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Through a Glass, Darkly: Reflections on James Lorimer's International Law

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Abstract

This article introduces a symposium wherein four well-known scholars reflect upon the work of James Lorimer, the 19th-century Scottish jurist. The articles, by Martti Koskenniemi, Karen Knop, Stephen Neff and Gerry Simpson, emerge from a seminar organized by the Edinburgh Centre for Constitutional Law to mark the anniversary of Lorimer's election in 1862 to the Regius Chair in Public Law and the Law of Nature and Nations at the University of Edinburgh, a post he held until his death in 1890. The degree of influence that Lorimer had on the development of international law in this crucial period of European expansion, and the lingering impact of his work on contemporary international law theory and practice, have never before been subjected to systematic academic analysis in a collection of this kind.

In the following symposium, four well-known scholars reflect upon the work of James Lorimer, the 19th-century Scottish jurist. During the period of European empire building, as international law developed the coherence of a modern academic discipline, Lorimer published two seminal books: *The Institutes of Law: A Treatise of the Principles of Jurisprudence as Determined by Nature* (1880) and *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (1883).[1] He was also one of the founders of the *Institut de Droit International* in 1873, playing an instrumental role not only in the conceptual development of international law but also in the first steps to institutionalize it as a regulatory system of inter-state relations.[2]

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1 J. Lorimer, *Institutes of Law: A Treatise of Jurisprudence as Determined by Nature*, 2 vols (1880); J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (1883).

2 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at ch. 1–2; Knop's article in this symposium, 'Lorimer's Private Citizens of the World', at 447.

The articles emerge from a seminar organized by the Edinburgh Centre for Constitutional Law to mark the anniversary of Lorimer's election in 1862 to the Regius Chair in Public Law and the Law of Nature and Nations at the University of Edinburgh, a post he held until his death in 1890. The degree of influence that Lorimer had on the development of international law in this crucial period of European expansion and the lingering impact of his work on contemporary international law theory and practice have never before been subjected to systematic academic analysis in a collection of this kind. And rather than simply addressing Lorimer as an exercise in intellectual history, the present project reflects upon Lorimer's work and the time in which it is situated to cast light on the later trajectory of international law and, in particular, upon the legacy of 19th-century developments for our time. When reading the articles, it is indeed apparent how many of the rules, principles, preconceptions and, indeed, prejudices of international law thought and practice have been distilled from the imperial origins of the discipline that Lorimer set out to articulate and indeed to shape. Despite the significance of his involvement in this early period, recent scholarship in international law has served to highlight how Lorimer's work is characterized by the same attitudes towards race, and the civilized/uncivilized distinction among peoples, that informed the ideology of the European and North American imperial powers.[3] Therefore, it is Lorimer's role both as pioneer of the idea of international organization and as apologist for imperialism, an ambiguity that is itself characteristic of the 'illusory' 19th century,[4] that we set out to explore in this collection.

The symposium opens with Martti Koskenniemi's article, which offers the hardest-hitting critique of Lorimer, focusing as it does upon Lorimer's 'deeply racist views of human communities', which Gerry Simpson also notes are extreme even by the standards of the day. As Koskenniemi tells us, Lorimer had a hierarchical view of humans and of human societies; the status that states enjoy depends for Lorimer upon the quality of the race that inhabits them. Koskenniemi focuses upon the broader importance of hierarchies in law for Lorimer and the special legal significance of race and racial qualities that underpin his very idea of statehood as a 'racial category'. Although he was a natural lawyer, his natural law informed a closeted idea of 'natural' hierarchy and rank, not liberal equality, and his intellectual contribution was thus narrow and mediocre just as his racism was 'stunningly open'.

In light of Koskenniemi's excoriating critique of Lorimer, Simpson's article is perhaps the most unsettling, highlighting how Lorimer's attitudes on the hierarchy of states and peoples continue to be reflected in the imbalances of legally codified power in our own time. Simpson's is a deeply personal account of how Lorimer's work has influenced his own legal study. Simpson's Scottishness, he feels, gives him a particular

[3] Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999) 1; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 75. For other references, see Knop's article in this volume, *supra note* 2, at n. 10.

[4] Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', 65 *Nordic Journal of International Law* (1996) 385.

insight into the psychology of his subject, and, in this context, he uses Lorimer as a mirror for our own time, particularly in the preparedness of international law to invent categorizations for excluded states, pathologized by Lorimer as 'savage' and by the contemporary language of marginalization as 'failed'. Race has ostensibly disappeared as a scale upon which the relative authority and moral currency of states is valued, but as Simpson's wider work shows,[5] the notion of hierarchy is embedded not only in the relative economic and strategic power of states but also in the institutional ordering of international law through doctrine and practice. For Simpson, 'relations between the civilised and uncivilised are the paradigm case in international society'.

Karen Knop also alludes to the continuing relevance of Lorimer who is widely read today 'for his vices, not his virtues' in the context of the contemporary 'powerful states debate'. Her focus is upon the relationship between public and private in international law. Addressing Lorimer's natural law orientation, Knop takes up the idea of the *jura privata*, the notion of people as private citizens of the world. This is a status that Lorimer derives from our generic humanity rather than from the specific attribute of state citizenship. Knop traces the ways in which Lorimer unites private and public personae in some kind of cosmopolitan conception of humanity. This raises the question of whether Lorimer prefigures – as Stephen Neff seems to suggest – the legal recognition of the individual as rights bearer, anticipating the emergence of the person as a discrete subject of international law, in itself a move that would prove to be a signal development of the next century. Notably, Knop's account, although curious about the way in which the private person is treated by Lorimer, also adopts a similar critique to that offered by Koskenniemi and clearly does not intend to pitch him as prescient or modern. Rather, she seeks to use Lorimer's account of the individual to explore a largely forgotten conception of the private law of states.

Knop draws out a double-edged persona that emerges from Lorimer's conception of individual subjecthood itself and, in doing so, addresses the shifting treatment of the individual through international legal history. She not only contends that there is no systematic treatment of individuals in Lorimer's *The Institutes of the Law of Nations* but also seeks at the same time to 'dislodge the textbook stories of the individual as an emerging subject of international law'. Nonetheless, she is interested in what she calls the idea of 'private citizens of the world' in Lorimer's work, deploying this as a 'legal fiction' or 'thought experiment about contemporary public international law'. Lorimer's cosmopolitan vision of the privileged individual is for Knop the one that has better survived today, making visible to public international lawyers 'how private citizens of the world have outpaced citizens of humanity as international legal persons'. The notion of the individual as a cosmopolitan citizen with a portmanteau of transportable rights and responsibilities may be present in Lorimer, but, as Knop crucially reminds us, it is so with a vital caveat. The public and private 'rights' of the individual are inherently contingent upon one's status as a national of a civilized, as opposed to a barbarous or savage, state, according to a three-way classification deployed by

[5] G. Simpson, *Great Powers and Outlaw States Unequal Sovereigns in the International Legal Order* (2004).

Lorimer to categorize the relative development of states. And while Knop retrieves the modernity of Lorimer's work, and later Stephen Neff addresses its path-breaking role in conceptualizing and articulating some of the key tensions in international law theory that continue to vex theorists and practitioners today, this last reference by Knop to the category of civilized states points to a darker side of his work, described also by Gerry Simpson as 'sinister'.

Stephen Neff's article alights on the interconnections between Lorimer's writings and the contemporary framework of international law. He, like Knop, also addresses Lorimer's consideration of the relationship between public and private in international law. Neff argues that Lorimer, while not by temperament a modernist, can be seen as a modern figure for 'the high status that he accorded to individuals in international law'. In this sense, he identifies Lorimer, as does Gerry Simpson in his article, as something of a maverick – a 'heretic' from the mainstream positivist outlook of the day with its 'obsessive focus on the independence of states from one another'. Instead, Lorimer gives us an account of international law that, in focusing on the status of the individual as well as the state and upon the interplay between, rather than a strict segregation of, the notions of public and private in international affairs, acts as a facilitator of transnational inter-dependence. This emphasis on boundaries as connecting points as much as containers is another conceptual move that resonates in today's world of intensifying normative and institutional pluralism, where the complex matrix of legal relationships beyond the state has become a prominent feature of recent academic accounts.[6]

A second way in which Neff considers Lorimer to be modern is in his support for international organization. Neff's angle of approach is interesting. He focuses upon Lorimer's account of the regulation of warfare – in particular, just-war thought and the principles governing neutrality – as the contextual setting for his reflections on Lorimer's broader desire for a more systematic global regulatory framework. As the United Nations, and the economic, financial and human rights regulatory regimes that it has produced, continue to expand their normative reach and depth, it is instructive to recall that it was war and its prevention that were the catalysts for the institutional orders established in 1946 – just as they were in 1919 – a development anticipated and desired by 19th-century jurists. Neff draws out in detail some of the ideas Lorimer had – for example, on neutrality – that would in turn be elaborated upon in the 20th-century moves towards international governance and stresses how the maintenance of peace was the overwhelming imperative of these initiatives.

Lorimer emerges from these accounts as an outlier even in his own time. His intellectual eccentricity, unfashionable natural law philosophy (as Neff concludes, in the end 'the future belonged more to the empiricists than to the scholastics') and pernicious social attitudes, make the excavation of his work a challenging task. Debate

[6] See, among many, N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010); N. Walker, J. Shaw and S. Tierney, *Europe's Constitutional Mosaic* (2012); G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012); V.M. Muniz-Fraticelli, *The Structure of Pluralism: On the Authority of* Associations (2014); N. Walker, *Intimations of Global Law* (2015).

will also continue over the range of Lorimer's influence. His efforts to systematize by way of natural law reason the emerging system of international law were doomed to fail, at least at the level of practice, in which a messy and ad hoc system developed over time. However, there are still areas where Lorimer was remarkably prescient: in relation to humanitarian law, the emergence of the individual as a discrete subject of international law and in predicting the development of systematic models of institutional regulation. Even today, much of international law remains built upon implicit assumptions of moral hierarchy, a fact that causes contemporary practitioners and scholars considerable disquiet. This leaves us with the disconcerting reminder that just as yesterday's heresy can become today's orthodoxy, so too can today's moral certainty, through the unforgiving retrospect of history, collapse into tomorrow's prejudice.