

The Law of Nations, American Law, Wars and Attempts to Stop Them

Exchanges among the Founding Fathers illustrate their concern with contemporary and classical European politics. Being a small, relatively isolated and only newly empowered group of statesmen, they were particularly attentive to the failures of the Europeans to keep their rulers from engaging in war and saw in that failure the gravest threat to freedom. They read widely and deeply. The experiences of Greece and Rome as well as the contemporary European states figure frequently in their conversations and writings. They also read the works of the recent European philosophers and imbibed the reflections, particularly Sir William Blackstone's *Commentaries*,¹ on English common law which they all assumed to be fundamental to their conception of government,² and Emmerich de Vattel's *The Law of Nations*.³

In the following pages I will discuss the development of international law and custom by the Founders, jurists and statesmen of the American Republic, the advent and development of the concepts of *jus genitum* and *jus belli*, show how they impacted upon American law, and then list the new American style of war and note the attempts to limit or outlaw war in the Nineteenth and Twentieth centuries. Because these are complex subjects, I can touch upon them only lightly but in, I hope, sufficient detail to illuminate the guidelines of contemporary thought and action with which I deal in the next essay. I begin with what the Founding Fathers knew and what they did about international law and custom.

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Known to the Founding Fathers was what appears to us a modern theme: the great divide between the parallel worlds of Islam and Christianity. Knowledge of the split led to thinking on fundamental concepts of international law and is so much an issue of our times that it deserves to be put briefly in place here.

Thomas Jefferson, America's premier humanist, had read the Quran while living in France as the American Minister.⁴ While there, he read among Montesquieu's writings on law, philosophy and politics also his novel *Persian Letters*. Although a thinly disguised satire on European manners and customs, it incidentally provided a rosy view of Islamic society. Jefferson was apparently not much moved by its view of Islam, since he remained fundamentally hostile to both Islam and Judaism, but perhaps the book fostered the belief, which he and a few other of the Founding Fathers held, that American politics should be open to Muslims, even as far as the Presidency -- at least theoretically.⁵ So, we can say that he and perhaps some others among the Founding Fathers would not have regarded the charge that Barak Obama was a secret Muslim, as some of our fellow citizens now do, grounds for impeachment.

We now know that some of the slaves who had been imported into America were Muslims -- probably in the tens of thousands⁶ -- but few Whites knew or cared.⁷ However, after independence, the new American leaders had to deal with Muslims abroad. Jefferson, Madison, Adams and Monroe each faced a challenge from a residue of the once-grand Ottoman Empire, the "Barbary [for Berber] Pirates." Newly independent, the United States had lost the protection of the Royal Navy, and Britain no longer paid the traditional subsidy to the Barbary rulers for passage through the Mediterranean. Britain and France were accustomed to the toll, but the Americans, particularly Jefferson, found it humiliating and were soon drawn into a military confrontation.

None of the Founding Fathers knew much about the long background of the issues of war and peace between the Islamic and Christian worlds, but because the customs that had evolved were of profound consequence to American thoughts on international law and on the proper relations among nations and peoples in our times, I will touch on them.

During the Middle Ages and indeed up to the early years of the Nineteenth century, the question of war and peace with the Islamic world loomed large in international affairs. The Muslim states regarded the world as being divided into zones of peace (the Islamic world, the *Daru's-Salam*) and war (*Daru'l-Harb*). The Christian states essentially agreed. But within a few centuries after the rise of Islam, this sharp division had become largely theoretical. When the states of the Islamic and European areas were in a rough balance of power, they tended to engage in profitable trade. So, as I have pointed out in my essay "Understanding Syria," despite the trauma of the Crusades, the "*Reconquista*" of Islamic Spain and the rise of the militant Ottoman Empire, long periods of peace prevailed.

For centuries after the Crusades, the Mediterranean was virtually a free trade area. True there were often tolls to be paid – as indeed there were along the roads that linked the European towns and cities. But what was distinctive about the Mediterranean borderlands was that the inhabitants of the two worlds overlapped. Large numbers of native Christians and Jews remained in areas under Muslim rule. In Islamic law, these non-Muslim natives were treated as Peoples of the Bible (*Ahlu'l-Kitab*). That is, they were recognized as protected or tolerated God-fearing "neighbors" who were allowed to follow their own faith, live according to their own customs and for all matters other than military affairs to rule themselves. In addition to such natives, new groups of Western Christians merchants were established in all the major Muslim ports with Jews acting as the links among them.⁸

The relationships of these groups to Muslim authorities in Islamic -- that is, domestic -- law was secure. There was no need for much thought of international law. Nor was there much thought on international law in Europe. Europeans were little concerned with Muslims because, except in Spain and the Balkans, there were few resident or visiting Muslims. Where they were allowed to settle, Jews were mainly restricted to ghettos and little thought was given to their legal status.

But there were "practical" issues that were addressed on a local level. In Spain, particularly, secular interests often overrode religious divisions. Muslims served in the bureaucracies and armies of the Christian states while some Christian and Muslim states joined together to fight combinations of other Muslim and Christian states. And cultural ties developed across frontiers. Then, as trade picked up in the period after the Crusades, buying and selling cargoes, handling ship wrecks, paying or evading customs, dealing with contraband etc. posed new problems. Muslim and Jewish commercial practice, particularly in banking and insurance, spread rapidly throughout Europe. By the late Middle Ages a new, non-military, balance began to be achieved.⁹

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What disrupted this balance was the European passage around Africa to India and across the Atlantic to the New World. How could Muslims and Christians relate in the newly contacted areas and what was the relationship of natives to each of them?

Within just about forty years of Columbus' voyage, a Spanish Dominican friar, Francisco de Vitoria, set about formulating answers. These he laid out in his 1532 unfinished treatise *De Jure Belli (On the Laws of War)* which may be said to be a foundation of international law.

Francisco conceived of the whole world as a universal republic, a *res publica totius orbis*, in which all states, regardless of religion or geography, should be held accountable for their actions. Although himself a Dominican friar, he appears to have inherited some notions from his Jewish ancestors. Among them was his insistence on maintaining the legal practice under which Jews and Christians had lived in Muslim lands. Extrapolating from that practice, he argued that the conquered peoples of the New World constituted separate nations or "sovereignities" and should not be despoiled as the Spaniards of his time were doing to the Indians.¹⁰

The next "father" of international law was the Italian Alberico Gentili who in his own person exemplified the increasingly international world. Born in Italy during the lifetime of Francisco de Vitoria, he studied law at Perugia. Then, in danger as a member of a persecuted minority – as a Protestant in Catholic Italy – he fled first to what is now Slovenia. From there, he made his way through the German principalities to England. By the time he arrived in England, he was 53 years old and was already so well known that he was immediately awarded the professorship of law at Oxford.

Probably dating from his experience in Italian commerce, Gentili plunged into the new field of the law of the sea and began also to practice at the High Court of Admiralty, but he is best remembered for his consideration of aggression and imperialism as practiced in the Roman empire. His study of Rome taught him that governments and states could so define justice as to legitimize almost any action.¹¹ That did not dissuade him but it forced him to replace Francisco de Vitoria's emphasis on morality with *realpolitik*. It followed that while peace was the ultimate objective of international law, it could be legally achieved on terms laid down by the victor rather than any notion of justice. We can see echoes of his thought in a number of recent issues including the war crimes trials at Nuremberg and Tokyo.

While he believed that law must aim at "liberty, peace and unity," Gentili did not follow Francisco de Vitoria's belief in *res publica totius orbis* or "One World." I infer that his residence in Slovenia had impressed upon him fear of "the alien." Whether that was what shaped his thought or not, he posited a concept that has been in the forefront of controversy in American law in our times: the exclusion of some people from protection by the law. In Gentili's concept of "unjust enmity"¹² we can see an early version of the Bush administration concept of "unlawful enemy combatants." For Gentili, such people were simply non-Europeans;¹³ for the legal advocates of the Bush administration, they were terrorists. At the time of the Revolution, the Philosopher Immanuel Kant warned that such a concept would lead to wars of extermination, becoming "a vast graveyard of the human race." (I will deal in more detail in my next essay with official legal opinions, particularly those of John Yoo that deprived Muslim insurgents of prisoner of war status and so opened them to indefinite incarceration, torture and murder.)

Gentili's themes were partly refuted by his younger contemporary, the Dutch Protestant jurist Huig van Groot (better known as Hugo Grotius) in his book *De Jure Belli ac Pacis Libri Tres (Three Books on the Laws of War and Peace)*.

Writing in 1625, Grotius announced his central theme: “no one has treated it [international law] in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished.”¹⁴ His work was anything but systematic, but he set out basic concepts of human relations that were to play a major role in law down to our times.

Living during one of the most horrible periods of European history, the Thirty Years War, Grotius sought peace in law. He argued that “there is a common law among nations, which is valid alike for war and in war [but that] when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had only been let loose for the committing of all crimes.”¹⁵

How to avoid that frenzy required a return to something like the stance of Francisco de Vitoria, but instead of basing the concept of justice on theology, Grotius based his thought on natural law¹⁶ and on treaties negotiated among states.

The legacy of his analysis deeply influenced, among other philosophers, John Locke and thus had an important influence on the American Founding Fathers – both Alexander Hamilton and James Madison drew on him in *The Federalist*.

Prevention of war was recognized from Grotius’s time as the prime task of international law. When it could not be prevented, it needed to be so defined – one might even say, refined -- as to do the least possible damage not only to the belligerents but also to the concepts of social order and human rights.

In short, the task was to enable neighbors and strangers to live on the same planet. This also is an issue we face today. Grotius’ legacy can also be seen have also been of major importance in the later development of the United Nations and such international agreements as the outlawing of chemical weapons. Appropriately, his works are housed in the Peace Palace Library in The Hague.

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Several later philosophers including Jean-Jacques Rousseau and the Abbé Charles-Iréné Castel de Saint-Pierre¹⁷ came to the conclusion that international law was necessary but not sufficient to deal with the grand issues of war and peace. So they began to experiment with the idea of a confederation of Christian kings and princes both to smooth relations among them and to make peace with Muslim rulers. Saint-Pierre’s plan was remarkably detailed – comparable in its major headings to the Covenant of the League of Nations and the Charter of the United Nations. It specified the way in which states could join, the penalties they had to pay upon violating its provisions or leaving the organization, how big their military forces could be (6,000 each!) and where the headquarters was to be established. It also specified that member states would guarantee freedom of religion to everyone throughout their lands. But it contained a “poison pill.” To win the support of at least 14 of the 24 identified European sovereigns,¹⁸ required to ratify it, Saint-Pierre proposed that the international union would guarantee them against revolution.¹⁹

It was the latter point, “guaranteeing their respective government against internal revolutions...thus extinguishing the hope of one day seeing the end of oppression...” that

frightened James Madison. It was governments, he and others of the Founding Fathers agreed, that were the real enemies of peace. Their leaders “feel so many allurements to war...war is to be declared by those who are to spend the public money, not by those who are to pay it.” What was needed, Madison thought, was “regeneration” of government, making it “subordinate to, or rather the same with, the will of the community.”

As Madison saw it, the problem lay not in the form of international relations but in the actors. Each ruler was intent on establishing his reputation as a war leader and pushing the boundaries of his state into the territories of his neighbors or acquiring the lands of the colonial peoples.²⁰ “Here our republican philosopher might have proposed as a model to lawgivers,” he said. “That war should not only be declared by the authority of the people, whose toils and treasures are to support its burdens, instead of the government which is to reap its fruits: but that each generation should be made to bear the burden of its own wars, instead of carrying them on, at the expense of other generations.”²¹

Whether or not the price Saint-Pierre was willing to pay for peace was too high, success was apt to be ruinous. With his eye always on history and events in Europe, Madison wrote, “...true it is, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments.”²² We shall see how prescient Madison was when we come to consider the experience of recent years.

Parallel to the speculations of such philosophers as Rousseau and Saint-Pierre, was the growth of conflicts arising from expanding commerce. The world-wide spread of Commerce and the imprecision of concepts of law gave rise to the expanded use of courts of law, which were already in common use in the Islamic world, and which would be reflected in the US Constitution’s creation of a Supreme Court. Their adjudication might be regarded as the “mechanical” aspect of international law. In itself, this was of major importance, but what underlay and justified it was a sense of political morality.²³ However imprecise and however often violated, law could be effective only if individuals and whole societies regarded it as just. It was this “spirit of the law” that gave Montesquieu his thesis and the title of the great work that so inspired our Founding Fathers.²⁴

The spirit or purpose of law spread beyond ringing declarations to practical effect only slowly in America and elsewhere. But the law of war, *jus belli*, was cited in one of the earliest cases before the US Supreme Court, *Bas v. Tingy* in 1800. Additionally, jurists and statesmen believed that an overarching sense of reasonable behavior existed not only in war but also in commerce. However, dedication to imperialism, to submerging weaker societies and depriving them of their self-respect and sovereignty was far more typical of the century following the American Revolution than the lofty thoughts of the Founding Fathers or the philosophers who had stimulated them.

From the beginning, American colonists were a warlike people. The Indians were their enemies and victims. But, after the Revolution, the increasingly took up arms against foreigners. It is worth setting them out because I doubt that many Americans are aware of how many overseas military ventures America undertook or how much of the globe they covered between 1800 and the First World War. Leaving aside the extreme genocidal wars with the Indians, the United States engaged in more than a hundred overseas military operations from 1800 until the First World War.²⁵ Here they are by categories:

First, major wars: The United States declared war with Great Britain in 1812, with Mexico in 1846 and with Spain in 1898; it also fought undeclared wars with France (1798-1800) and the North African states (1801-1805 and 1815).

In addition to these wars, what have been called “notable deployments” abroad began in 1806 with Mexico. I mention them here because I doubt that many Americans have any sense of how frequently and over such a wide area they occurred -- the Mediterranean, the Atlantic, the Caribbean and the Pacific. In the Marquesas islands in Polynesia, already in 1813, American forces built our first overseas base; today there are said to be over a thousand.

Some engagements were to punish the natives as in Canton, China (1856, 1866); Fiji (1840, 1855, 1858); Formosa (1867); Haiti (1888); Ivory Coast (1843); Jaffa (1851); Nicaragua (where the US Navy burned the capital, 1854); Ottoman Empire (“to remind the authorities of the power of the United States” 1858-1859); Paraguay (1859); Samoa (1841); and Sumatra (1832, 1838-1840).

Other expeditions were to pursue pirates or “bandits” the earlier terms for terrorists: Caribbean (1814-1825); Greece (1827); Mexico (1859 and repeatedly from 1873 to 1896 and a full-scale invasion to overthrow Pancho Villa in 1914-1917).

Most deployments were to protect or rescue American citizens or interests: Abyssinia (1903-1904); Angola (1860); Argentina (1833, 1852-1853, 1890); Brazil (1894); Philippines (1899-1901); Chile (1891); China (1854, 1855, 1859, 1894-1895, 1898-1899, 1911, 1912 to establish military bases which were held until 1941); Colombia (1856, 1865, 1873, 1895); Cuba (1906-1909, 1912); Dominican Republic (1903-1904 creating a precursor of the “no fly zone”, 1914, 1916-1924); Egypt (1882); Haiti (1891, 1914, 1914-1934); Falkland Islands (1831-1832); Hawaii (1870, 1874, 1889); Honduras (1903, 1907, 1911, 1912); Korea (1888, 1894-1896, 1904-1905); Mexico (1913, 1913-1917); Nicaragua (1853, 1867, 1894, 1899, 1910); Ottoman Empire (1849, 1912); Panama (1904); Peru (1835-1836); Samoa (1888-1889, 1899); Syria (1903); Tangier (1904); and Uruguay (1855, 1858, 1868)..

Four missions were to “regime change” countries: Columbia (to split Panama away, 1902, 1903-1914); Hawaii (1893 to support an American sponsored coup d’état); Cuba (1906-1909); and Panama (to supervise an election 1912).

Or they were undertaken to gain concessions: Japan (Commodore Parry “opened” the country to American trade in 1853-1854, 1864, 1868) and the Ryukyu and Bonin islands (for a coaling concession 1853-1854).

Law or no law, warfare remained endemic. Slavery prevailed in most of the world. Natives were impoverished and butchered. And commerce was as rapacious as those who practiced it could afford. So evident was the cost of such conduct that slowly, haltingly and with failure after failure, men of vision sought to find more likely routes to survival. If law was insufficient to stop war and if governments would not join together to settle their differences, perhaps – as Madison, Jefferson and others of our Founding Fathers had hoped -- individuals and groups of people might take up the task.

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The man who may be regarded as the father of the peace movement was neither a jurist nor a statesman. Elihu Howdett was a blacksmith. Self educated, he was the first of what today we call “activists.” In the years before the Civil War, he created a “League of Universal Brotherhood” to struggle against slavery, promote workers’ rights and demand peace among nations. In his thirties, he became active in the American Peace Society, but when it supported American action in the Mexican War he resigned, disillusioned by those who provided a loophole to the antiwar movement in “defensive” wars. To effect moves toward peace, he appealed to the working class through what we would call “Op-Ed” letters to the press. Cumulatively, his writings are believed to have been read by about two million people.²⁶

Elihu Howdett favored direct action and hoped to engage American workers in a union that would make the production of war materials impossible – removing the weapons and the profits gained by making them, he hoped, would end war. To show people across national divides between America and the European states that they shared interests in peace and prosperity, he came up with two ingenious schemes: one was the “pairing” concept that aimed to create “twin” European and American cities and the other was to facilitate the exchange of ideas and friendly contacts across the ocean with “Ocean Penny Postage.” These transatlantic ventures, and perhaps disillusionment with America, caused him to move to England where he found the working class better organized and more vigorous in promoting its interests. There, in 1848, he organized an international congress, a sort of citizens’ pressure group, to promote world peace. It held meetings in France, Germany and Britain in the 1850s, but, he realized with great sadness, that his efforts were doing little to stop recourse to war in either Europe (the Crimean War) or America (the Civil War). In the vast collection of his writing was to be found the a call for a “Congress of Nations.” Roughly similar to the Abbé Saint-Pierre’s earlier scheme, it also contained the idea of a “High Court of Nations” which was the notional ancestor of the International Court of Justice.

At the other end of the social scale from Elihu Howdett was Andrew Carnegie. Born 25 year after Howdett in Scotland, Carnegie shared a beginning in poverty. Carnegie reversed the movements of Howdett by migrating from Europe to America. For him at first the streets were not paved with gold as many immigrants dreamed. In his first job, he earned \$1.20 for a 72 hour work week, but he worked hard and saved (and also courted the rich and powerful) to get opportunities. And he was lucky. His major opportunity came in supplying railroad equipment and munitions to the Union army during the Civil War. He was not a blacksmith like Howdett, but steel became his lifelong preoccupation. Mainly from manufacturing it, he eventually accumulated a fortune said to have been the equivalent of over half of one percent of the total US economy. But remarkably he wrote articles and two best selling books. While not known for business ethics, he strongly opposed American imperialism; he tried to prevent the American conquest of the Philippines by offering to lend the Philippine insurgent government the equivalent of the money the US had paid to Spain to “buy” the country. Then, in 1901, he sold his major investment and devoted the rest of his life to charitable activities. Among them, he created the Carnegie Endowment for International Peace in 1910 to encourage the development of international law and in 1914, he organized an anti-war coalition, the Church Peace Union.

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During the years when Andrew Carnegie and others were trying to formulate a way to stop war, the Tsar of Russia and President Theodore Roosevelt struck out on a different path. If governments were not prepared to give up the right to make war, some statesmen thought they might at least make warfare “humane.” That was the intent of the 1899 and 1907 Hague Conventions.²⁷ Unlike Abbe Saint-Pierre scheme, which was only a dream, this venture had an element of reality: 45 states (including the US) initially adhered. What they wrote into their agreement was essentially the Lieber Code of conduct developed for the Union Army in the American Civil war. In deriving international law from domestic law it echoed the early borrowing of Islamic legal concepts for dealing with minority “nations” [Arabic: *wilayat*; Ottoman Turkish: *vilayet*].

The result of the Hague venture was disappointing. The delegates from the several governments failed to reach agreement on binding arbitration of disputes. The best their principals could agree was to set up an advisory court (which still exists), to delay the advent of aerial bombardment, to prohibit the use of projectiles carrying poison gas and to outlaw “dumdum” bullets. But, they set in motion moves that led to a series of international agreements including drug control (1912), protection of cultural property in time of war (1954) and unlawful seizure of aircraft (1970). All were themes with which we are still engaged. Its agreements, unable as they were to prevent recourse to war, are regarded as a part of the law of nations and so remain theoretically in force.²⁸ But most of its provisions were negated by the events of the First World War.

Whatever else it did, the First World War made clear that individuals, no matter how dedicated like Elihu Howdett or how rich and powerful, like Andrew Carnegie, could not prevent wars. When war broke out in Europe, Carnegie’s “heart was broken.”²⁹ Why, he asked – and legions of scholars, statesmen, journalists and ordinary people have since asked – do states rush headlong, as they all did in 1914, into catastrophe?

Many answers have been brought forward,³⁰ but one would have seemed obvious to the American Founding Fathers: while prevention of war is nearly always in the interest of societies it is not always in the interest of governments. In representing their peoples, rulers have a major conflict of interest: they profit in various ways from war. And they always have a rationale that makes preparation for war seem necessary. James Madison put his finger on the latter point: as he wrote, “If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprises to take corresponding precautions...A wise nation...whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.”³¹

It was in this context that Woodrow Wilson came onto the world stage. A convoluted person, driven both by deep anxieties and profound faith, he was also intensely ambitious.³² And he believed deeply in what has been called “American Exceptionalism”³³ a notion that still resonates with our leaders. His Presbyterian outlook on world affairs was magnified by his Secretary of State, William Jennings Bryan,³⁴ who believed more in Christian pacifism than any world figure since Francisco de Vitoria. Set against Bryan was the man who Wilson regarded as a virtual alter ego, “Colonel” Edward House, a pragmatist who embraced *realpolitik*.

Wilson wavered between their positions.

Wilson allowed Bryan to devote himself in 1913 to negotiating bilateral treaties with twenty states which pledged themselves to try negotiation before resorting to force.³⁵ Both France and Great Britain signed. Then in the spring of 1914, Wilson's other adviser, House, with Wilson's "warm approval" but without official status, went rushing around the European capitals in what was perhaps the first case of "shuttle diplomacy" to propose a coalition of powers to ensure peace. Reality came quick. In Berlin at the end of May, House saw that Europe had a case of "jingoism run stark mad."³⁶

House thought that a road to peace might be found in another direction: trade. To facilitate it, he urged that the relative rich lend money to the relatively poor on concessionary terms and reduce the tariff barriers as the US Congress was then doing. No one was paying attention. Fear and greed, as House had observed, were far too strong.

It was against these forces both at home and abroad that Wilson labored. At home he pushed the enactment of the Federal Reserve Act to "curb Wall Street's dominance over the nation's finances" and abroad he tried to break the stranglehold of American commercial interests on the Mexican economy. His venture there, done without an adequate understanding of the forces involved, led him try "regime change" policies that quickly pitted not only both Mexican loyalists and revolutionaries but also American overseas business and the Republican leadership in the Senate against him. In the confused situation, he felt himself forced to intervene militarily. He did so by occupying the city of Veracruz (to stop arms from reaching the rebels) and by sending the United States cavalry into central Mexico (to avenge a raid by the forces of Poncho Villa³⁷). Thus, the pacifist himself picked up the sword.

Engaging in foreign military action was deeply embarrassing to Wilson. My hunch is that he felt somewhat relieved to turn to the grand issues of European war and peace. When war broke out in August 1914 Wilson devoted himself to staying out of it. That was a difficult task. As the horror of the war on land became increasingly evident and combat appeared increasingly futile, both Germany and Britain sought to engage America. Finally, Germany inadvertently gave Britain the trump card in the so-called Zimmermann telegram.³⁸ Looking for a way to pressure America into war, the German ambassador had touched Wilson's most sensitive spot – Mexico. The British broke the code of the telegram in which he reported his efforts and delivered it to Wilson. It had the effect the British intended. He was swept into war as he proclaimed in his "Peace without Victory" speech in the Senate on January 22, 1917. America went to war.

As the Great War was drawing to a ragged end – with fighting still going on in many areas -- Wilson elaborated what he had meant in the apparent contradiction of peace without victory. In his January 8, 1918 "Fourteen Points" speech he laid out his plan for a new and peaceful world. Recognizing that governments – both those of the defeated states and also of the victorious allies – were his enemies, he sought to go over their heads to appeal to the hearts of all mankind. The response was astonishing. Never before had a ruler spoken such words. The public was ecstatic. Many people thought he was the Messiah. But, of course, he was hated by the men who would count, the leaders of the Allied governments and his Republican enemies. They were the realists; Wilson was the visionary. He wanted to do what no government had ever seriously considered: make peace. They were horrified. He had struck at their pride and at that most sensitive of human organs, the pocketbook.

Revolution in the very structure of world affairs was what he sought: action by the victorious governments first to allow previously depressed nations to form states and then to get the states to band together into a League of Nations.³⁹ These were the dreams, as I have shown, of others before him, but he was promulgating them as the leader of a powerful government. Dreaming about them was bad enough but actually trying to implement them was to overturn the practices and undermine the objectives of the winners. The leaders of the Allied coalition knew they had to pretend to cater to his program, but they also knew how to subtly undermine it. That, in a few words, was what happened in 1919 at the Paris Peace Conference.⁴⁰

Long before, Madison had issued a warning⁴¹ that Wilson did not want to hear: “A universal and perpetual peace, it is to be feared, is in the catalogue of events, which will never exist but in the imaginations of visionary philosophers, or in the breasts of benevolent enthusiasts. It is still however true, that war contains so much folly, as well as wickedness, that much is to be hoped from the progress of reason; and if anything is to be hoped, every thing ought to be tried.” The thing to be “tried” was the League of Nations.

Tried the League of Nations was, but only reluctantly. The US Senate rejected Wilson’s plan and the British and French governments devoted themselves to evading its intent. They disguised the colonies they were determined to seize by coining a new concept: such areas and nations were no longer to be called colonies but “mandates” which benevolent Europeans would lift from barbarism, civilize and educate to become states.

When I first studied the Covenant of the League of Nations and compared it to the Charter of the United Nations, I drew a parallel to the Articles of Confederation and the Constitution. That is, I thought that the weakness of the League and the Confederation lay in the written agreement and that the strength of the UN and the Federal Government came from improvements in the texts. I was wrong. While there were significant improvements, the operative weaknesses lay not in the words but in the attitudes and actions of the statesmen. Had governments abided by and enforced the Covenant of the League of Nations, it probably would have worked as well, that is imperfectly, as the UN does today.

A few key articles of the Covenant show that it set out the major issues: #8, limiting and revealing armaments; #10 joint defense against aggression; #12 agreement to arbitrate or adjudicate all disagreements at a to-be-established Permanent Court of International Justice and “in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council;” #15 “not go to war with any party to the dispute which complies with the recommendations of the report;” #16 “Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not;” #22 the “tutelage” of former colonial peoples “not yet able to stand by themselves under the strenuous conditions of the modern world” should be exercised by those willing to undertake the task, but “The wishes of these communities must be a principal consideration in the selection of the Mandatory.” Had they been implemented, these and other agreements would have been inclusive enough to have made peace at least possible.

But Covenants, Charters, Articles and Constitutions are only bits of paper; what counts is whether or not their words govern actions. Americans learned from the anarchy of the 1780s that they had to give up some of their autonomy and work together; they met in Philadelphia and hammered out a new document that encapsulated this lesson. On the contrary, neither the Europeans nor the American Senate were sufficiently aware of the costs of the last war and the danger of another to come that they determined to do what they proclaimed.

Indeed, things began to go wrong almost before the Covenant was drafted. It was clear that no matter what the wishes of the former colonial peoples such as the Syrians were, the major powers were going to prevail. Britain and France essentially blocked the American attempt (in the King-Crane Committee of Inquiry) to ascertain the wishes of the Syrian and other Middle Eastern societies.⁴² Worse was to come. Britain, France and Italy separately went about fighting (often with the tools and practices they had used on one another in Europe -- poison gas, aerial bombing and massive artillery) native movements throughout Asia and Africa that sought the freedom and independence announced by Wilson and echoed by the League.

Meanwhile, attempts continued to be made to create additional supports for the League.⁴³ Some useful things were done and several ringing statements were made in treaties, but the fatal flaws of the system remained: the public was easy to enlist because revanchism was fueled by the punitive regime imposed by the victors on the vanquished;⁴⁴ Americans withdrew into happy materialism; the poor of Asia and Africa struggled but were overwhelmed; and in 1933 both Germany and Japan withdrew from the League. Then, in 1935 the Italians conquered Libya and Ethiopia in what were virtually genocidal wars.

Almost automatically, the League Council declared Italy an aggressor and imposed sanctions. That was at least a sign of life in the League. But the key member, Britain, did not allow sanctions to include elements that would have stopped the war, fuel and passage through the Suez Canal. Britain and France then suggested a way to stop the fighting: partitioning Ethiopia, thus giving the aggressors the fruits of their victory. In a clear sign of contempt, Italy withdrew from the League. Meanwhile, the Roosevelt administration invoked the Neutrality Acts recently passed by Congress, declaring an embargo equally on both the Italian attackers and the Ethiopian defenders. The British also concluded a naval pact with Hitler that enabled him to begin rebuild the fleet that had almost starved Britain in the First World War; encouraged, Hitler instituted military conscription. Mussolini already had two million men under arms. They were getting ready for war.

Taking advantage of a military coup, the Italian Fascists and German Nazis plunged into Spain (aiding Franco's rebels in violation of international law⁴⁵) and using Spain as the training ground for the military forces they would soon turn on their neighbors. The British and the French starved the Spanish government of supplies that might have saved it. Indeed, the British and French ruling classes and statesmen -- even Churchill -- were enamored with Mussolini and Franco and many in the Royal family openly favored Hitler. Nor did anyone much care that in July 1937 the Japanese began a full-scale invasion of China. It was later fashionable to blame the League for its impotence, but the "League" was just the sum of its members. And they did nothing.

Why was this sorry tale unfolding? It wasn't for lack of law or lack of international mechanisms of peace-keeping. It was people -- an uninformed and uninterested public, the

cowardice or ambition of statesmen, the greed of armament sellers and lack of effective resistance from victims. So it was that the world plunged into the Second World War.

William R. Polk
January 24, 2014

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- ¹ Oxford: Oxford University Press, 1765-69 they were republished in Philadelphia in 1771-1772 in an edition of the then almost unheard of size, 1,400 copies. Daniel Boorstin wrote (*The Mysterious Science of the Law*) that Americans found in them a “blueprint” for American government.
- ² Although they rejected the English practice in which the Constitution could be amended by acts of the monarch or the Parliament.
- ³ Published in 1758 in Amsterdam, it was ordered by Benjamin Franklin who said in 1775 that it “came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the Law of Nations...Accordingly, that copy which I kept [he ordered 3 copies] has been continually in the hands of the members of our Congress now sitting.”
- ⁴ See Denise A. Spelberg, *Thomas Jefferson's Qur'an: Islam and the Founders* (New York: Knopf, 2013), 7. Judging by their names, George Washington apparently owned at least two of them.
- ⁵ Jefferson introduced a bill in the Virginia Legislature to extend religious rights to Muslims, Jews and pagans and later in his autobiography proudly remembered his action. James H. Hutson, “The Founding Fathers and Islam,” Library of Congress *Information Bulletin* 61, May 2002.
- ⁶ Denise A. Spelberg, *Thomas Jefferson's Qur'an: Islam and the Founders* (New York: Knopf, 2013) 7.
- ⁷ Robert Battistini, “Glimpses of the Other before Orientalism: The Muslim World in Early American Periodicals, 1785-1800,” *Early American Studies* (Spring 2010).
- ⁸ The Medieval trade is described in a remarkable series of books by S.D. Goitein (*A Mediterranean Society*, Berkeley: University of California Press, 1967 passim) and dealt with in my book *Neighbors and Strangers: The Fundamentals of Foreign Affairs* (Chicago: University of Chicago Press, 1997).
- ⁹ The first ventures in this commercial revolution were undertaken by the *boni homines* and Jews of southwestern France; about two centuries later, merchants of the Italian city states would develop extensive ties with one another, with the cities and towns of northern Europe and with the Islamic countries.
- ¹⁰ His work may be regarded as the intellectual or legal justification for the preaching of Fray Bartolomé de Las Casas with the Spanish forces in Cuba and Mexico. On this see my *Neighbors and Strangers: The Fundamentals of Foreign Affairs* (Chicago: Chicago University Press, 2000), 303.
- ¹¹ *The European Journal of International Law*, vol. 23, #3, Oxford University Press, 2012, Andreas Wagner, “Lessons of Imperialism and of the Law of Nations: Alberico Gentili's Early Modern Appeal to Roman Law.” p 878. The article is a review of Alberico Gentili's *The Wars of the Romans* and Benedict Kingsbury and Benjamin Straumann (eds.) *The Roman Foundations of the Law of Nations* (Oxford: OUP, 2010).
- ¹² Articles by Noel Malcolm and Peter Schröder in Benedict Kingsbury and Benjamin Straumann (eds.) op. cit.
- ¹³ Article by Randall Lesaffer in Benedict Kingsbury and Benjamin Straumann (eds.) op. cit.
- ¹⁴ The Prolegomena to *De Jure Belli ac pacis*, cited in Edwin Dickinson: “On the Classics of International Law,” *The American Journal of International Law*, 26 (1932) 239 ff and quoted in Herbert W. Briggs (ed.): *The Law of Nations: Cases, Documents, and Notes* (New York: Crofts, 1938 ff.)
- ¹⁵ *The Law of War and Peace* (translated by Francis Kelsey, 1925, quoted in Wikipedia). His anguished cry was echoed in many places. One of the most poignant was in William Byrd's four-part mass where “a prayer for peace ...results in a series of repeated and anguished dissonances as peace is ever sought but never found...” (*The New York Review of Books*, December 19, 2013, Nicholas Kenyon, “A Glorious Composer Between Two Worlds”)
- ¹⁶ As he wrote, “The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined.” That is to say,

natural law is based on the compatibility of actions with our essences as rational and social beings. Quoted in *The Stanford Encyclopedia of Philosophy*.

¹⁷ See *World Affairs* 137 (1974) 3, Patrick Riley, "The Abbé de St. Pierre..."

¹⁸ The sovereign states in the Europe of that time included the ones still independent -- France, Switzerland, Spain, England, Holland, Portugal, Sweden, Poland, Austria and Denmark -- and others that have been amalgamated or merged into the major states -- Savoy, Bavaria, Venice, Genoa, Florence, Lorraine, the Papal States, Prussia, Saxony, Palatine, Courland, Hanover, the Papal States and Muscovy.

¹⁹ What Rousseau really thought about these issues has been much debated.

²⁰ *The National Gazette*, February 2, 1792, "Is Universal Peace possible? Quoted in Saul Padover, *The Complete Madison* (New York: Harper & Brothers, 1952), 260. Madison was horrified by "the tendency of his [the Abbé de St. Pierre's] plan to perpetuate arbitrary power wherever it existed; and, by extinguishing the hope of one day seeing an end of oppression, to cut off the only source of consolation remaining to the oppressed."

²² *The Federalist*, 41.

²³ As the great jurist Sir Frederick Pollock wrote ("On the Nature of International Law, The Oxford Lectures, London: Macmillan, 1890, quoted in Herbert W. Briggs (ed.) *The Law of Nations: Cases, Documents, and Notes* (New York: Crofts, 1938), 1-2. "The doctrines of international law are founded on legal not simply ethical ideas [but] there is actually an international morality, distinct from, and compatible with international law in the usual sense."

²⁴ This approach to law is one I find to be often lacking in the many legal documents I have been reading to prepare this essay. A remarkable exception is the world of the Anglo-American legal scholar, Ronald Dworkin, in his book *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2013). In addition to seeking the sources of law, he emphasizes the purpose of law. He finds it in political morality or what he calls "value."

²⁵ Congressional Research Service, March 10, 2011, Richard F. Grimmett, "Instances of Use of United States Armed Forces Abroad, 1798-2010" and Barbara Salazar Torreon, "Instances of Use of United States Armed Forces Abroad, 1798-2013," R41677 and R42738. These reports mention other lists including Senator Barry Goldwater, "War Without Declaration: A Chronological List of 199 U.S. Military Hostilities Abroad Without a Declaration of War, 1798-1972, *Congressional Record*, V. 119, July 20, 1973; Department of State, Historical Studies Division, "Armed Actions Taken by the United States Without a Declaration of War, 1789-1967; John M. Collins, *America's Small Wars* (New York: Brassey's, 1990).

²⁶ Swarthmore College Peace Collection, Elihu Burritt Papers.

²⁷ International Committee of the Red Cross: "Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899." "The Conference of 1899 succeeded in adopting a Convention on land warfare to which Regulations are annexed. The Convention and the Regulations were revised at the Second International Peace Conference in 1907. The two versions of the Convention and the Regulations differ only slightly from each other."

²⁸ A part of the charge against the Nazi leaders at Nuremberg was that they had violated the Hague code by which they were bound because it was a part of the law of nations.

²⁹ PBS/WGBH, 1999: "American Experience: Andrew Carnegie."

³⁰ Among them, Barbara Tuchman in *The Guns of August* (New York: Macmillan, 1962) and Eric Hobsbawm, *The Age of Extremes: The Short Twentieth Century* (London: Michael Joseph and Pelham Books, 1994).

³¹ *The Federalist*, 41.

³² He has been the subject of a whole library of studies. His devoted secretary, Ray Stannard Baker, produced the most favorable (*Woodrow Wilson and World Settlement*, New York: Doubleday, 1924). A small volume with a balanced picture is Louis Auchincloss' *Woodrow Wilson* (New York: Viking/Penguin, 2000). I have also profited many other accounts and from the diaries and papers of my cousin Frank, who as Commissioner Plenipotentiary of the United States of America to Negotiate Peace and to be Head of the Peace Mission, took Wilson's place at the Peace Conference when Wilson

returned to America. In his papers at the Yale University Library, he found (August 29, 1919) that he had to fight ever for the right of the American commissioner to attend key meetings and reported that British Prime Minister David Lloyd George was trying to dissolve the Peace Conference.

³³ The term was coined by Louis Hartz in his book *The Liberal Tradition in America* (New York, 1955).

³⁴ Bryan was despised for his crusade for world peace by “the Carabao Club,” an élite society of American army and naval officers who regarded his quest for peace as effeminate. See Thomas J. Knock, *To End All Wars* (New York: Oxford University Press, 1992) 21. The officers were publicly reprimanded.

³⁵ The treaty with France “for the Advancement of Peace” was signed at Washington on September 15, 1914

³⁶ House to Wilson, May 29, 1914, quoted in Knock, 22.

³⁷ Although considered a bandit – the term then used for a terrorist – Poncho Villa was apparently reacting to what he thought was a plan to turn Mexico into an American colony. A detailed but controversial contemporary account is *Harper’s Weekly*, 4 articles in March and April 1916, Robert H. Murray, “Huerta and the Two Wilsons.”

³⁸ Barbara Tuchman, *The Zimmermann Telegram* (New York: Random House, 1966).

³⁹ The Covenant of the League of Nations is given in *The Avalon Project: Documents in Law, History and Diplomacy of the Gillian Goldman Law Library of the Yale Law School*.

⁴⁰ While Wilson remained in Paris, that was the strategy; when he left and Frank Polk took his place, Frank Polk had trouble even gaining admittance to the secret cabals of the British, French and Italian negotiators. Microfilms of his notes are in the Yale University Library as “The Frank L. Polk Papers.”

⁴¹ *The National Gazette*, February 2, 1792, “Is Universal Peace possible? Quoted in Saul Padover, *The Complete Madison* (New York: Harper & Brothers, 1952), 260.

⁴² On the King-Crane Commission” see H.N. Howard, *The King-Crane Commission*” (Beirut, 1963) and my book *The United States and the Arab World* (American Policy Library, Harvard University Press, 1969 ff.). It was delivered to Frank Polk on August 28, but he made no comment on it in his papers. Amir Faisal, head of the Arab Delegation, passed to Frank what came to be known as the Hussein-McMahon correspondence and asked that Frank be made the arbitrator between the Arabs and the British. Frank said he could not unless all parties requested that America intervene but he went on to say that “The United States had notified France and Great Britain that it did not regard itself bound by any such arrangements made between them.” Faisal then argued that America had “incurred a moral responsibility toward the people of Syria” and, in order to prevent war, should attempt to get France and Britain to agree to arbitration. Frank replied that America was not a party since it had not declared war on the Ottoman Empire but that “we had not been able to persuade the French to give Feisul [sic.] a hearing...” He recommends that Faisal bring the issue before the Supreme Council [of the Peace Conference] and he agreed to do so. Frank L. Polk Papers (Yale).

⁴³ The “Pact of Paris” (aka the Kellogg Pact) for “the Renunciation of War” was signed in Paris on August 27, 1928. The diplomats signified “in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.” A subsequent conference, the World Disarmament Conference of 1932-33 broke down when the new Nazi government of Germany withdrew.

⁴⁴ This, as I have pointed out, was justified by one of the earliest writers on international law, Alberico Gentili. As applied to Germany, it is brilliantly laid out in John Maynard Keynes’ *The Economic Consequences of the Peace* (London: Macmillan, 1919).

⁴⁵ *American Journal of International Law* 31 (1937), J. W. Garner, “Questions of International Law in the Spanish Civil War,”