The Laws of War in the 1812 Conflict

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Few American wars have been as closely tied to international law as the Anglo-American conflict of 1812. The legality or otherwise of impressment and cargo confiscation, definitions of contraband, blockade and the permissible limits of neutrality have all been endlessly argued. Such questions concern the causes of the war. What has attracted little attention, despite the keen contemporary awareness of the existence of laws on the conduct of nations, is the extent to which legal restrictions were observed in the actual waging of the War of 1812.

The notion that there were any limits at all is against the trend noted by those historians and specialists in military affairs who have observed that "restricted war was one of the loftiest achievements of the eighteenth century,"[1] but that "the doctrines of the French Revolution brought a new intensity to warfare,"[2] that unlimited war was reborn in August 1793,[3] so that "by the beginning of the nineteenth century . . . the limitations on the violence of war that had been imposed by the small-scale eighteenth-century armies had already disappeared."[4]

However true these generalizations may be for Europe, the idea of limited war still thrived in North America in 1812 and throughout the subsequent war there. As early as 18 February 1813, the United States House of Representatives amended a Senate bill to read as follows:

In every case wherein, during the present war, any violations of the laws and

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[1] Guglielmo Ferrero, *Peace and War* (London: Macmillan, 1933), p. 8.
[2] Piers Mackesy, *The War for America 1775–1783* (Cambridge, Mass.: Harvard Univ. Press, 1964), p. 5.
[3] J. F. C. Fuller, *The Conduct of War 1789–1961* (New Brunswick, N.J.: Rutgers Univ. Press, 1961), p. 37.
[4] Alastair Buchan, *War in Modern Society* (London: Watts, 1966), p. 100.

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usages of war among the civilized nations shall be or have been perpetrated by those acting under the authority of the British government . . . the President is authorized to cause full and ample retaliation to be made according to the laws and usages of war among civilized nations, for every violation.[5]

The existence of this amendment and of the committee subsequently convened to consider British breaches of customary usage are strong evidence that Americans did not accept that a new era of unlimited warfare had begun. Americans still demanded "legal" warfare and this ideal persisted throughout the conflict. As late as September 1814 the editor of the *Kentucky Reporter* evinced continued belief in restricted war when he complained that the British seizure of Alexandria outraged "the laws of heaven, of war, and of humanity."

These restrictions fall into two categories, the written and the unwritten. What the journalist called the laws of heaven and humanity both mean unwritten conventions based on morality and past usage. By contrast the laws of war, based partly on usage and partly on the concept of natural law, had been codified by many jurists. The great pioneer in the field was the seventeenth-century Dutchman Hugo Grotius, but he had many followers. Study of their writings indicates that no important quarrel with his principles developed as the years passed but more humanitarian changes in the modes of waging war emerged during the eighteenth century. A consensus on fundamental principle remained, but modification crept into codes of customary usage.

The problem of whose code to consult arises if one attempts to match conduct in the War of 1812 with the written rules. The commanders, politicians and editorialists charging violations refer to the laws of war as though they are generally known, without specifying any particular compilation. It would be natural to look first at what would be the most accessible rule book for serving officers, the Articles of War.

The need for American articles had been seen early. No doubt anxious to legalize rebellion as far as possible as well as to ensure order, the Second Continental Congress had set up a committee to formulate Articles of War on the very day, 14 June 1775, that it authorized the raising of an American army. The committee was chaired by George Washington and worked fast. A set of Articles was produced within a fortnight which obtained congressional approval on 30 June. They blended the contents of the British code with another adopted in April 1774 for the government of the Massachusetts

[5] Thomas H. Palmer, ed., *The Historical Register of the United States* (Philadelphia: G. Palmer, 1816), **I**, 77. Cited hereafter as Palmer and suffixed by O.D. if the page number refers to the official documents following Palmer's narrative.

force raised for security against the British. The 1775 code comprised sixty-nine articles. Some modification occurred in succeeding years but a major overhaul took place in 1806 to ensure that they corresponded to the letter and spirit of the United States Constitution. It was this code of 101 articles which was in force during the 1812 conflict.[6]

The code used by the British during that war was more complex, deriving both from a statute, the Mutiny Act, initially passed in 1689 and subsequently renewed annually, and also from much older Articles of War, first initiated in the Middle Ages by royal decree. They were revised and made more extensive as the centuries progressed. Rather more in number than the American articles, they existed in 1812 side by side with the more limited statutory code with which they sometimes confusingly overlapped.

But officers in the War of 1812, faced with a problem of how legally to conduct themselves towards the enemy, would have found little help in the Mutiny Act, nor in the British and American Articles of War because they were mostly concerned with regulations to ensure internal discipline and security, like the rules concerning courts martial. The strong similarity between the British and American codes would suggest that both sides observed common standards. However references to the enemy are scanty and incidental, as when the articles specify penalties for betraying the password to the enemy and for inciting comrades to desert to him. A wider code must, therefore, be considered.

Whichever of these wider codes would be consulted would of necessity be European but it was unlikely to be Grotius' *Law of War and Peace* since, deriving its examples from practice in classical times, it reflects more ruthless customs – enslavement of prisoners for example – than were acceptable at the beginning of the nineteenth century. Even less suitable would have been the work of Jean-Jacques Burlamaqui. Originally brought out in 1763, his *Principles of Natural and Political Law* might seem, from its year of publication in America, 1807, to be a likely code for Americans to use in 1812 but it was merely a condensation of Grotius and almost entirely theoretical. More appropriate would have been *A Summary of the Law of Nations* by a Göttingen professor, Georg Friedrich Martens, which was published in Philadelphia in 1795. This work, however, was limited in its distribution, although it is true that one of the two hundred or so subscribers to the sole American edition was James Madison. Four years later, another

[6] William Winthrop, *Military Law and Precedents* (Washington, D.C.: Government Printing Office, 1920), pp. 18–23. I am grateful to Mr. Dale E. Floyd of the National Archives Library, Washington, D.C. and Dr. Frank L. Owsley, Jr., of Auburn University, for their help in confirming which American articles were in use in 1812.

distinguished work on international law was published in America, Thomas Rutherforth's *Institutes of Natural Law*. Its weakness was that its two volumes included only a couple of pages on the laws of war. A fuller work was *A Treatise on the Law of War* by Cornelius Van Bynkenhoek which was first published in Latin in 1757, appearing in English only in 1810 both in book form and simultaneously in the *American Law Journal*. Nevertheless, despite its timely appearance and wide circulation, Americans probably neglected Bynkenhoek during the War of 1812, since he rejected the popular orthodoxy that "free ships make free goods" and, concerning war, omitted relevant topics like rights over public property and treatment of savage enemies.

These topics were, however, considered in the work of Emmerich de Vattel, a celebrated Swiss diplomat in the Saxon service, whose code of international law was originally published as *Le Droit des Gens* in 1758 and who has been described as probably exercising "a greater permanent influence than any other writer on international law."[7] His code reflected the fact that warfare had become less brutal:

> How could it be conceived, in an enlightened age, that it is lawful to punish with death a governor who has defended his town to the last extremity... ? In the last century this notion still prevailed: it was looked upon as one of the laws of war.... What an idea![8]

From the mid-1770s Vattel's code was known and respected by Americans in high places and became a college textbook. Among those who cited Vattel as an authority on points of international law were Samuel Adams, Thomas Jefferson, Edmund Randolph, Alexander Hamilton, and John Quincy Adams.[9] Another was Benjamin Franklin, who on 19 December 1775 wrote to Charles Dumas at the Hague to thank him for three volumes of Vattel:

> That copy which I kept (after depositing one in our public library here, and sending the other to the College of Massachusetts Bay, as you directed) has been continually in the hands of the members of our Congress now sitting...[10]

[7] J. L. Brierly, *The Law of Nations* (1936; rpt. New York: Oxford Univ. Press, 1963), p. 37.

[8] Emmerich de Vattel, *The Law of Nations* (1758; rpt. Philadelphia: Johnson, 1859), p. 349.

[9] Harry A. Cushing, ed., *The Writings of Samuel Adams* (New York: Putnam, 1904–08), **2**, 258; Edmund Randolph to Thomas Jefferson, 9 February 1781, in Julian Boyd, ed., *The Papers of Thomas Jefferson* (Princeton: Princeton Univ. Press, 1950–), **4**, 131; **11**, 409; Adrienne Koch and William Peden, eds., *The Selected Writings of John and John Quincy Adams* (New York: Knopf, 1946), p. 298.

[10] Francis Wharton, ed., *Revolutionary Diplomatic Correspondence of the United States* (Washington, D.C.: Government Printing Office, 1889), **2**, 64.

In addition to such European copies, at least three editions in English of Vattel's work, translated as *The Law of Nations*, were published in the United States between the Revolution and the War of 1812 – in 1787, 1796, and in 1805. When Washington proclaimed neutrality in 1793 he referred to Vattel, as did the Ellsworth Commission when it sought to persuade Talleyrand that it might lawfully dissolve the treaty of 1778. Between 1789 and 1820 in pleading cases concerning international law in American courts Grotius was cited sixteen, Bynkenhoek twenty-five, but Vattel ninety-two times.[11] It would seem that those Americans in the war of 1812 who had reason to consult a code of international law would probably have used Vattel.

The object of this essay is, using Vattel as a guide, to consider whether the combatants violated traditional eighteenth-century conventions and laws in their conduct of operations in the land war of 1812, and, if they did, to what extent. (The degree to which American practice was founded on experience in the War of Independence and perpetuated in subsequent conflicts, and the ways in which it differed from practice at sea, will not be considered here, although each is a valid field of study.) The task of assessment here cannot be completed simply by matching alleged misdeeds against Vattel's text and noting discrepancies, because of two complications.

One difficulty is that Vattel's code was not fully comprehensive. The Swiss jurist had a European readership in mind. Kings rather than republics supplied most of his examples, while Indian tribes and black slaves, both important elements in the War of 1812, received scant attention because European states had little need to heed them. A second source of difficulty is that military necessity could justify and legalize conduct which would, in other circumstances, be illegal and unjustifiable. As Vattel concisely phrased it, "Right goes hand in hand with necessity" (p. 346). Of course the stern necessity of one side might be seen as needless brutality by the other. The difficulty of deciding who was right in such cases prompts consideration of a related and important problem, the question of which combatant had justice on its side in waging war at all.

It was a difficulty which Vattel had anticipated. It was important because natural law imposed no limitation on the type of warfare that might be waged against an unjust aggressor: "whoever takes up arms without a lawful cause can have absolutely no right whatever" (p. 378). And yet Vattel

[11] Alexander De Conde, *A History of American Foreign Policy* (New York: Scribner, 1963), p. 55, and his *The Quasi-War* (New York: Scribner, 1960), p. 240; Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947), p. 161.

believed that "war cannot be just on both sides" (p. 305), although each side invariably claims its own is the just, its opponents' the unjust, cause. How then could war, as terrible and deplorable as it necessarily was, be rendered less harsh by restriction?

Ideally, thought Vattel, there would be no war because no quarrel could exist incapable of settlement by negotiation. Unfortunately, he wrote, men were not reasonable enough always to wait for a diplomatic solution. States with no interest in the dispute might not pronounce on the justice of wars since to do so would infringe national rights. In Vattel's day there was not even an imperfect international tribunal responsible for decisions on disputes between nations. Only God, the Divine Author, Vattel argued, could and would decide according to natural law whose cause was just: but he recognized that such a decision was useless for practical purposes. Therefore in addition to natural law, which provided criteria for human behavior and did not cease to exist merely because it was difficult to apply, Vattel alleged that necessity had dictated the existence of a voluntary law of nations which in practice limited modes of waging war and had two rules. The first was that a war should be accounted just on both sides, a fiction vindicated by its humane consequences; the second rule stated that whatever was permitted to one side should also be allowed to the other (p. 382) and sanctioned retaliation for breach of the rules. The rules of war in *The Law of Nations* concern mostly what was permissible or forbidden by the voluntary law.

A convenient summary of alleged British violations of the permissible in all except the War's later stages may be found in the report of the special committee of the United States House of Representatives set up by President Madison to consider "evidence of every departure by the enemy from the ordinary modes of conducting war among civilized nations."

A few charges related to the war at sea but most concerned the land war. It was asserted that the British had mistreated prisoners, ignored flags of truce, let Indians ransom American prisoners of war, and had pillaged and destroyed property in Chesapeake Bay. Britain's Indian allies, moreover, had burned and killed Americans who had surrendered to British officers. Finally it was charged that the British had committed various outrages in their conduct at Hampton, Virginia, including stealing private property, burning private houses, rape, and at least one murder. Subsequent to this report the chief British violations of the rules of war, according to their enemies, were the burning of the capital, the confiscation of private merchandise at Alexandria, and the enticement of slaves from their masters.[12]

[12] James Orm, Joseph Cook, Thomas Humphries and others to House Committee on the Manner in which the War has been waged, *American State Papers: Military*

Vattel discussed all these topics, although not always fully. On killing prisoners he was dogmatic:

> As soon as your enemy has laid down his arms and surrendered his person, you have no further right over his life. . . . Prisoners may be secured but they are not to be treated harshly, unless personally guilty of some crime against him who has them in his power. (p. 353)

On the use of flags Vattel was silent, perhaps because the use of a white flag to signify a temporary suspension of hostilities was too well known to require explanation, but he was clear in asserting the inviolability of truces. The only justification for their breach was evasion of the truce terms: "the injured party is entitled immediately to take up arms, not only for the purpose of renewing the operations of war, but also of avenging the recent injury" (p. 406). Vattel denied the right of auxiliaries ("foreign or allied troops of a nation at war") even to booty from conquest (p. 365). *A fortiori* savage allies – to whom Vattel accorded no rights at all – could not ransom prisoners.

Vattel wrote much about private property. Provided certain conditions were met, the inhabitants of a territory occupied by an enemy should be able to feel as secure in their property and persons as if living among friends (p. 352). They might enjoy no such safety, however, if they had resisted the enemy or refused to pay the contributions levied on them by the occupying power. Moreover destruction of private property was permitted if it undoubtedly shortened the war. Even so Vattel urged moderation, condemning destruction beyond what was absolutely necessary. Another acceptable reason for destroying private property, to the point of making a countryside uninhabitable, was to create a buffer zone against an enemy, but again only if one was absolutely necessary and only if he could be stopped in no other way (p. 367). Public buildings contributing to an enemy's warmaking power were fair game but others, such as temples, tombs and buildings of remarkable beauty, should be spared (p. 368).

Because they were themselves merciless, believed Vattel, for once unswayed by humanitarianism, savage nations could expect no mercy. Not only might savage prisoners be mistreated but they ought to be killed, the better to persuade survivors of their tribe to adopt humane practices (p. 349). He made no exception of savage non-combatants, but for civilized nations Vattel was tender of civilians' rights, provided that they abstained from participation in the war. Women, children, the sick and aged might officially be enemies but unless they resisted the occupying power they should not be molested (p. 351).

Affairs, Class 5, Vol. 1, 13, Cong., 1st sess. (Washington: Gales and Seaton, 1832), p. 341. Cited hereafter as ASP.

Vattel wrote nothing specifically of capitals, but his principles on private property would have permitted there the burning of warships, wharves, naval and military stores and public buildings useful in prosecuting the war. On the release of slaves he wrote vaguely. He acknowledged their existence and even approved the enslavement of prisoners in those few cases where a lawful alternative was killing them – if they were savages or guilty of some "enormous breach of the law of nature." Nevertheless he certainly did not regard slaves as chattels. Slavery was a state contrary to the nature of man, "a disgrace to humanity," and he seemed content not to have to dwell on it because it was "happily banished from Europe" (pp. 348, 356).

A suitable starting point for assessing the legality of British behavior would be the battle of the River Raisin which shortly preceded the Congressional amendment quoted earlier in this essay. On 22 January 1813, a force of two hundred British troops and two thousand Indians advanced southwards across the frozen river and surprised a smaller American force encamped at Frenchtown in the Michigan Territory near Lake Erie. According to contemporary accounts, about eight hundred Americans were taken prisoner, the wounded were tomahawked and fleeing Americans who surrendered on promise of quarter were then killed. Some prisoners were burnt to death and some scalped before being slain. The lives of others were spared on promise of ransom. A surgeon's mate, Samuel McKeehan, set out to help the wounded on a sleigh bearing a white flag. It was fired on, McKeehan wounded, and one of his attendants killed. In all some sixty Americans were slain after the battle.[13] British troops took part in the prior combat but did not perpetrate the atrocities of which there would, perhaps, have been none if General Henry Procter and the Indian Superintendent, Mathew Elliott, had not decamped for Amherstburg with most of the British troops as soon as the battle was over. Because they did not do their utmost to restrain their auxiliaries the British were undoubtedly culpable.

A similar incident equally worthy of condemnation under Vattel's code occurred in May of 1813 when American troops were overwhelmed by Indians while besieging Fort Meigs in northern Ohio. Fewer prisoners were massacred than in January, but Procter again left insufficient Britons to prevent Indian mistreatment of prisoners. According to an officer who was there, the few British guards at Fort Meigs were "forced" by Indians who had not fought in the preceding battle.[14] The bloodshed was stopped by the intervention of that gifted and unusual Indian chief, Tecumseh.

[13] *Niles' Weekly Register*, **4** (20, 27 March 1813), 49, 66.

[14] Alexander C. Casselman, ed., *Richardson's War of 1812* (Toronto: Historical Publishing Company, 1902), p. 153. Cited hereafter as Richardson.

But Indians were not expected to behave like Tecumseh. It was feared, rather, that they would behave exactly as they did at the River Raisin. It was assumed that the Indians had no civilization and their mode of warfare would reflect the lack. "If their warfare," proclaimed General Isaac Brock of his Indian allies, "from being different to that of the white people, is more terrific to the enemy, let him retrace his steps."[15] The proclamation was a reply to one of 12 July 1812, issued by the American general William Hull who had tried clumsily to prevent British-Indian cooperation by threatening "a war of extermination" before he invaded Canada:

> The first stroke of the tomahawk – the first attempt of the scalping knife will be the signal of one indiscriminate scene of desolation. No white man found fighting by the side of an Indian will be taken prisoner – instant death will be his lot.[16]

American repugnance for the Indian mode of warfare was matched in the British government. In 1811 Lord Liverpool, then secretary for war and the colonies, had instructed the governor-general of Canada, Sir George Prévost, "to exert every means in his power to restrain the Indians from hostilities." The effort was useless. Although feasible in peripheral areas like New Brunswick it was scarcely possible for Indians and British to fight separate wars against the common enemy in Upper Canada. The Indians were determined on war, a last desperate attempt to secure at least a portion of the land between the Ohio and the Mississippi. The British, meanwhile, had insignificant numbers of troops for the defense of all Canada; four thousand regulars and three battalions of Canadian fencibles. The inevitability of working with Indians was seen, "but," wrote Lord Bathurst, Liverpool's successor as colonial secretary, to Prévost:

> I cannot too strongly impress upon you the necessity of keeping that control over them which may enable you to prevent the commission of those excesses which are so much to be apprehended and cannot fail to bring discredit upon the power in whose service they are engaged.[17]

It seems that the government had wanted initially to keep the Indians out of the war and then to avoid the unrestricted warfare to which the employment of Indians might lead and succeeded in neither attempt.

The question of culpability at the River Raisin and Fort Meigs turns on the degree of responsibility which should be attributed to the British authorities for the excesses committed by their Indian allies. As has been

[15] Palmer, O.D., **2**, 35.

[16] *The Times* (London), 11 September, 1812.

[17] Ernest A. Cruikshank, "The Employment of Indians in the War of 1812," *American Historical Association Annual Report for 1895* (Washington: A.H.A., 1896), **2**, 323, 333.

noticed, Congress wanted to assign the entire blame to the British. The British did not disclaim all responsibility. Bathurst's telling phrase that Indian excesses "cannot fail to bring discredit upon the power in whose service they are engaged" together with the complaisance towards the Indian mode of warfare implicit in General Brock's proclamation add up to a partial acceptance of responsibility for what the Indians did in battle. To the same extent the British were engaging in war contrary to the law of civilized nations, for it was quite definite on the subject of the treatment of surrendered prisoners of war: their lives were to be spared and they should be gently treated.

The only reason which could justify the excesses of the River Raisin and Fort Meigs would be military necessity. Given the paucity of Canada's white defenders, it might plausibly be advanced to justify alliance with Indians to repel invasion, but not to excuse the rein given to them after successful battles. A combatant, wrote Vattel, had "a right to do against the enemy whatever we find necessary for the attainment of that end (i.e. avenge or prevent injury)." But the lawfulness of the end "does not give us a real right to anything further than barely the means necessary for the attainment of that end" (p. 346). The Americans had done nothing prior to the battle of the River Raisin or at Fort Meigs to justify as revenge the kind of excesses subsequently inflicted on them. Nor would the security of Canada or of the British forces there have been endangered by treating the American prisoners well and sending them under guard down the River Thames by boat to Major-General Sheaffe, as happened to the survivors.[18]

Events in the Chesapeake area in 1813 and 1814 raised different questions in that most of the alleged offenses were against civilians and property. Thanks to the British blockading squadron in Chesapeake Bay and the inadequacy of American defenses there the British could launch raids throughout 1813 and 1814 almost with impunity. For Americans the villain of these amphibious expeditions was Rear Admiral Sir George Cockburn.

The flamboyant relish with which Cockburn obeyed his rules to "destroy and lay waste such towns on the coast as may be found assailable,"[19] together with the number and success of his raids, concealed the restraint with which he conducted them. In April and May of 1813 he launched attacks on Frenchtown, Havre de Grace, Georgetown and Fredericktown. In each case

[18] Richardson, p. 142.

[19] Vice-Admiral Cochrane to James Monroe, 18 August, 1814, Palmer, O.D., **4**, 181. According to the *Kentucky Reporter* of 18 October, 1814, Cochrane was finally admitting what Cockburn had long practised.

severe but selective destruction attended his visits. Vattel offers authority for a combatant to deprive his enemy of the means of waging war (p. 363). Cockburn was in an unusually good position to do so. He always set fire to forts, harbors, military installations, cannon foundries and shipping, but would spare private property if certain conditions (such as Vattel would have approved) were met. Civilians had to accept invasion without resistance: the houses of both Fredericktown and Georgetown, except those where the inhabitants had remained, were put to the torch, because those who lived in them had fired on Cockburn's men or had left to join the militia. Sometimes a town obtained mercy by paying a ransom. From those who resisted him Cockburn confiscated food and supplies; others were paid for what he took, although many complained of inadequate remuneration.[20]

Cockburn's discipline was strict. A junior officer noted that "from the time of our arrival in the Chesapeake all individual acts of plunder or violence were strictly prohibited, and severely punished."[21] Admiral Cochrane, Cockburn's superior, ordered any looter to receive forty-eight lashes in the presence of the property-owner whom he had robbed, and to ensure enforcement he ordered officers to accompany any landing on American soil.[22]

Because many civilians in the Chesapeake area would not submit to Cockburn, official and legal depredation occurred which was distasteful to some officers. "It is bad employment for British troops," wrote Charles Napier. "This authorized, perhaps needful plundering, though to think so is difficult, is very disgusting, and I will with my own hand kill any perpetrator of brutality under my command."[23] The Chesapeake raids angered Americans and their enemies complained that they retaliated with uncivilized practices. On three occasions they allegedly poisoned wine, although the charges were never proved. In another instance a British officer was lured into an ambush by a white flag.[24] Vattel would have condemned such deceptions.

British discipline broke down in the attack of Hampton in Chesapeake Bay in June 1813. Although its houses were left standing their contents were not, a church was pillaged and, almost uniquely in the War of 1812, according

[20] ASP, p. 363 and Reginald Horsman, *The War of 1812* (New York: Knopf, 1969), p. 77. Cited hereafter as Horsman.

[21] The Author of the Subaltern (George R. Gleig), *A Narrative of the Campaigns of the British Army at Washington and New Orleans* (1827; rpt. London: Murray, 1889), p. 160. Cited hereafter as Gleig.

[22] John K. Mahon, *The War of 1812* (Gainesville: Univ. of Florida Press, 1972), p. 312. Cited hereafter as Mahon.

[23] Sir William Napier, *The Life and Opinions of Sir Charles James Napier* (London: Murray, 1857), **3**, 212. Cited hereafter as Napier.

[24] Mahon, p. 312.

to *Niles' Register* of 24 July 1813, five women were raped and a civilian killed. These were excesses beyond Vattel's and Cochrane's code of the permissible. No apologies but several excuses were offered. If the inhabitants had stayed at home, wrote Cochrane, there would have been no plundering. In any case the looting was the work of American blacks not the British and the outrages to the Hampton women had been perpetrated not by true Redcoats but by a unit recruited from French deserters. This last claim may have been true. The two independent companies of Frenchmen had been trained in Spain and were poor troops; their commander thought them "the greatest rascals existing. . . . They really murdered without an object but the pleasure of murdering . . . ,"[25] and some among them had found desertion habit-forming. In July both companies were sent back to Halifax.[26]

And so the French who had broken the rules were disqualified and sent off the field. Cockburn, who did obey rules, even though they were severe ones which his opponents did not accept, stayed to make further predatory raids in the Chesapeake in the campaigning season of 1814 and to take part in the occupation of Washington.

The British conquest of the American capital is often seen with a distorted perspective. There was nothing illegal in seizing an enemy capital. Vattel omits specific comment on the subject but, apart from recent precedents set by Napoleon, in the Seven Years' War Frederick the Great had taken the Saxon capital and the Russians had occupied part of Berlin. Another misconception promulgated even by British ministers was that it was retaliation for the American destruction of York (now Toronto), the capital of Upper Canada, in the previous years.

The British government apparently preferred not to defend the Washington raid by citing customary usage, perhaps because doing so would have meant citing the French emperor as exemplar. Its excuses were not consistent. Lord Bathurst said that the lives and property of all the people of Washington were forfeited "by the laws of war" because an attempt was made there to assassinate General Ross. Lord Liverpool justified burning the capital's buildings because Washington had not capitulated but been abandoned. The Chancellor of the Exchequer said the action in Washington was retaliation for the destruction of Newark. The Prince Regent said it was retaliation for York, echoing the governor of Canada who wrote of the incidents in Washington as 'just retribution" for the destruction of the provincial capital. Nevertheless parliamentary critics, including Lord Grenville and Sir James Mackintosh were not impressed and Whitbread's verdict that "we

[26] ASP, p. 377; Horsman, p. 80. [25] Napier, **2**, 224.
A Short History of Anglo-Saxon Freedom (New York, 1890), pp. ix, 7, 275, 362.

had done what the Goths refused to do at Rome" outdid American condemnations.[27]

In fact the attack on Washington was neither just in the sense of being equivalent to the raid on York, nor was it made in a spirit of retribution. By modern standards Washington was a small enough city, containing only 8,000 inhabitants and 900 houses, but it was a metropolis indeed compared to York which had only 625 inhabitants and was the capital not of a country but of a mere underpopulated province. The motive for the attack on Washington was strategic. Its intention was to draw American troops away from the Canadian border and, possibly, from the South where Britain's Creek allies were under pressure.

The diversionary blow need not have been made at Washington. To distract the enemy a successful attempt on Baltimore, the third largest city in the United States, could have been as effective and, if plunder were the object, a good deal more so. The choice of Washington may have been accidental. According to a British officer who was there, Major-General Ross, who commanded the marauding army, was indecisive; it was only the urging of Cockburn who had suffered much from the Washington press but who had no obvious connection with York or Newark, which persuaded him to try for the capital.[28]

The decision gave Baltimore a respite during which its defenses were made strong enough to withstand the attempt later made to conquer it, but taking Washington had a more telling psychological effect than the conquest of Baltimore could possibly have achieved. The loss of confidence in the government was felt everywhere but was particularly marked among New England Federalists towards whom the British, with reason, were tender throughout the war. Thoughts of secession must have been heightened by the national humiliation, so great was Federalist disgust with Madison's administration, of whom the *Providence Gazette* said on 3 September 1814:

> We have always declared our belief that they were imbecile, unable to preserve untarnished our nation's glory . . . Yet after all, we are convinced we have formed too good an opinion of them.

It was the shame of allowing the national capital to fall into enemy hands which caused anguish, not the atrocious misconduct of the British forces.

[27] T. C. Hansard, ed., *Parliamentary Debates From the Year 1803 to the Present Time*, 41 vols. (London: Hansard, 1803–20), **29**, 16, 23, 30, 46, 58; **30**, 527, 606; Palmer, **4**, 52. If the attempt on Ross had been authorized, Bathurst would have made a valid point since Vattel denied the right to quarter of any adversary stooping to such means (p. 460).

[28] Gleig, p. 148.

Federalists apart, most Americans felt that they could not allow the resentment stirred in them by its loss to be directed against their own government, and so they vented them on the British. Hence arose the legend of "the Gothic barbarity" of the British in taking Washington.[29] The British forces in fact were a good deal better disciplined than in some of their Chesapeake raids. Of course as usual and as authorized by the laws of war they destroyed public works of which there were naturally many in the capital.

The Capitol and the White House and all buildings erected for the accommodation of the principal offices of government except the Patent Office were burnt during the twenty-four hours (24 and 25 August 1814) that the British were in Washington. Their commanders were jubilant about what they had done; if taxed with violations of the laws of war they could have alleged that they had burned buildings used to prosecute the war rather than edifices of outstanding beauty. Nevertheless the American claim that many of the destroyed buildings were not used exclusively for war was irrefutable and one British commentator thought that the destruction had exceeded what was "necessary to promote the success of warlike operations."[30] Some of the destruction was by American officials who fired the Navy Yard, the frigate *Essex* and the sloop *Argus* as the British approached. They failed to burn the issuing store. Their enemies repaired this omission and also destroyed three rope-walks, the Potomac bridge, a cannon foundry and all abandoned military stores, including two hundred artillery pieces.[31]

The destruction of public property was awesome but legal. Destroying private houses was not. Only three private houses were set on fire, two by accident and one, the former residence of Albert Gallatin, because it contained riflemen who fired on the British advance guard as it entered the city. According to an English eyewitness this van consisted of a party carrying a flag of truce to state surrender terms which contained General Ross himself, who had his horse shot from under him.[32] One American account denied that there had been the slightest opposition but admitted that "the conduct of the British in general was orderly."[33] Another version appeared in the pro-government *National Intelligencer* of 31 August 1814, one week after Ross occupied the capital. It reported that the British general had been fired on from the house which he subsequently burned, and commended the British for unusual moderation in their respect for private property:

[29] Palmer, **4**, 57.
[30] *The Annual Register* for 1814 (London, 1815), p. 182.
[31] Ross to Bathurst, 30 August 1814, *The Times*, 26 September 1814.
[32] Gleig, p. 125.
[33] Palmer, **4**, 43.

No houses were half as much plundered by the enemy as by the Knavish wretches about the town who profited of the general distress.

Yet another eyewitness American account, written three days after the event and published in the *Providence Gazette* of 3 September, endorsed this assertion of British restraint:

the plunder of private property was rigidly prohibited by the commander of the British; and . . . two soldiers had received one hundred lashes each for disobeying the order.

The same account reported that there was one Briton at least prepared to defy the ban on the destruction of private property. Perhaps remembering that in 1813 the printing-press of the *York Gazette* had been destroyed by invading Americans, Admiral Cockburn rode the streets of Washington on a grey horse demanding the whereabouts of the *National Intelligencer*, "observing that he must visit that office as his friend Gales had honoured him with many hard rubs." He then smashed his "friend's" printing equipment. The British did not, however, mistreat American civilians who remained in the capital and as late as 1826 an American visitor found that "the memory of General Ross is much respected in Washington, on account of his gentlemanly conduct toward the females."[34]

The British behavior at Washington is not the best example to prove the point but in the later stages of the war there was a decrease in British respect for private property. A cogent instance would be the behavior of Captain James Gordon who, after the conquest of Washington, compelled the surrender of nearby Alexandria. Its citizens accepted Gordon's terms in return for his promise to spare private buildings. He had demanded not only the right to destroy all public works and military stores but also the surrender of all the shipping there, both public and private, in addition to merchandise including 1,000 hogsheads of tobacco, fifty bales of cotton and thousands of dollars worth of wine and sugar. Although Gordon alleged that he was confiscating only merchandise intended for export and kept his men under tight discipline, he was extending the approved principle of hampering the enemy's war effort to the point where it was difficult to distinguish between what he was doing legally and the despoliation of private citizens.[35]

A more subtle attack on property, however, had already been launched by Cochrane as early as April 1813 when he publicly posted a proclamation that:

[34] Anne Royall, *Sketches of History, Life and Manners in the United States* (1826; rpt. New York: Johnson Reprint Co., 1970), p. 174.

[35] Palmer, O.D., **4**, 158, 160.

all those that may be disposed to emigrate from the United States will have their choice of either entering into His Majesty's Sea or Land Forces, or of being sent as Free Settlers to the British Possessions in North America or of the West Indies where they will meet with all due encouragement.[36]

Slaves in short were being enticed away from their masters. Many went. By September over three hundred were available for military service, and these were trained as "colonial marines." They were used in operations in the Chesapeake and conducted themselves with discipline and bravery.[37]

Charles Napier had a more drastic plan. He requested 200,000 muskets and officers used to drilling blacks. He intended to land in Virginia and "strike into the woods with my drill men, my own regiment and proclamations exciting the blacks to rise for freedom."[38]

His scheme was rejected but Admiral Cochrane did encourage the recruitment of slaves to fight alongside the Creek Indians. Earl Bathurst, the colonial secretary, wrote in alarm forbidding him to encourage slaves to rise against their masters. Casuistically the admiral replied that he was doing nothing of the sort but merely offering protection to slaves who chose to join the British side.[39] It seemed otherwise to an American observer who insisted that most of the blacks who joined the British were coerced or decoyed into doing so.[40] It is most unlikely that moral considerations moved Cochrane to liberate blacks. Legally they were enemy property.

Article 1 of the treaty of Ghent which ended the war specified them as property and demanded their return. The British refused to do so if they had entered the British service prior to the date of the ratification of the treaty (15 February 1815) and denied that, in any case, the article covered any blacks in British ships, even if anchored in American waters, at the time of ratification. The Americans disagreed, alleged that British had stolen more than 3,600 items of human property and finally, after mediation by the Tsar of Russia, were paid $1,200,000 in compensation in the year 1826.[41]

Vattel would probably have sided with the Americans. Although movable property was not customarily restored to its previous owners at the end of a war, that was because of practical difficulties of location and identification, which did not apply to slaves. In spite of his abhorrence of slavery, Vattel

[36] Adm. 1/508, f. 1155, Public Record Office, London.
[37] Horsman, p. 155.
[38] Napier, p. 369.
[39] Horsman, p. 228.
[40] A. Lacarrière Latour, *Historical Memoir of the War in West Florida and Louisiana in 1814–15* (1816; rpt. Gainesville: Univ. of Florida Press, 1964), p. 201.
[41] Bradford Perkins, *Castlereagh and Adams: England and the United States 1812–1823* (Berkeley: Univ. California Press, 1964), p. 166.

cited approvingly the Roman practice of restoring slaves at the conclusion of hostilities (pp. 393–94).

The American view of slave repatriation was one of several British grievances. Although British complaints of illegal American behavior were far fewer than the converse American complaints providing the substance of this essay, they merit attention because some touch on different aspects of law.

One of the most serious concerned the status of American citizens born in Britain. The United States government considered them entitled to the same rights and subject to the same duties as any other American citizens and had no hesitation in employing them to fight their former fellow countrymen. The British government's view was quite different. The United States could confer what privileges it pleased on Britons but could not deprive them of their allegiance to their native land. To do so was as unnatural as forcing a man to renounce his parents and was, it alleged, contrary to the law of nations. Therefore when General Prévost captured twenty-three naturalized American soldiers who had been born in Britain, he treated them as traitors, imprisoning them with the intention of shipping them to Britain for trial. His American counterpart, General Dearborn, retaliated by confining an equivalent number of unfortunate British prisoners chosen at random, threatening to inflict on them precisely the same punishment as should befall the captive naturalized Americans. Prévost riposted by making hostage forty-six more American prisoners of war. Since death was the penalty for treason the upshot could have been bloody. Neither side withdrew its claims but the necessity of acting on harsh principle was obviated by compromise. A convention for prisoner exchange of 16 April 1814 was modified on 18 July to include all prisoners involved in the contretemps, except for the original twenty-three Americans who were repatriated under the terms of the peace treaty of 1815.[42]

Vattel would have supported the British claims:

> Children are bound by natural ties to the society in which they are born; they are under an obligation to show themselves grateful for the protection it has afforded to their fathers. (p. 103)

A naturalization in a foreign country without license could not discharge a native subject from his allegiance. Britain offered no such license. Both before and after the war of 1812 the legal maxim observed in Britain was *nemo potest exuere patriam* ("Nobody can set aside his native land") (p. 105).

[42] *The Annual Register* for 1814, p. 182; Ralph Robinson, "Retaliation for the Treatment of Prisoners in the War of 1812," *American Historical Review*, **49** (1943), 65–70.

Of course Vattel had written nothing on another subject on which the British felt strongly – the use of new devices for killing invented after the publication of *The Law of Nations*. In this connection the British objected most strongly to the American use of torpedoes, the name used then for fused explosives attached to hulls. Considering them barbarous the British promised severe retaliation against communities who helped their users. Accordingly Stonington suffered a two-day naval bombardment in 1814 and the British press was unusually enthusiastic when a torpedo-boat was destroyed. The British also protested when Americans booby-trapped the cargo of a merchantman.[43] And Charles Napier was not completely jocular when he wrote that "Man delights to be killed according to the law of nations" after discovering that instead of conventional shot Americans fired an assortment of old iron, broken pokers, nails and gun-locks.[44]

The British seem to have been conservative in their objections. They were also inconsistent: they freely used the new Congreve rocket against their American enemies. Nevertheless Vattel would have condemned torpedoes, booby-traps and Congreve rockets, both because he abhorred the treacherous and clandestine and because he believed nations "ought universally to abstain from everything that has a tendency to render it [war] more destructive" (p. 361).

The destruction of Canadian villages evoked British objections every bit as strong as similar American complaints, although the Americans had less opportunity to misbehave in this respect than their enemies. Nevertheless a number of Canadian border villages were destroyed, at Newark, Sandwich and York. At the provincial capital the American troops, after losing their commander, indiscriminately burned buildings with no warlike function like the courthouse, and looted. At Newark what was done was quite deliberate. Before the Americans put the torch to its buildings the 800 inhabitants, mostly women and children, were loosed into the countryside in the depth of the Canadian winter. The Americans pleaded military necessity – the village was too close to Fort George – but it was probably more resented by the British than any other American deed during the war. In retaliation for the destruction of the Canadian villages, Prévost ordered retaliation on the American settlements at Tuscarora, Lewiston, Blackrock and Buffalo.[45] It is significant of the trend towards deterioration of civilized usage as the war progressed that his orders here were restrictive in contrast to later less discriminating orders for destruction in the Chesapeake.

[43] *The Times*, 12 August, 3 October, 1814; *The Annual Register for 1813* (London, 1814), pp. 184–85.

[44] Napier, **3**, 223.

[45] *The Times*, 26 February, 1814.

In conclusion, and leaving aside breaches on both sides arising from differences of opinion on detail and an inevitable disparity between policy and execution, one may still say that the War of 1812 was fought on both sides with cognizance of a common code of rules essentially corresponding to Vattel's.

In spite of the legal but regrettable reply of ruthlessness to ruthlessness and, as counterreprisal followed reprisal, a lapse from pristine standards, particularly concerning private property, the modes of war adopted, insofar as any type of war can be, were "civilized." The main exception was the type of war waged by and on the Indians. Concerning the Indian war, charges of barbarism were justifiably made, but when Briton fought American similar allegations seem to the twentieth-century reader either ludicrous or indicative of admirably high standards.

In general the rules of war, as understood by eighteenth-century gentlemen through reading Vattel or acquaintance with customary usage, prevailed. The most important principles underlying the concept of civilized war negated the idea of total war advocated by the French revolutionaries. They were that fighting should concern only the fighters, that any excessive use of force was deplorable and that all combatants should respect private persons and property.

These Vattelian principles, generally associated with the wars of the eighteenth century, were fairly well maintained in the War of 1812, but were rather better respected by the United States than by Great Britain. If circumscribed aims make for restrained behavior this is surprising, because Britain had extremely limited aims in the war while the United States more ambitiously, among other things, wanted Canada, although it should be recalled that significant sections of the country were indifferent to or opposed to the war.

One explanation may be that the United States had fought no major war since the Revolution while Britain had done little else since 1793. During years which were for Americans marred only by Indian troubles, British armies had fought in the Netherlands, the West Indies, India, Egypt, Portugal and Spain. Of these campaigns they had been most heavily involved in the Iberian Peninsula where alliance with Spaniards waging guerrilla war and combat with a French foe who lived off the land probably modified traditional British views on how war should be conducted. Several years of economic war with Napoleon too had recently reminded the British that one way to weaken governmental power was to strike at private wealth, despite the rules of war.

A more important reason, perhaps, was that the British had more

temptation and opportunity to misbehave. Soldiers seldom act as well on foreign soil as they do on their own. During the War of 1812 British troops were in more of the United States oftener and longer than were American troops in Canada. Even if they had wanted to, Americans had fewer opportunities to destroy and plunder British property or to abuse royal subjects.

In contrast to their revolution, an eighteenth-century war foreshadowing, with its marked ideological motivation, wars of the future, the conflict which Americans fought in 1812 seemed to look to the past. They, their ideas and aims were, like most of their weapons, conventional eighteenth-century ones. And, although the readiness with which they adopted their primitive torpedoes and the British their rockets point to a factor which would make "civilized warfare" more and more difficult to practise in the future, they fought their battles, with some lapses, according to that obsolescent ideal.

It would be interesting to trace the history of the concept and practice of civilized war according to set rules in the years following 1812. The extent to which they survived in American wars of the nineteenth century poses difficulties. How were combatants affected by the well-known transition in international law in the nineteenth century from Vattelian criteria of conduct dictated by natural law to those of the analytic or positive school which insisted that only those rules actually observed by nations could be accepted as international law?[46] In the Mexican War did not the American participants in a war for territorial aggrandizement which the ideologues of Manifest Destiny justified by citing the inferiority of Mexican civilization nevertheless act towards the enemy in accordance with rules designed for civilized peoples? Did not the Union forces in the Civil War generally treat the Confederates, at least for a couple of years, as though they were citizens of another sovereign nation although their commander-in-chief President Lincoln (who called them rebels) consistently denied them any such elevated status? The perpetration of undoubted atrocities in both wars clouds the answers to such questions which remain for further study.

[46] Charles D. Fenwick, "The Authority of Vattel," *American Political Science Review*, **7** (1913), 405.