persons were determined by the laws of the state to which they belonged by virtue of their nationality.[154] The following decade, William Rattigan would observe in his private international law treatise that 'before the law the foreigner and the native subject are equal'.[155]

In 1900, the principle of nationalities as articulated in the conflicts style had contributed to the recognition of equal treatment of citizens and aliens and was enshrined in the Hague Conventions of Private International Law.[156] Influential writers followed suit, with Oppenheim being among those who believed that equal treatment was an expected standard among 'civilized'

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150 Demangeat, Charles. 'Force obligatoire du droit international en dehors et au-dessous de la loi positive'. *Journal du droit international privé* 1 (1874), 7–16, 7–8. Demangeat was professor of law in Paris and the author of a treatise on the rights of aliens: *Histoire de la condition civile des étrangers en France dans l'ancien et dans le nouveau droit* (Paris: Joubert, 1844).

151 Asser, Tobias. 'Droit international privé et droit uniforme'. *Revue de droit international et de législation comparée* 12 (1880), 1–22, 8.

152 Institut de Droit International, 'Principes généraux' (n. 148), 57.

153 Heffter, August Wilhelm. *Le droit international public de l'Europe* (Paris: Cotillon, 1857), 34, para. 15.

154 Institut de Droit International, 'Principes généraux' (n. 148), 42. The summary of the procès-verbal is at 41–57. Mancini was also among the rapporteurs, but he was not present at Oxford. The project was originally titled 'Conflit des lois civiles'.

155 Rattigan, William Henry. *Private International Law* (Edinburgh: W. Green & Sons, 1895), 48.

156 Houtte, Hans van. 'La réciprocité des règles de conflit dans les conventions de La Haye'. *Revue Belge de droit international* 1 (1991), 491–503.

nations and discussing it extensively in the first edition of his *International Law* textbook.[157]

Until now, the epistemic practices discussed here have not been a part of the human rights historical canon because the personal status and the rights derived therefrom were subsumed to private law, whereas human rights have traditionally been understood to integrate a public constitutional order.[158] But to early commentators, these standards straddled both the public and the private, and were known as fundamental private rights or *droits civils fondamentaux*.[159] Only later would these portmanteaus enter national legislation and public law in the form of human rights through the constitutional enactment of international treaties after World War II.[160] That publicists have long been blindsided from presenting a privatist human rights account can therefore be explained by the sharp distinction between public and private law that permeated the western legal tradition for most of the twentieth century.[161]

6 Conclusion

In retrospect, the unprecedented legal challenges resulting from the scattering of Russian refugees across Europe after 1917 represented a generational opportunity to develop human rights. Without the benefit of our hindsight, however, the problems were solved with the intellectual tools of private international law because this discipline ensured cross-border protection in an era of entrenched nationalism and state-building. Conflict of laws conveniently stabilized personal rights across borders while allowing for a degree of deference to national law. This created the adjacent possibility for future adaptations and permutations in universalist thinking, opening intellectual pathways for human rights later on.

157 Oppenheim, *International Law* 1905 (n. 44), 341.

158 McDougal, Myres, Harold Lasswell and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Oxford: Oxford University Press, 2018 [1980]).

159 On fundamental private rights, see Heffter, *Droit international public* 1857 (n. 153), 34, para. 15. Cassin used *droits civils fondamentaux*, see UN Doc. E/CN.4/SR.58 of 16 June 1948 (meeting of 3 June 1948), 3–6.

160 Beck, Colin J., John W. Meyer, Ralph I. Hosoki and Gili S. Drori, 'Constitutions in World Society: A New Measure of Human Rights', in *Constitution-Making and Transnational Legal Order*, eds. Gregory Shaffer, Tom Ginsburg and Terence C. Halliday (Cambridge: Cambridge University Press, 2019), 85–109.

161 Bobbio, Norberto. 'La grande dicotomia: pubblico / privato', in Norberto Bobbio, *Stato, governo, società. Per una teoria generale della politica* (Torino: Einaudi, 1985), 3–22.

The historical framing of private international law as a vehicle for protecting global public goods has important implications for the present. Just as Mandelstam found persuasive force in conflicts to 'revive' his compatriots in law, scholars are currently re-evaluating the potential of private international law to protect human rights today.[162] Furthermore, conflicts rules such as *forum non conveniens* are increasingly being used to ensure the protection of rights such as access to justice.[163] These trends have led human rights scholars to acknowledge that the rules of private international law are 'increasingly relevant' to human rights litigation.[164]

Finally, using the adjacent possible as a theoretical metaphor to rephrase the emergence of human rights law offers yet another reason to remain skeptical of genealogy and teleological histories that do not account for discursive moves in real time. For adjacency shows not only that human rights could have been otherwise, but also that the creative forces which adapted them contained elements of randomness and chance. And yet, having a sense that human rights emerged in spite of themselves can reaffirm our commitment to imagine new and better concepts in the pursuit of improving our relationship with others and ourselves.

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162 Dagan, Hanoch and Avihay Dorfman, 'Interpersonal Human Rights'. *Cornell International Law Journal* 51(2) (2018), 361–390.

163 Morgandi, Tibisay. 'Parent Company Liability, *forum non conveniens* and Substantial Justice'. *Cambridge International Law Journal* 11(1) (2022), 118–127.

164 Alston, Philip and Ryan Goodman, *International Human Rights* (Oxford: Oxford University Press, 2013), 1145.

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