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# *Race, Hierarchy and International Law: Lorimer's Legal Science*

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## Abstract

*The international lawyers of the late 19th century – the 'Gentle Civilizers' – had no doubt about the superiority of European culture over alternative ways of life and regularly supported the imperial ventures of their countries. While most of them were liberals of one or another sort, the Scotsman James Lorimer espoused an openly racist ideology. This article examines Lorimer's hierarchical view of human communities as an indispensable aspect of his international law.*

> Wealth of a State furnishes the best and perhaps the only means available for international purposes, of estimating the moral and intellectual qualities of its citizens.
>
> J. Lorimer, *The Institutes of the Law of Nations* (1883)

This striking sentence illustrates the idiosyncratic character of James Lorimer's (1818–1890) conception of international law. Lorimer must have been aware of the special nature of the kind of law of nations he was putting forward. He made no effort to examine its links with prior traditions. Although an enthusiastic member of the newly established *Institut de droit international*, his references to older proponents of the law of nations such as Grotius, Wolff, Vattel, Martens and Wheaton were sparse and mainly critical. He certainly did not wish to portray himself as continuing the tradition they represented.[1] In addition, the language he chose to use to discuss the basic doctrines and institutions of the law of nations was out of the ordinary. The 'de facto principle', the key role of recognition in the law, the distinctions between 'normal and

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1 Lorimer did appreciate the 16th-century Spanish scholastics. But Grotius and Pufendorf were creating a divorce between international law and ethics. Moreover, he regarded the work of Wolff and Vattel as part of the rising tide of 'empiricism'. J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, 2 vols (1883), vol. 1, at 78.

abnormal' as well as 'jural and anti-jural relations' point to a rather special way of conceiving and representing the law of nations. In various ways, they emanate from his hierarchical and deeply racist view of human communities. This view is the subject of the present article.

In discussing what Lorimer called the 'jural relations of separate communities', one might in principle commence by suggesting that he was a natural lawyer who was very critical of the different versions of positivism – utilitarianism, empiricism and voluntarism – and that his concern was to emphasize the role of ethics as the heart of the law. This would not be wholly wrong. Following his teacher, Sir William Hamilton, representative of the last generation of the 'Scottish philosophers', Lorimer rejected the view that utility, or empirical fact, what he called the 'proximate will' of individuals or groups, might constitute the foundation of legal rights and duties. He was looking for a deeper reason or an ethos behind the arbitrariness of the legislative will on which to hook the 'institutes of the law of nations'. Starting in this way, however, it would be impossible to highlight the radical character of his views concerning the relations between ethnic and political communities – the way in which what he was putting forward differed from what most of his contemporaries were thinking – or at least what they were saying – about the nature and future of international law.

Almost every jurist writing in the last half of the 19th century, and certainly most members of the *Institut*, were overt or covert natural lawyers. Their naturalism was part of a political project to advance the cause of liberal legislation, democracy and economic and technological modernity in Europe and the colonies.[2] However, Lorimer was no liberal. He was a conservative. He was also an elitist and a racist. Some of his 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. His naturalism – the deeper centre of law that he was looking for – embodied a hierarchical view of races, states and individuals. This hierarchy was also visible on the surface of human society, as the epigraph to this article suggests. Wealth and power were indications of moral virtue. This was difficult to align with what most of his colleagues in the *Institut de droit international* were saying, although it was perhaps not that alien to the general consciousness of late 19th-century Europe's elites, to whom racism, including racist pseudoscience, as Peter Gay has observed, proved 'an immensely serviceable alibi for aggression'.[3]

In Lorimer's case, this aggression was against everything he saw threatening to European high culture – not only the workers and the poor but also Turks, Africans and, with the greatest vehemence, members of what he called the 'Semitic races', the Arabs and (especially) the Jews. Thus, I do not think it right to depict Lorimer as the leading naturalist philosopher in the incipient international law profession. His philosophizing was neither deep nor original. Like Hamilton, he was impressed by German idealist thought, and his theorizing focused on the relation between the

[2] I have dealt with this *in extenso* in M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002).

[3] See P. Gay, *The Bourgeois Experience: Victoria to Freud*, vol. 3: *The Cultivation of Hatred* (1993), at 68, 68–95.

mind and the world that he translated into his awkward theory about the connection between recognition and the de facto principle.[4] I read Lorimer as a conservative ideologist, perhaps an 'organic intellectual', who gave voice to sentiments widely shared in Europe at the time but rarely expressed as bluntly as he does. This article will focus on three aspects of his doctrine of international law: (i) the de facto principle and the doctrine of recognition; (ii) the importance of hierarchies in law in general and (iii) the special legal significance of race.

## 1 The De Facto Principle and the Doctrine of Recognition

For Lorimer, as for conservative thinkers generally, law is (or ought to be) a reflection of 'deeper' social realities. His writing is peppered with critical remarks on the illusionary character of a law that fails in this respect. The fiction of legal equality, for example, which European states declared between themselves and Turkey at the close of the Crimean War in 1856, was both meaningless and counterproductive. It did not turn Turkey into a civilized state. The parts of the Paris Treaty that affirmed the permanent blockade of Russia in the Black Sea ignored the changing facts, especially the rise of Russian power, and thus constituted a predictable failure. Law failed because it departed from an accurate understanding of the real nature of the communities that were part of the arrangement.[5] The search for the fact underlying the law did not, however, signify empiricism or sensualism. On the contrary, Lorimer rejected much of what early Scottish philosophers such as David Hume or Francis Hutcheson had put forward. A legal theory that examined only the empirical surface of the facts without penetrating their (ideal) essence was meaningless: 'It is only when the necessary law is lost sight of in its concrete manifestations, that empiricism, utilitarianism and the like, degenerate into mere objectless groping among lifeless facts and life-destroying fictions.'[6] Jurists must be separated both from 'chroniclers and party-politicians'. Among the latter, he counted the American Henry Wheaton (1785–1842), the author of the very widely read *Elements of International Law* (1842), whom he dismissed not only as a 'chronicler' but also as an 'advocate of American interests and prejudices'.[7]

The ideology of equality – Lorimer's favourite target – for example, was founded on the empirical error of thinking that because some individuals or states may look superficially similar to other individuals or states they ought to be treated alike. But a more careful scrutiny will show that individuals and states have a different value and that we can understand and deal with them only once that value has been articulated. When we have dealt with individuals in society, we routinely pay regard to their moral

4 On Hamilton, see Graham, 'The Nineteenth-Century Aftermath', in A. Broadie (ed.), *The Cambridge Companion to Scottish Enlightenment* (2003) 338, at 344.

5 Lorimer, *supra* note 1, vol. 1, at 40–41, 44–50, 123, 176–177.

6 *Ibid.*, at 83.

7 *Ibid.*, at 84. By contrast, he regarded Johann Caspar Bluntschli, perhaps the most important of the early German members of the *Institut de droit international*, in a kind of backhanded compliment as 'a philosopher and a theologian'.

qualities. Why not act in the same way with states? Think of customary law. No custom is authoritative merely because it has existed for a long time. There are both good and bad customs, and it is the task of jurisprudence to discriminate among them. It is the same with individuals, whether natural ones or such conglomerates as states. Legal science ought to penetrate beyond their superficial similarities so as to bring to light their inner and true value – whether they are good or bad.[8] It was the task of Lorimer's 'de facto principle' to penetrate the surface of things and, thus, enable such discriminations.

The principle was bound up with Lorimer's scientism. The law of nations, he wrote, 'is rather a branch of scientific inquiry than a discovered system'.[9] On the other hand, he recognized that in this respect, international law left much to be desired; it was still 'the least developed branch of the whole science of jurisprudence'. There still persisted 'conflicting opinions' about its nature and content even among the best experts. Hence, more work was needed to analyse the world that it sought to deal with. If its objects, and the necessary character of the corresponding doctrines, were admitted, it was obvious that as soon as the contingent circumstances of separate communities became known, the necessary, but still general, doctrines could be converted into special doctrines or, in other words, into a system of definite rules of international conduct. These definite rules would not be invariable certainly, but they would be variable only to the extent to which the circumstances varied.[10]

In other words, we must know the facts – the 'contingent circumstances' of states – in order to know which rules ought to govern their conduct. Knowing these facts would mean situating them in a larger frame of understanding, which would inform the scientific jurist of the special value of each state. Only this process, Lorimer argued, would make it possible to really understand the nature of international relations and, hence, to predict also the course of international events. Like modern social scientists, Lorimer regarded the task of scientific jurisprudence as helping diplomacy by 'ascertaining the direction in which forces will act'.[11] This idea founded his doctrine of 'relative recognition', which distinguished even formal states – that is to say, states that had otherwise been accorded plenary recognition – by reference to their inner qualities.[12] Once this inner quality was known, it would be possible to predict with more accuracy how international events in which this entity was involved would develop. Had Turkey's and Russia's quality been correctly assessed, it would have been possible to predict that the Black Sea arrangement of 1856 would not be able to hold. Departing from the fiction of equality, Lorimer explained, meant ascertaining the intellectual elements of state power somewhat similarly to how economic analysts would ascertain the future of corporations by reference to shareholder power.[13]

[8] *Ibid.*, at 36.
[9] *Ibid.*, at 26.
[10] *Ibid.*, at 20.
[11] *Ibid.*, at 181.
[12] For, as I will explain below, not every human community was entitled to 'plenary recognition'. It all depended on the level of civilization the community had reached. 'Relative recognition' operated between communities that filled the civilizational criterion but, otherwise, had different 'value'.
[13] Lorimer, *supra* note 1, vol. 1, at 179, 189–190.

This view has little in common with what other international lawyers – John Westlake, Travers Twiss or William Edward Hall in England, for example – were saying at the time. It resembled the theory of the reason of states of the late 16th and early 17th centuries or the incipient empirical social science (*Staatswissenschaft*) spreading through German universities in the 18th century, disciplines that insisted that each state needed to develop its policy on the basis of a careful assessment of its situation – its history, resources and relation to its neighbours above all.[14] When this theory was put forward in works such as Giovanni Botero's *Ragione di Stato* (1589) or Gottfried Achenwall's *Staatsklugheit* (1761), its attractiveness to the ruling elites was based precisely on the suggestion that it would be able to produce scientifically accurate predictions of changes in a state's foreign policy environment.[15]

Something like this theory was also articulated in the long preliminary essay to Abbé de Mably's *Droit public de l'Europe* (1757). Once you receive a grasp of the real facts, including the real interests and relative power of each state, only then are you able to determine the proper policy it should follow. In Mably, too, this was part of an effort to develop a science – the 'science of European public law', as Mably called it, that would offer for the princes fact-based statements about the international world.[16] However, Lorimer was not really a diplomatic theorist. He was an armchair thinker – a philosopher-jurist, as one of his friends, the Belgian Ernest Nys, called him.[17] This did not prevent him from putting forward a proposal for international government, in which context he also engaged in a polemic with his colleagues at the *Institut de droit international*. When he wrote that the law of nations for a state is 'coextensive with national development',[18] he meant this in part as an analysis of the conditions of international law and policy and in part as a guide for organizing the future international government by realistically taking into account the different capacities of different states and other human communities.

Lorimer's de facto principle was the opposite of the rule approach of his English colleagues. When Albéric Rolin wrote in his memoir of the founding of the *Institut de droit international* that Lorimer '*était loin de partager complètement les opinions de son collègue eminent de Cambridge* [Westlake]', he probably meant that they came from opposite political sides but may have also indicated that their views of international law were completely different.[19] When Lorimer noted that jurists must acknowledge the '[e]xceptional dependence of international law on the law of nature'[20] and invited them to examine the facts as expressions of an underlying rationality, Westlake would have found this legally nonsensical. A liberal reformist, teaching at nights in the Working

[14] A good overview of these traditions is H. Münkler, *Im Namen des Staates: Die begründung der Staatsraison in der Frühen Neuzeit* (1987).

[15] G. Botero, *The Reason of State* (1956); G. Achenwall, *Die Staatsklugheit nach ihren ersten Grundsätzen* (1761).

[16] G. Bonnot de Mably, *Principes de négociations pour servir d'introduction au droit public de l'Europe* (2001).

[17] Nys, 'James Lorimer', 11 *Annuaire de l'Institut de droit international* (1889–1892) 66.

[18] Lorimer, *supra* note 1, vol. 1, at 12.

[19] A. Rolin, *Les origines de l'Institut de droit international* (nd), at 38.

[20] Lorimer, *supra* note 1, vol. 1, at 22.

Men's College in London, Westlake would hardly have appreciated Lorimer's celebration of inherited differences of class.

What is, is also proof of what should be, Lorimer would argue, but only once that something (that which 'is') is organized in scientific categories possessed by superior minds. Europe ruled the world, and this was because of the superiority of what Lorimer called the Aryan races and the European state form. Positive law was important above all because it was declaratory of something really 'real': '[T]here can be no more two positive laws than there can be two straight lines between the same points.'[21] This applied also to treaties between nations. Some treaties create law, while others do not, depending on the extent to which they reflect the underlying hierarchy of values. In treaties with Napoleon, for example, 'not a single permanent law of international life was disclosed or vindicated'.[22] On the other hand, some treaties such as Westphalia 'brought law into harmony with facts'.[23]

The philosophical problem of the relations between the world and the mind was translated by Lorimer into a relationship between his de facto principle and the doctrine of recognition. Facts do not, as it were, declare their own value. They must be taken cognizance of and then be recognized as expressions of some essence or tendency by external authority, namely by other states. Such recognition cannot, however, just express an opinion on some fact but must be carried out in a scientific fashion. In the recognition of states, for example, 'the de facto existence of the nation being given … its de jure recognition by other states becomes a right inherent in it, and a duty incumbent upon them'.[24] However, effects of the absence of centralized recognition were to be mitigated by science, including by the way reciprocity – 'reciprocal will' – operates in the absence of international law institutions.[25] A key moment in the institution of recognition was when cognizance is taken of the emergence of an independent state. This may involve intermediate states, gradual development and secession.[26] Recognition of belligerency, for example, was an early state in the secession of an entity, possibly followed by the adoption of the standpoint of neutrality by other states. But only once the new entity consolidates itself as externally independent may it be granted full recognition.[27]

Lorimer's interest in racial generalization also led him to speculate on what he called inter-ethnic recognition – the way some entity's existence as an ethnic group is recognized as a fact that determines some of the rules to be applied to it. I will come back to this idea later in this text. Inter-ethnic recognition was an aspect of Lorimer's interest in collective procedures such the Concert of Europe. Like Hersch Lauterpacht half a century later, Lorimer would associate the duty to recognize with the hope that the

[21] *Ibid.*, at 16.
[22] *Ibid.*, at 39.
[23] *Ibid.*, at 40.
[24] *Ibid.*, at 24.
[25] *Ibid.*, at 109–110.
[26] *Ibid.*, at 141.
[27] *Ibid.*, at 139–154.

process would in due course be made to operate in an institutionalized way. The final problem of jurisprudence – as Lorimer termed it – was the question of how to attain an international organization that would fulfil both of international law's essential tasks, namely the 'realisation of the freedom of separate nations', on the one hand, and the 'necessary interdependence' and 'inevitable solidarity of … interests', on the other. Of course, he rejected Johann Bluntschli's (and Immanuel Kant's) suggestion of the '*republicanisierung Europas*' as politically (or as he would say, scientifically) unacceptable. In his own surprisingly widely appreciated proposal, he would allocate the function of recognition to the international institution but preserve the internal government of states intact.[28]

## 2 Hierarchical Thinking

Lorimer was anything but a republican or a democrat. He believed democracy to be a dangerous form of government that would lead to class rule; and class rule was unable to grasp the inner essence of the state. If 'opinion' had a role to play as a 'proximate source of positive law', this role belonged to what he called 'ripe opinion', not to some uneducated whim of the masses. Such an opinion could even turn into custom, and it was the '[f]unction of scientific jurist … to influence consuetude by moulding opinion'.[29] Here, it was necessary to make a distinction between what he called 'societies with a high moral tone' and others. Only opinion cultivated in the former group possessed evidentiary value and should be legally taken into account. In *The Institutes of Law*, he enlisted general jurisprudence against the studies of primitive culture that were spreading with developmental anthropology at the time, '[f]or our purposes, the single life of Socrates is of greater value than the whole existence of the Negro race'.[30] However, because the interpreters of this highly moral opinion also varied – Lorimer lamented the great conflict of opinions in civilized states – it was the task of the scientific jurists to 'bring public opinion in harmony with reason' – that is, to make the public understand the necessary interdependence and solidarity that reigned between civilized states.[31]

Lorimer shared the commonsense assumption of the period that posited three levels of human society and, accordingly, three types of recognition. There were civilized, barbarian and savage nations to which corresponded three types of recognition: plenary, partial and purely human recognition. The names largely indicate their sense. The highest level comprised the civilized societies – that is to say, European societies and European settlement colonies entitled to full recognition of their identity as independent political communities and carriers of all of the accompanying rights and obligations. The second level comprised the great Asian states – China, Japan, Siam

[28] *Ibid.*, vol. 2, at 271–273.
[29] *Ibid.*, vol. 1, at 87.
[30] J. Lorimer, *Institutes of Law: A Treatise of Jurisprudence as Determined by Nature* (1880), at 53.
[31] Lorimer, *supra* note 1, vol. 1, at 88–90.

and, to an extent, Turkey. They were entitled to a kind of functional recognition.[32] On the basis of an assessment of their development in a particular regard, international law could be applied to them. There was no point in applying the law of nations to savages. They could benefit from only purely human recognition.[33]

However, Lorimer assumed that civilized nations also sometimes developed in 'antijural' ways so that their rational will found no political expression. This could take place in many ways, such as when an intolerant monarchy emerged that replaced law with the whim of its ruler – for example, Napoleon. Another example of a civilized state developing along an 'antijural' path was France in 1793 – a situation when a state, as Lorimer put it 'loses control of its citizens'.[34] When the rational will is overthrown – more recently, in the case of the Paris Commune of 1871 – the neighbouring states will then have to decide what to do with the matter and whether or not to begin military operations. A bar to recognition may also exist when the government is incapable of expressing the state's rational will, as was the case with the absolute monarchy of Louis XIV, and absolute democracy would be another example. In these cases, the rational will of the nation cannot find any expression at all. Only the view of absolute equality sustains such an idea, but absolute equality, Lorimer insisted, was a pure fiction that had no legal sense whatsoever.[35] The nation was the product of its superior classes and, even there, only the supreme men of those superior classes counted in the evaluation of the nation.

Alongside the recognition of statehood, there was a need for relative recognition or, in other words, to give effect to the hierarchies between states that were otherwise granted plenary recognition, just as the worth of individuals was to be taken into account in domestic society. In assessing the value of states, four types of criteria were to be taken into account: (i) its size; (ii) its 'quality'; (iii) its state form and (iv) the form of its government. Lorimer disagreed with such German jurists as August Heffter, Johann Klüber, and Bluntschli who all endorsed the doctrine of the equality of states. States were different, and this difference must play a role in their influence on international law. The size of the state operated in relatively straightforward ways. But size was not all. It was above all the 'content of the State or the quality of the materials of which it is composed' that determined relative recognition – qualities such as 'industry, frugality, energy, ingenuity, and martial spirit'.[36]

Moreover, a state's prosperity was a predominant criterion for assessing its 'value'. For 'wealth is the result of the moral and intellectual qualities of the population as much as, if not more, than of the physical means at their disposal'.[37] The richer a country, the wiser and the better it is; the poorer, the more stupid and depraved.

[32] *Ibid.*, at 101–102; Lorimer, 'La doctrine de la reconnaissance: Fondement du droit international', 16 *Revue de droit international et de législation comparée* (1884) 335.
[33] Lorimer, *supra* note 1, vol. 1, at 103.
[34] *Ibid.*, at 132.
[35] *Ibid.*, at 166–167.
[36] *Ibid.*, at 185–186.
[37] *Ibid.*, at 185.

Lorimer's favourite examples were Belgium and Holland – no doubt, the fact that they had so many international lawyers was proof of their moral and intellectual weight.[38] In addition to wealth, account was to be taken of whether the state was 'progressive, stationary or retrogressive' – after all, as Lorimer disarmingly suggested, 'inherited wealth is not the same guarantee for the qualities we have mentioned as acquired wealth, either in a State or a man'. [39] The de facto principle would apply: moral superiority may be deduced from the fact of wealth, while moral deprivation may be deduced from poverty. To quote Lorimer himself again, '[a]ll progressive states become first moral, then intelligent, and then rich; and all retrogressive States become first immoral, then stupid, and then poor'.[40]

The two further criteria – the form of the state or government – were of secondary importance. The essential point is that the rational will of the state and its unity comes to be expressed through state structures and the governmental mechanism. The question is what enables the parts of the state to best act in unity. Here, Lorimer aligned himself with the nationalism of his colleagues and with late 19th-century international law generally. The state was but a shell over the nation with a determined identity and role to play in the international world. If this unity is broken, or unable to express itself – the cases of intolerant absolutism or class rule – then the value of the state is diminished. Again, Lorimer makes the analogy with a corporation. A corporation may be organized in all kinds of different ways, but the test of its viability and performance is to what extent its organization enables it to work efficiently in pursuit of its objective – form follows function.[41]

Finally, Lorimer divided international legal relations into 'normal' and 'abnormal'. The first group of relations has to do largely with peace, the latter with war. Each set of relations has organized itself differently depending on whether they have taken place between states 'within the pale of recognition' or 'without the pale of recognition'. Among Christian European states, the basic system of relations was 'negative' – that is to say, each state shall have the obligation to refrain from mingling in another's affairs, where 'non-interference is the basic, natural principle of action'.[42] The 'positive' relations take place predominantly by diplomatic representation where the status of their representatives would express the relative recognition that states have accorded to each other – again, the fiction of legal equality would be useless.[43] Large states have ambassadors, smaller ones ministers, while commercial relations would be carried out through consular representatives. Recognition was also to be accorded to the legal systems and the systems of private international law of states but only to those 'within the pale of recognition'. Again, with states beyond the pale of recognition, there would usually only be fragmentary relations, unless there was 'positive'

[38] *Ibid*
[39] *Ibid.*, at 186.
[40] *Ibid.*, at 187.
[41] *Ibid.*, at 189–191.
[42] *Ibid.*, at 230–235.
[43] *Ibid.*, at 241–243.

involvement through intervention in order to establish tutelage over them as in the case of 'retrograde children'.[44]

Everything in Lorimer's *Institutes of the Law of Nations* turns on hierarchical thinking. The differences between states and the levels of civilization did not presuppose any kind of relativism. Lorimer insisted on the need for what he called an 'absolute standard' in order to assess legally the political activity of nations. Some phenomena were simply and completely anti-jural, having no legal sense at all, and these included 'nihilism, fenianism and communism'. Such ideas had no claim to even ephemeral recognition, which may sometimes be extended to those 'abnormal relations' that operate between civilized and uncivilized nations.[45] Yet Lorimer did not advocate extinguishing inferior races or forms of civilization. Whatever differences there were among nations and races, 'laws of common nature' would apply to all races and all nations alike.[46]

## 3 The Centrality of Race in Law

As we have seen, Lorimer believed 'recognition' to be central to international law because it mediated the ethical facts in human consciousness. In terms of basic jural relations in the world, there were two kinds of recognition: international and interethnic. It is true that Lorimer focused on statehood – after all, most of the law is an outcome of what statehood produces, according to the 'subjective principle' of the freedom of the state. Statehood, however, was an essentially racial category: '[I]t is race even more than history that binds communities together.'[47] How well states develop – namely what kind of recognition they are entitled to – is predominantly a matter of the quality of the race that inhabits it. To enjoy statehood meant not only the development of external independence (even this was relative since no state in the modern world could be fully independent) but also that the state had a 'rational will'.

Such rational will could be absent or perverted in a number of ways. A state might fall into a situation of 'nonage' or 'imbecility'. Unlike the domestic one, international nonage was not a question of age: 'The most barbarous communities are probably as old as the most civilized.'[48] Such communities were fundamentally non-progressive or stationary; consciously or not, Lorimer resorted to language made familiar by Henry Sumner Maine. Unlike Maine, however, Lorimer proposed that right of such communities was not to statehood at all but, rather, to guardianship. 'Imbecility' again concerned situations in which no rational will of the state is formed at all: 'Communism and Nihilism are thus prohibited by the law of nations.'[49] However, imbecility was also

[44] *Ibid.*, at 229.

[45] *Ibid.*, at 99. On the need for 'absolute standards' in a world of differing ethnicities, see also Lorimer, 'La doctrine de la reconnaissance', *supra* note 32, at 334.

[46] Lorimer, *supra* note 1, vol. 1, at 99.

[47] *Ibid.*, at 195.

[48] *Ibid.*, at 157.

[49] *Ibid.*, at 159.

a racial property so that it would form a relation of 'perpetual pupilarity and guardianship' of the inferior to the superior races. In determining this, Lorimer understood the law of nations, for example, to have its own criteria that are not affected by domestic laws, so that:

> [t]he recognition of the equality of the negro with the white races in America is a case where law has outrun fact and for the present, at least, it furnishes no precedent of which international law can take cognizance.[50]

In the case of the USA, the right to recognition was owed only to the superior – white – race and the fact that the country had enacted laws providing for domestic equality had no meaning for international law. The rational will that formed the state's claim for independence was that of the white races. It was even the case that – the temptation to quote Lorimer once again is unavoidable – 'the absolute claim of the superior race itself will be cut off, should the preponderance of proximate power pass into the hands of the inferior race'.[51] Of course, the risk of lower races coming to rule was aggravated in countries of electoral democracy: '[T]he extremest instance of this occurs in the case of a community in which a slave population has been recently emancipated and endowed with the suffrage.' For, in such a case, '[t]hey are surely to be got hold of by the most worthless portion of the free men'.[52] It would therefore follow, apparently, that the election of Obama would have led to the withdrawal of full political recognition from the USA!

## 4 How Does All This Fit with the Intellectual Life of the Period?

In one of the few references to the cultural life of the 1880s, Lorimer noted the 'very wonderful results' of ethnology, specifically mentioning the recent work of Friedrich Blumenbach and James Prichard.[53] However, he recognized that ethnology was still in its very early stages and only beginning to spread into such areas as comparative philosophy and comparative theology. Lorimer refrained from quoting more recent research.[54] It may be useful to note that both of the men he referred to – one writing at the turn of the 19th century and the other in the 1840s and 1850s – were staunch defenders of the unity of the human family against the polygenetic view that identified separate origin for different human races. Blumenbach divided the human species into five races, whereas Prichard argued that the variations were in fact innumerable – yet they all had the same intellectual and psychological qualities. Blumenbach

[50] *Ibid.*, at 158.

[51] *Ibid.*

[52] *Ibid.*, at 166.

[53] *Ibid.*, at 93–94; Lorimer, 'La doctrine de la reconnaissance', *supra* note 32, at 333.

[54] For some reason, he refrained from quoting racial theorists such as Arthur Gobineau or Herbert Spencer, for example, whose views were in many respects similar to his.

attributed the differences to 'degradations', while Prichard stressed environmental and historical conditioning.[55] Despite the relative antiquity of the works of the men whom he quoted, Lorimer confessed that he had a keen interest in ethnological speculations and hoped that they would one day lead to something like 'comparative ethics, politics and jurisprudence'.[56]

The 1880s were a time of institutional organization not only in international law but also in the human sciences. The study of sociology and social anthropology slowly became established. Men such as Gustave Rolin-Jaequemyns and Westlake, who were active liberal reformers and founders of the *Institut de droit international* (1873), met each other at the meetings of the National Association for the Promotion of Social Science, which was set up in London in 1857. The members of the association had keen interest in the study of primitive society, especially after the mid-century, with the view of deducing developmental laws from what could be observed from them. The Anthropological Society in Britain was established in 1863, specifically owing to the sense that ethnology of the kind represented by Blumenbach had been too narrowly focused on 'classifying and tracing the early history of the various races of mankind'.[57] In contrast, anthropology would strive to make bold generalizations – laws of human development – accompanied by value judgments regarding the positioning of various societies at different levels of civilization.[58]

The great concern of the period had to do with whether recognition of the diversity of the races would lead into relativism. This danger was to be fought by evolutionism that would enable inserting different societies at different levels of a single evolutionary scale – some higher, others lower. One of the works that European readers were anxiously devouring to sort out this puzzle was E.B. Tylor's *Primitive Culture* (1871). Tylor himself became the first reader in Anthropology at Oxford University in 1884, and one of his legacies was the view of 'primitive' cultures of Africa and the Americas as 'survivals' from earlier stages of development that Europe had long since left behind. This idea was not that new. After all, already John Locke had claimed that 'in the beginning all the World was America'.[59] However, it now opened an interpretative scheme that contemporaries could use so as to have a language with which to assure themselves of the superiority of Victorian society over the communities with which Europeans came increasingly in contact.

Lorimer was firmly against such a turn in anthropology. With his search for an 'absolute standard', he argued that there was absolutely no need to study primitive society. This study of superior cultures would be sufficient: 'It is the highest and not the lowest specimens of the organism that we seek for their typical manifestations. … [A]mong men and horses, we select European men and Arabic horses, not Hottentots

[55] See especially F. Blumenbach, *De l'unité du genre humain et de ses variétés* (3rd ed., 1804); J.C. Prichard, *The Natural History of Man* (2nd edn, 1845).

[56] Lorimer, *supra* note 1, vol. 1, at 93–94.

[57] J.W. Burrow, *Evolution and Society: A Study of Victorian Social Theory* (1966), at 121.

[58] *Ibid.*, at 123.

[59] J. Locke, *Two Treatises of Government*, 2 vols (1689), vol. 2, at 140, para. 49.

or Icelandic ponies.'[60] This was a feature of Lorimer's idealism; reality did not reside at the surface of human things. The surface was subject to variations between moments of flourishing and decline. Instead, the essence of things existed deep inside the surface phenomena, and the scientist's task was to bring this hidden essence to the surface and learn from it. The Greeks may have fallen into decline long since, and yet they produced Socrates and stoicism, lasting contributions to human flourishing. Similarly, Buddhism, in Lorimer's view, may have degenerated into faith in the misery of the human condition and a passive anticipation of dissolution in Nirvana. But this was only due to popular corruption of the ideas of Buddha and of the thinking of earlier Buddhist periods. The ideas of happiness and learning from nature were just as much at the heart of Buddhism as other Aryan religions.

Lorimer referred to findings by ethnologists and anthropologists interested in skull sizes and crane formation, which, in his view, had not yet been sufficiently used in politics.[61] He found them helpful to fabricate distinctions, such as those between progressive and non-progressive races and between Aryan and Semitic races, which enabled him to give free reign to his prejudices and subconscious fears. However, he rejected their evolutionism. He accepted that the 'progressive races' did develop constantly – among them, the Aryan was the predominant and perhaps only example. At one point, Lorimer asked if the Indians could develop – 'a question of great importance to Britain'. There were only two ways for this to happen: either by subjugation – that is to say, by continuing under English tutorship or, as he disarmingly put it, by developing 'some oriental form of political organization hitherto unknown in the history of politics'.[62] Although he accepted that there were many Indians whose literary cultivation well matched that of many members of the white race, he never suggested that this could have had anything to do with their Indian heritage or upbringing.

Evolutionary sociology played a large role in the social sciences of the period, not least through the great success of Herbert Spencer's popularization of Darwinistic ideas. The Scottish Enlightenment had made use of Adam Smith's four-stages theory of human evolution: from hunter-gatherers, to shepherding and agricultural societies and then to commercial society, which was the way of life in Britain. However, Lorimer did not share this theory, or if he did, it was some obscure modification of it. His racism prevented him from assuming that the highest stage – life in Britain – could develop just anywhere or that, if it did, it would be a lasting achievement. He assumed that the world was divided into ethnic groups that were larger than nations and suggested that the law of nations should also contain the institution of 'inter-ethnic recognition'. Once a nation was firmly situated in the appropriate ethnic grouping, others would know how to deal with it.

Yet his ideas in this respect seem quite confused. On the one hand, he doubted the possibility of comparison across ethnic divides because, as he put it, each ethnic group had

[60] Lorimer, *supra* note 30, at 52.

[61] Lorimer, 'La doctrine de la reconnaissance', *supra* note 32, at 333.

[62] Lorimer, *supra* note 1, vol. 1, at 100; Lorimer, 'La doctrine de la reconnaissance', *supra* note 32, at 334–335.

its own 'genius'. Although Slavic, Romantic, and Teutonic ideas about the law differed, they were still all inside the large Aryan group, and, thus, distinctions – say between more or less individualistic or collectivistic leanings – were possible.[63] He felt he could say things such as that 'Celtic language and literature' were 'in themselves of no great value'.[64] But his work was also full of dismissive remarks on the 'non-Aryan' races, and he never once doubted their inferiority. Nowhere did Lorimer suggest that Africans might also have a 'genius' pointing them to a distinct developmental trajectory.

So far, full membership in the international community had only been possible for Christian nations. Was it always to be so? Lorimer had great interest in discussions of – and predominantly dismissing – non-Christian religions. Here, too, he saw little possibility for evolution. The genius of Christians had been to develop the theory of natural law that enabled identification of law independently of revelation. Thus, it was possible for everyone to ascertain the content of the law by merely examining the facts and seeking to find their real essence. By contrast, all other religions connected law directly with God's word and, thus, were open only to the faithful. They were disqualified as members of a legal community because they would always and necessarily be ruled by theocracy.[65] For this reason, they could not become part of the community of the law of nations – that is, endowed with plenary recognition (apparently, though Lorimer avoided saying this).

Lorimer thought this of the Semitic religions, and of Judaism, in particular, which he associated with Benjamin Disraeli's (Lord Beaconsfield) imperialistic foreign policy. Lorimer regarded Disraeli's novel *Tancred* as a product of what he called a policy of 'Anglo-semitism', which made no difference between Jews and Arabs and even asked the arrogant question: 'When has God spoken to a European – Never!'[66] What better evidence was there, Lorimer stated, that where Christians have logic, the Jews have rhetoric.[67] As a theocratic religion that only accepted the truth of revelation, Judaism was by nature, Lorimer believed, so intolerant 'that had this been possible, it would have been propagated, like Mahometism [*le mahométisme*] with iron and fire'.[68]

Lorimer devoted long passages to demonstrating the impossibility that a theocratic religion such as Islam could possibly be part of an international legal community. As a religion of revelation, he wrote, it could accept no possibility of gradual development: a sharp line would always be drawn between the faithful and the infidel. For a non-believer, the only alternatives were 'Islam or the sword'.[69] Turks could never become equal with Christians or, again in Lorimer's fantastic phrase, '[t]o talk of the recognition of Mahometan … as a question of time is to talk nonsense'.[70] Apparently, the only

63 Lorimer, *supra* note 1, vol. 1, at 95.
64 *Ibid.*, at 97.
65 *Ibid.*, at 118.
66 Lorimer, 'Prolégomènes d'un sustème raisonné de droit international', 10 *Revue de droit international et de législation compareé* (1878) 342.
67 Lorimer, *supra* note 1, vol. 1, at 122–123.
68 Lorimer, 'La doctrine de la reconnaissance', *supra* note 32, at 343.
69 Lorimer, *supra* note 66, at 340.
70 Lorimer, *supra* note 1, vol. 1, at 23.

way for an Islamic community to enjoy plenary recognition and full statehood was by conversion. If there was development, it did not follow separate pathways. In order to come to enjoy full membership in a universal community of international law, revelation had to be set aside. In practice, this meant that one had to become a Christian of a particular sort, believing that divinity was disclosed by the essences that were hidden inside secular phenomena.

## 5 Conclusions

In a small book from 1865 written in response to John Stuart Mill's proposals for extended suffrage, Lorimer observed that 'human inequality is a fact which society exhibits. Therefore, our representative system must accept and enforce itself to the fact of human inequality as socially exhibited'.[71] Unlike his colleagues in the *Institut de droit international*, he was not at all a social reformer, at least not in the sense that Westlake was, as an early supporter of William Gladstone. However, he did not exclude change in the social world: '[T]he moment humans are *sui juris* in fact, we shall do them a wrong if we refuse to recognize them as *sui juris*, in law.'[72] The challenge for law as science was to align the law with 'facts', including the fact that states and human communities were not only different but also of different value. Lorimer's politics were based on very strong hierarchies between human groups underwritten by a strong belief in the duty of guardianship of the inferior races by the superior ones.

Like many of his contemporaries – though far from all – he believed 'race' to be a scientific category and a useful basis for generalizing on the behaviour of human groups and, hence, that it was a necessary aspect of international law. He had only limited faith in the ability of races and other human groups to advance on the evolutionary scale. For those that were able to do this – that is, for those who were not inherently 'stationary' – this meant coming to resemble modern Christians, perhaps even converting to Christianity (after all, 'plenary recognition' had until then only been accorded to Christian nations). But he did not have much faith in the ability of 'inferior' races to progress. But his racism was based on very limited readings of comparative religion and ethnology. That he referred to Blumenberg as an authority, pointing to the latter's 'famous *Collectio craniorum diversarum gentium*',[73] suggests that he saw little problem in surveys of the kinds of skull type whose aesthetic qualities Blumenberg had assessed. It was natural that he would agree with the latter's assessment that since the Caucasian skull was the most symmetrical and harmonious it constituted powerful evidence of the highest human type.

[71] J. Lorimer, *Constitutionalism of the Future: Parliament the Mirror of the Nation* (1865), at 29.
[72] *Ibid.*, at 106–107.
[73] Lorimer, 'La doctrine de la reconnaissance', *supra* note 32, at 333.