Lorimer’s Private Citizens of the World

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Abstract

In contrast to its notorious legal differentiation of communities into civilized, barbarous and savage, there is no systematic treatment of individuals in James Lorimer’s The Institutes of the Law of Nations (1883). This article pieces together Lorimer’s account of the legal status of individuals in international law and suggests why this account should be of contemporary interest. It identifies three figures of the individual in the Institutes and uses them – Lorimer’s ‘private citizens of the world’ in particular – to dislodge the textbook stories of the individual as an emerging subject of international law. Employed as a lens, private citizens of the world can focus us on the extent to which a variety of otherwise unrelated theories, critiques, proposals and developments restore or refract such attributes, and on the exclusion of certain features and impacts of the individual from today’s public international law.

Why read James Lorimer’s 1883 The Institutes of the Law of Nations on subjects of international law – indeed, why read Lorimer at all? As Martti Koskenniemi writes in this symposium, the 19th-century Scottish international lawyer was ‘a conservative … also an elitist and a racist [some of whose] most powerful emotions were reserved for attacking what he called the idea of absolute equality, whether that idea was applied to states or to human beings’. Six decades earlier, in a 1935 address to the Grotius Society on

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1 J. Lorimer, The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities (1883).

the topic of Lorimer’s contribution to international law. University of Edinburgh professor A.H. Campbell quoted with astonishment from Lorimer’s discussion of the relative value of states: “‘Taäke my word for it, Sammy, the poor in a loomp is bad,” is an assertion, harsh though it seems, which the internationalist ... must accept.’ On top of these repellent views, one might add that Lorimer was an idiosyncratic thinker, an intellectual also-ran, his work to be tracked down if the topic is the Scottish tradition in international law; the early years of the Institut de droit international (of which he was a founding member) or the history of blueprints for international organizations, but not for its own merits or influence. ‘What seems missing’ in Lorimer’s thought, to quote another commentator, circa 1978, ‘is the sense of proportion which lies behind the sense of absurdity’.

1 States and Individuals as Subjects of International Law

Rather than relegating him to a shameful minor footnote, however, over the past decade and a half Lorimer’s vices have made him close to required reading among critics of international law. Already canonical histories of the discipline by Antony Anghie, Martti Koskenniemi and Gerry Simpson have made notorious Lorimer’s differentiated treatment of subjecthood, specifically the legal distinction he drew between the civilized, the barbarous and the savage spheres of humanity. ‘Savage’ referred to the colonized ‘periphery,’ particularly Africa, whose peoples were not recognized as having any collective legal personality, while ‘barbarous’ included ‘semi-peripheral’ states such as China, Turkey and Egypt, which Lorimer recognized


3 Campbell, supra note 2, at 226 (quoting Lorimer, supra note 1, vol. 1, at 185, quoting, in turn, Tennyson’s ‘Northern Farmer’).

4 See Johnston, supra note 2, at 29–38.


7 See Koskenniemi, Gentle Civilizer, supra note 5, at 92: ‘Lorimer’s idiosyncratic naturalism received no following.’ On Lorimer’s unfashionableness in England, Europe and even his native Scotland, see Johnston, note 2, at 32–34, 39.


as states but not as full members of the ‘civilized’ European family of nations.\textsuperscript{10} Although not unique to him, Lorimer took this differentiation furthest,\textsuperscript{11} which has made him an ideal point of reference for critics. More distinctive to Lorimer is his calibration of recognition \textit{among} civilized states according to various determinants of power, including the state’s size, its material wealth and the perceived moral and intellectual qualities of its citizens.\textsuperscript{12} ‘Even within the sphere of plenary ... recognition’, he wrote, states ‘differ in powers, and consequently in rights; and the recognition which they are entitled to claim from each other is proportioned to their powers and rights.’\textsuperscript{13}

In the 2000s, critics of international law marshalled Lorimer’s vision of differentiated statehood to demonstrate problematic continuities with modern international law, despite its principle of sovereign equality, while others used it to caution against the vogue of the 2000s for regulating liberal states differently from illiberal states or otherwise departing from equality among states.\textsuperscript{14} And delegitimization is not the only current case that could be made from reading Lorimer on statehood.\textsuperscript{15} Proponents of some doctrine, arrangement or proposal might instead bolster its legitimacy by acknowledging a parallel with Lorimer’s civilized/barbarian/savage distinction, for instance, and distinguishing their position.\textsuperscript{16} Or, Lorimer could be cited to prevent

\begin{footnotes}
\item[10] Lorimer, \textit{supra} note 1, vol. 1, at 101–103.
\item[13] Lorimer, \textit{supra} note 1, vol. 1, at 103.
\item[15] See Berman, ‘Intervention in a “Divided World”: Axes of Legitimacy’, 17 EJIL (2006) 743, at 767–769 (hypothesizing that evoking the colonial past in arguments about present-day international law can have different rhetorical effects).
\item[16] Compare, e.g., Purdy and Fielding, ‘Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power’, 70 \textit{Law and Contemporary Problems} (2007) 165 (relating a revived doctrine of odious debt to a tradition of private law concepts as limits on state power by seeking to dissociate the tradition from the civilized/uncivilized distinction).
\end{footnotes}
a contemporary position from being extended too far. His gradation of recognition according to a state’s relative power takes to one extreme, for example, long-standing discussions about whether certain states do or ought to play a more prominent role in the formation of custom.\(^\text{17}\)

Unlike the recognition of political communities as states, which is central to the *Institutes of the Law of Nations* and to recent critical interest in Lorimer, there is no systematic treatment of individuals in the *Institutes*, and the topic has received virtually no attention.\(^\text{18}\) The first aim of this article is to piece together Lorimer’s account of the legal status of individuals in international law. While affected by his views about statehood, Lorimer’s references to individuals as subjects of international law neither reduce immediately to the same disquieting parallels between past and present, nor do they evidently redeem him. Rather, I will show, they include a figure of the individual not found in current analyses. The article’s second aim is to suggest how this figure – the private citizen of the world – might make Lorimer’s depiction of individuals relevant to public international lawyers today.

As will be seen, the *Institutes of the Law of Nations* proceeded on the basis that individuals were citizens of the world as well as citizens of their state. The latter, public citizens, had no standing in international law other than as part of their state. This subsumption is familiar to modern international lawyers from the doctrines of nationality, diplomatic protection and state responsibility. As to citizens of the world, two kinds are discernible in the *Institutes*, although Lorimer did not always label them separately or consistently.\(^\text{19}\) The one kind, which I will refer to as ‘citizens of humanity’, is the individual as a member of humanity under universal natural law. Nowadays, this figure would most likely be associated with the human being as the subject of international human rights law.\(^\text{20}\) The other kind of world citizen I will label ‘private citizens of the world’. Internationally, this ‘person’ was nothing more or less than an amalgam of national private law relations. His international legal existence, as will be explained, was the private corollary of Lorimer’s doctrine of the recognition of states.\(^\text{21}\) Unlike nationals and humans, Lorimer’s private citizens of the world are now unthinkable.


\(^\text{19}\) For the main contemporary sense of ‘citizen of the world’, see Held, ‘Cosmopolitanism: Ideas, Realities and Deficits’, in D. Held and A. McGrew (eds), *Governing Globalization: Power, Authority and Global Governance* (2002) 305, at 309–317. While Lorimer also did not describe them as subjects of international law, it is fair to say, as Neff observes, that his system of international law posited them as such. Neff, supra note 18, at 480.


\(^\text{21}\) Lorimer, supra note 1, vol. 1, at 350. I will retain the original usage of man and the masculine pronoun for historical reasons. The gendered nature of Lorimer’s private citizens of the world is beyond the scope of this article, but I note that such an analysis might build on the feminist critiques developed of EU citizenship. See, e.g., O’Brien, ‘I Trade, Therefore I Am: Legal Personhood in the European Union’, 50 *Common Market Law Review* (2013) 1643.
as part of public international law because it is no longer united with private international law (conflict of laws), as it was for Lorimer and his circle.22 Indeed, that \textit{sina qua non} registers as ‘conceptual confusion’23 since contemporary public international lawyers understand the treatment of foreigners in a state’s internal legal order solely in terms of the other two figures, the national and the human.

Why might this lost figure, Lorimer’s private citizen of the world, be interesting in itself? I have argued elsewhere that a state’s private international law should be understood as the private side of citizenship in that state.24 Private international law represents an alternative form of belonging and one that is potentially – in some states, has actually been – more cosmopolitan than the form of belonging organized through the laws of citizenship and nationality. At the same time, this is not the ‘universal concern’ cosmopolitanism25 of human rights law, which localizes in the state obligations owed to individuals \textit{qua} members of humanity. Lorimer’s conception of private citizens of the world can contribute to our understanding of private international law as a form of citizenship by changing its focus from the national to the global. For Lorimer, the ‘right to exist, as a person, involves the right to energise freely. The right of choosing his own sphere of existence ... involves the right of choosing his own sphere of action’.26

With respect to their modern relevance, the aim here is not to reinstate Lorimer’s private citizens of the world as subjects of international law – even if the notion were appealing, that ship has sailed – but to illustrate their value as a lens.27 To recover them, we would not only have to reunite public and private international law somehow, but to negotiate the demise of the public/private distinction, resistance to personifying legal fictions28 and even a trend away from subjects of international law as such.29 Used instead as a lens, private citizens of the world reveal and sharpen

28 See Twining, ‘Preface’, in M. Del Mar and W. Twining (eds), \textit{Legal Fictions in Theory and Practice}, (2015) v, at vi. I acknowledge that any use of a personifying legal fiction runs the risk of naturalizing that (male) fictional person. See, e.g., Naffine, \textit{supra} note 27, at 354–357. See also, e.g., Kelsen, ‘On the Theory of Juridic Fictions: With Special Consideration of Vaihinger’s Philosophy of the As-If’, translated by C. Kletzer, in M. Del Mar and W. Twining (eds), \textit{Legal Fictions in Theory and Practice} (2015) 3, at 6–9. However, the risk is arguably lesser when the fiction, as here, has long ago been discarded and is reemployed critically and reflexively.
alternatives to the usual textbook stories of the individual as an emerging subject of international law: stories that revolve primarily around victims of international human rights abuses as rights holders, and perpetrators of international crimes as bearers of responsibilities. The limitations of such conventional accounts are sometimes registered. Andrew Clapham, for instance, writing in a symposium on the human dimension of international law, ends on the following note:

[We] should perhaps admit the progressive idea that individuals have, in addition to these rights and criminal law obligations, certain international civil law obligations; this step could help to build an international community which properly recognizes the role of the individual in international law.  

While Lorimer’s focus was not on obligations, it included private law in its field of view and, thus, adjusts the eye of the public international lawyer.

Anne Peters’s recent book on the legal status of the individual in international law likewise tells a story ‘beyond human rights’, but with a public law sensibility. Peters maintains that, in constitutionalfashion, human rights form a level on top of the individual rights found elsewhere in international law and that the individual’s international legal personality is distinct from, and necessary to, holding rights or duties on either level. Critical theories of individuals in international law, too, move ‘beyond human rights’ but are, again, predominantly public in their interests, whether it is the construction of the individual as an abject bare life or as a political subject. In contrast, arguing that international law should engage with the problem of exploitation in the Marxist sense, Susan Marks seeks to capture ‘particular facet[s] of human experience’ that are traditionally associated with the private law subjects of the market. She begins with the observation that ‘[t]here is a great deal of talk about victims, vulnerable groups, marginalised communities, disempowered populations and less developed countries’, while ‘[t]he beneficiaries seem to pass largely unnoticed, or at any rate without comment’, and proposes making beneficiaries central to international law.

‘What would Lorimer have said of post-war poverty in Britain?’ A.H. Campbell asked rhetorically in his Grotius Society address, after quoting Lorimer’s view that ‘all retrogressive States become first immoral, then stupid, and then poor’. Clearly, Lorimer’s private citizen of the world was not a conceit intended to raise Marks’s questions about beneficiaries in international law. Nonetheless, the Institutes of the Law of Nations is particularly suited to highlighting the violence as well as the cosmopolitanism of the

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32 Discussed in subsection 4.B.1 of this article.
34 Ibid., at 282.
35 Campbell, supra note 2, at 226 (quoting Lorimer, supra note 1, vol. 1, at 187).
private. In Lorimer, we encounter individuals in international law as mobile private law-made persons who produce sometimes shocking structural effects as such. Most notably, he argued that citizens of neutral countries should be free to fight and to trade with belligerents and that the industrial expansion of private individuals into a neighbouring state could ground, via private international law, an outright change of sovereignty. The inclusion of private citizens of the world in Lorimer’s picture of international law and its implications, I suggest, should invite us to compare discussions of the individual in contemporary public international law. What is inside and outside our frames of analysis, what do we foreground and what recedes, whom do we privilege and whom do we miss? And while private citizens of the world are no longer in the picture, are there current theories, critiques, proposals and developments that capture some or all of their legal dimensions?

My reading of Lorimer’s *Institutes of the Law of Nations* begins, in part 2, by drawing out the three different statuses that he attributed to individuals in international law. Part 3 relates them to his legal distinction between the civilized, barbarous and savage spheres of humanity. Moving beyond their status, part 4 describes other discernible features of Lorimer’s private citizens of the world and brings this figure to bear on current treatments of the individual in the international legal system. Part 5 turns to the second kind of distinction between states for which Lorimer is well known: his de facto principle, according to which the recognition of civilized states varied with their power. It examines the consequences of joining private citizens of the world to this power-infused view of public international law and then uses these consequences as a lens on contemporary interest in private international law as a form of global governance, which looks to public international law instead as a normative wellspring.

2 Three Figures of the Individual

Lorimer’s three figures of the individual are most evident in the book of the *Institutes of the Law of Nations* on war, particularly in the chapters on how wars may legally be fought. At the time, the tide was turning away from the view that a war between states encompassed their individual members and the property that they owned as private persons, and towards the view that states could only wage war in their corporate capacity using their corporate resources. The all-embracing view of war still commanded the weight of authority and custom, but the view of war as exclusively public in character, associated with Jean-Jacques Rousseau and Jean-Étienne-Marie Portalis and popular on the Continent, had been adopted by the Institut de droit international, to which Lorimer belonged. For Lorimer, the exclusively public character of war flowed logically from the nature of the recognition of states in international law. States recognized one another’s existence as political entities, and the right to vindicate that existence therefore belonged to the state only in its political capacity and could involve only its political means.36

The private rights of individuals thus exempted from belligerency were determined by what the individuals’ respective municipal legal systems treated as private at the start of the war. However, alienable private rights (proprietary and possessory rights) were dealt with differently from inalienable private rights (generally, rights of status and strictly personal rights). Rights that could be bought and sold, according to the law of the state in which they were situated, were subject to the state’s power of eminent domain and therefore potentially public – vis-à-vis both the owner’s own state and the enemy state. The objects of inalienable rights were life, liberty, domestic and family relations, and religious and moral convictions. An individual could not sell his child or his conscience, for instance. And were his state to compel the sale, then international law would invalidate the transaction.\(^{37}\) For Lorimer, inalienable private rights were coextensive with universal rights, and humanity stepped in to protect them ‘[e]ven when the action of the State is in abeyance’.\(^{38}\)

In discussing neutrality (which he viewed as an exclusively public relation, like belligerency), Lorimer contrasted the legal invisibility of individuals in international law as citizens of their state with their status as citizens of the world:

> Internationally the jural existence of the citizen is … wholly sunk in the jural existence of the State … Its individual or personal subjects are not recognised as citizens of a State, but as citizens of the world; and it is from a cosmopolitan point of view alone that the law of nations exercises jurisdiction over them.\(^{39}\)

The private side of this public/private distinction proves, on closer inspection, to be twofold. Within the cosmopolitan point of view, universal human rights were distinct from individual, or private, rights: ‘Mankind as a whole’ was distinct from ‘man as a person’.\(^{40}\) As Lorimer put it picturesquely, ‘[t]he law of nations spreads her wings over the interests of humanity and shelters the sanctity of the hearth and the home’.\(^{41}\)

Whereas a combatant was protected by his state in wartime, he temporarily lost that protection when taken prisoner, becoming solely a citizen of the world in this double sense of universal law and private law:

> Combatants who throw down their arms are entitled to claim from humanity, as a whole, that protection which their own State is unable to afford them. By abandoning their own State they become citizens of the world ... Their lives, ceasing to be jura publica under the dominion of belligerency, have become jura universalia, when seen from one point of view, and jura privata, when seen from another; thus, by a double portal they re-enter the sphere of the normal relations. Though separated, for the time being, from any political community, they once more belong to humanity and to themselves.\(^{42}\)

We see here clearly that citizens of humanity (as I call them) were creatures of natural law. In his chapter on private international law, Lorimer described relations between ‘human beings, considered simply as rational and responsible entities’ as universal

\(^{37}\) Lorimer, supra note 1, vol. 2, at 80–89.

\(^{38}\) Ibid., vol. 2, at 83, 96.

\(^{39}\) Ibid., at 131.

\(^{40}\) Ibid., at 62.

\(^{41}\) Ibid., at 61 (emphasis added).

\(^{42}\) Ibid., at 72.
and independent of the communities to which they belonged. They were *juris gentium*, as opposed to *juris gentis*.\footnote{Ibid., vol. 1, at 348.}

Private citizens were citizens of humanity come down to earth, so to speak. They reflected the variation that came from localizing universal relations in the positive law of separate states. ‘Diversities of climate, soil, geographical position, natural production, occupation, race, language, stages of intellectual and moral development, political institutions, historical antecedents, and a thousand other peculiarities in the earthly lot of nations’\footnote{Ibid., at 373.} meant that municipal legal systems could validly differ in their instantiation of natural law and that each community ought to be respected as having particular insight into its own circumstances.\footnote{Ibid., at 351. Lorimer therefore concluded, following Savigny, that the many doctrines of private international law could be distilled into the single doctrine of the localization of legal relations. \textit{Ibid.}} In the spirit of Friedrich Carl von Savigny’s remark that legal relations ought generally to be considered as personal attributes, Lorimer used ‘person’ as ‘a collective term for personal qualities’ created by municipal private law: ‘major or minor, married or single, a debtor, a creditor, or a personal criminal’ and so on.\footnote{Ibid., at 397.}

A state’s right to decide the age of majority for its society is a separate issue, however, from whether other states are obliged to recognize that status for matters falling within their jurisdiction, regardless of where they draw the legal line between adult and child for themselves. It was here that private citizens of the world and private international law entered the picture. ‘Person’ was synonymous with ‘the jural existence of a foreigner’, for Lorimer.\footnote{Ibid., at 413, 326.} ‘If, with reference to a certain class of legal relations, we redefine him according to our own notions, so as either to increase or diminish his jural capacities, we have made a different person of him, in a jural sense.’\footnote{Ibid., at 413. The late 19th-century German legal philosopher Georg Jellinek transposed the notion of the ‘person’ as a system of legal relations, as opposed to a substance, to public law and state-citizen relations, which left the status of foreigners unaddressed. See Jouanjan, ‘L’émergence de la notion de droits publics subjectifs dans la doctrine de langue allemande’, in Association Française pour la Recherche en Droit Administratif, \textit{Les Droits Publics Subjectifs des Administrés} (2010) 25, at 29–31.}

What prevented the foreigner being re-defined – what made the private citizen of the world possible – was Lorimer’s view that the recognition of a state in international law had a private side. Recognition presumed that the recognized state had justly defined the private legal relations that came within its jurisdiction and, furthermore, had the will and ability to enforce those definitions. From this presumption flowed the state’s right to have its private law recognized by other states insofar as the interests of its citizens were affected.\footnote{Ibid., at 350; see also 224, 370–371.} It was (and is) the rules of private international law that decided the so-called ‘choice of law’ issue: precisely which private law relations – divorce, inheritance, ownership and so on – were determined by the foreigner’s own legal system, and which by the law of the forum state or that of some other state with which he had a connection.
For Lorimer, then, private international law resulted ‘logically from the same great doctrine of the recognition of the international existence of the state’ as public international law. Contrary to the commonly held view in the country, he told a public law class at the University of Glasgow, private international law was not an ‘isolated, exceptional, and indeed contradictory branch of jurisprudence’. This explained too why Lorimer regarded it as being appropriately included in his Chair in Public Law and the Law of Nature and Nations at Edinburgh. The Institut de droit international also subscribed to the unity of public and private international law, and its first resolution, passed in 1874, spoke of a foreigner’s ‘natural juridical capacity’ to exercise his civil rights everywhere without the need for a treaty to this effect or for reciprocity. The ability to enjoy these rights and to have applied the foreign laws on which they depended was ‘a duty of international justice’ and not a matter of comity—that ‘fable of a sort of international civility’, as Lorimer called it slightly. Lorimer’s reason for rejecting comity was, again, a function of his understanding of the state as a subject of international recognition. Because states were not independent in fact, they were, for him, also not independent in law. Their right of independence was limited ‘in its own nature and of necessity’. By the same token, states were not simply free to refuse to recognize foreign law.


52 ‘Professor Lorimer’s Introductory Lecture’, supra note 51, at 316.


55 Ibid., at 364.

56 Ibid., at 363–366.
In short, the individual, for Lorimer, had an international legal existence as a private citizen that he did not have as a public citizen: \(^{58}\) ‘If a man is a husband or a father, a debtor or a creditor, in his own State, these characteristics cling to him wherever he goes; but he is a voter, a magistrate, a tax-payer, or a tax-gatherer only at home.’ \(^{59}\)

3 Citizens of the World and Spheres of Humanity

As mentioned earlier, what has drawn contemporary critical attention to *The Institutes of the Law of Nations* is how little of Lorimer’s 19th-century world benefited from full recognition as states. While distinctions based on Europe’s ‘civilizing mission’ and the privileges of the Great Powers were common among international lawyers at the time, \(^{60}\) what particularly set Lorimer apart, along with Thomas Lawrence, was the view that these distinctions were integral to international legal personality rather than being political facts or social background conditions. \(^{61}\) Europe and its European-populated colonies and the independent states of the Americas merited plenary recognition from one another. Partial recognition was extended to Turkey, Persia and the other barbarous states of Central Asia, China, Siam and Japan. Savage communities attracted only ‘natural or mere human recognition’. \(^{62}\)

How did Lorimer’s citizens of the world relate to these three spheres of humanity? There is little reference in the *Institutes* to individuals belonging to barbarous states and still less to those who were members of savage communities. It follows logically, however, that because savage communities were not entitled to collective recognition, their positive law would also be unrecognized, and thus their members could not be recognized as either public or private citizens. For the same reason, their rights as humans presumably would emanate directly from natural law. \(^{63}\) Furthermore, individuals living in savage communities remained ‘mere humans’ until their communities reached a higher stage of development. We have seen that combatants who lay down their arms ceased to belong to their state and belonged only to humanity and to themselves for the duration of the hostilities. In contrast, rather than functioning as a residual set of protections, the recognition of savages as humans advanced a project

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of transformation: ‘The right of undeveloped races ... is a right ... to guidance – in becoming that of which they are capable, in realizing their special ideals.’

The partial recognition of barbarous states meant that recognition of a barbarous state’s private law extended only as far as its own citizens within its own frontiers were concerned. In addition, recognition did not extend to the judgments of its courts. An ‘honest contract’ made in China would be valid and might be enforced in England, but its ‘honesty’ would not be assumed because a Chinese court had upheld it, and an English court would not apply Chinese law to determine the matter. In effect, members of a barbarous state could be private citizens, but not private citizens of the world. Members of a civilized state, in contrast, embodied their state’s private law wherever they were. Moreover, within a number of barbarous states, certain of the civilized states maintained separate courts that heard cases between the citizens of that state and sometimes between its citizens and citizens of the barbarous state.

Even among civilized states, however, the ‘person’ composed of one state’s private law could exceptionally change character when he crossed into another. In Lorimer’s day, the starkest issue of this kind was whether courts in states that had outlawed slavery would nevertheless respect it within their jurisdiction as a foreign legal relation. Although their shared level of civilization ordinarily meant that European and American states would recognize one another’s laws, ‘[n]o free state puts either its conscience or its judgment wholly in the keeping of any other’. There was always the possibility that a foreign law might be unenforceable because it departed from the forum state’s conceptions of morality or was inconsistent with its public policy. On this basis, Lorimer considered English law justified in not recognizing, for example, gaming debts and polygamous marriages, even though they were voluntarily entered into by the parties in a state where they were valid. The law of England was all the more justified, he ventured, in not recognizing slavery as a foreign contractual relation since it was involuntary as well as immoral according to the English conception of natural law. Lorimer explicitly left open, however, whether the English conception was correct or whether slavery might be one means of educating ‘inferior races’.

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64 Ibid., vol. 1, at 227–228 (insofar as it was within the power of a civilized state to help and did not unduly burden that state’s own resources).
65 Ibid., at 157.
66 Ibid., at 217.
67 Ibid., at 239.
68 Ibid., at 444.
69 Ibid., at 217. See generally Becker Lorca, supra note 12, at 79–88; T. Kayaoğlu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China (2010).
71 Lorimer, supra note 1, vol. 1, at 216.
72 Ibid., at 255–256. 440. Lorimer also argued that when a foreign law was based on that state’s mistake in adapting natural law to its local circumstances (or the forum state believed this to be true), then it was not a law at all, but a mere ‘legislative blunder’ that should go unrecognized by other states. Ibid., at 372–373. Regarding exceptions to the recognition of foreign judgments, see ibid., at 328–329.
73 Ibid., at 256; see also 216, 440.
74 Ibid., at 256–258.
Thus, among the implications of Lorimer’s three spheres of humanity were that only members of civilized states could be private citizens of the world and that, even so, one civilized state retained the right to civilize, legally speaking, the private citizens of another.

4 Private Citizens of the World: Then and Now

A ‘The Right to Energise Freely’
Beyond their international legal status, what more can be learned about Lorimer’s private citizens of the world? In his view, a person’s ‘right to choose his own sphere of existence … involves the right of choosing his own sphere of action’. Individuals possessed a number of rights that operated across borders or presupposed a certain cross-border mobility: freedom of trade, freedom of intercourse and interchange of opinions and freedom to adopt and renounce nationality. Lorimer was not alone in this attitude towards migration. Among the rights of individuals recognized by Pasquale Fiore, also a member of the Institut de droit international, were the entitlement to choose their nationality and citizenship, with duties owed only in exchange for benefits received, and rights of emigration and commerce. And an 1892 resolution of the Institut provided that:

6. Free entrance of aliens to the territory of a civilized State, may not be generally and permanently forbidden except in the public interest and for very serious reasons, for example, because of fundamental differences in customs or civilization, or because of a dangerous organization or gathering of aliens who come in great numbers.
7. The protection of national labour is not, in itself, a sufficient reason for non-admission.

These rules did not extend, though, to ‘colonies where European civilization is not yet dominant’.

It is telling that, unlike the Institut, Lorimer preferred domicile over nationality as the connecting factor that determined which state’s laws governed an individual’s status and capacity, his family relations and the rights and obligations dependent thereon. Domicile was the connecting factor used by common law systems of private international law and also advocated by Savigny, who was a significant influence on Lorimer. In contrast, the Institut endorsed nationality as the link for private, as well

75 Ibid., at 438.
76 Ibid., at 232.
77 See Koskenniemi, Gentle Civilizer, supra note 5, at 55.
80 Ibid., at 413–414. Lorimer told a Glasgow public law class that they would take Savigny’s ‘luminous treatise … as a lantern in our hands’. ‘Professor Lorimer’s Introductory Lecture’, supra note 51, at 317.
as public, international law purposes. Rather than being nationalistic, though, the ‘principle of nationalities’ associated with Pasquale Mancini, the Institut’s first president, can be understood as cohering with a cosmopolitan liberal outlook. Perhaps accordingly, Alexander Pearce Higgins, in a 1933 appreciation of Lorimer, chided him for not giving ‘sufficient attention to the growth of the doctrine of nationality and its effect on international law; it might have been expected that he would have dealt at greater length with this movement as illustrating the growth of freedom of development of combinations of men’.

Domicile, however, was arguably more individualistic than nationality and seems to have been championed by Lorimer on that basis. ‘In fixing the jural locality of a free man, the determining element is his own free will,’ he wrote, ‘and I very much doubt whether, as regards his private relations, any single test of volition will ever be found adequate to supersede the various considerations involved in the conception of domicile.’ In the 1869 case Udny v. Udny, Lord Westbury defined the two elements of domicile as follows:

There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or animus manendi, can be inferred the fact of domicil is established.

Thus, an individual could change domicile even simply by changing his mind, whereas the acquisition and loss of nationality were standardized processes that required the involvement of the state. Lorimer, moreover, favoured the extensive use of domicile as a connecting factor. As applied to succession to immovable property, this position put him at odds both with the Institut, which supported nationality, and with his common law colleague Sir Travers Twiss, who objected that the law universally recognized as governing succession to immovables was that of the place where the property was

Nonetheless, Lorimer mildly criticized Savigny for not having moved far enough away from comitas gentium as the basis for private international law. Lorimer, supra note 1, vol. 1, at 363. Although Savigny’s conception of private international law is more detached from the state than Lorimer’s, the state in the traditional public international law sense is also more relevant for Savigny than is often assumed. See Michaels, ‘Globalizing Savigny? The State in Savigny’s Private International Law and the Challenge from Europeanization and Globalization’, in M. Stolleis and W. Streeck, Aktuelle Fragen zu politischer und rechtlicher Steuerung im Kontext der Globalisierung (2007) 119.


See Koskenniemi, ‘Nationalism’, supra note 5, at 15; Koskenniemi, Gentle Civilizer, supra note 5, at 63–67; Mills, supra note 54, at 64. On Savigny and Mancini, the main private international law protagonists of the period, see Mills, supra note 54. at 56–60, 63–66.


Lorimer, supra note 1, vol. 1, at 428.

Udny v. Udny (1869) LR 1 Sc & Div 441, at 458.
situated.\textsuperscript{86} For movable property, Lorimer again supported domicile as the connecting factor, in this case regretfully parting company with Savigny and agreeing with the English and American position \textit{mobilia sequuntur personam}.\textsuperscript{87}

Being ‘the fact of homeness, as the law gathers it’, domicile did not always align with the political bond of nationality.\textsuperscript{88} Nor, in Lorimer’s view, should the two be yoked together.\textsuperscript{89} The potential for nationality and domicile to part company also featured in his opposition to the statutory ban of the time on foreign enlistment, which prohibited British subjects from joining the armed forces of a state fighting a war in which Britain was neutral.\textsuperscript{90} On Lorimer’s approach to neutrality, individuals could be neutral as citizens and belligerent as persons or vice versa:

[W]hilst \textit{qua} citizen he follows the State just as its official members follow it, \textit{qua} person his character is cosmopolitan, and he has a separate \textit{international} status which leaves the question of belligerency or neutrality open to his personal decision. ... His allegiance to his own State does not deprive him either of the rights, or relieve him from the duties, of a citizen of the world. The very object of his citizenship, on the contrary, is to ensure the independence of his personality.\textsuperscript{91}

Foreign enlistment would require or result in a change in nationality, but not in domicile, Lorimer maintained.\textsuperscript{92} As a result, the individual’s former state of nationality would no longer be associated with him in his public capacity but would, for instance, administer his private affairs if he were captured, in accordance with the law of his domicile. \textsuperscript{93}

Lorimer also held the dissident view that a citizen of a neutral state had the private capacity to trade with a belligerent state.\textsuperscript{94} In this context, he entertained the alternatives that to do so, the individual would have to change nationality, as with foreign enlistment, or ‘remain outside of State rights altogether, and content himself with being simply a citizen of the world’.\textsuperscript{95} Neither was viable, Lorimer concluded, but it is striking that he raised the possibility of citizens without states. Pirates were another such case. Having broken the laws of humanity, they ceased to be citizens of a state and were punished directly by the law of nations as ‘cosmopolitan criminals’.\textsuperscript{96}

\textsuperscript{86} Institut de droit international, Session d’Oxford – 1880, ‘Principes généraux en matière de nationalité, de capacité, de succession et d’ordre public’ (7 September 1880), Art. VII, available at \url{www.justitiaetpace.org/idIF/resolutionsF/1880_oxf_01_fr.pdf} (last visited 20 March 2016); Du Bois, ‘Bulletin de jurisprudence belge en matière de droit international comparé’, 1\textsuperscript{er} ser. (1881) 52, at 72. Lorimer joined Twiss’s objection on the practical ground that common law countries would never accept the Institut’s position. Following Savigny, Lorimer himself thought that \textit{lex domicilii} should govern. Lorimer, \textit{supra} note 1, vol. 1, at 414–415.

\textsuperscript{87} Lorimer, \textit{supra} note 1, vol. 1, at 417–421.

\textsuperscript{88} \textit{Ibid.}, at 423–424.

\textsuperscript{89} \textit{Ibid.}, at 432–438.

\textsuperscript{90} \textit{Ibid.}, vol. 2, at 147–148.

\textsuperscript{91} \textit{Ibid.}, at 137.

\textsuperscript{92} \textit{Ibid.}, at 139, 141.

\textsuperscript{93} \textit{Ibid.}, at 142–143.

\textsuperscript{94} See also Neff, \textit{supra} note 18, at 484–487.

\textsuperscript{95} Lorimer, \textit{supra} note 1, vol. 2, at 144.

\textsuperscript{96} \textit{Ibid.}, at 132.
Finally, we might wonder whether the nationals of a civilized state could be domiciled in a barbarous one. Lorimer did not address it, but the question whether an Englishman could acquire domicile in nations such as India, China or Turkey divided publicists in this period, with the British courts dismissing the possibility by the end of the 19th century. Among the underpinnings for theories supporting the latter position were both the notion of immiscibility and the political incentives that this stance created for British nationals to incorporate foreign areas into the British Empire. 97

Overall, the picture of the private citizen of the world found in the Institutes of the Law of Nations is of an individual belonging to a civilized state who was potentially mobile or transnational; able to choose his ‘home’ state for private law purposes without the need for that state’s bureaucratic approval and remarkably free to change and mix the public citizenship represented by nationality with the private citizenship represented by domicile.

B A Lens on Individuals in Current International Law
As currently theorized, private international law is not anchored, as it was for Lorimer, his Institut colleagues and others, in an obligation between states. 98 And without some sort of international obligation, any private law relation is always, in principle, open to question by other states when it involves a foreign element: a spouse can be presumed divorced by the law of one state yet retain the status of a married person according to the law of another. Hence, for public international lawyers, Lorimer’s private citizens of the world become inconceivable as subjects. As a practical matter, however, less has changed. From one angle, this is because modern private international law has other bases for routinely recognizing the attributes of the ‘person’ defined by foreign private law. From the opposite angle, less has changed because Lorimer’s unified theory of recognition made an exception for public policy. This meant that even according to Lorimer’s theory, a divorce in one state, for example, could come undone in another.

In any event, the starting point for this section is that the private citizen of the world, in Lorimer’s sense, is a personifying legal fiction that today’s public international lawyers neither register nor employ. The section illustrates what might look different about discussions of individuals in contemporary international law if we use his figure not as such, but as a lens. A first broad difference is that the potentially mobile individual would move to the foreground (subsection 1). Second, our discussions would incorporate attention to the roles of the private, private international law and law generally in the construction of individual identity in international law and explore the extent to which these roles are now played by or interact with other kinds of law (subsection 2). Lastly, we might find modern prototypes of Lorimer’s private

citizen of the world hiding in plain sight. Subsection 3 introduces the European citizen as one alternative story about the individual as an emerging subject that Lorimer’s three types of citizens might reveal, sharpen or otherwise put into conversation with public international law.

1 Mobile Individuals

In the Institutes of the Law of Nations, the private citizen was paradigmatically mobile, while the public citizen was paradigmatically stationary and the human, universal. For Lorimer, all three paradigms were part of international law, whereas modern international law lacks the first. Thus, although the treatment of aliens is a well-established area, public international law conceives of nationals outside their state of nationality as being exceptional.\(^9^9\) Border crossing is similarly constructed as exceptional in international human rights law. For example, in his book on the origins and drafting of the Universal Declaration of Human Rights, Johannes Morsink treats separately as ‘special’ the provisions on departure from and return to a country, asylum and nationality because they were not ordinarily found in domestic constitutions and depended on more than one state.\(^1^0^0\)

On an assumption of mobility, or transnationality, Lorimer’s private citizen of the world personified the multiple private law dimensions of movement (family relationships, trade and so on) in their public law contexts (war and peace). While this private law focal point no longer exists in international law, some scholars are beginning to develop similarly multi-dimensional public law perspectives on the mobile individual, presenting migration as a new field of international law over and above existing regimes regulating particular categories of migrants such as refugees or workers.\(^1^0^1\)

In public international law, however, mobility is an issue rather than an assumption. Emphasizing the implications for sovereignty, Chantal Thomas offers a critical genealogy of the emerging international law of migration that incorporates both the growth of migrants’ rights and the counter-weight of recent norms designed to strengthen states’ control over their borders. Thomas traces how theories of bio-power capture the latter elements of international law, which ‘are either completely unintelligible to liberal politics or are understood to be exceptional rather than endemic to human governance’.\(^1^0^2\) Other scholars attend to the right to be a migrant, arguing for the liberalization of economic migration.\(^1^0^3\)

\(^9^9\) See, e.g., Nottebohm Case (Liechtenstein v Guatemala), Second Phase, ICJ Reports (1955) 4, at 44 (Judge Read, in dissent, criticizing the Court’s conception of nationality for excluding non-resident citizens from the body politic). See also Corneloup, ‘Can Private International Law Contribute to Global Migration Governance?’, in H. Muir Watt and D.P. Fernández Arroyo (eds), Private International Law and Global Governance (2014) 301, at 303; Sohn and Buergenthal, supra note 78, at v (international law pays great attention to movement of goods and services across borders, but not movement of persons).


\(^1^0^1\) See, e.g., V. Chetail and C. Bauloz (eds), Research Handbook on International Law and Migration (2014); B. Opeskin, R. Perruchoud and J. Redpath-Cross (eds), Foundations of International Migration Law (2012). See also Corneloup, supra note 99, at 302 (trend in European Union (EU) towards a global approach to migration and mobility).


In international human rights law, supplementing a static or universal paradigm with a mobile one can also provide critical insight into the field’s construction of the subject. For example, by focusing on regional human rights courts’ treatment of migrants, Marie-Bénédicte Dembour reveals that rather than encompassing them as humans, as the Inter-American Court of Human Rights does, the European Court of Human Rights conceives of them, first, as aliens subject to the control of the sovereign state and only second as humans.\textsuperscript{104} Her account of the European Convention of Human Rights (ECHR) puts the alien clause and the colonial clause front and centre and documents that the ECHR was elaborated primarily to protect citizens, unlike the American Convention on Human Rights, which always addressed migrants.\textsuperscript{105}

A full picture of the mobile individual in current international law would also include the range of ways in which private international law and human rights law interact, a topic that, to date, tends to interest mainly private international lawyers.\textsuperscript{106}

2 Identity

In the general literature on individuals in the international legal system, their legal personality tends to be presented as a mounting \textit{a posteriori} conclusion about the build-up of discrete rights and duties and/or as a story of advancement relative to an \textit{a priori} theory of international human rights or of the individual as the foundation of the international legal order.\textsuperscript{107} Although \textit{a priori} accounts are more likely to do so, both narratives tend to treat victims of human rights abuses and perpetrators of international crimes as the standard-bearers of international legal subjecthood.\textsuperscript{108} In


\textsuperscript{106} See Corneloup, \textit{supra} note 99 (examining how private international law’s tools and methods could be developed to contribute to the regulation of international migration). While the discussion in the present article takes private citizens of the world as a lens on public international law, a similar thought experiment could be performed on private international law. Compare Muir Watt, ‘Future Directions?’, in Muir Watt and Fernández Arroyo, \textit{supra} note 99, 343, at 367–374. Although not in these terms, Muir Watt analyses European private international law scholarship and practice that, in effect, partially recreates the private citizen of the world through the contemporary imperative of the recognition of identity, whether in the form of individual dignity or communitarian identity. She examines separately the extent to which European human rights law has displaced choice of law rules in private international law, and thus the human, the private law-made individual.


terms of Lorimer’s figures, the effect is to narrate progress as gains made by the citizen (or enemy) of humanity relative to the citizen of the state. The private citizen of the world is nowhere to be found in these general investigations. Instead, the consideration of individuals other than human rights victims and criminal perpetrators tends to be hived off in branches of international law regarded as specialized; notably, in our context, international economic law. Alternatively, they are dealt with as one of the heterogeneous actors, interested parties or stakeholders in a transnational legal process or a ‘post-subject’ functional regime.

Private citizens also do not feature in recent critical scholarship on individuals as subjects of international law. This work moves beyond the national of public international law, on the one hand, and the human of international human rights law, on the other. However, the inclination is either to add the individual as a political subject or to illuminate what might be seen as the modern production of Lorimer’s ‘mere human’ as outcast.

The closest cousin to Lorimer’s private citizen of the world is perhaps the ‘empowered self’ welcomed by Thomas Franck in the late 1990s. This new citizen of the world derives from:

the acceptance of a right of persons (and other entities, including transnational corporations) to compose their own identity by constructing the complex of loyalty references that best manifests who they want to be. In that sense, we may already have entered an era of freely imagined identities.

For Franck, this capacity to choose and combine flows both from states’ increasing acceptance of multiple nationality and from the potential of such human rights as freedom of conscience, the right to privacy and protections for the culture, language and religion of persons belonging to minorities. Thus, Lorimer’s right to energize freely, expressed through the exercise of private citizenship and private rights, becomes a function of layered public citizenship and human rights relating to identity, that is, a modern combination of Lorimer’s other two figures.

Absent from the components of Franck’s empowered self is the potential for individuals to belong to a state by virtue of their private acts. The possibility in private

109 Nor do they figure in historical and theoretical treatments such as Nijman, supra note 29; and Portman, supra note 107.
110 See Michaels, ‘Public and Private’, supra note 98, at 133–135 (discussing whether public and private international law must merge in international economic law, with reference to current German scholarship).
113 T.M. Franck, The Empowered Self: Law and Society in the Age of Individualism (1999), at 75; see also 60; Nijman, supra note 29, at 416–427.
international law that an illegal immigrant could make her ‘home’ in Britain, for example, is arguably more audacious than the international human rights idea that her humanity together with her presence in the jurisdiction grounds certain human rights. In a 2005 case, *Mark v. Mark*, the House of Lords held that a Nigerian national had satisfied the common law requirements for domicile, giving the English courts jurisdiction over her petition for divorce, even though her presence in England was a criminal offence under the *Immigration Act*.\(^{115}\)

For a domicile-like form of belonging in public international law, we can now look to the United Nations Human Rights Committee’s 2011 expansion of the right not to be arbitrarily deprived of the right to enter his own country: ‘The words “his own country” invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.’\(^{116}\) Under the International Covenant on Civil and Political Rights, this lived experience of belonging limits the state’s inherent power as sovereign to control immigration.\(^{117}\) In *Mark v. Mark*, though, it is arguably the other way around: Baroness Hale portrays the system of immigration control as the historically contingent limit.\(^{118}\) Unlike the role of ‘own country’ vis-à-vis public law, domicile in private law appears as the residue of an earlier cosmopolitanism.

Finally, used as a lens, Lorimer’s private law-made persons can focus attention on the extent to which individuals in international law are constructs of domestic law. Critics of state-centrism in public international law fault the discipline for not paying more attention to non-state actors. In turn, critiques of this criticism fault it for its tendency to treat non-state actors as if they were ‘just out there,’ pre-political facts to be taken into consideration rather than constituted in part by politics and law.\(^{119}\) (Similarly, in Franck’s analysis of the empowered self, it is not significant whether some feature of an individual’s identity derives from his religion or from the religiously based law of his state.) A ‘private citizens of the world’ lens would apply this critique to natural persons, as well as to corporations, non-governmental organizations, collectivities and other non-state groups, and would concentrate it on private law relations and their link to relations between sovereigns. The import of this focus will be illustrated in part 5.

### 3 European Citizens

Public international lawyers tend to gauge individuals as emerging subjects in terms of general international law, as well as in isolation from private international law. But when I made the point at a private international law workshop in London that

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\(^{117}\) International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

\(^{118}\) *Mark v. Mark*, *supra* note 115, paras 16–19; Knop, *supra* note 24, at 328–331.

Lorimer’s private citizens of the world had disappeared from the public international law mind set, one reaction was that this was Hamlet without the prince. The private citizen of the world was the very figure thriving in modern form – as the European Union (EU) citizen – much more so than Lorimer’s citizen of humanity. This observation exists, of course, against the backdrop of a rich debate about the evolving nature of EU citizenship, much of which is more interested in its progress relative to public citizenship or citizenship of humanity.\(^{120}\) Given that the purpose of this subsection is simply to demonstrate Lorimer-as-lens at various ranges, the discussion of EU citizenship that follows is confined to introducing a number of similarities with private citizenship of the world and does not attempt a full comparison or critique.

EU citizenship was introduced by the Treaty on European Union, which entered into force in 1993.\(^{121}\) Every national of an EU member state is a citizen of the Union. Hence, EU citizenship complements, rather than replaces, national citizenship.\(^{122}\) Originally scarcely more than an ‘immigration status’ or, at most, a ‘market citizenship’ tied to the free movement of workers, the freedom to provide and receive services and the other economic freedoms fundamental to a European common market, EU citizenship may be transforming into a ‘civil status’ horizontally.\(^{123}\) Loïc Azoulai refers to ‘la création d’une véritable “citoyenneté de jouissance”, distincte à la fois de la citoyenneté de marché, liée aux fonctionnalités de la construction européenne, et de la citoyenneté d’appartenance qui fonde classiquement l’autonomie politique du sujet de droit dans la théorie de l’État’.\(^{124}\) It is this status that resembles Lorimer’s private citizens of the world in at least four respects.

The pivotal right of EU citizens is freedom of movement.\(^{125}\) And akin to the status of Lorimer’s private citizens of the world, until relatively recently the rights of EU citizens signified only when they migrated within the Union or had some sort of transnational connection.\(^{126}\) Second, the accompanying rise of so-called EU private international law means that member states are increasingly bound to recognize the features of


\(^{121}\) Treaty on European Union, OJ 2010 C 83/13.

\(^{122}\) Treaty on the Functioning of the European Union (TFEU), OJ 2010 C 83/49, Art. 20(1).

\(^{123}\) See Shaw, supra note 120, at 40–48 (based on equality of treatment between nationals of member states). The private citizen of the world might be more easily recuperated in civil law systems, where the category of status has greater relevance than in the common law. See Audit, ‘A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles’, 27 AJCL (1979) 589, at 591–592, 603.

\(^{124}\) Azoulai, ‘L’autonomie de l’individu européen et la question du statut’, EUI Working Paper LA W 2013/14, at 8: ‘[T]he creation of a true “citizenship of enjoyment”, distinct from both market citizenship, linked to the features of European integration, and the citizenship of belonging that classically bases the political autonomy of the subject of law in the theory of the State’ (author’s translation).

\(^{125}\) TFEU, supra note 122, Art. 21.

these EU citizens created by the laws of other member states. Horatia Muir Watt argues that the real revolution in European conflict of laws is in the personal sphere, as distinct from the economic; namely, the rise of a methodology aimed primarily at respecting and protecting identity and status from the potentially adverse effects of border-crossing mobility. In the *Grunkin and Paul* case, for example, a child born to German parents living in Denmark was registered there, pursuant to Danish law, as Grunkin-Paul. A German registry office refused to recognize the child’s surname because, according to German private international law, a person’s name was governed by the law of his state of nationality. The child was a German national, and German law did not allow hyphenated surnames composed of the father’s and the mother’s surnames. The European Court of Justice held that this discrepancy impermissibly hampered the child’s exercise of his right as an EU citizen to move and reside freely within the territory of the member states since, among other things, the name in his passport would differ from his name in the state where he was born and resided.

Third, the role of residence for EU citizens is broadly similar to the role of domicile for Lorimer’s private citizens of the world. EU citizenship generates rights for nationals of EU member states by virtue of their choice to exercise their right of freedom of movement to reside in another member state. As Samantha Besson and André Utzinger observe, ‘although EU citizenship remains in principle derivative and based on a Member State’s nationality, it has triggered a shift from nationality to residence as a criterion for the acquisition of certain national citizenship rights’.

In these three respects, then, we can see the resemblance between Lorimer’s private citizens of the world and the core of the EU law regime that Azoulai describes as ‘imposing on Member States the obligation to grant a legal status that corresponds to the concrete life of these “European individuals” who are anchored in different points of the European territory’. At the same time, unlike Lorimer’s *Institutes of the Law of Nations*, contemporary European analysis is alive to the problematic asymmetry between mobile citizens who can take advantage of the benefits of Europe’s integrated space and those who lack the means and yet bear the consequences through the sorts

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129 Case C-353/06, *Grunkin and Paul* [2008] *ECR I-7639*. Compare Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693 (where such a discrepancy was upheld in the context of Austria’s abolition of the nobility).

130 Besson and Utzinger, *supra* note 120, at 194 (emphasis in original). See also Michaels, ‘Public and Private International Law’, *supra* note 98, at 132 (referring to ‘a late victory for Savigny’).

131 L. Azoulai, *The European Individual as Part of Collective Entities (Market, Family, Nation)* (nd), at 9–10 (on file with author).
of regulations imposed on them. As against a story of pure individualism, Azoulai, for instance, develops critically a ‘trans-institutional’ story in which the object of the rights granted to individuals by EU law is understood as the individual’s participation in the institutional orders of the marketplace, the family and society at large and her recognition as a member of those orders.

The last, more unsettling, parallel with Lorimer is that EU citizenship can be aligned with a distinct tradition of exclusion. In public law fields such as immigration and refugee law, ‘Fortress Europe’ is a familiar trope. The contrast between Europe’s soft internal borders and its hard external borders can also be found in Europeanized private international law. As between EU member states, preference for the law of forum is widely barred, whereas vis-à-vis third countries, ‘the trend goes toward unilateral preference for European law’. The European Union is not co-extensive with Lorimer’s sphere of civilization, of course, but there is some resemblance here to his implicit restriction of ‘private citizen of the world’ status to citizens of civilized states, while the recognition of barbarous states’ private law extended only to their own citizens within their own borders. My point in this subsection is not to insist on the European citizen as a modern expression of Lorimer’s private citizens of the world, but, rather, to illustrate how Lorimer’s figures of the individual can alert us to alternative patterns and consequences of international legal personality.

5 Private Citizens of the World and Relative Power

Being travelling assemblages of the private law of states, private citizens of the world had the capacity, in and of themselves, to redistribute a state’s private law beyond its boundaries when they acted in sufficient numbers or on an otherwise significant scale. In this part, I turn to the potential of Lorimer’s private citizens thereby to produce structural consequences for international relations and even international law. Curiously, the Institutes of the Law of Nations did not discuss transnational corporations, but modern debates about host-state versus home-state regulation of transnational corporations can be seen as reflecting this redistributive potential of law-made persons.

In the Institutes of the Law of Nations, Lorimer sometimes parried possible criticisms stemming from the political or economic impact of his public/private citizens. What of his neutral citizens who renounced their citizenship in order to fight for a belligerent state but retained their neutral domicile? Would the sum total of their actions in the interests of belligerency not compromise the neutrality of their state of domicile? Lorimer thought not, because without its citizenship they had no right to vote or other public means of influence, and they could not employ their private means any

132 See Azoulai, ‘L’autonomie’, supra note 124, at 8. See also Everson, supra note 120, at 15–25.
134 E.g., M. Carr, Fortress Europe: Inside the War against Immigration (rev. edn, 2015).
differently than they would have been free to do had they continued to be citizens.\footnote{Lorimer, supra note 1, vol. 2, at 142.} Furthermore, did his rules on the freedoms of private neutrals not feed war and therefore contradict permanent peace as the final object of both belligerents? Here, his response was that the freedom to enlist and the freedom to trade advanced the completeness of the victory and, thus, permanent peace.\footnote{Ibid., at 147–149; see also 155–156.}

For a modern reader, what positively jumps off the page is Lorimer’s analysis of a hypothetical based on the Schleswig-Holstein dispute between Denmark and Germany because here he drew legal, as opposed to political, consequences from the structural impact of his private citizens of the world. His analysis of this hypothetical also reveals an aspect of the relationship between private citizens of the world and Lorimer’s ‘ultimate definition’ of international law as ‘the realisation of the freedom of separate nations by the reciprocal assertion and recognition of their real powers’,\footnote{Ibid., vol. 1, at 3 (emphasis added).} which led him to distinguish among civilized states.\footnote{On Lorimer’s de facto principle as out of step with other international lawyers of the time, see Koskenniemi, supra note 2, at 417–421.}

I will first introduce Lorimer’s Schleswig-Holstein hypothetical and then reflect on its relevance for current discussions of the ‘publicization’ of private international law.

### A Industrial and Social Annexation

For Lorimer, jural war was limited to the vindication of existing rights; that is, he conceived of it as correctional. This sits uneasily with the case of the duchies of Schleswig and Holstein, which came under the Danish crown but had a large German population.\footnote{Lorimer, supra note 1, vol. 2, at 25–27. Lorimer did not factor in all of the international legal circumstances of the two duchies, which were notoriously complicated.} In Lorimer’s hypothetical, one state’s population (Germany’s) expanded socially and industrially into the territory of a neighbouring state (Denmark): buying property; intermarrying; building houses, villages, bridges and railways; establishing factories; opening private schools and so on. Through the ordinary operation of principles of private international law, German private law now largely governed private rights and obligations in the territory. From a private law perspective, ‘the province has already changed hands’.\footnote{Ibid., at 25.} It followed for Lorimer that the use of force by Germany would therefore simply be the vindication of a territorial acquisition that had already occurred through social and industrial annexation.\footnote{Ibid., at 26.} In other words, it would be corrective.\footnote{In this context, Wilhelm Grewe described Lorimer’s doctrine of jural war as attempting ‘in a completely unmistakable manner, to provide an interpretation of the bellum justum which offered sufficient freedom of action for further conquest by British-style economic-industrial imperialism’. W.G. Grewe, The Epochs of International Law, translated and revised by M. Byers (2000), at 533.}

What is initially puzzling about Lorimer’s reasoning is why German private law could not co-exist with Danish public law in the territory since, as discussed earlier,
Lorimer accepted that an individual’s nationality and domicile could differ. We learn through this hypothetical that, for Lorimer, this arrangement was only acceptable ‘for a special purpose or a limited time ... under certain circumstances’. Lorimer’s citizen of the world was not, then, Thomas Franck’s empowered self in the liberal tradition, who composes a multi-jurisdictional identity for himself. Lorimer accented the choice of one’s sphere of existence, whereas for Franck and also for contemporary global legal pluralists, the emerging ‘global system’ is ‘increasingly characterized by overlapping communities and multivariegated personal loyalties yielding more complex personal identities’. The Schleswig-Holstein scenario, for Lorimer, was an anomaly that would cause constant conflict, and it was therefore an evil to be remedied. The remedy could not be in Denmark’s favour because it was the German population ‘who had absorbed the State into which they had migrated, not the State which had absorbed them’. In accordance with Lorimer’s de facto principle of international law, the objective of ‘bringing positive law into conformity with fact, and with natural law as the exponent of fact’, trumped the objective of respect for Denmark’s territorial integrity and thus justified war.

The aspect of private international law’s relationship to public international law revealed by the hypothetical was therefore as follows. The large-scale actions of private citizens of the world, together with the routine functioning of private international law, created the mismatch between the public and private law applicable in the territory. In turn, Lorimer’s particular brand of public international law required a territorial realignment that reflected power, matching political power to economic and social power.

B A Lens on the ‘Publicization’ of Private International Law

Needless to say, Lorimer’s doctrine of industrial annexation is even more chilling in retrospect. Quoting his statement that ‘[i]f a progressive and a retrogressive State exist side by side, that the former will absorb the latter, in point of fact, is as inevitable as that a sponge will drink up water’, Campbell remarked in 1953: ‘Lorimer was most probably thinking of economic development and commercial expansion but it was by such arguments that Hitler supported his claim to Lebensraum at the expense of his eastern neighbours.’ Nonetheless, if we bear in mind that Lorimer’s late entry into

144 Lorimer, supra note 1, vol. 2, at 25.
147 Ibid.
148 Campbell, supra note 2, at 221 (quoting Lorimer, supra note 1, vol. 2, at 41). Lorimer’s claim as quoted might sound purely predictive. However, he went on to argue that once the neighbouring state’s retrogression appeared inevitable (despite a duty on the progressive state ‘in so far as may be’ to prevent it), then the alignment of law with fact became necessary and could be legally enforced by war so long as the progressive state stood to gain more freedom than the retrogressive state would lose. Lorimer, supra note 1, vol. 2, at 41.
the international law canon has been through his vices, not his virtues, is this odious doctrine of any relevance for apprehending current international law?

Leaving aside the doctrine’s justification for the transfer of sovereignty, one response might be that it draws valuable attention to the potentially wide-scale implications of the operation of private international law on its own. Public international law leaves untheorized, or under-theorized, such agents of deterritorialization as expatriates, migrant workers, same-sex marriage tourists and other foreigners who redistribute their states’ private laws from one jurisdiction to another, absent any transfer of public sovereignty.

On the other hand, Lorimer’s argument that public international law should underwrite the change of sovereignty that had ‘already’ occurred through private international law now seems inconceivable. And, yet, there is a certain similarity in structure to arguments that public international law should impose duties directly on transnational corporations based on the private authority they exercise in areas such as the region of Nigeria once dubbed ‘the Republic of Chevron’. The similarity may not be apparent since this argument for corporate accountability might be taken to rely on power, not law. Certainly the implicit analogy is often to effective control as the test for statehood: corporations are filling a de facto vacuum of sovereignty or have gained control over a lawless zone. However, akin to Lorimer’s hypothetical, their effective control is also a function of law, private law and even private international law. Indeed, the very ‘sovereign’ is a creature of private international law because the laws of incorporation are national.

The fundamental substantive difference, needless to say, is that Lorimer amplified the structural effects of the private by upgrading them to a justification for the use of force. In the case of international corporate accountability, the aim is the opposite: to acknowledge the effects of the behaviour of powerful states’ corporations in order to constrain them through the direct imposition of duties. That said, we might nevertheless ask what public international law – even in a more idealistic mode than Lorimer’s – would reliably bring to the private. In the context of proposals for direct corporate accountability under international law, Patrick Macklem cautions that ‘international corporate duties to respect human rights will produce a realm of international corporate liberty that will likely render the international legal order unrecognizable to the apostles and priests who zealously guard its normative mission’.

The larger point to be made is that such proposals count on public international law for normative deliverables, whereas Lorimer’s connection of private international law to the relative power of states reminds us that public international law can also


administer a dose of Realpolitik. Critical public international lawyers are attentive to the systemic impact of private economic power and are increasingly focusing on the historical role of private law in empire – although not yet that of private international law. From the other side of the fence, private international law theorists are increasingly introducing private international law into conversations about global governance. [T]he informal empire that is currently unfolding in the shadow of global state-led politics is the realm of the private, Muir Watt observes. Private international law theory now features a growing range of ways in which private international law has been and might be reconnected with public international law, that is, be ‘publicized’. Alex Mills, for example, seeks to reinvent the internationalism of private international law advocated in Lorimer’s day, but ‘founded not only on the aspiration of an international society of states, but on its legalisation through the constitutionalisation of international law’. Ultimately, however, any theory of public international law, even a constitutionalized one, will graft realist, as well as idealist, elements onto private international law.

Lorimer’s hypothetical makes vivid that the question should be which idea of public international law is being joined to which idea of private international law and how. Mills, writing from a British perspective as a private international lawyer, codes both public and private international law differently from David Kennedy writing about the post-1945 United States as a public international lawyer, for instance. To Kennedy, the renewal of public international law in US legal studies came from adopting the policy orientation of private international law.

151 Cf. Schwöbel, ‘Whither the Private in Global Governance?’, 10 International Journal of Constitutional Law (2012) 1106, at 1107: ‘Faith is placed in public law, which ... forges the hegemonic potentials enabled through systems and hierarchies in the international sphere.’


153 See, e.g., Hoerger, Kjaer and Ralli, ‘A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation’, 2 Transnational Legal Theory (2011) 153 (introducing special issue on this topic); Knop, Michaels and Riles, ‘Foreword’, 71 Law and Contemporary Problems (2008) 1 (introducing special issue on transdisciplinary conflict of laws); Muir Watt and Fernández Arroyo, supra note 99; Schiff Berman, supra note 145.

154 Muir Watt, ‘Schism,’ supra note 98, at 349. On informal empire in Lorimer’s time, see Koskenniemi, Gentle Civilizer, supra note 5, at 110–121.


157 See M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2005). The same could be said of transnational law.

Whereas Mills argues that private international law has been isolated from public international law and that this should be remedied, Joel Trachtman argues that private international law has collapsed into public international law because we now recognize all law as public. Private international law has therefore become a question about the allocation of public power between states, which is also the fundamental question of public international law. However, this still leaves a distinction between their legal subjects to be worked out.\footnote{Trachtman, ‘The International Economic Law Revolution’, 17 University of Pennsylvania Journal of International Economic Law (1996) 33, at 40–43 (writing in the context of international economic law).}

Although Lorimer’s analysis of the Schleswig-Holstein scenario revolved around private citizens of the world, even victim and perpetrator – the paradigmatic humans in public international law – can be legally factored into international law as transnational structural forces, as well as subjects. Frédéric Mégret makes this move in a new theory of universal jurisdiction in international criminal law. Whereas universal jurisdiction is typically understood as assigning all states the same potential vertical role as local agents of humanity, Mégret begins with the differentiating horizontal idea that ‘victims of atrocities travel and bring their trauma and suffering to their country of adoption. That trauma, then, continues to unfold as part of the “long tail” of mass crime in the host country.’\footnote{Mégret, ‘The “Elephant in the Room” in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political’, 6 Transnational Legal Theory (2015) 89, at 106.} While paying lip service to the ‘strictly legal point of view’ that these crimes are committed once and for all where they physically took place, he argues that ‘place’ is better described by the ‘body’ of the victim than by territory, and makes the further, structural point that perpetrators and victims often flee to the same countries and thereby recreate in the host state the very tensions from which each group sought to escape.\footnote{Ibid., at 100.} In light of these settled diasporas, universal jurisdiction ought to be conceived of in terms of duties owed to individuals who are not simply humans present in the state’s territory, but ‘very much “one of us”’.\footnote{Ibid., at 111.}

6 Conclusion

As James Lorimer’s 1883 *The Institutes of the Law of Nations* demonstrates, dimensions of the individual as a subject of international law can disappear, as well as appear, over the course of the field’s intellectual history. While public international lawyers are familiar with the antecedents of the ‘human’ in post-World War II international human rights law, the ‘private citizen of the world’ glimpsed in Lorimer’s *Institutes* is less, even un-, recognizable.\footnote{See Parlett, *Continuity and Change*, supra note 108, at 281 (distinguishing English courts’ refusal to recognize slavery as a foreign legal relation from the antecedents of international human rights law).} I have sought to show that the latter figure is both of historical interest, as part of a particular tradition of cosmopolitan citizenship, and of relevance to the present. Its unfamiliarity as a subject implicitly invites attention to the current international law whereabouts of its underlying assumption that individuals
might lead transnational lives by choice or necessity, and of its preservation of their private law attributes as aspects of their identity, their home and their actions in that other private sphere, the market. The private citizen of the world also offers a historical window onto the structural impact that could be had by members of civilized states through the ordinary operation of private international law across Lorimer’s different spheres of humanity and that Lorimer was moved to incorporate into, rather than check by, public international law in his Schleswig-Holstein scenario. The growing tendency to study international law as a collection of functionally differentiated legal regimes might be seen as providing a post-subject framework of analysis that readily and flexibly encompasses private actors. However, because it fractures them by function, stake or interest, the shift from subjects to regimes risks missing the sorts of cross-cutting patterns and consequences that a ‘private citizen of the world’ lens might prompt us to synthesize and to relate to differences of culture and power between states.164

Insofar as this article makes a case for the private citizen of the world as an analytical lens to add to the public international lawyer’s toolkit, I conclude by emphasizing that it is simply a preliminary case. The article has singled out this figure from the three kinds of citizen found in the Institutes of the Law of Nations, but – as touched on in the comparison with Franck’s ‘empowered self’ and with EU citizens – the figures of the public citizen (national) and citizen of humanity (human) have also not been preserved in amber since Lorimer’s time. An obvious place where they currently interact is the public policy exception in private international law. In Oppenheimer v. Cattermole, to give a leading example, the grave infringement of human rights caused the House of Lords not to recognize the 1941 Nazi law depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property.165 Moreover, this article has singled out Lorimer’s private citizen of the world, whereas assumptions about the nature of the individual, as well as his place, varied between private international lawyers of the period. Recent historical work in private international law argues not only for the recovery of an individual-centred internationalism found in 19th-century writing, but for the promise of its emphasis on the social and on the individual as relationally constituted, as opposed to the later emphasis on international commerce and the autonomous individual.166 The ultimate relevance of Lorimer’s private citizen of the world, then, might be as a placeholder for a conversation about the individual between public and private international lawyers.

164 To which would need to be added differences of gender and class. For feminist critique of EU citizenship as market citizenship, see, e.g., O’Brien, supra note 21.
