

Heresy in Action: James Lorimer's Dissident Views on War and Neutrality

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Abstract

Lorimer's positions on issues of war and neutrality were rooted in his commitment to natural law. This included, crucially, an insistence on individuals acting in a dual capacity – as citizens of their states and also as members of the larger global community. At the same time, Lorimer was committed to a traditional just war doctrine and, in particular, to the principle that, in a given conflict, only one side can be right. This notion led him, in turn, to take a principled negative view of neutrality, in contrast to the prevailing positivist tendency in international law, which was to look with approval on neutrality. On the specific subject of contraband of war, he maintained that there could be no fixed division between contraband and non-contraband goods. He was doubtful that the cardinal neutral duty of impartiality could realistically be applied. He also doubted the feasibility of a code-of-conduct approach to the law on the conduct of war and on neutrality, insisting instead (consistently with his just war approach) that necessity was the foundation of belligerents' rights. Lorimer was also an outspoken opponent of the Washington Rules on neutrality that had been crafted by the USA and Britain in 1871. He objected to the restrictions in these rules on the freedom of individuals to contract with belligerent powers as well as to the imposition of a duty on the part of neutral states to police the activities of their nationals.

James Lorimer, of the University of Edinburgh, was the foremost intellectual heretic of 19th-century international legal thought. He was an outspoken dissenter from the mainstream positivist outlook, which he condemned as being excessively narrow and negative in character, with its obsessive focus on the independence of states from one another. In certain respects, he appears as a modern figure, foreshadowing some of the most important developments of the 20th century. This was the case in two areas especially. One was in the high status that he accorded to individuals in international law.

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The other was his support for international organization (which apparently extended even to the coining of the term).¹

The truth is more nuanced (as so often happens). Lorimer was certainly no modernist by temperament. He was a supporter of natural law and a systematizer in the hypothetico-deductive style of the writers of systematic jurisprudence of the preceding centuries. His writing and general outlook bore more traces of the meticulous medieval scholastic than of the impatient modernist. The recent scholarship of the 19th century that most influenced him was speculative and idealist philosophy – first, of William Hamilton from Scotland and, later, of the German political scientist Christoph Dahlmann.² So strongly was Lorimer's thought in this idealist mould that he was sometimes referred to as the 'Scotch Hegelian'.

A major goal of Lorimer's was to embed international law doctrine in a comprehensive system of general jurisprudential thought. In this sense, he was indeed a thoroughgoing professor of the law of nature and of nations (as the title of his chair at Edinburgh indicated). Central to this framework were two sets of ideas. One was a double classification of acts as 'jural' and 'non-jural', on the one hand, and as 'normal' and 'abnormal', on the other. The second key feature was the central role accorded to the concept of recognition.

The present discussion will focus on the natural law character of Lorimer's thought and on the implications that it had in the important area of war and neutrality. To begin, there will be a discussion of certain salient features of Lorimer's overall legal outlook. It will then be demonstrated how these ideas were applied to key issues of war and neutrality and how they led Lorimer to adopt positions that were sharply at variance with mainstream international legal thought and practice.

1 Lorimer and Natural Law

For present purposes, the most salient feature of Lorimer's thought was his commitment to a natural law approach to international law, and his concomitant disdain for the positivist outlook that was then dominant in the field. '[J]urisprudence', he insisted, 'contains deeper roots than mere formalism.'³ Two elements of his natural law outlook should be appreciated from the outset. One was that his approach to natural law was predominantly in the rationalist tradition, which descended, ultimately, from Thomas Aquinas and the medieval Aristotelians. This version of natural law was hypothetico-deductive in character, with basic propositions – or a basic framework – devised with conclusions on specific questions then derived by logical deduction, broadly in the manner of mathematical proofs or demonstrations.

¹ Potter, 'Origin of the Term International Organization', 39 *American Journal of International Law* (1945) 803.

² On Dahlmann, see L. Krieger, *The German Idea of Freedom: History of a Political Tradition* (1957), at 305–309.

³ J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (1883), vol. 2, at 48–49.

The other key feature of Lorimer's natural law outlook, which also harkened back ultimately to medieval Aristotelian thought, was a committed belief in the basic sociability of the human species. In the Middle Ages, this belief contrasted sharply with the traditional Christian view of human nature as being inherently depraved and sinful. In the more immediate context of the 19th century, this belief in human sociability contrasted with the prevailing positivist emphasis on the independence of states from one another. Positivist writers tended to see a world in which the states were perpetually locked in jealous rivalry with one another – a vision that Lorimer condemned as a 'negative' picture of international law. His own theory was pointedly contrasted with this one, emphasizing the interdependence of states with one another as the fundamental feature of international life. Lorimer was emphatic that his vision of international law laid great stress on 'the active duties of humanity in the jural relations between separate communities'.⁴

These basic natural law principles had direct and important applications in several areas of international law. For present purposes, three are worth particular attention: the role of individuals in international law; the continuing vitality of just war thought and the basic principles governing neutrality.

A *The Role(s) of Individuals in International Law*

Natural law spoke chiefly to individuals, albeit to individuals who were seen as living a social rather than a solitary existence. Natural law, to be sure, was relevant to inter-state relations, but only in the somewhat indirect sense that certain individuals who wielded sovereign powers in their communities naturally interacted in the course of their activities with other sovereigns. In principle, though, the same basic norms applied to sovereigns as to humbler folk, meaning that natural law was primarily a law regulating the conduct of individuals and, only secondarily or by extension, a law regulating relations between states.

It is therefore hardly surprising that individuals would play a larger part in Lorimer's system than they would (or could) in mainstream positivist thought, which was strongly state centred. Lorimer had some original thoughts on this subject, though, which played an important part in shaping his unorthodox ideas about war and neutrality. Most importantly, he saw individuals as functioning in a dual capacity: on the one hand, as citizens of their respective states and, on the other hand, as 'citizens' of the world at large. In this latter capacity, individuals are seen 'as existing independently of the States to which they belong'.⁵ The concrete illustration that he gives, interestingly, is of pirates, whom he refers to as 'cosmopolitan criminals' (that is, offenders against humankind in general) as opposed to 'citizen criminals' (who offend only against the law of their home state).⁶ Moreover, Lorimer made it clear that these two capacities were governed by two distinct sets of legal rules, which had distinct sources. '[An individual's] citizen rights and duties are municipal, or *juris gentis*', he explained, while 'his personal rights are international, or *juris gentium*'.⁷

⁴ *Ibid.*, at 123.

⁵ *Ibid.*, at 131–132.

⁶ *Ibid.*, at 132.

⁷ *Ibid.*, at 137.

Lorimer was therefore a forthright dualist, in that he made a sharp distinction between international law and national law. It should be noted, though, that his dualism referred to the sources of the legal rules and not to their sphere of application. The most thoroughgoing form of dualism sees national and international law as being distinct not only with regard to their source or origin but also with regard to their field of application. In this radical form of dualism, the possibility of a clash between the two systems of law cannot occur because of their application to different persons – international law applies only to states and not to individuals and national law applies only to individuals and not to states. Lorimer's version of dualism was not of this radical sort. National and international law were seen as having different sources, but both kinds of law were applicable to the conduct of individuals. In this sense, it would be fair to say of Lorimer's system – though he does not put it in these terms himself – that it posits individuals as subjects of international law.

The two sets of rules were seen not only as being distinct bodies of law, independent in their content and operation, but also as operating simultaneously. 'His allegiance to his own State', Lorimer maintained, 'does not deprive [an individual] either of the rights, or relieve him from the duties, of a citizen of the world'.⁸ The inevitable result was that an individual's two legal roles could be sharply inconsistent with one another. 'Whilst neutral as a citizen', Lorimer contended, '[an individual] may thus be belligerent as a person, and whilst belligerent as a citizen he may be neutral as a person'.⁹

One particular natural law right of individuals was especially relevant to Lorimer's thinking about war and neutrality: the right to freedom of trade. He did not mean a right on the part of individuals to trade freely without regard to the prevailing laws of the states where transactions took place (for example, to import goods into a country that the law of that country prohibited or to import goods without paying prescribed customs duties). What it meant was that, once two individuals had arrived at an agreement between themselves on some commercial transaction, no third party had a right to step in and disrupt that arrangement. Just as third parties were seen as having neither rights nor duties under a given contract, so third parties had no right to intrude into the contractual relations of others. It will be seen presently that this principle played a large role in Lorimer's thinking on neutrality.

B Lorimer's Commitment to Just War Thought

Lorimer's view of war was, in all of its essentials, a straightforward endorsement of traditional just war thought. In his somewhat idiosyncratic terminology, a just war was labelled as being 'jural' and an unjust one as 'non-jural'. A jural (or just) war was seen by Lorimer in strictly traditional terms as a conflict waged in the cause of 'objective freedom' – that is, for the enforcing or vindicating of legal rights. As Lorimer put it, such a war was 'waged for jural objects and sanctioned by necessity'.¹⁰ Such a war was, at the same time, 'abnormal', meaning that war was not the usual means of

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*, at 49.

pursuing legal rights. An unjust war, such as a war of aggression, was, in contrast, both non-jural and abnormal.¹¹

Natural law modes of thought are also apparent in Lorimer's opinions about the conduct of war, which held that law on the conduct of hostilities emanated from two basic propositions. One was that the unjust side in a war has no right to use military force against the just side. The other was that the just side is entitled to employ whatever means are necessary, under the particular circumstances of each case, to bring about victory. The combatants in war, insisted Lorimer, should be 'free to bring their whole resources into play' for the successful prosecution of the struggle.¹²

This stubborn loyalty to just war modes of thought led him to reject the prevailing trend in the international law of war towards regulating the conduct of war by means of a context-independent code of conduct, rather than by the single principle of necessity. The background leading towards this code-of-conduct approach to war had been adumbrated by the Swiss natural law writer and diplomat Emmerich de Vattel in his famous treatise on *The Law of Nations* in 1758.¹³ It was only in the 19th century, however, that the actual drafting of specific rules began in earnest, in the generation prior to Lorimer's penning of his *Institutes of International Law*.¹⁴ A first step had been the adoption of the Declaration of Paris in 1856, which fixed rules on capture of property at sea, blockades and privateering.¹⁵ This was followed by the first Geneva Convention of 1864, drafted by the newly established International Committee of the Red Cross, which provided for immunity of medical personnel from attack.¹⁶ The Declaration of St Petersburg of 1868 prohibited the use of exploding bullets in warfare.¹⁷

Contrary to this trend, Lorimer held fast to the natural law position that there is basically only one principle governing the conduct of hostilities: the principle of necessity, which allows the just side in a war to employ any and all means actually conduced to bringing about victory. Lorimer's views on the capture of property in war illustrate the point particularly clearly. He pointed out that the majority of commentators held private property to be subject to capture at sea, but not on land. The prohibition against the capture of private property in land warfare had long been hailed as one of the signs of the laudable growth in moderation in warfare. Lorimer disagreed. It was illogical, in his opinion, to allow capture of private property at sea while prohibiting it on land. It should either be allowed for both or prohibited for both. Of these two choices, he opted for allowing capture in all cases. The reason, he explained, was that it was the very essence of warfare that a just belligerent is entitled to choose whatever means of war 'by which the objects of war can be attained at the smallest cost', and if that means capturing private property on land and sea alike, then so be it.¹⁸

¹¹ *Ibid.*, at 49–50.

¹² *Ibid.*, at 157.

¹³ See Neff, 'Vattel and the Laws of War: A Tale of Three Circles', in V. Chetail and P. Haggenmacher (eds), *Vattel's International Law in a XXIst Century Perspective* (2011) 317.

¹⁴ Lorimer, *supra* note 3.

¹⁵ Declaration of Paris 1856, 115 CTS 1.

¹⁶ Geneva Convention for the Amelioration of the Condition of the Wounded 1864, 129 CTS 361.

¹⁷ Declaration of St Petersburg 1868, 138 CTS 297.

¹⁸ Lorimer, *supra* note 3, vol. 2, at 152, n. 1.

Humanitarian arguments on the subject did not impress Lorimer. He doubted that the 19th-century campaign to ban the capture of private property at sea was really motivated by humanitarian concerns, suspecting instead that it was driven by ‘considerations of immediate self-interest’ on the part of commercial parties.¹⁹ If humanitarian concerns were really uppermost, Lorimer suggested – possibly with tongue in cheek – then efforts might more profitably be directed towards allowing only the capture of property in war, while prohibiting the shedding of blood.²⁰

It is not difficult to see Lorimer’s commitment to just war ways of thought at work here. Given that only the just side has an actual legal right to wage war, it can easily seem perverse to place arbitrary limitations on its ability to vindicate its legal rights against a wrongdoer. The code-of-conduct approach to war, in contrast, positively supports the placing of arbitrary limits on the waging of war in support of a general program of moderating suffering in armed conflict. This opinion, however, is based on the thesis that the justice of going to war is regarded as being altogether independent of rules governing the conduct of war. If neither side is regarded as having a legal right to prevail over the other, then imposing an arbitrary set of rules on the conduct of the struggle is easily justified. (It should be appreciated that the laws of war are ‘arbitrary’ in the rather special sense that they are man-made and are independent of context – that is, they are required to be obeyed even if breaching them in a given instance would make a material contribution to military victory. The analogy with the rules of a sporting event is apt here.)

C Neutrality

On the subject of neutrality, Lorimer also hewed strictly to the traditional just war position, holding that neutrality is, in principle, not permissible. He referred scornfully to neutrality as a decision ‘to let ill alone’.²¹ In this regard, Lorimer’s commitment to the concept of the natural sociability of humans, and to the centrality of interdependence in international law, came to the fore. States, in his opinion, are under a duty to assist one another, which meant, concretely, that they are under a positive duty to intervene in jural wars (that is, in wars in which a just side was arrayed against an unjust one), provided, crucially, that intervention is possible in practice in the particular case. If a given state is fighting a just war, then other states that recognize it as a state are obligated to assist it to the extent that they are able.²²

Such interventions, Lorimer contended, are ‘moral necessities’, which meant, in turn, that they are ‘jural necessities also’, on the basic natural law thesis that moral imperatives are necessarily at the root of legal obligations.²³ This duty of intervention was seen as being closely tied to the fundamental institution of recognition – to the extent that, in Lorimer’s words, the duty of intervention is merely ‘the

¹⁹ *Ibid.*, at 152.

²⁰ *Ibid.*

²¹ *Ibid.*, at 122.

²² *Ibid.*, at 42.

²³ *Ibid.*, at 48–49.

doctrine of recognition reversed, negative being substituted for positive propositions'.²⁴ Thoroughly in the spirit of natural law and just war thought, Lorimer explicitly rejected the view of Vernon Harcourt, that intervention was only a moral obligation and not a legal one.²⁵ Lorimer therefore defined lawful neutrality as 'the *involuntary* abstention from war in behalf of 'objective freedom' (that is, from participation in a just war).²⁶ Voluntary neutrality, in contrast, he defined as a 'failure to intervene in behalf of objective freedom' (that is, of war in a just cause).²⁷

2 Lorimer as a Dissident

In his commitment to natural law values and analyses, Lorimer was an explicit – and proud – dissident in the 19th-century international legal community. It is hardly surprising then that his views led him to adopt sharply different positions from those of mainstream writers on a number of important questions. Five of these questions may be singled out for particular attention. The first was in the matter of discrimination between contraband of war and ordinary goods. The second concerned the basic neutral duties of abstention and impartiality. The third dealt with the right of neutral individuals to trade with belligerents free from any regulation by their home states. The fourth concerned support for military necessity as the foundation of belligerents' rights *vis-à-vis* neutrals. The fifth concerned the duty of neutral states to police their territories to ensure that their nationals did not engage in certain forms of unneutral conduct.

A On Contraband and Its Contraries

By the 19th century, the dichotomy between contraband and non-contraband goods was deeply ingrained into international legal thought and practice. The distinction between them was simple enough at the level of general principle, if sometimes difficult to apply in particular cases. Contraband goods were goods employed in the prosecution of war, with arms and ammunition being the archetypal examples. Non-contraband goods were those whose use bore no relation to the war.

With the promulgation of the Declaration of Paris in 1856, the distinction between the two categories became more important than ever. This was because the Declaration laid down a general rule that non-contraband materials that were carried to a belligerent state on a neutral ship were not subject to capture and confiscation by the opposing belligerent. Contraband goods, in contrast, were subject to capture and confiscation (by way of prize-court adjudication), even if they were being carried on neutral vessels.

Lorimer had scant regard for the dichotomy between goods that were of contraband character, as opposed to ordinary goods. The important division for legal purposes,

²⁴ *Ibid.*, at 50.

²⁵ *Ibid.*, at 45–46.

²⁶ *Ibid.*, vol. 1, at 225 (emphasis added).

²⁷ *Ibid.*, at 226.

he insisted, lay elsewhere: in the principle of military necessity. A just belligerent was entitled to capture any item that contributed to the augmentation of his enemy's armed strength, regardless of its nature. In other words, there is no such thing as goods that are inherently of contraband quality, nor any such thing as goods that are inherently not of contraband quality. Everything depended on the context and circumstances of the particular struggle and, in particular, on the state of the just side's military needs from time to time. This line of reasoning led Lorimer to conclude that '[a]ll objects are munitions of war if a belligerent is in want of them; and no objects are munitions of war unless, or until, he is in want of them'.²⁸

Some difficulty arises in discerning just what Lorimer's point was. There is, it might be said, a strong and a weak interpretation of his stance. The weak interpretation would hold that Lorimer is contending merely that it is not possible to have a fixed, *à priori* list of goods that are contraband of war – that what constitutes contraband must always be context dependent. In regard to this interpretation, there is a real distinction between contraband and non-contraband goods – but the boundary between them is not fixed and inflexible. Rather, the distinction is functional and contextual, with contraband not being reducible to a fixed and permanent list.

The strong interpretation would see Lorimer as altogether denying, in principle, the very existence of a dichotomy between contraband and non-contraband goods. Anything that a belligerent state is seeking to import must be presumed to be of benefit to it. Otherwise, it would not bother with the expense and trouble of importing. It may then be further contended that anything that 'benefits' the importing state must make at least some positive contribution to its war effort. And if that were so, then the practical effect would be that any and all imported goods must be regarded as contraband.

B On Abstention and Impartiality

Traditional neutrality law was seen – and continues to be seen – as resting on two fundamental foundational principles: the duty of abstention and the duty of impartiality. The duty of abstention referred to war-related activity. According to this view, a neutral state must not allow the use of its territory for belligerent operations, such as the provision of sanctuaries for the armed forces of one side from which attacks were launched against the other. Similarly, a neutral state must not supply war-related materials to either belligerent. The duty of impartiality, in contrast, referred to non-war-related activities, sometimes referred to as 'offices of humanity', such as the use of port facilities to repair warships. Whatever courtesies are extended to one belligerent must be made available to the other, on an even-handed basis.

It will be noted that these two principles are importantly different in character. Abstention is essentially prohibitive, or negative, in character. It tells neutral states that they must not do certain things. Impartiality, in contrast, is permissive, or positive, in character. It allows neutral states to do various things, subject to the key proviso that what is done must be done even-handedly for both belligerents. To the duty of abstention, Lorimer had no fundamental objection. But he did insist that it was

²⁸ *Ibid.*, vol. 2, at 135.

applicable only to states and not to individuals. Individuals, he insisted, were entitled to trade with, or lend to, belligerent states or even to enlist in their armed forces and fight in the war, subject only to the proviso that 'they did so on their own responsibility, and at their own risk, in virtue of the international status which belonged to them as persons'.²⁹ In other words, individuals, in their capacity as subjects of international law, were seen to have a natural law right to take sides in foreign conflicts if they so wished – at their own risk, meaning that they would not be entitled to protection from their state in the event of action taken against them by the opposing belligerent and, conversely, that their home state would incur no legal responsibility for their actions. It will be seen that Lorimer was intensely concerned that this key state of affairs be scrupulously maintained in international law.

Regarding the question of impartiality, on the other hand, Lorimer harboured a deep-seated scepticism, which was based on the thesis that what was actually being sought by the principle of impartiality was equality between the belligerents as to the material effect of neutral policies. It would be easy enough to devise policies on 'offices of humanity' that are even-handed on their face between the belligerents. But they would never, in practice, be even-handed in their actual material impact. It is inevitable that one belligerent would always derive a greater benefit than the other from any policy that a neutral state might choose to adopt, including a total ban on trade with both sides. 'By forbidding [the purchase of goods by] both belligerents', Lorimer maintained, 'we consequently favour the belligerent who either does not want them or who cannot pay for them; and in so far as the effect of our municipal legislation extends, we fight on his side'.³⁰ Impartiality, in short, is a will-o-the-wisp, an unrealizable goal.

C *The Right of Individual Freedom of Trade in International Law*

It will be recalled that, in Lorimer's theory, individuals have dual capacities – with different rules of neutrality applicable to the two roles. When the individuals are considered in their capacity as citizens of their state of nationality, they are prohibited from any trading, of any character, with either belligerent. This is simply a mechanical application of the fundamental principle of abstention. This duty of abstention is easily seen to be applicable to the state itself when it is acting in its corporate capacity – that is, as a subject of international law. Less obvious is the application of this principle to individuals. But Lorimer maintained that, insofar as individuals are regarded in their capacities as citizens of their state of nationality, they are subject to the very same restrictions on their normal freedom as the state itself. In effect, citizens are seen as components of their state apparatus, with the logical consequence that any legal restrictions that apply to the state apparatus per se must necessarily apply with equal force to all of the components of that apparatus. Lorimer, however, was quite prepared to concede that this way of looking at things was 'at variance both with dogma and usage'.³¹

²⁹ *Ibid.*, at 164–165.

³⁰ *Ibid.*, at 161.

³¹ *Ibid.*, at 135.

Regarding individuals in their cosmopolitan capacity, however, the position was seen by Lorimer to be radically different. Viewed from this standpoint, individuals were at liberty to trade with belligerent states in goods of any kind – with no distinction between contraband and non-contraband materials. His insistence on the simultaneous applicability of both national and international law to the activities of individuals enabled him to achieve the impressive intellectual feat of being an advocate, simultaneously, of a radically restrictive set of rules on neutral trading and also of a radically permissive set of rules.

Lorimer went so far as to contend that neutral states actually had no legal right to constrain their nationals from freely trading with belligerents. The reason lay in his thesis that individuals operate simultaneously under two separate and independent legal regimes – of national law and international law – with international law conferring the right of free trade. ‘The State’, insisted Lorimer, ‘has no more right to constrain its subject, in his private capacity, to be neutral, than the subject in his private [capacity] has a right to constrain the State, in its public capacity, to be belligerent.’³² For a state to restrict the freedom of its nationals in this respect would pose a direct threat, Lorimer feared, to the principles of freedom of speech and freedom of trade.³³

Lorimer readily admitted that the radical *laissez-faire* policy that he advocated would not, and could not, be truly impartial. As explained above, he believed that, in principle, no neutral trade policy could ever be truly impartial, in the sense that neither belligerent would benefit more than the other. The best policy was therefore one that combined a minimal infringement of the individual natural law right of freedom of trade with a policy that is neutral on its face and simple to administer – in short, a policy of complete *laissez-faire* trading by neutral individuals, free from any supervision or interference by neutral governments. ‘[T]he best and fairest rule’, asserted Lorimer, ‘is that which shall leave [a given belligerent] and his antagonist, whoever he may be, to spend their money for their money’s worth in open market. No rule but this can ever be impartial.’³⁴ As Lorimer put it in a proposed codification of the law of neutrality, which he embedded in his treatise, ‘[t]rade, in every species of commodity, between neutral and belligerent citizens in their private capacity, shall be absolutely free, without distinction between such commodities as may or may not possess the character of munitions of war’.³⁵

The *laissez-faire* policy of any given neutral state, Lorimer conceded, would be of greater benefit to whichever belligerent had the greater need for resources from that state. His response to this idea, though, was to hold that, over the longer run, different states would benefit from the *laissez-faire* policy in different circumstances, so that there would be no infliction of a permanent disadvantage onto any given state.³⁶ Lorimer conceded that, theoretically, this radical *laissez-faire* approach should be applicable to states as well as to individuals. In reality, though, it only applied to

³² *Ibid.*, at 145–146.

³³ *Ibid.*, at 146.

³⁴ *Ibid.*, at 168.

³⁵ *Ibid.*, at 176, Art. 2(a).

³⁶ Lorimer, *supra* note 3, vol. 1, at 165–167.

individuals. The reason was that, in Lorimer's natural law approach, a state is not allowed to be neutral in the first place unless it was actually not possible for it to make a contribution to the cause of the just side. Therefore, the right to trade without limitation with both sides will be, in practice, a prerogative of individual neutral traders and not of their states.³⁷

D *Necessity as the Basis of Belligerents' Rights*

It should be appreciated that Lorimer's championship of individual freedom of trade only meant that neutral individuals must be left free by their own governments to trade with belligerents without restriction. He did not suggest that the belligerents themselves were under a duty to passively allow such trade. On the contrary, each belligerent had a right to interrupt trade between neutrals and its adversary that bolstered its enemy's war-waging capacity. Moreover, the absence of any sharp distinction (and perhaps of any distinction at all) between contraband and non-contraband goods meant that the belligerents' right to interrupt trade between neutrals and their enemies was, potentially at least, very great. The necessary result, then, was a particularly chaotic situation – one in which neutrals had an outstandingly large degree of freedom in which to trade with belligerents, but one in which belligerents also had a very high degree of freedom to interrupt that trade. That is to say, the degree of overlap between the rights of neutrals and the rights of belligerents was particularly great in Lorimer's system.

In this regard, Lorimer's views, which were consistent with his general just war approach, were a throwback to earlier modes of thought. The prevailing tendency in the 19th century was to forestall conflicts of rights between neutrals and belligerents by way of resort to a code-of-conduct approach. This meant, in essence, that the rights and duties of neutrals and belligerents would be carefully delimited so as to ensure that no overlapping would occur. Where the rights of neutrals stopped, those of belligerents would begin and vice versa. This approach to the law of neutrality had been first championed by the Danish lawyer Martin Hübner in 1759.³⁸ In the course of the 19th century, it gradually gained the upper hand. Admittedly, delineation between the rights of neutrals and those of belligerents inevitably involved an element of arbitrariness. This was generally held, however, to be an acceptable price to pay for the rewards of certainty in the law and the avoiding of clashes of rights.³⁹

Lorimer disagreed and held instead to the older position, which founded the rights of belligerents on the principle of military necessity – once again, consistent with traditional just war thought – and thereby accepted the inevitability of overlapping rights. This approach to the law of neutrality belonged to Vattel – who, interestingly,

³⁷ *Ibid.*, at 161–162.

³⁸ See M. Hübner, *De la saisie des bâtiments neutres; ou Le droit qu'ont les nations belligérents d'arrêter les navires des peuples amis*, 2 vols (1759).

³⁹ See generally S.C. Neff, *The Rights and Duties of Neutrals: A General History* (2000), at 86–142. For the summation of this approach to the law of neutrality, see generally R. Kleen, *Lois et usages de la neutralité d'après le droit international conventionnel et coutumier des États civilisés*, 2 vols (1898–1900).

did not extend his code-of-conduct approach to the laws of war to the area of neutrality. Instead, Vattel candidly recognized the existence of a key dilemma: a clash of rights between belligerent states and neutral individuals. Neutral individuals had a natural law right to engage in trade with either belligerent (or, for that matter, with both) simply on the basis that the neutral individual was, by definition, at peace with both belligerents and that third parties had no general right, under natural law, to disrupt peaceful relations between two entities that were voluntarily trading with one another. On the logic of this argument, which was also readily recognized by Vattel, neutral individuals must be allowed to trade in any goods at all with belligerents, including things such as arms and ammunition that played a direct and obvious part in the waging of the war.⁴⁰

Vattel did not actually deny the existence of such a natural law right on the part of neutral traders. Instead, he pointed out the existence of an overlapping right possessed by the belligerents: a right to take any steps that were necessary under the circumstances to bring the war to a successful conclusion. This was simply a restatement of the general principle of military necessity, which guided the conduct of war according to natural law. In one important respect, though, this general principle of military necessity was now expanded. It was now held to apply even-handedly to both sides in a war and not (as in classical just war doctrine) to the just side only. This principle of military necessity obviously allowed each belligerent to kill and capture enemy soldiers, to occupy enemy territory and so forth. But it also allowed each belligerent to interrupt trade between its enemy and neutral parties. However, this right, by its nature, only allowed the disruption of trading activity that contributed to the enemy's war effort. Trade that had no connection with the war must be allowed. That is to say, belligerents were entitled, in Vattel's view, to put a stop to trade in goods that were contraband of war, such as arms and ammunition.

Having broad-mindedly acknowledged the existence of both the neutral's right to trade and the belligerent's right to put a stop to contraband trading, Vattel's next task was to find some way of reconciling these incompatible rights. This he did not do. Each right was left intact, with some curious results. A belligerent had a full right to capture a neutral ship that was trading contraband of war with the enemy, to take that ship into a port for adjudication by a prize court and to confiscate the contraband goods. At the same time, however, it was conceded that the neutral party was not in violation of any law in carrying on (or attempting to carry on) this trade. The neutral was therefore not being punished for any wrongdoing. That meant that no corporal or personal punishment, such as imprisonment, could be inflicted upon him. It is true that the neutral suffered the loss of his anticipated trading opportunity, but that must be regarded as a mere misfortune rather than a delict, somewhat in the nature of the loss of a trading venture to storm or shipwreck. Consequently, the neutral's home state had no ground to complain of the confiscation, which was merely an exercise by the belligerent of its rights under the principle of military necessity.

⁴⁰ E. de Vattel, *The Law of Nations; or, The Principles of Natural Law*, translated by Charles G. Fenwick (1916 [1758]), at 271–272.

A similar reasoning applied to the situation in which the neutral trader succeeded in delivering his contraband shipment and receiving payment in cash or kind for it from his belligerent trading partner. He could not be regarded as having thereby committed any violation of international law since he was merely exercising his natural law right of freedom of trade. It is true that his exercise of that right caused a worsening of the other belligerent's material position in the conflict (by virtue of having his opponent's war-waging capacity augmented). This result, however, must be regarded as a misfortune rather than an infringement of any legal right, which meant that the belligerent could inflict no punishment or penalty of any kind on the neutral party after the contraband was delivered (for example, during the neutral party's homeward voyage).

The essence of Vattel's necessity-based approach to the question of contraband trading was therefore simply to leave each party to exercise its respective set of rights to the fullest extent possible under the circumstances. To some extent, it was clearly biased towards belligerents, since they had might on their side in the form of naval vessels that could capture neutral contraband traders. The traders, on the other hand, could only trust to their luck and hope that they were not caught.

There was, however, a certain element of even-handedness in that the necessity-based reasoning underlying the belligerent right of capture, by its nature, allowed the capture and confiscation only of goods that were actually related to the prosecution of the war – that is, to contraband of war. Non-war-related goods must be allowed to be freely traded in the usual manner, as if no war were in progress. For this reason, it was necessary to make as sharp a distinction as possible between contraband goods and 'ordinary' goods. The principal European maritime powers had been doing exactly this since about the middle of the 17th century, by way of bilateral treaties of friendship, commerce and navigation, which commonly specified goods that would be regarded as contraband and left all other goods as free to trade.⁴¹

However, Lorimer, as observed above, denied that there could be any fixed and permanent dichotomy between contraband and non-contraband goods (even based on the weak interpretation of his views). The implication of his ideas, then, was to apply the necessity-based reasoning in a more thorough fashion than even Vattel had done. A belligerent must be seen as entitled, under Lorimer's system, to capture any and all goods that, in the particular circumstances prevailing at the time, would make a contribution to its enemy's war effort. If the strong interpretation of Lorimer's position was adopted, then the conclusion would be more drastic still – a belligerent would be entitled to capture any and all goods shipped from neutral countries to the territory of its enemy.

It is interesting to note, though, that Lorimer did not actually carry the necessity-based analysis to its fullest logical conclusion. If he had, then belligerents would be allowed to capture enemy-owned goods even if they were being carried on neutral ships. Lorimer, however, did not propose to allow this but, instead, adhered to the rule stated in the Declaration of Paris, that 'free ships make free goods' and, indeed,

⁴¹ Neff, *supra* note 39, at 32–34.

even extended it by removing the exception made for contraband goods. In Lorimer's view, a neutral flag should protect all enemy goods from capture, with no exceptions of any kind.⁴²

E Opposition to the Washington Rules of 1871

The British government had readily conceded that the construction of warships for a belligerent power should not be allowed. It even had domestic legislation in place that criminalized this activity in the form of the Foreign Enlistment Act of 1819. During the American Civil War of 1861–1865, however, the Confederate states took great care to circumvent this law, by ensuring that only the ship itself was constructed in a British port, without armaments or a belligerent crew on board. The 'bare' ship was then sailed outside of British territorial waters, where the armaments were installed and a crew formally engaged (often the same crew that had sailed the ship out of the British port). The British government itself took a dim view of this practice and contended that the 1819 Act was violated if the builders of the ship acted with knowledge of the use to which their handiwork would later be put. A prosecution that was instituted on that theory, however, failed to win acceptance by the courts.⁴³ The Act was violated, it was held, only if the actual arming and equipping of the vessel took place in British territory. The American government contended that, by failing effectively to stop this ship-building activity, the British government was in violation of its duty of abstention as a neutral power.

In 1871, Britain and the USA concluded the Treaty of Washington, which set out the rules that an arbitral panel was to apply in resolving the dispute.⁴⁴ These Washington Rules (as they came to be called) set out a different, and more stringent, duty than the British courts had. A neutral government, it was stated, was bound to employ 'due diligence' to prevent the fitting out of a warship when it had 'reasonable ground to believe' that a vessel under construction was 'intended' to be employed in belligerent operations. Moreover, this duty was applicable whenever a vessel was 'specially adapted, in whole or in part' in the territory of the neutral state.⁴⁵

Lorimer emerged as an outspoken foe of this rule. He condemned it for its failure to respect the important distinction between, on the one hand, the right of individuals under international law to trade freely and, on the other hand, the duty of neutral states to abstain from participation in wars. Under the old (and preferable) law, he maintained, there had been complete freedom of action on the part of neutral individuals (in the exercise of their natural law rights under international law), coupled with a complete absence of responsibility of the part of the neutral state for any of their nationals' acts.

The admirable simplicity and clarity of this approach, Lorimer lamented, was being fatally undermined by the Washington Rules, which restricted the freedom of

⁴² Lorimer, *supra* note 3, vol. 2, at 177, 178, Art. 2(e); see also Art. 2(m).

⁴³ *A.-G. v. Sillem*, 2 H & C 431 (1864).

⁴⁴ Treaty of Washington (Washington Rules) 1871, 143 CTS 145, Art. 6.

⁴⁵ *Ibid.*, Art. 6.

individuals and also made the state responsible for their conduct.⁴⁶ The result, in his view, was the worst of both worlds. Individuals were having their natural law freedoms unjustly curtailed. And states were saddled with the impossible task of overseeing and controlling the conduct of their nationals. In practical terms, this oversight could not be exercised properly since it was envisaged that individuals were to be placed under restrictions not only, or even primarily, on the basis of their overt actions but also on the basis of much more subjective factors such as their degree of knowledge or their intentions as to the future.⁴⁷ Thus, the only effect of laws such as those in the USA and Britain was, in Lorimer's opinion, 'to make neutral States responsible for transactions which they cannot prevent'.⁴⁸

Such restrictions on the freedom of individuals could not be justified, Lorimer maintained, on the basis of the neutral state's duty of impartiality, since (as noted above) he essentially denied the very possibility of impartiality. Forbidding the sale of warships (or, more strictly, of warships to be) by neutral individuals to belligerent powers amounts to 'forbidding to the belligerent ... the use of his money; and as money is proverbially the sinews of war, we are favouring his adversary by thus tying his hands'.⁴⁹ If such a rule was seen to be justified, Lorimer contended, there was no logical reason for it to be applied only to warships. Belligerents should be prevented from acquiring any commodity at all from neutral parties, thereby marking the complete destruction of the natural law right of individuals to freedom of trade.

His proposed alternative was that '[n]eutral citizens in their private capacity' should be free to construct warships for belligerent powers – though with the proviso that the actual arming and equipping of them in the territory of the neutral state should not be permitted.⁵⁰ That is to say, he supported the policy of the Foreign Enlistment Act of 1819 as interpreted by the courts. There should be no obligation on the part of a neutral government, he maintained, to take action against citizens – that is, to infringe the natural law rights of their citizens under international law – on the basis of mere knowledge of the use that someone else would later make of their work.

Lorimer candidly conceded that allowing neutral individuals to bolster the war efforts of belligerents would have the practical effect of prolonging wars, by keeping weaker belligerents in the field longer than would otherwise have been the case. In defence of his position, he offered the rather speculative argument that, even if the war was prolonged, the peace – when it eventually came about – would be more durable.⁵¹

3 Final Comments

The views of Lorimer on the key questions of war and neutrality that have been discussed here provide an excellent illustration of the strengths – and also, it must be

⁴⁶ Lorimer, *supra* note 3, vol. 2, at 164–165.

⁴⁷ *Ibid.*, at 169–170.

⁴⁸ *Ibid.*, at 155.

⁴⁹ *Ibid.*, at 161.

⁵⁰ *Ibid.*, at 178, Art. 2(k).

⁵¹ *Ibid.*, at 147–150.

said, of the weaknesses – of logic when applied to the messy and chaotic events of the real world. Like his intellectual ancestors – the medieval Aristotelians and the systematic-jurisprudence writers of the 17th and 18th centuries – Lorimer sought to bring reason relentlessly to bear on the world of contemporary international relations. Of course, it was not reason ‘in the raw’, completely divorced from any connection to reality. His system involved reasoning outward from a set of first principles, with a view to constructing (or at least advocating the construction of) a world in which those first principles would have the fullest possible expression.

His opponents, the positivists, in sharp contrast, accepted that the world was not, and probably never could be, a single, coherent whole, as the natural lawyers (such as Lorimer) hoped. The international law of the positivists – and especially those of the empiricist persuasion – accepted that international law is a jerry-built, ad hoc system, hammered together by way of treaties and customary practices that owed far more to the vicissitudes of power politics and history than to the austere ratiocination of scholars.

As it turned out, the future belonged more to the empiricists than to the scholastics, which meant that, for the most part, Lorimer’s unorthodox ideas failed to win support. It should be noted, though, that two of the positions discussed here did go on to win widespread support. One was his stance on contraband – that is, his contention that a sharp line could not be drawn between contraband and non-contraband goods. The wars of the 20th century would bear this out. The other belief that went on to win acceptance was his insistence that individuals have various rights under international law that are independent of the law of their states of nationality. To these may be added Lorimer’s support for international organization. Lorimer therefore can be said to have made some lasting contributions to international law. But it may also be said that these lasting contributions are in the nature of fragments or shavings from a much broader conceptual edifice – an edifice to which the history of international law has not been kind.

It may be speculated, though, that Lorimer himself would prefer to be remembered for the grand edifice rather than merely for the fragments or shavings. From the standpoint of a historian, it is fitting that a writer’s ideas be looked at in full and in their context and that ‘cherry-picking’ of individual morsels be eschewed. Lorimer’s grand vision of international law may have failed to take hold. But that does not detract from its grandeur.