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Does International Law Have a Future?

Adda B.W. Bozeman

DOES INTERNATIONAL LAW HAVE A FUTURE?*

*DR. ADDA B. BOZEMAN***

It is a great honor to be in the company of New York Law School lawyers; and more specifically lawyers who are concerned with both international and comparative law. Elsewhere in academe these two fields of legal concern are usually treated in isolation from each other. Each has its own clientele and its own law review; at times it even looks as if their respective custodians are barely on speaking terms. Yet, and this is my main thesis tonight, international and comparative law are interpenetrating and mutually supportive in all matters of substance. In fact, the answer to the question whether international law has a future depends almost entirely on just what studies in comparative law reveal. And since I am persuaded that public international law is today in a critical phase of decomposition, I ardently wish that comparative law would come to the rescue sooner rather than later. Let me explain the thinking that leads to this conclusion.

The future of men and of their ideas and institutions is shaped not only by the present but also by the past. This means, in the case of international law, that we should reflect on the seventeenth century when this code of norms for the conduct of relations among states first emerged in a systemized form. The genius responsible for this composition was, of course, Hugo Grotius, a Dutch jurist, historian, diplomat and poet.

It so happened, a few years ago, that I was asked by the Grotius Society at the Hague to help celebrate the 400th anniversary of this great man by writing an essay entitled "On the Relevance of Hugo Grotius and *De Jure Belli ac Pacis* for Our Times."[1] I admit that the

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** Professor Emeritus of International Relations, Sarah Lawrence College, Bronxville, New York; Barrister at Law of the Middle Temple Inn of Court; J.D., Southern Methodist University School of Law; Diplomée of Section Diplomatique, Ecole Libre des Sciences Politiques, Paris.

1. *See* Bozeman, *On the Relevance of Hugo Grotius and* DE JURE BELLI AC PACIS *for Our Times*, 1 *Grotiana* 65-104 (1980). This is the first volume of the "new" Grotiana; the

assignment was difficult but it has proven to be one of the most enriching and scholarly experiences of my life.

Among the relevancies "for our times" which I discovered in writing that essay are a few that bear directly on the theme we are discussing tonight. One of them is that the "father" of international law pioneered comparative studies of law before he felt ready to pronounce himself on just what constituted an international consensus.

As you know, Grotius's chief work, *The Rights of War and Peace*,[2] was designed to pacify and unify Christian Europe, whose nations had been tearing themselves apart in warfare after their religious and political unity had waned. The fundamental question that moved Grotius was this: how may war be justly waged and peace justly maintained in the new European society of independent states? With this concern steadily in his mind, he explored the records of history, law, religion and philosophy of a great variety of European peoples. The aim was to isolate their modes of reasoning, their insights into human nature, their convictions of what is just and what is injust, then compare the findings and determine upon which values and norms Europe's diverse nations could be said to converge.

Most of Grotius's witnesses were Greeks, Romans and Christians, and his richest source of inspiration was no doubt Roman law, specifically the laws of contract and property. Several factors explain this close linkage with classical jurisprudence. First, the civil law was and continues to be the base of internal order in each of the continent's separate realms. Second, it was generally esteemed as "written reason," a reliable carrier of accepted values and a code of precepts for diplomacy and for the orderly and intelligent conduct of government. Third, it was and is to this day the core of Christianity's Canon law. In short, Roman law had functioned for centuries as Europe's *de facto* international law.[3]

As scores of sections in the massive Grotian *oeuvre* reveal, however, Grotius did not rest his case on these readily available records. Rather, he was determined to examine the pre-Roman and pre-Chris-

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journal had been discontinued in the 1940's.

2. H. GROTIUS, DE JURE BELLI AC PACIS [THE RIGHTS OF WAR AND PEACE] (Paris 1625) [hereinafter cited as GROTIUS] For a listing of published editions of Grotius's works, see *The Grotius Collection at the Peace Palace, A Concise Catalogue,* 3 GROTIANA 94-98 (1983).

3. On the singular importance of the Roman law for the Occidental cultural world in general and the evolution of international law in particular, see BOZEMAN, POLITICS AND CULTURE IN INTERNATIONAL HISTORY 162-212 (1960); *see also* Bozeman, *supra* note 1, at 97. For Grotius's focus on law and history, see *id.* at 95; *Prolegomena, infra* note 4, at 38, 40, 46; GROTIUS, *supra* note 2, bk. 2, ch. xviii, at 7.

tian laws and law-related norms of Europe's indigeneous peoples. He seems to have first conceived of this dimension of law when he compared his native Dutch law to that of Rome. Later, when he served as Sweden's ambassador to France, he proceeded to compare the laws of the Visigoths, Ostrogoths, Franks, Langobards, Angles, Saxons and other Nordic peoples with those of the Romans, an effort which convinced him that the former were in many respects superior to the latter.

The reasoning behind these investigations, Grotius tells us, was that one cannot understand the soul of a people unless one knows its laws as well as its history. It is this double focus which explains why he could recognize the significance of the fact that Gothic laws were duly resuscitated after the Spanish provinces had been liberated from the Muslims; that the constitutions then in force in the Kingdom of Naples and in Sicily had their origin in the laws of the Langobards; that England was ruled by Norman law to a considerable degree, and, in short, that the Germanic peoples had firmly implanted their laws wherever they went. Furthermore, and in the same vein, Grotius realized clearly that no common international maritime law could have arisen had it not been for the excellence of the Island of Gotland's municipal law.[4]

The other source of the new European law of nations is of course the New Testament. The Old Testament is cited frequently, but Grotius admitted in *The Rights of War and Peace* that he had difficulties in reconciling God's law and natural law with the law of Moses. Thus, he insisted that the virtues required of Christians "are not enjoined to Hebrews in the same degree." Likewise, he noted that the special law given to the Israelites did not bind strangers to whom it was not given, and that Christ abolished those parts of the Mosaic law which formed a wall of separation between Jews and other nations.[5]

There is a reference in *The Rights of War and Peace* to the "lawless Arabs" but Grotius did not examine the Koran and commentaries

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4. Grotius developed his interest in comparative law early when he examined his native Dutch law in counterpoint to that of Rome, but it was toward the end of his life that he took occasion to explore the properties of various Germanic legal orders and to compare them with those of Roman law. This work remained incomplete but it was published in the *Prolegomena* of *Historia Gotthorum, Vandalbrum et Langobardorum [A History of the Goths, the Vandals and the Langobards]* (Amsterdam 1655) [hereinafter cited as *Prolegomena*]. For an extended analysis of these writings see Andreae, *Une Etude de Droit Comparé par Grotius*, 10 GROTIANA 29-44 (1947); *see also* Van Eysinga, *Quelques Observations sur Grotius et Le Droit Romaine*, 10 GROTIANA 18-28 (1947).

5. GROTIUS, *supra* note 2, bk. 1, ch. i, at 16 and bk. 2, ch. xv, at 9. For Grotian approaches to Arab and Mohammedan norms of behavior in international relations and for Grotius's reasoning in excluding them from his scheme, see Bozeman, *supra* note 1, at 98-104.

on the Islamic law of war. Nor was his attention attracted to the intricate principles and practices of diplomacy and war prevalent in the Islamic Mogul Empire, the different Hindu and Buddhist kingdoms of India, or Southeast Asia and China. All of them were irrelevant to the task upon which he had set himself; namely, to reunify Christian Europe around shared principles and beliefs.

The second group of "relevancies" which I selected for this evening's occasion relates to the following: Grotius was persuaded that the problems in a given state's foreign relations could be neither understood nor resolved unless they were perceived and analyzed in the context of ruling domestic or internal norms and values. Contrary to the persuasion much in vogue today that nations can or should be expected to conduct their foreign policies in ways unrelated to the fundamental beliefs and dispositions operative within their societies, Grotius insisted on anchoring his chief themes, and they relate after all to war and law in interstate relations, in the concepts that control each state's inner order.

As *The Rights of War and Peace* shows conclusively, Grotius argued from the law of persons, contract, property and crime to the law of nations. It would not have occured to him to reverse the process and affirm, as is the custom today, that the rights of persons or citizens in, for example, China, India, Saudi Arabia, Guinea-Bissau or any of the Marxist-Leninist societies can be determined by the fiat of an international covenant or a declaration of universally applicable rights. Thus, if he had found in the course of studying Chinese law and history that the family law or the penal law was radically different from the one common to European nations, as it was and is, or that the Chinese rendition of natural law has nothing in common with the natural law philosophy of the West, he would not have been ready to assume that Europe's *ius gentium* was appropriate to China. The chances are he would have read the T'ang and Ch'ing codes, the writings of Chinese philosophers, especially those of the perennially influential Legalists, and the records of imperial diplomatic transactions so as to discover the "soul" or mind of the Chinese.

Documents such as these were not available in translation in the early seventeenth century, but they have been in our libraries and law schools for quite some time and have obviously also been read. What is so odd today is that the knowledge thus acquired makes no difference when it comes to the conduct of foreign relations. To stay with the Chinese example for a moment, Henry Wheaton's *Elements of International Law*[6] was translated into Chinese in the nineteenth century,

6. H. WHEATON, ELEMENTS OF INTERNATIONAL LAW WITH A SKETCH OF THE HISTORY OF

and it was generally assumed in the West that China would relate to it affirmatively. No one either in academe or the diplomatic corps, however, made much of the "Foreword" to the Chinese edition. Here, an important Chinese official announced that his government might not follow the practices and propositions set out in the work, but indicated that the book could nonetheless serve as a useful aid to Peking in planning a "border defense"— a Chinese euphemism for coping with aggressive barbarians, in this case the "red-haired" Western ones. In this one sentence you find, in my view, the measure of the difference between two totally different ways of conceptualizing the conduct of foreign affairs; that of the West and that of China.

Understanding China, or any other non-Western state, including those associated with Marxism-Leninism, comes easily when one follows the Grotian method. As indicated earlier, this consists of finding out what the guiding norms of the internal order are. In China, these center on the family hierarchy and the ethics of family relations, and on a public system of criminal punishment that has been of frightening severity in all dynasties. In the past, China's international order was modelled on the same sets of principles. In the sinocentric universe of Asian peoples, the emperor was thus cast as the Son of Heaven and the omnipotent father to all other states or peoples on the Chinese periphery, for they, in turn, were viewed not only as younger or older sons but also as totally inferior barbarians. If imperial guidance proved ineffective, punishment in the form of war ensued as a matter of course. In other words, the twin notions of state sovereignty and equality were not accepted and a *ius gentium* was, therefore, not fathomable.

The message for comparativists in jurisprudence, then, is this: comparative law must be operational on two levels if it is to serve the cause of international law. The first requires comparisons among internal systems of ordering human relations and decisions as to which societies can be grouped together to form an international system and which societies, by contrast, have to be excluded if one's own society is to survive. Only when this has been completed can one proceed to the second level, where the challenge calls for comparing and coping with different international systems. The premise for both undertakings is the recognition that the international or outer order is ineffectual unless it reflects the norms and values dominant in the component national or inner orders. The occidental states system could center on international law only because its component units, whether monarchies, republics or free cities, were states which subscribed genuinely, and not just rhetorically, to shared norms and values.

THE SCIENCE (Philadelphia 1836).

Two further observations are pertinent. Comparisons of international systems, and many can be distinguished in the seventeenth century as in our times, show convincingly that the law of the Western nations is the only recorded international scheme that is anchored in secular law. It is also the only one that became universally applicable, at least for a brief span of time, and therein lies a tale.

The international law that issued from comparative studies in the seventeenth century was a meaningful and effective house law for Europe because its norms were organically linked to extensions of national domestic legal orders, whether in common law or civil law states. What, then, were the characteristics of the West's classical law of nations? In which ways have they changed? Are they applicable to the modern world society?

In the Grotian design, as well as today, the pivotal concerns relate to the sovereign, territorially defined state and to the laws of war and peace. Each of these closely related sets of conceptions is exceedingly complex and, therefore, not readily transferable outside the cultural milieu that created it. This was clearly recognized by scholars and statesmen until the First World War. For example, when you open the first edition of L. Oppenheim's text *International Law, A Treatise,*[7] you find a nice explanation of why it was deemed possible to extend the European order to the Ottoman Empire, Siam and Japan. Intricate comparative studies had preceded decisions on these memberships, although political calculations had also played a part. But the aspect of greatest interest to a comparative lawyer relates, in my view, to the close studies which oriental authorities undertook before they decided from which Western systems of law they would borrow, so as to modernize their countries' internal legal orders.

The Western authorities, meanwhile, wanted to be sure that they were dealing with territorially bounded sovereign states, which understood not only the ground rules of international law, but, and this is noteworthy, those rules implicit in the system of the balance of power. Commenting on these two prerequisites, Oppenheim notes that if states cannot keep one another in check, no rules of law would have any force because an overpowerful state would naturally try to disobey the law. In other words, no claim was made between the seventeenth and mid-twentieth centuries that the law of nations was a jural order above the society of states. Rather, and contrary to present day trends in American thought and policy, it was viewed as a law regulating relations among consenting, legally equal states. Needless to say, no one thought that international law was tantamount to foreign policy, a the-

7. L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE 30, 73, 147 (1905).

sis that has been making the rounds in the United States in recent times. Further, and also counter to present day trends, the stress throughout the earlier era was on the absolute right of a sovereign state to defend its national interests by resort to war. Following Grotius, it was explicitly acknowledged that war had its legal and moral justifications, as did peace.

Certain Grotian insights and wisdoms, by contrast, were allowed to wither even though many of these insights speak more directly to modern problems in international relations than those officially espoused in our times. For example, Grotius is clearly right on target today when he defines war as "the state of forcibly contending parties,"[8] thereby allowing non-state actors to be counted in; when he explains that peace and war are not always the stark opposites they appear to be; and when he warns that "war is not the worst of destinies,"[9] for nothing is worse, he insists, than the loss of liberty and the fatal weakening or destruction of the state.

Other passages in *The Rights of War and Peace* contribute greatly to a clarification of the relation between war and peace and of that "no war, no peace" syndrome with which many in the modern West cannot come to terms. Grotius thus writes that wars are often interrupted by truces, and that truces may go on for as long as one hundred years.[10] In other words, he tells us to accept the possibility, which is cast away by modern international law, that a state of belligerence may be frozen into a state of "cold war" for an indefinite period. Enduring international peace, by contrast, is presented by the father of international law as a remote condition. The prophesy of Isaiah that the time will come when nations "shall beat their swords into plowshares, and their spears into pruninghooks: nation shall not lift up sword against nation, neither shall they learn war anymore"[11] is in Grotius's view irrelevant

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8. GROTIUS, *supra* note 2, bk. 1, ch. 1, at 1. The Grotian definition of war does not exclude private war. It is more ancient than public war, and he argues, "has, incontestably, the same nature than public war." *Id.*

9. Peace is not the leading or supreme reference in the Grotian scheme, nor is it treated as ethically always superior to war. Both are subordinated by Grotius to the primary consideration which is physical and moral survival. Grotius thus sided with Livy, who held that peace when coupled with servitude is a far more grievous calamity than all the horrors of war, and with Tacitus, who wrote that a wretched peace is well exchanged for war. *Id.* bks. 1-3.

10. For careful arguments in support of this most interesting proposition see GROTIUS, *supra* note 2, bk. 3, ch. xxi. Grotius concludes that "war is a name for a situation which can exist even when warlike operations are not being carried on." *Id.* bk. 3, ch. xxxi, at 1.

11. *Isaiah* 2:4.

insofar as the justice of war is concerned.[12] It merely describes the state of the world that would come about if all nations would submit to the law of Christ. Temporary peace, by contrast, is attainable but it is always limited in time as well as space, and it can be maintained only when the state's armed forces are in readiness.[13] ([Secretary of Defense] Cap Weinberger would approve of this, I think). On this score Grotius suggests strongly that any internationally effective law of war must take into account any kind of war as well as any kind of sovereign warring entity.

Most of these important understandings of war and its relation to peace had been dropped by the beginning of the twentieth century—just when they would have helped the West to adjust to radical changes in the composition of the world society and to come to terms with Marxist-Leninist and non-Western political systems and doctrines of conflict and war. Instead, one notes that in our times international law has been allowed to drift into conceptual decomposition and political irrelevance. Rather than continue the tradition of examining the internal structures of foreign societies before determining whether they can be accommodated securely by our orders of domestic and international law, it is simply assumed today that they either do or should live by our norms and axioms; that all men everywhere love peace and abhor war, and that they, therefore, are or should be committed to the laws of war and peace as we understand them.

The combination of negligent laissez-faire and simplistic rigidity, which has come to mark political thought in academe and government, supplies, in my view, the context in which international law has slithered into something of a nonsystem, at times even into a deceptive cover for flagrant lawlessness. In these circumstances it is not surprising that no one seems to want to think systematically about questions such as these:

1) Is "the State" still the only subject of international law when half of the world's so called states are in no way either sovereign or territorially defined? And how should international law treat such new politically sovereign organisms as the totalitarian transnational communist party and its Soviet apparat of executive committees, buros and secret police agencies, the conspiratorial command posts of border-

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12. GROTIUS, *supra* note 2, bk. 1, ch. ii, at 8.

13. *Id.* bk. 2, ch. xxii, at 5. Grotius is wholly in accord with Tacitus, who commended the noblest of the Germanic peoples on the ground that they were always prepared for war without ever provoking it, and that they were therefore capable of upholding their reputation in the midst of peace. Grotius also sides with Tactius in his insistence that the peace of nations cannot be preserved without armies, that armies cannot be maintained without pay, and that pay cannot be supplied without taxation.

defying terrorist organizations and fanatical religious sects, or such strictly personalized aggressive war states as Colonel Quaddafi's Libya? These entities openly avow their determination to bring ruin to established independent states, and, as the record shows, they have been eminently successful in their undertakings.

2) Just what is "International War" now that it is no longer possible to view it as the exclusive function of "the State" and what is the meaning of "the Law of War" to which so many dense academic texts are dedicated? As many of you know, these questions have long ceased being academic. "What is War?" was the title of an article in *The Wall Street Journal* not too long ago.[14] The article concerned a legal case involving the Aetna Insurance Company and Holiday Inns, Inc.,[15] in which Holiday Inns sought to collect for the destruction of its Beirut hotel. The federal judge ruled that the fighting there did not constitute war and, therefore, the insurer was liable.

Further, just what is war when we insist on excluding guerilla warfare, terrorism, covert war and all foreign military interventions deliberately camouflaged as "internal civil war" or "insurgency"? This, I think, was the main issue in the libel trial that General Westmoreland brought against CBS.[16] Paul Nitze explained it authoritatively in his testimony on the enemy strength and order of battle question by indicating that "in a war [i.e., the Vietnam War] that . . . was part conventional, part terrorist, part psychological and part political . . . he was uncertain in 1967, as now, what importance to attach to forces that 'could be one thing one day' and 'the next day be something else.' "[17]

The realities of war today, then, are not adequately covered by the traditional Western code of international law in which war is presumed to begin when some state violates the territorial jurisdiction of another state. Furthermore, and also counter to the preceding era, war is no longer viewed as the last resort in foreign policy and peace is not the overriding concern of the plurality of nations. Rather, it is incontrovertible that values supportive of hostility and recourse to violence have eclipsed those making for cooperation and peace, and that statehood has come to rest, in most provinces of the world, upon ideologies and traditions which do not respect either law or spatially fixed borders. In these conditions it is hardly ever possible to set interstate war

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14. Lipman, *What Is War? Court Ruling Forces Insurers to Address Increasingly Difficult Question*, Wall St. J., Nov. 3, 1983, at 33, col. 3.

15. Holiday Inns, Inc., Holiday Inns, Inc. (Lebanon) v. Aetna Ins. Co., 571 F. Supp. 1460 (S.D.N.Y. 1983).

16. Westmoreland v. CBS, No. 82 Civ. 7913 (S.D.N.Y. filed Nov. 30, 1982).

17. Farber, *Paul Nitze Takes Stand in CBS Trial*, N.Y. Times, Dec. 5, 1984, at B4, col. 4.

apart from internal warfare, revolution, insurgency, counterinsurgency and that vast conglomerate of different species of guerilla combat in which recent generations of men in all regions of the global society seem to find political, professional and ideological fulfillment.

War is fluid and formless in today's world. It does not begin with a declaration of war or with an act of aggression that can be pinpointed in terms of time and space. Instead, one finds that most wars today are nurtured in webs of deliberate covert action or "active measures" (in Soviet tactics and parlance), and in theories stipulating protracted war and the revolution without frontiers. In other words, they are enacted from within the states targeted for takeover.

Other modern wars, among them Black Africa's coup d'etat wars and the scores of tragic sub-wars between power-seeking religious sects and separate sovereign armies that have been finishing off the state of Lebanon in the last decade, are primarily private wars. Neither can be analyzed or controlled effectively by reference to standing classical rules of the law of nations, because these had been conceived in opposition to codes governing irregular warfare and in the assumption that only states were the subjects of organized international relations.

These realities continue to be bypassed by modern authorities on the law of war and peace. For example, just what is one to make of the following definition; it would surely have perplexed Hugo Grotius:

> International law is the standard of conduct, at a given time, for states and other entities subject thereto. It comprises the rights, privileges, powers, and immunities of states and entities invoking its provisions, as well as the correlative fundamental duties, absence of rights, liabilities, and disabilities. International law is, more or less, in a continual state of change and development . . . .[18]

So understood, international law is indeed a nothing, and the conclusion with which I began this presentation is justified: that the term "development" as used in this definition really stands for "decomposition." After all, it surely cannot be denied any longer that the core concept of the law of nations, namely that of the sovereign law-conscious state, has been jettisoned; that the law of war which is the essence of the West's classical international system is in shambles; and that the word "peace" has shed whatever norm-setting meanings it once possessed. Floating, imprecise and devoid of relevance in world politics, international law has been allowed to degenerate into empty

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18. 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1 (1963).

rhetoric.[19]

Should Americans today acquiesce in the defeat which enemies of international order have been allowed to inflict on one of the West's greatest intellectual and political contributions to the cause of conflict resolution in the multicultural world or should they go to work, in the Grotian tradition, and reexamine existing assumptions, correct inadequacies in light of changed actualities and come up with realistic responses to the challenges implicit in a legally, morally and politically divided world? Clearly, only the latter course is worthy of the present generation of talented lawyer-citizens.

The task at hand requires the realization that any international system, including that of international law, is only as solid as the concepts that combine to compose it. In regard to our embattled subject matter, this means that we simply cannot go on adding to or subtracting from it at will. In short, we must stop ad-libbing international law in cheap deference to the desires for the broadest political consensus in the world society. Instead, we should start to identify and distinguish the greatly various local and regional orders with which our order coexists. Only after today's world has been mapped reliably and objectively in this way, will we muster the intelligence to know just which basic norms in Western, non-Western and Marxist-Leninist societies are sufficiently compatible to make for a universally valid international order.

It goes without saying, I hope, that the needed intelligence requires a well-planned program of comparative studies. For international law can have no future unless specialists in both international and comparative law cooperate closely.

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19. For a more complete analyses on these themes, see BOZEMAN, *supra* note 3, particularly the conclusion (at 161-86) and the appendix (at 187) analyzing the Brezhnev Doctrine; Bozeman, *The Future of International Law in a Multicultural World: A Preliminary Estimate*, in PROCEEDINGS OF A WORKSHOP ON THE FUTURE OF INTERNATIONAL LAW 85, 104, 189 (R. Dupuy ed. 1984). *See also* Bozeman, *The Nuclear Freeze Movement: Conflicting Moral and Political Perspectives on War and Its Relation to Peace*, 5 CONFLICT: AN INTERNATIONAL JOURNAL 271-305 (1985); Bozeman, *Covert Action and Foreign Policy*, in INTELLIGENCE REQUIREMENTS FOR THE 1980'S: COVERT ACTION 15-79 (R. Godson ed. 1981); Bozeman, *International Law*, 2 ENCYCLOPEDIA OF AMERICAN FOREIGN POLICY 455-72 (A. de Conde ed. 1978); Bozeman, *War and the Clash of Ideas*, 20 ORBIS 61-102 (1976).

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