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Does International Law matter?

The *Institut de Droit International* and the regulation of international human mobility before 1873-1914

Studying international law is a strange choice for an historian of migrations. Today's lawyers tend to consider the regulation of migrations as the last unfettered bastion of national sovereignty<sup>1</sup> and the - mostly - continental European lawyers, who made it an academic field at the end of the nineteenth century, as helpless utopians. They were, the story goes, unable to devise tools and institutions solid enough to withstand the test of the twentieth century, as the two world wars demonstrated. When historians study them, they tend to depict European lawyers as men of good will and convoluted theories, who wrote lengthy volumes describing what the world ought to be like according to late Victorian sensibilities, or produced excuses for the actions of the powers that be, who made it what it really was.<sup>2</sup>

I however argue, drawing from a recent study on the *Institut de Droit International*<sup>3</sup>, that they were the first to define, before the First World War, a pan-European legal order allowing the regulation of transnational human mobility and that studying their attempt contributes to the understanding of the birth of international migration politics.

I use to that effect mainly the published works of IDI's members, the printed minutes of their meetings<sup>4</sup>, the text of international conventions and treaties and of resolutions passed by the IDI<sup>5</sup>, but also the personal archives of successive general secretaries of the organisation<sup>6</sup> and the archives of the French ministry for foreign affairs, the last in order to examine interventions on the national scene of the prominent French members of the IDI.<sup>7</sup>

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1 Catherine Dauvergne, 'Migration and the rule of law in global times', *The Modern Law Review* 67:4 (2004) 588-615.  
2 Marti Koskenniemi, *From apology to Utopia, The structure of international law argument* (Helsinki 1989); Marti Koskenniemi, *The gentle civilizer of nations. The rise and fall of international law, 1870-1960* (Cambridge 2008, first edition 2001).  
3 Philippe Rygiel, *Une impossible tâche? L'institut de droit international et la régulation des migrations internationales 1870-1920* (Paris 2011) Habilitation thesis, Université Paris 1, Panthéon-Sorbonne.  
4 Minutes of the first meetings were printed in the *Revue de droit international et de législation comparée*. From 1877 onwards the *Institut*, publishes an *Annuaire de l'institut de droit international*, each volume containing the minutes of a session (thereafter *Annuaire IDI*). A shortened version of the nineteenth century *Annales*, is published during the twenties (thereafter *Annuaire abrégé IDI*).  
5 All resolutions ever passed by the IDI are available online from the web site of the IDI, [http://www.idi-il.org/idiF/navig\\_res\\_chron.html](http://www.idi-il.org/idiF/navig_res_chron.html).  
6 I use here the personal papers of Alphonse Rivier (Thereafter Fonds Rivier), kept in Lausanne, general secretary of the IDI (1878-1885), which contains part of the personal papers of Gustave Rolin-Jaquemyns, first general secretary of the Institute (1873-1878 and 1885-1892) and the papers of Ernest Lehr (1892-1900), also kept in Lausanne (Thereafter fonds Lehr).  
7 I use mainly here the papers of the legal branch of the French ministry for foreign affairs (*Contentieux*) and the

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## United lawmakers of the world

### *Liberal pacifism*

The *Institut de Droit International (IDI)* was founded in 1873 in Ghent, hometown of Gustave Rolin-Jaequemyns,<sup>8</sup> a Belgian lawyer, editor of the *Revue de Droit International et de Législation Comparée*, who initiated the meeting. His call was heard by a small group of men, lawyers by trade and training hailing from several western European countries and the English-speaking world. Most of them had long been associated with the international social reform movements<sup>9</sup> and the pacifist movement of the 1860s. Gustave Moynier, one of the founders of the Red Cross, was among them, as well as David Dudley Field, a prominent figure of American pacifism.<sup>10</sup> Seven of the thirteen attendants at the Ghent meeting had been at some stage members of the *Association Internationale pour le Progrès des Sciences Sociales*, founded in Brussels in 1862 in imitation of the British *National Association for the Promotion of Social Sciences*. The activities of John Westlake, one of the of most influential members of the British association, but also of the *Association Internationale* and later of the *Institut de Droit International* illustrates the strong connexions between international lawyers, social reform and pacifist movements during the 1860s and early 1870s.<sup>11</sup> They shared a similar agenda and what Marti Koskenniemi called a late Victorian liberal sensibility. The first and foremost goal of the IDI was to prevent war amongst ‘civilised’ nations and if that could not be avoided, to prevent unnecessary brutality. Members of the IDI spent of lot of time discussing arbitration and codes of war. However, proclaiming itself to aim to ‘satisfy the sense of justice of the civilised world’<sup>12</sup> the IDI intended to lead many more battles. Fervent admirers of the

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personal files (*Dossiers personnels*) and papers of its agents (PA serie), kept in the Archives of the French ministry for foreign affaires (thereafter FFAA).

8 Martti Koskenniemi, ‘Gustave Rolin-Jaequemyns and the establishment of the Institut de Droit International (1873)’, *Revue Belge de Droit International* 37:1 (2004) 5-11.

9 On the links between the IDI and the international social reform movement see Christian Müller, ‘The politics of expertise. social science, political reform, and the institutionalization of transnational networks in Europe, c.1840–c.1910’, in: David Rodogno, Bernhard Struck and Jakob Vogel (eds.), *Shaping the transnational sphere. Experts, networks and issues* (New-York/Oxford 2011).

10 On the links between the IDI and the pacifist movement see Sandi E. Cooper, *Patriotic Pacifism. Waging War on War in Europe, 1815-1914* (Oxford 1991) 45-48.

11 Lawrence Goldman, ‘The Social Science Association, 1857-1886: A context for mid-Victorian liberalism’, *The English Historical Review* 101:398 (1986) 95-134, 126.

12 ‘Statutes of the Institute of International Law’, art. 1 in: Carnegie Endowment for International Peace, *Resolutions of the Institute of International Law dealing with the Law of Nations with an historical introduction and explanatory notes* (New York 1916) xx.

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classical-liberal economists, who ‘illustrated so well the wonderful law of economic harmonies’<sup>13</sup>, they believed in the pacifying nature of the *doux commerce*<sup>14</sup> between the nations. The process of civilisation, according to Saripolos ‘making States more and more interdependent shall make conflicts between them an ever more exceptional occurrence’.<sup>15</sup> Nicolas Jean Saripolos (1817-1888) was a Greek lawyer, an early and active member of the IDI, and one of the drafter of the first Greek constitution. Promoting the free movement of goods, men and capital, defined as a condition for peace, was a constant preoccupation of the members of the IDI. During the 1870s and 1880s the IDI prepared drafts of international agreements on such matters as the universal validity of bills of exchange (1885) and the legal status of international joint stock companies (1891). It showed a strong interest in bringing about international agreements on communication by land, underwater (1879), fluvial (1887) or maritime (1898).

The connected and peaceful world dreamed by the founders of the IDI was also a civilised world free from barbaric institutions and respecting human dignity. Saripolos and Pasquale Mancini were staunch opponents to the death penalty, and in Greece and Italy led successful campaigns against it. The first members of the *Institut*, often took part, on the national stage, in the political battles of time, on the liberal side. Westlake was a Gladstonian liberal elected to the House of Commons in 1885, Johann Caspar Bluntschli<sup>16</sup>, president of the Grosser Rath in Zürich in 1845, led a Swiss liberal-conservative party, influential in Swiss politics during the 1840s. Mancini in Italy<sup>17</sup> and Gustave Rolin-Jaequemyns<sup>18</sup> in Belgium became prominent members of liberal governments during the 1870s and 1880s. True to the principled liberalism of its founders, the IDI on several occasions expressed its hostility to the remnants of slavery, opposed discrimination based on race, and manifested its attachment to the rule of law.

Their liberalism, as well as their internationalism, had however limitations and was by no means democratic, nor universally applicable. Most of these men were hostile to universal suffrage ‘that will allow ignorance to prevail for a long time’<sup>19</sup> and very wary of any kind of working class

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13 Gustave Rolin-Jaequemyns, ‘La conférence de Berlin sur la législation du travail et le socialisme dans le droit international’, *Revue de droit international et de législation comparée* (1890) 24, quoted in Jean J.A.Salmon, ‘Gustave Rolin-Jaequemyns’, in: Institut de droit international, *Livre du centenaire, 1873-1973. Évolution et perspectives du droit international* (Bâle 1973) 103-123, 123.

14 See A. Hirschman, *Les passions et les intérêts* (Paris 1980).

15 *Annuaire abrégé de l’I.D.I.*, 1, 436.

16 H. Schulthess (ed), *Schweizer Juristen der letzten hundert Jahre* (Zürich 1945) 135-167.

17 Education 1862, justice 1876-1878, foreign affairs 1881-1885.

18 Ministry of Interior, 1878-1884.

19 Gustave Rolin-Jaequemyns, letter to Olin – a liberal MP – January 2 1895 quoted in Jean Salmon, ‘Gustave Rolin-Jaequemyns’.

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organisation.<sup>20</sup> They were crafting rules and regulation valid only for the civilised world and applauded European colonisation of Africa. The *Institut* congratulated Leopold II on his work in Congo in 1885<sup>21</sup>, at the instigation of Rolin-Jaequemyns, a fervent patriot, as were most of the members of the IDI, eager to serve the interests of their State as well as those of civilisation.

### *A pragmatic attitude*

The IDI of the 1870s can be described as the product of the secession of the most elitist, moderate and bourgeois element of the pacifist movement, and also the most pragmatic, eager to find, after the brutal Franco-Prussian war, efficient means of action. Tobias Asser was a Dutch lawyer, the father of modern Dutch diplomacy, and one of the founding members of the IDI.<sup>22</sup> In 1879, he declared that even if the institute was a scientific society, its goal was to see the texts it prepared endorsed by governments and parliaments.<sup>23</sup>

In a very deliberate way, its founding members were distancing themselves from the pacifist movement defining a *modus operandi* from which the IDI did not depart until the First World War. The IDI was a learned and specialised society, an ‘exclusively scientific association without official character’<sup>24</sup>, with a limited number of elected members. These were supposed to have made a significant contribution to the growing, and growingly academic, field of international law. Meetings of the IDI were not public and its sessions were dedicated to the discussion of thorny legal questions that had been studied by sub-committees in the interval during two sessions. When the discussion proved fruitful the IDI adopted a resolution on the matter. Some of them were meant to extract the legal meaning of recent treaties or development in international politics, offering a formulation of the international *lex lata* approved by the most prestigious international lawyers of the time. The IDI could also approve a text defining legal evolutions that its members deemed desirable. In this case the text was seen as a draft for future international conventions or bilateral treaties and was used as such by representatives of western states. In 1910 in Paris Léon Bourgeois, a central figure in French politics at the time, and member of the IDI, reminded its members that the

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20 Carl Blüntschi, *Die Kommunisten in der Schweiz nach den bei Weitling vorgefundenen Papieren bei Weitling vorgefundenen Papieren* (Zürich 1843).

21 *Annuaire I.D.I.*, 8, 18.

22 Tobias Asser is considered, at the beginning of the twentieth century, the father of modern Dutch diplomacy, see C. Van Vollenhoven, ‘Holland’s International Policy’, *Political Science Quarterly*, 34:2 (1919) 193-209, 195.

23 *Annuaire abrégé de l’I.D.I.*, 1, 328.

24 ‘Statutes of the Institute of International Law’, art. 1 in: Carnegie Endowment for International Peace, *Resolutions of the Institute* xx.

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origin of many recent international treaties could be traced back to drafts laid out by the IDI.<sup>25</sup> *De facto* the institution of the international Prize Court<sup>26</sup> and the international convention on duties of neutral powers during maritime war<sup>27</sup> to which Bourgeois referred, heavily drew on the work done by the *Instituit* during the last three decades of the nineteenth century. At the eve of the twentieth century, prominent members of the IDI can be seen as the invisible legal hands of liberal globalisation, collecting peace Nobel prizes for their joint efforts. The IDI was awarded the Nobel Prize for Peace in 1904, as were Tobias Asser (1911) and Louis Renault (1907). Gustave Moynier was nominated for it in 1901, 1902, 1903, and 1905, but did not receive it.

### *Men of influence*

The achieved status of the IDI derives partly from the rapid expansion of the institution. By 1878 the *Institut* had 68 members, and by 1898 there were 118 members<sup>28</sup>. True to the intention of the founders, who retained at least until the end of the nineteenth century a strong influence, a large share of the newcomers were influential lawyers and men of power sharing a strong liberal ethos. In 1898 two third of the members held a prominent academic position, be it full professor or editor of an influential legal review. Ten percent were, or had been, member of government, while a similar percentage was at the time member of a national parliament. Another sixteen per cent had diplomatic credentials and were attached to the diplomatic services of their country of residence. Born a gentlemen's club, the IDI soon became a – mostly – European forum where lawyers, law-makers and diplomats met and exchanged ideas and information, and tried to define common principles that could serve as the basis of a new international liberal order respecting the interests of their respective states. Those were mostly, from the 1880s onward, European and continental. Founded by Belgian, Swiss and Dutch lawyers, with strong English connexions, eager to preserve the *status quo* in Europe, the IDI became a kind of *Union juridique latine*, with a strong French and Italian influence while the German or Austrian representation dwindled. In 1908, in Firenze, eighteen French lawyers attended the general meeting of the IDI alongside fifteen internationalists from the founding countries (Belgium, Swiss, the Netherlands). Only five Germans and four

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<sup>25</sup> *Annuaire I.D.I.*, XXII, 368.

<sup>26</sup> Convention (XII) relative à l'établissement d'une cour internationale des prises, The Hague, October 18 1907.

<sup>27</sup> Convention (XIII) concernant les droits et les devoirs des Puissances *neutres* en cas de *guerre maritime*, *The Hague*, October 18 1907.

<sup>28</sup> In the paragraph below we use a statistical analysis of the IDI *Annales*, each one giving the list of the members of the *Institut*.

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Austrians make it to Firenze. Even if the IDI was keen to find members in southern Europe, south America and even Japan, and did to a certain extent succeed, they were few and most played a marginal role.

## **The IDI and the movement of people**

What we today call the ‘politics of migration’<sup>29</sup>, and the complex and integrated legal frame that embodies them and regulates admission and sojourn, as well as the rights of foreign residents, according to a fine-grained classification of foreigners, did not exist in 1870s Europe. According to most historians,<sup>30</sup> telling a similar story in different national contexts, the word and concept of immigration and its definition as a political issue was a novelty of the mid 1880s. Coherent and efficiently enforced migration policies only very slowly developed from then and could only be defined as such during and after the First World War.<sup>31</sup> As for international politics of migration, that only recently attracted historians’ interest. Most authors situate their beginnings in the League of Nations’ debates.<sup>32</sup> It is unsurprising that the IDI did not address international regulation of international migration as such before the war. Its members however dedicated time and effort to questions that would today be addressed in the general context of migration politics. I will illustrate the point by examining the stance of the IDI on three of these issues.

### *Rights of foreigners*

The rights of foreigners were one of the most constantly discussed issue within the IDI. The very first resolution passed by its members mentions it. The 1874 resolution on the ‘Usefulness of a common agreement on uniform rules for private international law’ stipulates that ‘aliens have a natural legal capacity and should be able to exercise it everywhere’ ‘The acknowledgment and respect of this rights by states cannot result from comity [*comitas gentium*] or treaties but must be

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29 Andrew Geddes, *The politics of migration and immigration in Europe* (London 2003).

30 Frank Caestecker, *Alien policy in Belgium, 1840-1940. The creation of guest workers, refugees and illegal aliens* (New-York/Oxford, 2000); Gérard et Silvia Arlettaz, *La Suisse et les étrangers* (Lausanne 2004); Jochen Oltmer (ed.), *Migration Steuern und Verwalten* (Göttingen 2003); Gérard Noiriel, *Le Creuset Français. Histoire de l’immigration XIXe et XXe siècle* (Paris 2006, first edition 1988).

31 Bevan Vaughan, *The development of British Immigration Law* (London 1986); Clifford Rosenberg, *Policing Paris. The origins of modern immigration control between the wars* (Ithaca 2006).

32 Paul-André Rosental, ‘Géopolitique et État-providence. Le BIT et la politique mondiale des migrations dans l’entre-deux-guerres’, *Annales ESC* 61:1 (2006) 63-98; Alison Bashford, ‘population, geopolitics, and international organizations in the mid twentieth century’, *Journal of World History* (2008) 327-348.

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considered an obligation of international justice'.<sup>33</sup> This obligation implied the application of foreign laws and ceased to be enforced when public order was threatened or if local laws prevented the application of this principle. That early statement, put in natural law terms, and new neither in its substance nor its formulation, summarised a stance the IDI would be true to until the First World War and an agenda its members would follow for several decades. We find under this 'natural legal capacity' heading a set of rights that included rights of ownership, security of contracts, access to courts and the possibility to exercise family rights. The IDI methodically studied the possibility of international agreements allowing foreigners to enjoy each one of them during the 1880s and the 1890s. In 1877 a resolution was passed on the right of foreigners to access local courts on the same terms as nationals, another one in 1887 on marriage and divorce, in 1891 one was passed on orphans of foreign parents, and many more.

This long effort was, for some prominent members of the IDI, something of a crusade. For François Laurent in 1880, the European legal systems were, when defining foreigners rights, 'Barbaric. Generalise [its principles] and the foreigner will have no rights whatsoever'.<sup>34</sup> By the mid nineteenth century, law only minimally guaranteed foreigner's rights in most European countries. In civil law countries following a version of the Napoleonic code, according to article 11 of the original code, foreigners would enjoy the same rights as those attributed to French nationals by bilateral treaties. Legal texts were not as explicit in common law countries or in Scandinavia, but they were not more generous. Property rights of foreigners were curtailed in most of Europe. In Württemberg, a foreigner could not buy or receive real property.<sup>35</sup> Access to courts could be denied, and specific conditions imposed. In France a deposit (*judicatum solvi*) was asked of foreigners.<sup>36</sup> Marriage, divorce, death abroad could be the source of insolvable personal and diplomatic difficulties. In 1859 the authorities of Großherzogtum Baden refused to accept the validity of marriages celebrated in France between their nationals, unless they followed the procedure defined by the law of the duchy, which the French authorities refused. As a consequence, offspring of these unions could not enjoy the rights normally derived from their birth.<sup>37</sup>

Laurent's statement might seem somewhat overstated. A slow process of legal assimilation

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33 IDI Resolution, *Utilité d'un accord commun des règles uniformes de droit international privé* (Geneva 1874).

34 François Laurent, *Droit civil international. Tome premier* (Paris/Bruxelles 1880) 24.

35 Joseph Champcommunal, *Essai sur la tutelle des impubères en droit romain (rom)*. *De la succession ab intestat endroit international privé* (Paris 1892) 136.

36 Étienne Crestovitch, *De la litis contestation sous le système formulaire (romain)*. *De la compétence des tribunaux français à l'égard des étrangers* (Paris 1885).

37 Ministère des Affaires Étrangères à Vicomte de Serre, June 22, 1859, French Foreign affairs archives (subsequently FFAA), Contentieux 132.



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was under way by the 1870s. An act of 1870 made it possible for foreigners to own property in England.<sup>38</sup> In most European countries, a status of resident alien offered legal protection, sometimes even against expulsion. In Belgium, resident aliens enjoyed almost the same civil rights as nationals.<sup>39</sup> In Denmark an 1875 law defined two groups of denizens, (*infödsret* and *försögelsesret*) who could not be expelled by administrative authorities.<sup>40</sup> Furthermore, bilateral treaties, most often the innumerable navigation acts linking together European countries, many rewritten after the mid nineteenth century economic crisis<sup>41</sup>, offered strong protection.

The outrage expressed by Laurent and the mobilisation of the IDI in this context needs to be linked both to practical considerations and ideological commitments expressing their position as liberal lawyers and diplomats. The sheer complexity of this legal European system created endless difficulties that could result in the impossibility for an individual to defend his rights in court. In 1868 a young French woman wanted to separate from her Dutch husband. The French courts refused to examine the case, since she had lost her French citizenship by marrying a foreigner. Dutch lawyers concluded at the impossibility for Dutch courts to decide on the case, as the marriage, celebrated in France, was not valid according to Dutch laws. The French consulate could see no issue and concluded that ‘Two civilised countries might well leave a human being without a judge’.<sup>42</sup> That was both a problem – and a frequent one – for chancelleries and a cause for scandal for a liberal conscience.

The prominent members of the IDI, often attached to chancelleries, were well aware of the fact. Even more so because they acted, not infrequently, as legal counsel of wealthy families whose activities spanned several countries. During the 1880s, Mancini and Pierantoni, his son in law, both founding members of the IDI, opposed each other for years in the Samama case, that saw members of a rich Tunisian Jewish family fight over the properties of the deceased Nissan Smama, who had considerable interests in France and Italy.<sup>43</sup> As liberal continental lawyers they shared, together with

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38 David Glover, *Literature, Immigration and Diaspora in England fin de siècle: a Cultural History of the 1905 Aliens Act* (Cambridge 2012) 136.

39 Frank Caestecker, ‘The transformation of nineteenth century West European Expulsion Policy, 1880-1914’, in: Andreas Fahrmeir, Olivier Faron, and Patrick Weil (eds.), *Migration control in the North Atlantic World. The evolution of state practices in Europe and the United States from the French Revolution to the Inter War Period* (New-York/Oxford 2003) 120-137, 122.

40 Courrier de la légation de France au Danemark (direction du contentieux politique et commercial) au ministre des Affaires Étrangères, en date du 27 avril 1882, FFAA, Contentieux 132.

41 Hannes Lacher and Julian Germann, ‘Britain, free trade and nineteenth century world order’, *International Studies Review* 14:1 (2002) 99-124.

42 Légation et consulat général de France à ministre des Affaires Étrangères, July 14 1880, FFAA, Contentieux 111.

43 Kurt H. Nadelman, *Conflict of laws: international and interstate* (The Hague 1972) 63-67.

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their IDI's counterparts, the belief that only by law the rights of individuals could be guaranteed.<sup>44</sup>

Mancini's theories, upheld by the IDI until the First World War, provided a way of cutting the Gordian knot of both protecting foreigner's rights and respecting national sovereignty. For this generation of liberal lawyers, the main difficulty in private international law laid in the choice of the law that should apply to a case and the court that would decide on it. Drawing from the Medieval Italian legal tradition, Mancini offered a uniform system for the resolution of conflict of laws that linked personal status to citizenship.<sup>45</sup> It was far from allowing lawyers to solve every case. The numerous and lengthy volumes on the matters published during the last decades of the nineteenth century amply demonstrate it but, given a universal recognition of the principle, it allowed individuals to carry their rights with them and offered a guideline for international agreements the IDI lawyers efficiently used.

### *Protection of political exiles*

Private international law was not the only field of international law by which foreigner's rights were defined. Rules of public international law could have a strong impact on them, as discussions on extradition demonstrate. Between 1877 and 1892, the IDI addressed extradition on several occasions. Its interest was aroused by the multiplication of treaties<sup>46</sup> and extradition laws at the end of the nineteenth century. In 1870 Britain passed a new extradition act. It was revised in 1878<sup>47</sup> and again in 1890.<sup>48</sup> The IDI favoured the generalisation of extradition. Following Bulmerincq's teaching,<sup>49</sup> Brocher, a Swiss lawyer, who reported on the matter in 1879<sup>50</sup>, saw it as a natural consequence of the intensification of transnational mobility and a manifestation of the common participation of civilised states to the process of civilisation.

However several problems needed to be addressed. Liberal states intended to retain the right to refuse extradition when they deemed the motivation of the demand to be of a political nature.

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44 Jean-Louis Halpérin, *Histoire des droits en Europe* (Paris 2004) 96.

45 Rafael Encinas de Munagorri, 'Droit international privé et hiérarchie des normes. Observations sur une rencontre', *Journal for Constitutional Theory and Philosophy of Law* 21 (2013) 71-89.

46 Ivan Anthony Shearer, *Extradition in international law* (Manchester 1971) 169-172; Christopher H. Pyle, *Extradition, Politics and Human Rights*, (Philadelphia 2001)

47 *Reports of the Royal Commission on Extradition*, Parliamentary Papers, 24 (1878).

48 *Extradition, Politics and Human Rights* (Philadelphie 2001) 93-95.

49 Charles de Bulmerincq, *Das Asylrecht in seiner geschichtlichen Entwicklung beurtheilt vom Standpunkte des Rechts und dessen völkerrechtliche Bedeutung für die Auslieferung flüchtiger Verbrecher. Eine Abhandlung aus dem Gebiete der universellen Rechtsgeschichte und des positiven Völkerrechts*, (Dorpat 1853) (reprint Wiesbaden 1970), 9.

50 *Annuaire abrégé I.D.I.*, 1, 368.

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This pretension was actively contested by Russia, who had, in the person of its juris consult, Friedrich von Martens<sup>51</sup> a permanent and active representative within the IDI. On several occasions at the end of the 1870s and during the 1880s, Russian representatives contested decisions not to hand over individuals they claimed were criminals who had committed crimes so hideous that they could not be granted asylum. In 1879 the Russian ambassador asked French authorities to hand over Hartmann, who he accused of having intentionally damaged the railway and imperilled the passage of trains during an attack against the tsar's family.<sup>52</sup> The refusal of French authorities created a diplomatic incident. Russian diplomats, eager to persecute nihilists and socialists abroad, tried to avoid inscription of the political offender clause in the extradition treaties they negotiated or tried to revise. The 1877 treaty with Spain allowed both governments to refuse extradition of political offenders. The new treaty of 1888 did not and provided for the extradition of authors of 'lese majesty crimes'.<sup>53</sup> The definition of political offenders and therefore of political refugees became an international issue, all the more so because of a change in expulsion practices. In 1884 first the German authorities, and later the Dutch government refused entrance to expelees from Belgium, who were not German or Dutch.<sup>54</sup> This became the rule in Europe. It gradually became impossible to expel a foreigner to another country than his own, and therefore to expel an exile who had been granted asylum. Defining who could legitimately be granted asylum became a national issue as well as an international one, all the more so because of the difficult economic context of the period and of the development of socialist and anarchist contestation of the liberal order that European governments intended to quash, a concern IDI members did share.

IDI members were implicated in multiple ways in these developments, as actors of international and national politics. Louis Renault, the main figure of the French foreign affairs legal branch since the beginning of the 1880s,<sup>55</sup> who reported on extradition in front of the IDI in 1880 in Oxford,<sup>56</sup> was also one of the authors of the memorandum used by the French foreign affairs to push for a law on extradition in 1890<sup>57</sup> and the counsel used by the French government to decide on

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51 Lauri Mälksoo 'F.F. Martens and his time: When Russia was an integral part of the European tradition of international law' *European Journal of International Law* 25:3 (2014) 811-829.

52 Lora L. Deere, 'Political offenses in the law and practise of extradition', *American Society of International Law* 27:2 (1933) 247-270.

53 Olivart, (de) *Colección de los tratados, convenios y documentos internacionales celebrados por nuestros gobiernos con los estados extranjeros desde el reinado de Doña Isabel II hasta nuestros días* (Madrid 1890-1911) VII, 221; and IX, 329.

54 Caestecker, *Alien policy*, 40-41.

55 Paul Fauchille, *Louis Renault (1843-1918): Sa Vie, son oeuvre* (Paris 1918).

56 'Rapport de M. Renault sur l'extradition', *Annuaire I.D.I.* 5 (1882) 70-102.

57 Procès verbal de la réunion du comité consultatif du contentieux du 9 juillet 1890, FFAA, Contentieux 120.

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the legality of expulsion of foreign anarchists.<sup>58</sup> Alphonse Rivier, general secretary of the IDI was one of the drafters of the Swiss project on extradition law in 1890<sup>59</sup> and Pasquale Mancini presided over the work of the Italian commission on extradition.<sup>60</sup>

Their interest was not only functional. Extradition procedures were potentially affecting foreigners' rights. They implied the arrest and detention of an individual by the state without trial and could expose him to inhuman or unfair treatment by the state pursuing him. It was, according to Renault 'a question of personal freedom, of the rule of law'.<sup>61</sup> Extraditions procedures should be dictated by laws and controlled by courts, which was far from being the case in Europe at the time. The French project of an extradition law he defended did not imply changes in the procedure followed by French authorities, but had, as its main goal, having the legal guarantees it provided written into law<sup>62</sup>. The wish to implement a liberal legal order recognising the foreigner as a subject of law was therefore central in this endeavour.

The difficulty of conciliating personal freedom, geopolitical conflicts and the defence of the liberal order against its opponents translated into very long and heated debates. A first resolution was passed by the IDI in 1880 in Oxford<sup>63</sup>, liberal in its inspiration. It wished extradition to be regulated by treaties and laws. It stated that 'extradition cannot be granted for political reasons', but conceded that those who committed hideous crimes could not avoid extradition only because of political motives. It left states free to decide what constituted a political crime. The balanced and cautious wording, was supported by veterans of the liberal cause who had sometimes, like Von Arntz<sup>64</sup>, Pierantoni<sup>65</sup> or Mancini<sup>66</sup>, been freedom fighters and exiles themselves and who opposed attempts by Von Martens and others to restrict the possibility to grant asylum to political exiles.

The Oxford resolution soon came under attack. Voices within the institute asked for a revision of the Oxford rules, because they considered it to be too protective for violent political

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58 Note sur la dépêche de la légation de Belgique du 18 mars 1892 au sujet de l'expulsion des anarchistes, FFAA Contentieux 798.

59 Alphonse Rivier, letter to Ernest Lehrs, april 3 1890, Fonds Ernest Lehrs, boîte 1B, Bibliothèque intercantonale de Lausanne.

60 *Atti della Commissione Ministeriale (Mancini) per lo studio e la compilazione di un progetto di legge sul estradizione*, (Rome 1885), final draft, 107-115.

61 'Rapport de M. Renault sur l'extradition', 93.

62 C. Seruzier, *Examen du projet de loi sur l'extradition voté par le sénat et soumis à la chambre des députés suivi du texte du projet amendé et de la liste des traités d'extradition conclus par la France avec les pays étrangers* (Paris 1880) 1.

63 IDI, Résolutions d'Oxford, Extradition, september 9, 1880, [http://www.idi.org/idiF/resolutionsF/1880\\_oxf\\_03\\_fr.pdf](http://www.idi.org/idiF/resolutionsF/1880_oxf_03_fr.pdf), april 11 2015.

64 Adolphe Prins, 'Notice nécrologique de M. Arntz', *Annuaire I.D.I.*, 18 (1885) 30-34.

65 *Il Risorgimento invisibile. Patriote del Mezzogiorno d'Italia* (Milano 2011) 101.

66 Grazia Mancini, *Impressioni e Ricordi* (Milano 1908).

Rygiel Philippe. Does International Law Matter? The Institut de Droit International and the Regulation of Migrations before the First World War. *Journal of Migration History*, Brill, 2015, 1 (1), pp.1-6. <http://www.brill.com/products/journal/journal-migration-history#related-files> . [hal-01165133](#)

opponents. In Geneva in 1892, Alberic Rolin and Heinrich Lammasch led a successful campaign and saw the IDI pass a new resolution<sup>67</sup> modifying the clauses dealing with the non extradition of political offenders. It defined a long list of crimes that would lead to extradition even if they could be considered linked to a political act. It asserted that in no case foreigners granted asylum could have committed ‘actions undermining the basis of any social organisation rather than directed at a specific form of government’. The debates within the IDI allow us to clarify the meaning of this unfamiliar wording. Blüntschli, Von Martens, even the liberal Brocher, considered that the action of the ‘great European and American socialist movement’ of which nihilists and anarchists were a part ‘Threatens all of civilised humanity’<sup>68</sup> and that its members are not opponents of local governments but ‘Enemies of Humankind’ who ‘Aim to destroy the public and legal order of all civilised nations’.<sup>69</sup>

The principled liberalism of the founding members was slowly eroded by the political realities of the late nineteenth century. From the 1880s the development of anarchism justified an ever tighter collaboration of police forces<sup>70</sup>, whose action did not always abide by liberal principles, and sometimes circumvented legal provisions. The IDI reacted to that by adopting rules that preserved the right of political exiles not to be returned to the State pursuing them, but gave a narrow definition of those protected by such a provision, excluding opponents of the liberal order.

### *Expulsions and border control*

After the 1880s the IDI appeared in this matter to be on the defensive. The same can be said when we examine its position on expulsion and border control. When the founding members of the IDI met in Ghent in 1873, the regulation of international migrations was not an issue for liberal lawyers. Inhabitants of European countries had gradually been allowed to leave their country in the course of the century<sup>71</sup>, the Russian empire being a notable exception. Most states in Europe and the new world followed a free entry policy. Between 1826 and 1905, England knew no legal barrier to

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67 IDI, Revision des articles 13 et 14 des Résolutions d’Oxford (Extradition) September 8 1892, [http://www.idi-iiil.org/idiF/resolutionsF/1892\\_gen\\_03\\_fr.pdf](http://www.idi-iiil.org/idiF/resolutionsF/1892_gen_03_fr.pdf), April 11, 2015.  
68 Brocher in *Annuaire I.D.I.*, 3-4:1 (1880) 264.  
69 Bluntschli in *Annuaire I.D.I.* 5 (1882) 104-105.  
70 Richard Bach Jensen, ‘The international anti-anarchist conference of 1898 and the origins of Interpol’, *Journal of Contemporary History* 16 (1981) 323-347.  
71 Aristide Zolberg, ‘International migration policies in a changing world system’, in: William H. Mac Neil and Ruth S. Adams (eds), *Human migration: patterns and policies* (Bloomington 1978) 241-286, 260-265.

immigration.<sup>72</sup> Switzerland in 1862<sup>73</sup> and the Deutscher Bund in 1867<sup>74</sup>, followed the same path, applauded by the Darmstadt chamber of commerce whose representatives declared that: ‘The entrance of foreign capital, workers and brains can only ever have positive effects on the development of a country’.<sup>75</sup> By the mid 1880s however, in a context of massive proletarian migrations and economic difficulties, these liberal policies were under threat. The progressive closure of American borders is well documented.<sup>76</sup> Similar developments took place in Europe. Imperial Germany tightened border controls<sup>77</sup> and proceeded to mass expulsions. From 1885 to 1888, 30 to 40 thousand Poles were expelled from the German confederation.<sup>78</sup> Russia retaliated in 1887 with a decree commanding that foreigners managing a farm or an industrial plant in the western part of the Empire were to be expelled.<sup>79</sup> In France after 1880<sup>80</sup>, but also Belgium or Switzerland, voices demanded in parliament limitation of immigration.

Immigration became an international problem as well as an issue in national politics. Liberal principles and policies were clearly threatened. The IDI very reluctantly addressed the issue. The question of expulsion and admission of foreigners was set on the agenda of the Institute in 1885, in connexion with the discussion of extradition, following the request of Brusa, an Italian lawyer. The competence of the IDI on this matter was however dubious for a good number of its members. Pierantoni declared in Hamburg in 1891, at the opening of the session, that the Institute should not discuss matters that were not related to international law<sup>81</sup> and that any discussion of expulsion and admission of foreigners was useless anyway since ‘Every state will, as usual, get rid of foreigners when it wants to’.<sup>82</sup> He declared that he would not take part in the debates, nor vote on any proposal. Von Martens, Renault, Holland and a few other lawyers joined him. The dissidents were the lawyers most closely associated with their respective foreign affairs office and some of the

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72 David Feldman, ‘Was the nineteenth century a golden age for immigrants? Voluntary controls’, in: Fahrmeir, Faron, and Weil P (eds), *Migration control in the North Atlantic world*, 167-177.

73 Arrêté du conseil fédéral touchant la modification de l’article 32 du règlement consulaire, in: *Recueil officiel des lois et ordonnances de la confédération suisse* 7 (Bern 1863) 270.

74 John Torpey, *L’invention du passeport: Etats, citoyenneté et surveillance* (Paris 2005, first edition in English 2000) 105.

75 *Idem* 101.

76 Roger Daniels, *Guarding the Golden Door* (New York 2005).

77 Michael G. Esch, ‘Utilité, degré de civilisation, valeur biologique. Le désirable accroissement de la population allemande (1870-1945)’, in: Philippe Rygiel (ed.), *Le bon grain et l’ivraie. La sélection des migrants en Occident, 1880-1939* (Paris 2009) 37-76 first edition 2004.

78 Rogers Brubaker, *Citizenship and Nationhood in France and in Germany* (Cambridge Mas. 1992) 133.

79 Eli Nathans, *The politics of citizenship in Germany; ethnicity, utility and nationalism* (New York 2004) 124.

80 Gérard Noiriel, ‘L’immigration : naissance d’un problème (1881-1883)’, in: *L’invention de l’immigration, Agone*, 40 (2008) 15-40.

81 *Annuaire I.D.I.*, 11 (1891) 317.

82 *Idem*, 318.

dominant figures of the IDI at the beginning of the 1890s.

In 1888 and 1892, the IDI passed two resolutions on the matter at the personal initiative of Gustave Rolin-Jaequemyns and his brother Alberic Rolin. No report had been prepared for the 1888 session and the sub-committee in charge of the matter had not done any preparatory work. Rolin-Jaequemyns, the general secretary of the Institute, used the possibility given to him by the statutes of the IDI to offer to discuss a text he prepared when none was available. He had however not consulted members of the commission beforehand, nor prepared a full report, in a violation of the IDI statutes that could only be forgiven because of his personal status. The short resolution he had discussed and voted in 1888 appeared as the product of the personal initiative of a liberal lawyer shocked by recent events. Fighting for the IDI not to abandon the issue in 1891, he admitted that on this matter a resolution of the IDI could only be the expression of a moral stand and a wish meant to ‘raise public consciousness’.<sup>83</sup>

Despite its nature, the position adopted by the IDI appears quite timid. Acknowledging the fact that the right to refuse admission or expel was a ‘Logical and necessary consequence of sovereignty’<sup>84</sup> it stated that the admission could only be prohibited for ‘very serious reasons’<sup>85</sup>, that conditions of admission should be written into law and mass expulsion should only result from a sovereign act. Both should ‘respect the rights and freedom of foreigners’<sup>86</sup> as much as was compatible with the safety of the state.

If, according to the IDI, states should respect legal norms in dealing with foreigners, no judgment was made on the content of legislation, with one exception. The IDI firmly stated that ‘protection of private interests’ or ‘protection of national work’<sup>87</sup> could not be a cause for expulsion or non-admission. The fabric of international law discourse, as understood within the IDI, explains the measured wording of these texts, which strongly contrasted with the outrage expressed by some members during the debates. After the 1870s, the IDI did not condemn or evaluate states’ practices, politics or legislation. It produced resolutions that were supposed to be compatible with national laws. Opposing exclusion based on the protection of economic interest was possible because national parliaments were debating, especially in France, the possibility of legislation based on that principle, but it had nowhere been written into law yet. When some members of the IDI strongly

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83 *Idem* 319.

84 IDI Règles internationales sur l’admission et l’expulsion des étrangers, (1892) [http://www.idi-iiil.org/idiF/resolutionsF/1892\\_gen\\_01\\_fr.pdf](http://www.idi-iiil.org/idiF/resolutionsF/1892_gen_01_fr.pdf).

85 *Idem*.

86 *Idem*.

87 *Idem*.

opposed non-admission clauses based on race, and even proposed to make that position public, the proposal was rejected, after a close vote, following a decisive observation from Von Bar reminding the *Institut* that the United States had banned by law the entrance of Chinese migrants.<sup>88</sup> The opponents to racial discrimination had to be content with a final wording, offered by Fiore, an Italian lawyer, that avoided legitimating race as a legal category by stating that entrance could be denied in reason of a ‘Fundamental difference of mores or civilisation’.<sup>89</sup> Even if the questions raised at the end of the 1880s debates became even more pressing during the next two decades, the IDI would not again consider the possibility of international rules on admission or expulsion of foreigners.

From the examination of these three issues, we can specify the position of the IDI members on matters related to migrations. Their interest derived from the liberal wish to protect the rights of individuals - among them the right to freely circulate and the possibility to exercise one’s civil rights - and from political considerations. Matters pertaining to migrations could lead to conflicts between nation states.<sup>90</sup> Reaching an international agreement on some rules was a way to avoid friction between them. Combined with the particularities of its membership it meant that only some of the aspects of international mass migrations were of interest to the IDI. Despite calls, at the beginning of the twentieth century, by some Italian and French members, the leading figures of the Institute refused, or neglected, to examine issues pertaining to the pensions of foreign workers<sup>91</sup> and, more generally, to the specific socio-economic rights and situation of foreign workers, when they spent a lot of time working on the legal framework allowing merchants and investors to conduct business abroad.

In that context they pleaded for the equality of foreigners and nationals as far as civil rights were concerned, considered that legitimate asylum seekers should be given some amount of protection and insisted on the duty for immigration states to respect the natural rights of foreigners, among them migrants. They should therefore not expel them without a good and legitimate reason. These positions can appear timid, especially when considering that the rules proposed by the IDI offered the possibility for sovereign states to forget about them when public order, a very vague notion, was at stake. As some from within the IDI point out, that was stating that sovereign states should respect the rights of foreigners, especially since not doing so could be considered an offence

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88 *Annuaire abrégé IDI*, 3, 133.

89 IDI Règles internationales sur l’admission et l’expulsion des étrangers, (1892) [http://www.idi-iil.org/idiF/resolutionsF/1892\\_gen\\_01\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/1892_gen_01_fr.pdf).

90 Lars Olson, ‘Labor Migration as a prelude to World War 1’, *International Migration Review* 30:4 (1996) 875-900.

91 *Annuaire I.D.I.*, 24, (1911) 398.



Rygiel Philippe. Does International Law Matter? The Institut de Droit International and the Regulation of Migrations before the First World War. *Journal of Migration History*, Brill, 2015, 1 (1), pp.1-6. <http://www.brill.com/products/journal/journal-migration-history#related-files> . [hal-01165133](#)

to another sovereign.

These principles, upheld until 1914, were not as benign as they first sound, given the fact that equality of civil rights was not the rule in Europe in the 1870s, and that the possibility to protect political refugees was contested by some European states.

The bow to the will of the nation-state and the lavish use of the notion of public order did not mean that members of the IDI approved of the international community being made of absolutely sovereign states whose will should not be bound by supranational rules or universal moral rules. Most international lawyers however, while for some regretting it, considered that, *de facto*, the international domain was made up of Machiavellian sovereign states and tried to propose rules that stood a chance of being accepted by states as they were: unlikely to approve of conventions that would strictly bind them in matters of sovereignty.

### **Is anybody listening?**

#### *Drafts of a European order*

Evaluating the impact of the IDI's work means studying its influence on positive international law. We can conclude that, prior to 1914, the lawyers of the IDI played a major role in the development of international private law in Europe. The Hague conference on private international law was founded in 1893, at the initiative of Tobias Asser with the support of Louis Renault, Friedrich von Martens and Auguto Pierantoni.<sup>92</sup> They would represent their nation during the meetings of the conference and, drawing from the IDI's work, took a major part in the preparation of the conventions adopted in The Hague. In 1893, Louis Renault headed the commission on uniform rules for the validity of marriages. He produced a report that became a draft, following the Mancinian inspiration of the IDI.<sup>93</sup> In 1902, this text became an international convention, approved by eleven countries, among them Austria, France, Germany, Italy and the Netherlands.<sup>94</sup> In France the committee in charge of advising the government on the opportunity of the convention was headed by Lainé, an old time member of the IDI, and had Renault as a member. It concluded positively. A law therefore needed to be passed. Renault, as head of the legal branch of the French

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92 Hans van Loon, 'La conférence de La Haye de droit international privé', *Journal judiciaire de La Haye* 2 (2007) 3-13.

93 'Procès verbal numéro 5. Séance du 22 septembre 1893 », *Actes de la conférence de La Haye, chargée de régler diverses matières de droit international privé (12-27 septembre 1893)* (The Hague 1893) 33-40.

94 HCCH, Convention du 12 juin 1902 pour régler les conflits de lois en matière de mariage, [http://www.hcch.net/index\\_fr.php?act=text.display&tid=13](http://www.hcch.net/index_fr.php?act=text.display&tid=13)

Rygiel Philippe. Does International Law Matter? The Institut de Droit International and the Regulation of Migrations before the First World War. *Journal of Migration History*, Brill, 2015, 1 (1), pp.1-6. <http://www.brill.com/products/journal/journal-migration-history#related-files> . [hal-01165133](#)

foreign affairs prepared the text that would be examined by parliament and even the one justifying the necessity of such law that would ‘Introduce more safety and justice in private international relationships’.<sup>95</sup> The international lawyer was at the same time an expert, a diplomat, and a lawmaker playing with some of his counterparts a key role in the framing of an order regulating the legal consequences of the circulation of individuals within continental Europe. Six such conventions were signed in The Hague before the First World War, on divorce, marriage, civil rights of foreigners, and guardianship of minors. All of them followed the guidelines, and sometimes the project, elaborated by the institute and aimed to guarantee foreigners the possibility to exercise their rights. The influence of the IDI was of a different nature regarding issues defined as matters of public international law.

### *International lawyers as national actors*

Before the First World War no general convention on extradition, or on admission of foreigners can be found in Europe. It does not follow that the IDI or its members had no influence whatsoever on this score. Its most influential members were not independent transnational agents but representatives of their states in the international sphere and quite often, influential actors of domestic politics. We have already noticed this studying their work on extradition. The same can be said on other subjects. In France Louis Renault and his close associates, among them André Weiss, were involved in every campaign aimed at protecting foreigner’s rights and at keeping borders open. As prestigious professors at the *Faculté de droit de Paris* they supervised closely most of the law thesis on these matters. Most of these were linked to proposals being examined by Parliament and reproduced the liberal opinion of Renault, Weiss, Lainé and their collaborators.<sup>96</sup> In 1899 Bernard de Jandin, under the supervision of Louis Renault produced a very detailed study on the industry and economical activities of foreigners in France, concluding on the necessity of assimilating foreigners and nationals in the matter of economical activities, unless national safety was at stake.<sup>97</sup> He was referring to the law of nations, international treaties and parliamentary debates, quoting, illustrating and justifying the position of the minister for foreign affairs who, on several occasions, between 1884 and 1899 had to firmly oppose law proposals aiming to tax or

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95 FFAA PA AP 147.

96 Philippe Rygiel, *L’institut de droit International*, 241-254.

97 Bernard de Jandin, *Des professions que les étrangers peuvent exercer en France* (Paris 1899).

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restrict the use of foreign workers, producing on each occasion a very constant argumentation.<sup>98</sup>

These theses were not only meant to consolidate the argumentation of the French juris consults, that Jandin aimed to join and would join<sup>99</sup>, and of the successive ministers for Foreign affairs. Most of them were published and their conclusions exposed in one of the *Laboratoires de la réforme*<sup>100</sup> that multiplied in *fin de siècle* France. Louis Renault, André Weiss, Charles Lyon-Caen, personal friend of Renault, member of the IDI and juris consult for the French Ministry of Commerce, were members of the *Académie des Sciences Morales et Politiques* and of the *Société de Législation Comparée* that Lyon-Caen presided.

### *Discursive resources*

It was not only through their direct actions that members of the IDI, and other international lawyers for that matter, bore on the politics of migrations. They were prolific writers, controlling most of the international law journals of the time, but also authors of the textbooks used in law schools.<sup>101</sup> The editors of the *Journal de Droit International Privé*, of the *Revue Générale de Droit International Public*, of the *Revue pratique de Droit International Privé*, were all, at the end of the nineteenth century, members of the IDI and contributed to the propagation of the positions of its members.

The IDI, true to its statutes, according to which it was meant to propagate ‘by every possible means the principles of justice it stands for’, was also keen to reach international public opinion. Successive general secretaries of the Institute tried to get the press mention its work and positions. In 1880, Louis Clere, a young lawyer helping Alphonse Rivier with the preparation of the *Annuaire*, was pleased to announce that *Le Temps* – an elite French liberal newspaper - had, relating the Harmann case, mentioned the positions of the IDI on extradition and kept Rivier informed of dealings with other newspapers.<sup>102</sup>

The power of the liberal discursive resources the IDI produced, legitimated and propagated is of course hard to evaluate, even if we do know that local actors, at the end of the nineteenth century could and did use international law to articulate their grievances. It was by invoking international law and the freedom of commerce that, in 1879, Chinese merchants successfully, for a

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98 *Idem*, 206.

99 FFAA, Dossiers personnels. Roger Victor Bernard de Jandin.

100 Christian Topalov, *Laboratoire du nouveau siècle. La nébuleuse réformatrice et ses réseaux en France, 1880-1914* (Paris 1999).

101 André Weiss, *Manuel de droit international privé* (Paris 1909, first edition 1895).

102 Louis Clere to Alphonse Rivier, 5 mars 1880, Fond Rivier, IS 1977, bibliothèque cantonale de Lausanne.

Rygiel Philippe. Does International Law Matter? The Institut de Droit International and the Regulation of Migrations before the First World War. *Journal of Migration History*, Brill, 2015, 1 (1), pp.1-6. <http://www.brill.com/products/journal/journal-migration-history#related-files> . [hal-01165133](#)

time, challenged the restrictions on Chinese migrants imposed by Australian colonies.<sup>103</sup> Quoting Vattel they denounced the loss of ‘Human brotherhood and cosmopolitan friendship’<sup>104</sup> and of ‘The hospitality and mutual obligation guaranteed by treaties under international law.’<sup>105</sup>

## **Defeated or irrelevant?**

### *Relics of a bygone age?*

The language used by these Victorian, if Chinese, gentlemen who invoked natural law and a freedom guaranteed by international treaties between sovereigns was judged outdated by their opponents who opposed it a republican discourse of democratic self government. If, wrote one of them, ‘In aristocratic forms of governments [...] treaties may be maintained against popular wishes’, in democracies, ‘The power of the people is supreme [...] and cannot be signed away’.<sup>106</sup>

Twentieth century lawyers have passed similar judgments on nineteenth century IDI. They laboured within a theoretical legal framework that was rapidly abandoned after the First World War, a time also when some of the international agreements were denounced they painstakingly helped devise and implement. The period also saw the decline of the political forces they were usually associated with. They have been portrayed as poetically out of touch lawyers using a pre-scientific natural law language to address matters no longer relevant after the First World War. It is true that, when dealing with migrations, one would look in vain for insights on how to address the burning issues confronting western countries after the First World War, be it the refugee crisis or the strengthening of border control.

### *Liberal freedom fighters*

They were however men of their world, and of their time, engaged in political battles, they fought from positions of power. Their battlefields were amphitheatres, chancelleries, international conferences, publishing houses, and often parliaments. They had powerful allies within states’ apparatus, and among merchant and bankers. Freedom of circulation was one of their goals, for economical as well as ethical reasons. It could only be effective if properties were secure,

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103 Marylin Lake, Henry Reynolds, *Drawing the Global Colour Line. White men’s country and the International Challenge of Racial Equality* (Cambridge 2008) 28-35.

104 Kong Meng Lowe, Hong Cheong Cheok, and Ah Moy Louis, *The Chinese question in Australia* (Melbourne 1879) 5, quoted in Lake Marilyn, ‘Lowe Kong Meng Appeals to International Law: Transnational lives caught between Empire and Nation’, in: Deacon Desley, Penny Russel, and Angela Woollacott (eds), *Transnational Lives. Biographies of Global Modernity*, (New York 2010) 223-237.

105 *Idem*.

106 *Daily Evening Bulletin*, 10 April, 29 July 1878, in: Marylin Lake, Henry Reynolds, *Drawing the Global Colour Line*, 27.

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transactions safe and rights respected. It was far from being the case in Europe *circa* 1870. Following Montesquieu and generations of liberal lawyers<sup>107</sup>, they were crusaders fighting the remnants of a legal order that derived the rights of foreigners from their affiliation to the sovereign, leaving some unprotected. They planned to grant full civil rights to foreigners and devised rules ensuring that judges would know which law to apply and which court should judge. They did also provide discursive resources and legitimacy to local supporters of a liberal migratory order. Their discourses impregnated French universities, and defined the position of the French Ministry for Foreign Affairs undisputed, and until 1914, victorious champion of migratory liberalism.

### *On the defensive*

Most Scandinavian or English speaking countries never accepted the solutions devised by the IDI . The legal order they defined was *de facto* the right of an *Union juridique latine*, that could not survive the First World War and the strong national backlash that came with it. Their legal constructs were valid as long as states were ready to endorse them. They were well aware of that fact and found themselves on the defensive after the mid 1880s. The intensification of proletarian mass migrations, the extension of suffrage, diplomatic tensions that made transterritorial affiliations suspect<sup>108</sup>, led to the birth of immigration as a political issue. At the same time powerful actors having a vested interest in the easy circulation of labour demanded access to transnational pools of labour, sometimes asking the state to protect their interests.<sup>109</sup> The legal translation of these dynamics was in western Europe a new legal figure, the foreign worker, whose labour was deemed necessary but whose presence should be politically and socially innocuous.

The lawyers of the IDI, as a group, were not well equipped to deal with this new context, which clashed with their ethical liberalism, with strong religious undertones. The most pragmatic of them could only conclude that states intended to define on their own terms border crossing and the legal status of foreign workers, forbidding the implementation of universal norms. Furthermore the traditional tools of international law, devising reciprocal obligations, were no use in this context. Asymmetry of positions became the rule, since states tended to define their position according to their place in the international division of labour. Since the IDI as a body was deeply hostile to

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107 Peter Sahlins, 'The Eighteenth-Century Citizenship Revolution in France', in: Fahrmeir et al., *Migration Control*, 11-25, 15-18.

108 Christopher Alan Bayly, *La naissance du monde moderne (1780-1914)* (Paris 2007, first edition 2004) 404,

109 Caroline Douki, 'Entre discipline manufacturière, contrôle sexué et protection des femmes. Recrutement, encadrement et protection des jeunes migrantes italiennes vers les usines textiles européennes (France, Suisse, Allemagne) au début du XXe siècle', *Migrations Société* 22:127 (2010) 87-120.

Rygiel Philippe. Does International Law Matter? The Institut de Droit International and the Regulation of Migrations before the First World War. *Journal of Migration History*, Brill, 2015, 1 (1), pp.1-6. <http://www.brill.com/products/journal/journal-migration-history#related-files> . [hal-01165133](#)

organised labour, and wary of Catholicism as a political force, it could not before the First World War join other international networks engaged in the development of an international organisation of labour migrations.<sup>110</sup> This was all the more so because the IDI was an elite body, whose members tended to define responsible scientists and merchants as the human types whose circulation linked nations together and brought prosperity to all.

Even when defeated or unheard however the IDI lawyers were useful to us. By training and by function sharp analysts of pan-European legal trends they helped us identify their shifts. They also shed some light on what ‘precisely went on’ during the ‘liberal period’.<sup>111</sup> They tell us that, when migrations were concerned, liberalism was not the lack of a policy.

Freedom of circulation, that entailed recognising the foreigner as a subject of law, was part of a liberal program organising ‘*le commerce entre les nations*’ and ensuring peace, prosperity and the progress of civilisation. It was promoted by agents acting both within the confine of states and on the international scene, who had skills, influence and resources and were instrumental in enshrining this liberal *credo* into international treaties and conventions as well as national legislations. The ideological and political power of these supporters of a liberal regime of circulation was, from the mid 1880s onwards strongly contested. Their strong commitment to liberal values faltered when they were confronted with the growth of an international labour movement and the anarchist crisis. They remained however constant and influential enough in Europe to promote, at the beginning of the twentieth century, international agreements facilitating international mobility and to resist, except to a certain extent in Germany, attempts at implementing restrictive migration policies, strongly advocated by emerging political forces.

Looking at the birth of immigration politics in European countries through the eyes powerfull actors who opposed the very idea of restrictive immigration policies also allows us to show that these developments were, even then, enmeshed in transnational politics of circulation and mobility whose actors were often present on both international and national scenes.

The emerging international discussions on proletarian migrations of the late nineteenth century can samely, in that light, be seen as directly connected too a much older international conversation on circulation between western states, that did not separate human mobility from trade

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110 Caroline Douki, David Feldman, and Paul André Rosental, ‘Pour une histoire relationnelle du ministère du travail en France, en Italie et au Royaume-Uni dans l’entre-deux-guerres: le transnational, le bilatéral et l’interministériel en matière de politique migratoire’, in: Alain Chatriot, Odile Join-Lambert, Vincent Viet, *Les politiques du travail (1906-2006). Acteurs, institutions, réseaux* (Rennes 2006) 143-159, 144.

111 Andreas Fahrmeir, ‘Law and Practice. Problems in researching the history of migration controls’, in: Fahrmeir and all, *Migration control*, 301-315, 302.

Rygiel Philippe. Does International Law Matter? The Institut de Droit International and the Regulation of Migrations before the First World War. *Journal of Migration History*, Brill, 2015, 1 (1), pp.1-6. <http://www.brill.com/products/journal/journal-migration-history#related-files> . [hal-01165133](#)

and communication.

Notwithstanding the interest of their work, taking the IDI lawyers as our guides imposes some limitations on our conclusions. The order they tried to build was relevant only so far as migrations within the Atlantic world were concerned and efficient only within continental Europe. That was only one of the migratory systems of the time. The British world<sup>112</sup>, the transpacific stage<sup>113</sup> can also be considered semi-autonomous migratory systems and Latin-America lawyers were busy from the 1870s organising a regional legal regime defining the rights of foreigners and the prerogative of states.<sup>114</sup>

We can point out connexions between actors appearing on these different stages. Some members of the IDI were members of the rival International Law Institute and Carlos Calvo<sup>115</sup>, one of the leading Latin-American lawyers of the time was a long time member of the IDI. Not having explored systematically these connexions probably leads to overemphasising the autonomy of a European legal regime.

We also took as a starting point the founding of the IDI, when in these matters it prolongs a very old liberal tradition that intended to ensure prosperity by ‘dismantling barriers to bourgeois activity in commerce and industry’<sup>116</sup> and forget here that the IDI was not the only place where matters pertaining to rights of foreigners and migrations were discussed at the time in a European, or larger, context. The Catholic Church<sup>117</sup>, and the International Socialist were also actors, left here in the shadow, of the history of the birth of international politics of migration in Europe, still yet to be written.

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112 Erich Richards, *Britannia's children: Emigration from England, Scotland, Wales and Ireland since 1600*, (London/New-York 2004).

113 Adam Mc Keown, *Melancholy order: Asian migration and the globalization of borders* (New York 2008).

114 Boris Nolde, ‘La codification du droit international privé’, *Recueil de l’académie de droit international privé* 55, (1936) 301-432. 354.

115 Limantour Jose Yves, *Notice sur la vie et les travaux de Carlos Calvo, lue dans la séance du 17 juillet 1909* (Paris 1909).

116 Max Horkeimer, *Les débuts de la philosophie bourgeoise* (Paris 2010, first edition 1930) 25.

117 Gianfausto Rosoli, and Gabriele De Rosa (eds), *Scalabrini tra vecchio e nuovo mondo: atti del Convegno storico internazionale (Piacenza, 3-5 dicembre 1987)* (Roma 1989).