

James Lorimer and the Character of Sovereigns: The Institutes as 21st Century Treatise

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Abstract

In Vienna, Freud is completing his medical degree just as James Lorimer, in Edinburgh, is polishing his Institutes of the Law of Nations. I suppose the overall claim might be that Lorimer's Institutes represents one sort of unwritten, 'unwriteable' textbook for our own time – international law's uncivilized unconscious speaking to us from the late 19th century. More specifically, and because I am the only Scot writing as part of this symposium, I will begin by placing Lorimer in the cultural and political frame of late 19th-century Scotland. Then I will take a look at the state, or, in particular, the not-quite-fully sovereign state, and the way it preoccupied the late 19th-century legal imagination and continues to do so today, albeit in a more obscure manner. Finally, I will conclude with some thoughts on Lorimer as a 21st-century scholar of war and peace.

I remember dining many years ago with Neil MacCormick, the author of *Institutions of Law* and a former holder of James Lorimer's Regius Chair in Public Law and the Law of Nature and Nations.¹ I pride myself in knowing a little about the major figures in Scottish literature of the 20th century, but Neil seemed to know most of them personally. In Aberdeen, I studied Scottish literature at the same time as I was attending a course on Roman law, and it is in the spirit of this eccentric combination that I will say something later in my article about the literary scene around Lorimer in mid to late 19th-century Edinburgh.

I visited Edinburgh in 2004, invited by Stephen Tierney and Alan Boyle, and gave a talk at the Scottish Centre for International Law. The next day, I went to a bar in order to soak in the atmosphere surrounding the opening of the new Scottish Parliament, which was attended by the Queen, and found myself sitting next to three elderly gentlemen, each exuding enormous vitality for their age. They all looked like Sean

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¹ N. MacCormick, *Institutions of Law* (2007).

Connery; one of them was Sean Connery. Is it patriotism or nostalgia that leads us to describe Connery as the best James Bond? Scotland, it seems, likes to produce at least one world-class individual in most fields of endeavour. James Boswell in literary biography, Robert Burns in romantic poetry, David Hume and Adam Smith, of course, and Andy Murray, Charles Rennie Mackintosh, Walter Scott and Hugh MacDiarmid (very probably). But did it have a world-class international lawyer in the 19th century? I do not really know. Lorimer himself wondered if international lawyers in general could rise above mediocrity: 'There is, as far as I know, not a single instance of a man of first rate speculative ability who has ever made the law of nations as a science, the study of his life.'²

This statement strikes me as a bit defeatist and self-denying (though it resembles something Martin Wight said about philosophers). According to him, philosophers, in general, save their best international thought for political theories of the sovereign state rather than for interstate relations.³ The symposium invitation, from which this article emerges, seems to be making a claim on Lorimer's behalf: 'Lorimer's ideas have undoubtedly been widely influential,' it states at one point. Is this true? Douglas Johnston, in his survey of the barely visible 'Scottish Tradition in International Law', regrets the fact that Lorimer had suffered 'the fate of oblivion'.⁴ The *Scots Law Review*, in its obituary for Lorimer, attributes it to 'the degrading inefficiency' of the University of Edinburgh faculty at the time. It goes on to bemoan the sight of 'an accomplished Professor, of European reputation, year by year haranguing benches barely vitalised'.⁵ On the other hand, when Wilfred Jenks spoke about Lorimer at Burlington House in London at the 50th anniversary of his death, he was introduced by Lord Alness who described Lorimer as 'the only jurist produced in Scotland during his century with a truly European reputation'.⁶ (Whatever we think of this, there is something almost heroic about the idea of a group of international lawyers gathering in London in the winter of 1940 in order to discuss a 60-year-old proposal for international organization that must have seemed, at that point, remote in time and space.)

It is true, though, that I do not hear Lorimer's name invoked as I attend conferences or read journals and books. He does not feature much in *The Creation of States* (though he is in the general bibliography) or in, say, recent work on statehood or international organization.⁷ He is rarely placed among the great Europeans, and no volume of the *European Journal of International Law* has until now been devoted to exegeses of his work. I first came across James Lorimer in 1985 in a course called 'Scottish 18th

² 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 61–62.

³ Wight, 'Why There Is No International Theory', in H. Butterfield, W. Herbert and M. Wight (eds), *Diplomatic Investigations* (1966) 21.

⁴ Johnston, 'The Scottish Tradition in International Law' 16 *Canadian Yearbook of International Law* (1978) 3, at 38.

⁵ 6 *Scots Law Review* (1890) 71, cited in *ibid.*, at 39.

⁶ C. Wilfred Jenks, 'The Significance To-day of Lorimer's "Ultimate Problem of International Jurisprudence"', 26 *Transactions of the Grotius Society* (1940) 35, 66.

⁷ J. Crawford, *Creation of States* (1979).

Century Legal Thought', which was taught by the legal historian Kenneth Mackinnon to a class of five students in his tiny office overlooking Elphinstone Hall (named after Bishop Elphinstone who had founded one of Aberdeen's two 15th-century universities [the same number as England had at the time]).⁸ I had not expected to encounter anyone from the 19th century in this course, nor did I expect that an international lawyer from the 19th century would feature among the Hutchesons, Fergusons, Stairs and so on. But the course seemed to concern itself – to invert Eric Hobsbawm – with the long 18th century.

The Lorimer I took away from this course was one more natural lawyer, but this time one who applied natural law to international law (a subject I had taken little interest in at that point) and one who, as a 19th-century Victorian imperialist, would happily divide the world into civilized states, barbarians and savages.⁹ Am I the only person alive who can claim that Lorimer's *Institutes of the Law of Nations* is the first international law book that I read? After Lorimer, as one might expect, Louis Henkin, Richard Pugh, Oscar Schachter, David Harris and Malcolm Shaw came as a bit of a shock to me. Where were the barbarians; the missing sections on relative and plenary recognition; the lengthy disquisitions on legation or private international law; the fear and loathing of the savage?

This imperial Lorimer seemed to represent a pre-modern version of a tendency to pathologize certain states. Lorimer divided polities into three categories, and the same tripartite scheme is found, for example, in John Rawls' *The Law of Peoples* (liberal, decent and illiberal, outlaw) and almost qualifies as a motif in international thinking on the state.¹⁰ And Lorimer is chilling, too, because he invoked a whole language of development drawn from local, medical categories of imbecility or nonage and applied these to states in ways that seemed evocative at a later point when sovereigns were being described as 'underdeveloped', 'burdened' or 'failed'.¹¹ Indeed, on first encountering Lorimer, there is something comic and, at the same time, sinister about his efforts to produce scientific theories of state or racial development or inequality. He was a connoisseur of the fine distinction; his taxonomies at times raging out of control.¹² He believed in class and classification and, especially, in national destiny, and the combination of these beliefs take him in directions that look retrospectively dubious.

I would like to do three things in this article. First, as the only Scot writing as part of this symposium, I want to locate Lorimer in the cultural and political frame of late 19th-century Scotland. Second, I will look at the ways in which the not-quite-fully sovereign state preoccupied the late 19th-century legal imagination. Finally, I will conclude with some thoughts on Lorimer as a 21st-century scholar of war and peace. In Vienna, Freud is completing his medical degree just as Lorimer is polishing his *Institutes of the Law of Nations* in Edinburgh. I suppose the overall claim might be

⁸ Interestingly, two of the five went on to become international law academics: myself and Catriona Drew at the School of African and Oriental Studies in London.

⁹ Lorimer, *supra* note 2, vol. 1, at 227–229.

¹⁰ John Rawls, *The Law of Peoples* (1993).

¹¹ Lorimer, *supra* note 2, vol. 1, at 157–162.

¹² *Ibid.*, vol. 1, at 126–133.

that Lorimer's *Institutes* represents one sort of unwritten, unwriteable textbook for our own time – international law's uncivilized, unconscious speaking to us from the late 19th century.¹³

1 Lorimer and Scotland

The Scottish intellectual elites had a good 19th century. Yet, by the 1860s, there may have been a sense that the moment had passed. George Steiner, in *Bluebeard's Castle*, describes this period as one of melancholy yearning for the idealism of the French Revolution conjoined to a sadness that political contestation was gone – an early version of the end of history.¹⁴ The Scottish Enlightenment had certainly run out of steam by this time. Hume, Smith, the Scottish philosophers of the common sense tradition, Walter Scott and the very modern gothic James Hogg had lived, and produced their work, in the late 18th and early 19th centuries. William Blackwood, Lorimer's publisher, had begun publishing in the early 19th century, and this we might say was the moment to be alive in Edinburgh. James Buchan, in *Capital of the Mind: How Edinburgh Invented the Modern World*, ends his story of the great Lothian flourishing more or less just as Lorimer is ascending to his professorship.¹⁵

Lorimer then is post-Enlightenment, though I cannot find much Adam Smith or David Hume in his work. At times, he sounds like the anti-Hume, compulsively deriving 'ought' from 'is' at every opportunity. For Lorimer, there is precisely an urge to reason towards common assumptions or answers to pressing problems through reference to nature, and there is very little about the sorts of techniques that might permit such deductions. On the other hand, Lorimer is steeped in the historicism of another Scottish tradition (Henry Home [Lord Kames] and William Robertson). There may be universal propositions available to reasoning man, but men (and states) are very different and occupy different stages in their historical development in relation to these propositions.

We can imagine in the late 19th century an atmosphere of decline as well around the idea of Scotland as a national project and European public law as a pacifying influence. This was the beginning of the Balmoral period with Victorian Scotland serving as a neutered royal playground. And, in Lorimer's work, there are portents of the disaster that is to befall Europe and Scotland in the early 20th century. Still, the Scottish mercantile and administrative elites are doing well out of empire at the time that Lorimer is writing *Institutes of the Law of Nations*. There is an impressive literary cadre in Edinburgh around Lorimer. Robert Louis Stevenson, who studied Scots law at Edinburgh University, published *Treasure Island* and *The Strange Case of Dr Jekyll and Mr Hyde* at the same time as the *Institutes* appeared, and, in some ways, of course, Lorimer could be understood to be an archetypal Victorian Scot caught between sober

¹³ In the same way that Thomas Hardy's poetry from the end of the 19th century might be about the Great War. See P. Fussell, *The Great War and Modern Memory* (1975).

¹⁴ G. Steiner, *Bluebeard's Castle* (1971).

¹⁵ J. Buchan, *Capital of the Mind: How Edinburgh Invented the Modern World* (2007).

judgment and wild romantic fantasy – half Hanoverian, half Jacobite. Schemes for world peace are set against warnings about idealism. The jural separateness of nations co-exists with pleas for a highly interventionist international executive.

Like many Scots, Lorimer aligned himself with Europe.¹⁶ His interlocutors tended to be European and not English. Befriending Europe, as always, was a way in which Scots could differentiate themselves from the insular English. It is clear from *Studies: National and International* (his lectures and essays) that he wants to position himself as a national and European man of greatness. One can imagine his delight at this symposium in his name, published in the *European Journal of International Law*, though his regret that Scotland has not produced a scholar of jurisprudence to match its exploits in political economy and philosophy might come off as a bit self-advertising. As if he is positioning himself for posterity, he urges at one point: 'I can see no reason why Edinburgh should not vie with Heidelberg and Bonn.'¹⁷

Lorimer certainly has a Scottish style. There seems to be something local and distinctive about his writing, especially his affection for the casual put-down. He accuses Samuel von Pufendorf of 'unpardonable dullness'; the 1877 conference at Constantinople is the 'first diplomatic transaction on a great scale which yielded no results whatever, either real or imaginary, even at the time'; Grotius is accused of 'laying down principles and failing to pick them up again' and so on.¹⁸ Boswell had it, Hugh MacDiarmid had it.¹⁹ It is a familiar trait, almost a national characteristic and one that often lapses into facetiousness. There is not really enough of this in a field in which, despite the enormity of what is at stake, politeness and formality seem the dominant tonalities. However, this quirky style hardly represents a 'Scottish tradition'.

Douglas Johnston concedes that there has not been a Scottish school of international law.²⁰ Certainly, Scottish international lawyers were not very evident when I eventually did study public international law there.²¹ There is one famous Scottish case, the Dornoch fishing judgment, *Mortensen v. Peters*, which still features in cases and materials, and Scottish international lawyers have made a contribution, of course.²² Johnston mentions William Welwood's counter-Grotian defence of enclosure in the 17th century²³ and James Reddie's *Inquiries into International Law* (1842).

There may be some Scottish themes present in international law. For example, Scottish international law, as befits an island nation (a specially affected statelet, perhaps), has tended to look outwards to the sea (as in Welwood's case), but if this is a national characteristic, then Lorimer is atypical in this regard. There is precious little

¹⁶ Lorimer locates himself in a German tradition. Certainly in political matters, Lorimer had a strong preference for German paternity over French fraternity. J. Lorimer, *Studies: International and National Law* (1890), at 62.

¹⁷ *Ibid.*, at 51.

¹⁸ E.g., Lorimer, *supra* note 2, vol. 1, at 74, 177.

¹⁹ See, e.g., A. Bold, *Hugh MacDiarmid* (1990).

²⁰ Johnston, *supra* note 4, at 3.

²¹ Lorimer himself contrasts the juridical realm (where 'Scottish labourers have been lamentably few') with work by Scots in ethics and political economy. Lorimer, *supra* note 16, at 36.

²² *Mortensen v. Peters* (1906) 14 Scots LTR 227.

²³ W. Wellwood, *An Abridgement of All Sea-Lawes* (1613).

law of the sea in *Institutes of the Law of Nations*. On the other hand, Lorimer's combination of sovereignty as national self-fulfilment and international organization as cosmopolitan necessity might be quintessentially Scottish. After all, Scotland relinquished its sovereignty for a multi-national project (the United Kingdom) and periodically seeks to have it returned in some capacity while looking again at the comforting idea of 'Scotland in Europe'. His nationalism also works alongside his cosmopolitanism (Lorimer was a supporter of schools of Scottish architecture and restored Scottish castles when not developing schemes for the federation of Europe).²⁴

Just to bring us up to date on this Scottish proto-tradition, more recent examples of prominent Scottish practitioners would include Lord Iain Bonomy at the International Criminal Tribunal for the Former Yugoslavia and Lord Patrick, the Scottish judge (and vice-president) at the Tokyo War Crimes Tribunal.²⁵ Patrick co-wrote the majority judgment, and Bonomy, in a recent essay about Patrick, noted that his main difference of opinion with William Webb, the Australian president of the Court, was that Webb had applied unfamiliar natural law ideas, derived partly from a reading of Lorimer, to the Japanese defendants.²⁶ The Tokyo War Crimes Trial, like so much in life, turns out of have been a largely Scottish affair.

2 Lorimer and the Character of Sovereigns

In 1945, the Japanese were the latest incarnation of the enemy of mankind, and there is at least an aspect of international law (certainly, international criminal law) that might be defined as the law applied to such figures (from pirates to tyrants).²⁷ Lorimer's work partly belongs in this tradition, a tradition in which international society's self-understanding is parasitic on an image of groups outside that society. However, I think in some ways he wants to formulate international law as two projects: a project of differentiation and a project of consolidation. These projects are developed in the midst of at least three great geopolitical struggles occurring in the late middle years of the 19th century: the mapping of Africa (forming the context for Lorimer's Victorian imperialism), the Franco-Prussian war (influencing Lorimer's ideas about the great power conflict and the political exception) and the US Civil War (which lends urgency to his discussions of rebellion, beligerency and secession as distinctive topics in his treatise and in his published lectures).

However, Lorimer also defies a few expectations we might have about the 19th century.²⁸ His naturalism, for example, seems unusually full-blooded and late in the day,

²⁴ C. Harvie, *Scotland: A Short History* (2002), at 171.

²⁵ 'The Late Lord Patrick', *Scots Law Times* (1967), at 42.

²⁶ Though Patrick had little sympathy for Justice Pal either (Pal was the most forthright critic of the Webb approach, and, indeed, the whole trial and its constitutive charter). See Bonomy, 'Lord Patrick', in Y. Tanaka, T. McCormack and G. Simpson (eds), *Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited* (2011) 103.

²⁷ See generally G. Simpson, *Law, War and Crime* (2007).

²⁸ The 19th century is the century of Hegel, Marx and Austin – the strong state, the weak state and the impossibility of international law respectively. But Lorimer has little time for this (or maybe he has a little time for each). See also Kennedy, 'International Law in the Nineteenth Century: History of an Illusion', 17 *Quinnipiac Law Review* (1998) 99.

and his ideas about interdependence seem to arrive at a moment when we are told that positivism had (finally) elevated independent sovereignty as the organizing norm of the interstate political order (projecting back to the myth of 1648 in order to do so).²⁹

A Consolidation and Organization

As far as consolidation is concerned, Lorimer is best known for his thoughts (perhaps proleptic) on international organization, in general, and on arbitration, in particular. This is where his libertarianism about state development comes into mild tension with the thought that state freedom might have to be constrained by international institutionalism. In *Studies: National and International*, the posthumous collection of his lectures, he offers a very elaborate vision of the sort of arrangement he has in mind: an institution with annual meetings in Geneva or Brussels; voting in relation to power and revenue or exports and imports; a forerunner of the Military Staff Committee and a proposal that aggressive states be excluded from the organization. Lorimer anticipates Articles 2(7) and 39 of the Charter of the United Nations when he states in his own Principle 9 that national questions be excluded from the deliberations of the Council but that the Council should determine whether a matter was national or international. And he anticipates the actual practice of the Security Council when he argues that even civil wars should come within the jurisdiction of the international executive (but not rebellions – the distinction being as obscure and central as it is in relation to Libya and Syria today).³⁰

Whenever one reads about Lorimer, he is described as a bit of a dreamer, and these plans must have seemed visionary at the time. Now they feel very familiar. But if Lorimer was idealistic about international organization (or, perhaps, Hobbesian in his blunt assessment that only centralization can complete international legality, combined with his sense that this might be something to be feared about this very project at the same time), he was much more hard-headed about dispute resolution and arbitration. Indeed, he is so busy nominating possible subjects as being unsuitable for arbitration that he sounds like the US pleadings at the preliminary phase of the *Nicaragua* case.³¹

According to Lorimer, arbitration is impossible in at least two states of nature. The first is war between great powers, and here he is thinking of the Franco-Prussian war – where the war will define the relative standing of the two warring parties in a way that is not possible through the application of norms or principles of law. Here, too, one is reminded of the Serbian effort on 25 July 1914 to have the Great War settled through arbitration in The Hague.³² The second state of nature, of course, is in relations between civilized and non-civilized states because uncivilized states lack a rational will and, in any case, would not comply with arbitral awards.³³

²⁹ B. Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations* (2003).

³⁰ Lorimer, *supra* note 16, at 60–62.

³¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports (1984) 392.

³² See S. McMeekin, *1914: Countdown to War* (2013), at 197.

³³ H. Lauterpacht, *The Function of Law in the International Community* (2011), at 13–14. Just to digress for a moment, I think it is striking that states often believed to be lawless in some way either internally

B Differentiation

This relationship between the civilized core and uncivilized periphery is not just central to Lorimer's work, but it is also defining in international law. To paraphrase Tony Anghie, some states make international law and some are made by it. Thus, we have Hersch Lauterpacht, mildly rebuking Lorimer seventy years after his *Institutes of the Law of Nations*, when he says that the whole of interstate relations is rather like Lorimer's description of core-periphery relations: 'The relations between States belonging to the community of nations are . . . under the sway of limitations which Lorimer assigned to the field of relations with uncivilised peoples.'³⁴ In other words, relations between the civilized and uncivilized are the paradigm case in international society.³⁵

Of course, Lorimer's distinction was a fairly standard 19th-century view in one sense. And it does not seem to be generated by Lorimer's apparent naturalism. As many people have pointed out, 'positivism' too was implicated, with its distinction between civilized and uncivilized states and its belief that actual existence or capacity was somehow anterior to recognition in international law.³⁶ Uncivilized states sat beyond international law. Relations in these cases were a matter of something other than law. James Crawford might recall his own footnote comparing two editions of *Oppenheim*: 'Lauterpacht omits the sentence: "It is discretion and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family".'³⁷ Omitting this sentence has been a distinctively 20th-century project in the modernizing of international law.³⁸

Lorimer's work then plays into the image of the 19th century as a place where sovereignty was fragmented (prior to its consolidations in the mid-20th century), where the distinction between civil and uncivil states was dominant and in which there was a struggle between positivism and naturalism.³⁹ Certainly, Lorimer is determined to oppose the utilitarianism of Bentham and what he takes to be the positivism of Austin and (what has been retrospectively understood to be) the dominant school of international law at the time. Utility is the mere 'preferences of men', as he puts it in one of his essays. And it makes sense that someone burnishing his anti-democratic credentials so frequently would not be interested in basing either political decision or political

(Democratic Republic of Congo) or in their external relations (Serbia, Iran and Libya) have had quite frequent recourse to the International Court of Justice over the past few decades. Nowadays, it seems to be the civilized core that lack a reciprocal will and, at least in the *Nicaragua* case, *supra* note 31, a willingness to abide by court rulings.

³⁴ H. Lauterpacht, *The Function of Law in the International Community* (2011), at 175.

³⁵ See also the criticism of Lorimer in H. Lauterpacht, *Recognition in International Law* (2013 [1947]), at 31.

³⁶ Most prominently, A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

³⁷ J. Crawford, *Creation of States* (1979), at 13.

³⁸ See Simpson, 'Something to Do with States', in A. Orford and F. Hoffman, *Oxford Handbook of the Theory of International Law* (2016).

³⁹ Mill also believed that liberty applied only to 'civilized community'. See Mazower, 'An International Civilization? Empire, Internationalism and the Crisis of the Mid-Twentieth Century', 82 *International Affairs* (2006) 553.

philosophy around the collective wishes of the demos. This would simply be philosophy repeating democracy's mistake. And it all feeds into Lorimer's aristocratic ideas about social organization and ambivalence about state equality. So let me say a little more about this combination of class and classification.

C Class and Classification

Lorimer has become known as someone for who state equality or sovereign equality was a misguided fiction.⁴⁰ His classifications were intended to put international law on a firmer footing and to bring the reality of relative state power, material circumstances and culture into some sort of conformity with the law and to harness all of this to his ideas for international organizations or, rather, to permanent international organizations arranged around impermanent hierarchies of sovereigns. He ends up replacing one (arguably) civilizing fiction with a series of malign fictions of his own.

This may or may not have had something to do with the way in which 18th-century Scottish intellectuals were interested in mathematics as a way of understanding philosophy. This goes back to Smith and Hume again and their fascination with Isaac Newton, but it is also true that as early (or as late) as the 16th century someone like Welwood could be a professor of mathematics and write a treatise on the law of the sea.⁴¹ Lorimer was also influenced by a German chemistry professor under whom he had studied. This is likely to have had two effects – one was a belief in laws of human nature (just as there were laws of science) but it also might have led Lorimer to apply the classification systems found in chemistry to international law, a sort of periodic table of states.

For him, this inequality is a fact of human nature, the basis for a natural law of nations, and states have a duty to recognize situations brought about by, or grounded in, this inequality.⁴² Alfred Tennyson, another Lorimer contemporary, though considerably older, in his very late poem of the 1880s, *Locksley Hall Sixty Years Later*, discourses in a similar way about equality. This is doggerel, but we get the idea:

Equal born? O yes, of yonder hill be level with the flat
Charm us, Orator, till the Lion look no larger than the Cat
Till the cat thro' that mirage of overheated language loom
Larger than the Lion – Demos end in working its own doom.⁴³

For Lorimer, some versions of international law would qualify as 'overheated language' producing fatal and misconceived formal equalities.

Lorimer's writing on equality is derived from a very firm sense that social and political hierarchies are vital to the health of nations. Sounding like virtually all of our politicians of the centre and right, Lorimer understands class war to be a politics of envy, and he is full of New Labour-style praise for the self-denying grandeur

⁴⁰ Lorimer, *supra* note 2, vol. 1, at 168–181.

⁴¹ Johnston, *supra* note 4, at 16.

⁴² See also M. Koskeniemi, *From Apology to Utopia* (2006), at 140.

⁴³ 'Locksley Hall Sixty Years After', in A. Tennyson, *The Major Works* (2009) 462.

of the aristocracy.⁴⁴ And there is something a bit Blairite about Lorimer's insistence that within a circumscribed field, he is willing to endorse many forms of political life, providing each produces good administration. There is a limit though – democracy is declared 'impossible' since inequality is God's work⁴⁵ and savages are unable to govern themselves.⁴⁶

These ideas about civilization, which are now applied to states, were common at the time, of course. Gerrit Gong's book on *The Standard of Civilisation* documents the ways in which international law methodically distinguishes the family of nations from mere states on the outside.⁴⁷ This cataloguing is a feature of a younger contemporary of Lorimer's, the Scottish don, J.G. Frazer, who, in *The Golden Bough* (1890), produces a typology of the barbarian (although as Robert Crawford in his possibly definitive *History of Scottish Literature* puts it, 'Frazer never did any fieldwork; probably he had never seen a "savage"').⁴⁸ In international law, one of Lorimer's interlocutors, John Westlake, famously contrasted states with good breeding with other states,⁴⁹ and for Lassa Oppenheim, there is the familiar distinction between the family of nations and states outside the family.⁵⁰ Nonetheless, it would have to be conceded that there is an undiluted racial element to Lorimer that is lacking in some of his Victorian contemporaries.

Lorimer's classifications are astonishingly ornate but perhaps not as odd as they seem on first blush. Nonage, of course, as we have seen, becomes a familiar idea in the mandates and in the trusteeship doctrine. The idea that some states are 'crazy or sinister', as Martin Wight puts it, is reflected in Lorimer's ideas about the imbecility of states. This comes in two forms: either congenital (because of some racial defect) or political (because of the nature of a particular political orientation). Communism and nihilism are given as examples.⁵¹ We get a sense of the empire's confusions about the stability of these terms in Joseph Conrad's *Heart of Darkness*, where empire begins with a project and ends in hallucination. Marlow experiences Lorimer's categories as precarious and absurd. Marlow's encounters with Africans maps onto international law's own prevarications. They are first described as enemies by one of the other administrators, but Marlow cannot quite believe in this designation: '[H]e called them enemies!' Later, he conjures with possible definitions (natives,⁵² enemies,⁵³ criminals⁵⁴)

⁴⁴ Though there is something more critical at work at times. The poor will always be with us, of course, but Lorimer's view is that they are necessary to the 'moral discipline alike of those who suffer it and those who alleviate it'. Lorimer, *supra* note 2, vol. 1, at 74.

⁴⁵ Lorimer, *supra* note 16, at 70–71.

⁴⁶ I am being a little unfair here, Lorimer does occasionally speak of the benefits of equalization and rationalization and rails against the twin evils of equal subdivision (welfare democracy) and unlimited accumulation (late-capitalism). See *ibid*.

⁴⁷ G. Gong, *The Standard of Civilisation in International Society* (1984).

⁴⁸ R. Crawford, *A History of Scottish Literature* (2009), at 504.

⁴⁹ J. Westlake, *Collected Papers* (1894), at 6.

⁵⁰ L. Oppenheim, *International Law* (1905–1906).

⁵¹ Lorimer, *supra* note 2, vol. 1, at 157–162.

⁵² J. Conrad, *Heart of Darkness* (1976 [1899]) (to be exploited or cared for).

⁵³ 'To be fought by firing into the continent.'

⁵⁴ To be punished then rehabilitated: 'The philanthropic desire to give some of the criminals something to do.' Conrad, *supra* note 52, at 24.

but concludes that they are merely 'unhappy savages' (indeed, they are so demoralized that they do not even find him appetizing).⁵⁵ In the end, they become obscure to him: '[N]ot enemies, not criminals, not earthly ... phantoms',⁵⁶ they are 'incomplete, evanescent'.⁵⁷ As Marlow puts it, '[w]hat would be the next definition I would hear?'.⁵⁸ I have the same feeling reading Lorimer.⁵⁹

It is hard not to read Lorimer's ideas as being more than imperial, perhaps even dangerous. The idea that human beings enjoy natural claims to development (derived from liberty) is transposed into a highly developmental account of the way in which nations or states are depicted in the *Institutes of the Law of Nations*. Certainly, there is a great deal of talk of freedom and destiny. Lauterpacht goes as far as to say that the views of the Hegelians (among whom he includes Lorimer) cannot be reconciled with law itself.⁶⁰ Johnston, in a highly contentious aside, even claims that Lorimer's thought that states had a right to unfettered development (via Georg Hegel) was to be 'barbarously abused half a century later in Nazi claims to *Lebensraum*'.⁶¹ This is pretty strong stuff and does not seem right given the way in which Lorimer also accentuates the idea of interdependence. Still, Lorimer's prejudices (against Turks and Musselmen, in particular) are never far from the surface of his thoughts. Indeed, the 1856 Treaty of Paris (guaranteeing Ottoman independence at a time when it was no longer capable of guaranteeing its own independence) is regularly exhibited when it comes to pointing out how misconceived the attribution of equality might be.⁶²

Neil Boister and Robert Cryer, meanwhile, in their discussion of Lorimer's influence on the Tokyo War Crimes Trial indict Lorimer's naturalism as colonial: '[N]aturalism is often ... considered implicated in the colonial project, perhaps most notoriously, in the (comparatively) modern era with James Lorimer's characterisation of levels of sovereignty based on standards of civilisation'.⁶³ But if these are easy pickings, there are also problems internal to Lorimer's reasoning. He professes to deplore immutability and equality (or equalization) and, yet, his civilized states are regarded as equal and his savages are equally savage. It would be too much to expect Lorimer to have picked up the interpenetrations around space and law found over a century later in, say, Lauren Benton's work, but his distaste for immutability combined with the constant referencing of, say, reciprocity or freedom as permanent facts of existence begin to seem strained and full of bad faith.⁶⁴

Although the international system seemed ready by the early 20th century to repudiate these late Victorian hierarchies and standards of civilization, Lorimer's categories

⁵⁵ *Ibid.*, at 60.

⁵⁶ *Ibid.*, at 24.

⁵⁷ *Ibid.*, at 65. In the end, the Westerners, too, turn out to be 'phantoms'.

⁵⁸ *Ibid.*, at 84.

⁵⁹ This passage draws on Simpson, *supra* note 38.

⁶⁰ Lauterpacht, *supra* note 35, at 103.

⁶¹ Johnston, *supra* note 4, at 31.

⁶² Treaty of Paris (1856).

⁶³ N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), at 292.

⁶⁴ L. Benton, *A Search for Sovereignty* (2010).

continued to hover over the way the mandate system operated – for example, with its mathematical regard for states of development. The A, B and C mandates are still with us in some respects (I have been reading Lorimer in Australia where the government is putting its unwanted refugee claimants on Nauru, an original C Class mandate. This tripartite scheme goes back as well to Pufendorf, who wants to draw a distinction between those individuals entirely outside the system (towards whom ‘it will be necessary for other men to show them no more mercy than they do birds of prey’) and the marginal cases who are ‘so partial [a very Lorimer word] as to be just in the Observation of compacts with [only] some particular Allies. ... [T]heir Credit, it is evident, must very much sink, but it would be too severe to deny them every degree of esteem’.⁶⁵

3 Lorimer as a 21st-Century Treatise

Alongside the obsessions with classification and the gestures towards international organization, Lorimer seems to have written a text on intervention and war in the early 21st century, and I want to finish by pursuing this theme a little.⁶⁶

A Natural Law

There is a lot to be said about Lorimer’s prescience. If we take Lorimer as a natural lawyer somehow out of time, then it is fair to ask whether he was just foreshadowing a return to a natural law in the middle of the 20th century.⁶⁷ There have been explicit versions of this question (in Nuremberg and Tokyo in the 1940s), and it is found more implicitly in the way in which international criminal law institutionalizes a pre-political commitment to end impunity. It also reflects some transcendently true objection and distaste for genocide or mass killing as well as the possibility that there is a distinction (famously deplored by Prosper Weil⁶⁸) to be drawn between ordinary rules of international law and supernorms of *ius cogens* or international crime or obligations owed *erga omnes*. There are also the various ways in which the sacred or trans-historical is smuggled back into international law – or has never been absent – in the form of an ‘evolving world community’,⁶⁹ a commitment to universal human rights⁷⁰ or a teleology of development.⁷¹

⁶⁵ R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999), at 161–162, quoting S. von Pufendorf, *The Law of Nature and Nations*, vol. 4.5, at 802. Civilization is still there as an organizing principle of international law as late as 1947. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd edn, 1947). In order to be a state, ‘the inhabitants of the territory must have attained a degree of civilisation’ (at 73, quoted in Crawford, *supra* note 48).

⁶⁶ Johnston, *supra* note 4, at 37: ‘Lorimer’s “interdependent” positions ... are thoroughly modern in the late-20th Century, more so than the sovereignty views of his critics.’

⁶⁷ Johnston says there are at least 60 distinguishable meanings of natural law. Johnston, *supra* note 4, at 6.

⁶⁸ Weil, ‘Relative Normativity in International Law’, 77 *American Journal of International Law* (1983) 413.

⁶⁹ Boyle, ‘Of Ideals and Things’, 26 *Harvard International Law Journal* (1985) 327, at 334.

⁷⁰ C. Douzinas, *The End of Human Rights* (2000).

⁷¹ S. Pahuja, *Decolonising International Law* (2013).

And surely there is something very modern about Lorimer's claim that a positive form of international law is a 'form of speech of which the real must always fall short of the ostensible signification'⁷² and also in his awareness that codification might just rehearse the very disagreements that it was meant to escape.⁷³ The varied 'character' of states and the asymmetrical relations produced by differences in character is found in Lorimer's description of the 'capitulations' with the Ottomans, China and Japan. However, this could also be a description of the way in which the Western powers still dis-apply local jurisdiction (through status of forces agreements) and international jurisdiction (through, say, Security Council resolutions). Lorimer states at one point: '[T]he recognising States consequently maintain separate courts exercising separate jurisdiction within the borders of the partially recognised states.'⁷⁴ In another mildly prophetic moment, Lorimer discusses the possibility of mixed tribunals: courts in which there are representatives of civilized and semi-barbarous states on the judiciary. Such arrangements may 'give a greater or less preponderance to the native [foreshadowing the Extraordinary Chambers in the Courts of Cambodia] or foreign [the Sierra Leone Special Court] element, as circumstances demand'.⁷⁵ I want to end, though, by insinuating Lorimer into two areas of contemporary war law: the current practices of intervention and the recent efforts to criminalize aggression.

B Intervention

According to Lorimer, intervention is excluded in normal relations between sovereigns, but all bets are off when a situation of abnormality arises. The abnormality in relations, though, is created by the intervening states themselves. They declare the object state to be an unrecognized entity or not fully sovereign and therefore lacking an immunity from intervention. In a way, Lorimer's theory of barbarian war in the 19th century might be becoming a generalized practice of war in the 21st century. Wars are abolished not by refusing to fight them but, rather, by refusing to concede that violence can even be designated 'war'. 'Enemies' become 'enemies of mankind' and warriors become 'pirates'. To go to war today, we might say, is to assume an anterior relationship of inequality. Just as the 19th-century colonial war or war against the savage or barbarian was not war but, rather, 'gun-boat diplomacy', 'suppression of the natives' or 'police action', so too postmodern war can be described as anything but war – anything but what it is.⁷⁶ Thus, we have the language of peace making, peacekeeping and peace enforcement by the forces of humanity against those who defy or resist humanity (one of the interesting consequences of this in recent practice is a sort of indignation that anyone would fire back).

⁷² Lorimer, *supra* note 16, at 30.

⁷³ 'When we know what we ought to do, and are ready to do, we shall have something to codify.' *Ibid.*, at 86. 'To suppose that separate nations should be reasonable enough to institute such a tribunal is perhaps, equivalent ... to supposing that they should be reasonable enough to do without it.' *Ibid.*, at 87.

⁷⁴ *Ibid.*, at 216.

⁷⁵ *Ibid.*, at 218.

⁷⁶ See also J. Butler, *Frames of War* (2009).

International lawyers and others have been agitated over the past decade about the attempts to expand the right to self-defence to include pre-emptive self-defence.⁷⁷ However, perhaps the more symptomatic move in this period – and predating it – is to circumscribe rights to ordinary self-defence (on the part of sovereign unequals such as Iraq, Iran and Serbia) to an almost vanishing point. Appropriately enough, it was a former pirate – but then perhaps Thucydides was right and everyone is a former pirate – who put this best. William Dampier (who later rescued Alexander Selkirk, the Fife-born model for *Robinson Crusoe*, which was later rewritten as *Robinson* by the Edinburgh author, Muriel Spark) wrote of Papuan natives in the 19th century, describing them as '[a] fierce and intractable race of savages who, when fired upon, did not scruple to retaliate'.⁷⁸ This is, again, an era of unscrupulous retaliation. One gets a similar sense of indignation from reports of Western forces in Afghanistan, Iraq or Libya, which is reflected to an extent in attempts to reconfigure the legal regime whether by converting enemies into terrorists or by depriving detainees of the protections of the laws of war.

Lorimer, then, is of his time and of our time. As the *Institutes of the Law of Nations* were being published, Alexandria was set ablaze after undergoing a shelling by the Royal Navy, while Gladstone, in Parliament, invokes an early version of humanitarian intervention. Meanwhile, a few years earlier, Lord Elgin was bombing Canton during the Opium Wars. The pretext was that the Chinese authorities had boarded a pirate vessel, which the British claimed was flying the Union Jack: 'These half-civilised Governments such as those in China, Portugal, Spanish America all require a dressing down every 8 or ten years to keep them in order.'⁷⁹ This, then, was China's dressing down.⁸⁰ The government got into hot water (not so much for going to war but, rather, for choosing the wrong pretext). They sought the attorney-general's legal advice, and he said the war would probably be regarded as illegal. The prevailing mood, however, according to John Newsinger, was that international law did not apply when dealing with barbarous states.⁸¹

This tendency to organize interstate relations around the character of sovereigns or to deny certain sovereigns full plenary recognition and protection remains pervasive, if more euphemistically stated. Lorimer's 'imbeciles' became 'those territories and colonies ... which are inhabited by people not yet able to stand for themselves' (Article 22 of the League of Nations Covenant and then Robert Jackson's 'negative sovereigns').⁸² Later, Lorimer's 'intolerant democracies' become Tony Blair's 'irresponsible states' or the Department of State's 'states of concern'. Surely, too, the idea of the responsibility to protect people from these irresponsible states seems to be there in the interstices of Lorimer's work.⁸³ For him, intervention might be, for example, a duty in the face of a

⁷⁷ See, e.g., Lord Goldsmith, Advice to Prime Minister Blair, 7 March 2003 [on file with the author]; Sofaer, 'On the Necessity of Pre-emption', 14 *European Journal of International Law* (2003) 209.

⁷⁸ M. Wight, *International Theory: Three Traditions* (1991), at 58. See also M. Foot, House of Commons Debate, (18 December 1974).

⁷⁹ Newsinger, 'Elgin in China', 15 *New Left Review* (2002) 119, at 127.

⁸⁰ *Ibid.*, at 127.

⁸¹ *Ibid.*

⁸² R. Jackson, *Quasi States* (1993).

⁸³ Lorimer, *supra* note 2, vol. 1, at 224.

deprivation of sovereign freedom.⁸⁴ Indeed, he anticipates a constitutive distinction in the work of the United Nations when he contrasts ‘double intervention’ (intervening on both sides) or what we now think of as peacekeeping and ‘single intervention’ (or peace enforcement).⁸⁵

C Aggression and Character

Today, war is alternately understood as administrative error or international crime.⁸⁶ We might compare the Chilcot Inquiry⁸⁷ with the Kampala Agreement in 2010⁸⁸ – one thinking of war as a failure of bureaucratic process, the other as a matter of criminal intent. However, as Lorimer put it: ‘All errors are not crimes.’⁸⁹ I find that this little aphorism eerily foreshadows much of what has happened to war and law in the 20th and 21st centuries. A.J.P. Taylor once said that states did not commit crimes, they made mistakes. And half a century after that, Lord Hoffman in the Iraq War civil disobedience case, *R v. Jones*, noted that the defence in this case ‘thus depend upon the proposition that the war in Iraq was a crime as well as a mistake’.⁹⁰

At Kampala in 2010, the Assembly of States Parties finally concluded that wars could be crimes as well as mistakes and concocted a definition of aggression or, at least, provided the Court with a few clues as to the meaning of aggression.⁹¹ It defined aggression as a manifest breach of the UN Charter, the manifestness to be derived from a study of the scale, gravity and character of the aggression.⁹² I suspect, though, and following Lorimer, that the character of the aggressor and not the quality of the act is likely to be a critical feature of any judicial determination. But Lorimer captures in his work something else that is important about the crime of aggression. As Justice Pal noted in his massive dissenting judgment at Tokyo, in the absence of a just global order, criminalizing aggression itself creates an injustice. Lorimer is succinct: ‘[F]irst we must be pure, then peacable.’⁹³ In other words, we should not criminalize aggression until we have achieved justice. Lorimer hopes – for all of his scepticism – that war might be abolished just as the duel ceased to be an accepted social practice after the 19th century. However, in the absence of justice, or perhaps in its name, inter-sovereign warfare as a duel was simply supplanted by more punitive exercises of violence.

At Tokyo, in fact, Webb had relied on Lorimer for this naturalist support for the existence of the crime of aggression, stating in a letter sent at the time: ‘If, with Professor Lorimer in *Institutes of International Law* (1884 [sic]), we regard international law

⁸⁴ S. Neff, *War and the Law of Nations* (2005), at 221.

⁸⁵ Lorimer, *supra* note 2, vol. 2, at 53; Neff, *supra* note 84, at 219.

⁸⁶ This is an idea I pursue more fully in Simpson, *Law, War and Crime* (2007).

⁸⁷ Chilcot Inquiry, available at www.iraqinquiry.org.uk/ (last visited 17 April 2016).

⁸⁸ Kampala Amendments to Rome Statute (2010), available at www.icc-cpi.int/iccdocs/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf (last visited 17 April 2016).

⁸⁹ Lorimer, *supra* note 2, vol. 1, at 160.

⁹⁰ *R. v. Jones* [2006] UKHL 16, at 44.

⁹¹ For a discussion, see Heller, ‘The Uncertain Legal Status of the Aggression Understandings’, 10(1) *Journal of International Criminal Justice* (2012) 229.

⁹² Kampala Amendments, *supra* note 88.

⁹³ Lorimer, *supra* note 16, at 61.

as the law of nature realised in the relations of separate political communities, then aggressive war is a crime under international law.’⁹⁴ It is not at all clear how or why this follows. Of course, Nuremberg and Tokyo are often described as having provoked a revival in naturalism (crimes against humanity, the conscience of mankind, the gaps in positive law that had to be filled and so on), but there is no necessary affinity between the crime of aggression and natural law thought. Indeed, as Stephen Neff suggests in his book on law and war, Lorimer’s social Darwinism points in the other direction altogether. War could be a way of realizing a national destiny, liberty or progress that Lorimer values so highly.⁹⁵

I found the experience of re-reading Lorimer melancholy, infuriating and even uncanny. Sometimes, the concerns are familiar, but the mood is unfamiliar; at other times, the opposite is the case. He comes across as astonishingly contemporary and yet also antique and distant – an embarrassing (great, great) uncle (and to return to the themes in the first part of this article, cold and disaffected, in comparison to the great figures of the Scottish Enlightenment). I will finish with a very emblematic Lorimer moment in which he is discussing the Iraq War (or perhaps the self-image of the discipline). International law, he complains, is neglected – until war arrives, at which point: ‘It is then we call in despair on the science which we despised.’⁹⁶

⁹⁴ William Webb Archives, Australian War Memorial, File 3DRL/2481, Box 1, Wallet 8, 7–9, quoted in Boister and Cryer, *supra* note 63, at 282.

⁹⁵ Neff, *supra* note 84, at 198, 218: ‘Such a way of thinking came dangerously close (to put it mildly) to an admission that outright aggression was perfectly legal.’

⁹⁶ Lorimer, *supra* note 16, at 78.