

# *The British View of Neutrality in 1872*

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*The past is a foreign country;  
they do things differently, there.*  
--L.P. Hartley

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In 1872, the United States (US) and Great Britain (GB) met in Geneva to arbitrate a number of claims which had arisen between them mainly during the US Civil War (1861–65), also referred to as the American Civil War (ACW).<sup>1</sup> The main thrust of the arbitration was the issue of ships which had been built in Britain and sold to the rebellious Southern Confederacy for use during the belligerency.<sup>2</sup> The central issue of the US claims, which were more widely known as the ‘*Alabama* claims,’ after one of the British-built ships, was whether or not GB had breached the rules of armed neutrality during the ACW.<sup>3</sup>

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<sup>1</sup> Wider claims included British ones: (1) the navigation of the St. Lawrence River; (2) fisheries’ disputes; (3) transit of goods through Maine, the lumber trade down the St. John River, and reciprocal trade between the US and the Dominion of Canada; (4) the Manitoba boundary; (5) the San Juan water boundary; (6) British claims arising from the ACW; and, (7) Canadian claims for ‘Fenian’ raids. See, e.g., J.T. Adams, *A History of the American People* (London: Routledge, 1933), 141-144; J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. 1 (Washington: Government Printing Office, 1898), 539, 540-541.

<sup>2</sup> Initially comprising South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas, soon joined by Virginia, Arkansas, and North Carolina. The states of Missouri and Kentucky were later accepted, unofficially, as members.

<sup>3</sup> The Tribunal would examine a total of 18 such claims.

Armed neutrality is a practice developed over many centuries, which allows states to declare their non-involvement on the outbreak of war elsewhere. It is thus distinct from ‘permanent’ neutrality better known today in the case of Switzerland, for example, who, along with some other small European states, was acknowledged as a permanent neutral in the Declaration of Vienna of March 20, 1815, at the end of the decades-long Napoleonic Wars. For permanent neutrals (today, also including Ireland), neutrality forms a central and permanent aspect of foreign policy. Both types of neutrality can be observed as ‘perfectly,’ ‘qualified,’ ‘benevolent,’ or ‘differential,’ depending on the facts and circumstances of each case, but a stance of armed neutrality is ad hoc, and thus temporary, lasting only so long as hostilities elsewhere.

Between 1861-65, such laws of neutrality may have been a fact of international life, but their precise content was not because neutrality would be first codified after the turn of the following century, mainly in Hague Conventions V and XIII of 1907. So the US and GB had to agree on specific standards of neutrality in advance, as the ‘law’ of their arbitration. The final rules were included in their arbitration treaty, the Treaty of Washington of May 8, 1871.<sup>4</sup> The difficulty for GB was that the ‘agreed’ rules in the Treaty clearly favored the US case from the outset, but Britain felt pressured to arbitrate the *Alabama* claims, if only for the sake of continued friendly relations. Even so, Britain never accepted that the treaty rules had reflected principles of general international law during the ACW, or of any neutral precedent, and stated so expressly.<sup>5</sup>

The ACW began after the election of Abraham Lincoln as US President in 1860, which brought specific divisive issues to a head. The war began with the Southern attack on April 12,

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<sup>4</sup> Text of Treaty reprinted in Moore, 1, 547-553. Articles I-XI of the Treaty regarded the so-called ‘*Alabama*’ claims.

<sup>5</sup> As discussed more fully in E. Chadwick, “Gone with the War? Neutral State Responsibility and the Geneva Arbitration of 1872,” in *Traditional Neutrality Revisited: Law, Theory and Case Studies* vol. 4, International Humanitarian Law Series, ed. Elizabeth Chadwick, ed., *Traditional Neutrality Revisited: Law, Theory and Case Studies* vol. 4, International Humanitarian Law Series (The Hague: Kluwer Law International, 2002), 19.

1861, against Fort Sumter, a Federal fort, located in Charleston Harbor, South Carolina. The attack prompted the President to declare a maritime blockade of the entire Southern coastline, on April 19, 1861.<sup>6</sup> Under long-standing principles of international law, the imposition of a maritime blockade is equivalent to an assertion of a state of belligerency and constitutes a legal acknowledgment of a state of war,<sup>7</sup> so should not be confused with a mere domestic-state, municipal decree of closure, which latter does not involve the international consequences of neutrality law.<sup>8</sup> The Southern blockade thus presented the community of nations with a *de facto* state of affairs under international law, and several states promptly declared neutrality, GB being the first, on May 13, 1861.

The laws of armed neutrality have a long history,<sup>9</sup> as the practice of third states declaring their neutrality on the outbreak of war elsewhere was derived from the fact of war. As more and more serious attempts to respect rules of neutrality, and to discourage as many states as possible from participating in the wars of others were made – at least, not without some personal ‘cause,’ having occurred – the rules were extended by analogy to full-scale civil wars,<sup>10</sup> once they reached the intensity of an international conflict. For example, the early American and French revolutions had left little doubt that such struggles could disturb international relations –

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<sup>6</sup> I.e., South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, extended on April 27 to North Carolina and Virginia. Moore, 1, 594; J.H.W. Verzijl, *International Law in Historical Perspective: The Law of Neutrality*, vol. X (Leiden: Alphen aan den Rijn, 1979), 116. The blockade stretched about 2500 nautical miles, and was universal, in the sense it was impartially applied. H. Lauterpacht, ed., *Oppenheim's International Law*, 7th ed., vol. II (London: Longmans, 1952), 770-771.

<sup>7</sup> See *Prize Cases*, 67 U.S. 2 Black 635 (1862); *The Hiawatha*, 2 Black 676 (1862).

<sup>8</sup> T.C. Chen, *The International Law of Recognition* (London: Stevens, 1951), 384. The blockade was characterized as being “for the purpose of collecting the revenue in the disturbed part of the country, and for the protection of the public peace, and of the lives and properties of quiet and orderly citizens,” until Congress could meet on July 4. Moore, 1, 562.

<sup>9</sup> Consider, e.g., the *Consolato del Mare*, a work notionally dating from the 12<sup>th</sup> Century, but first published in 1474, in Barcelona, in Catalan. See Sergio Moratíel Villa, “The Spanish School of the new law of nations,” *International Review of the Red Cross* 32, no. 290 (2010): 424-425.

<sup>10</sup> Fueled in part by the need to harness new military technology. I.P. Trainin, “Questions of Guerrilla Warfare in the Law of War,” *The American Journal of International Law* 40, no. 3 (1946): 534, 536\_n. 2. See also Bernard Montague, *Neutrality of Great Britain during the American Civil War* (London: Longman, Green, Reader, and Dyer, 1870), 115-116. Accessed 18 April 2018, <http://archive.org/details/ahistoricalacco02moungoog> (the practice of recognizing civil war as belligerency better protects neutral trade, is more expedient in restraining the means and methods of war, confines the spread of the hostilities, and is more humane); Geoffrey Best, “The Restraint of War in Historical and Philosophical Perspective,” in *Humanitarian Law of Armed Conflict: Challenges Ahead*, ed. Astrid J. M. Delissen and Gerard J. Tanja (Dordrecht: Martinus Nijhoff, 1991), 3, 19.

including trade relations – as much as international wars, so third states relied on neutrality laws to protect their interests when presented with a *de facto*, large-scale civil war.

In short, the law of armed neutrality was designed to protect trade rather than to prevent war, which no doubt would have been an impossible task in any event. Neutral laws sustained the markets in which to buy and sell the goods of neutral and belligerent state citizens alike, while the observance of any particular set of neutral rules was designed primarily to secure the neutral-belligerent relationship, *viz-a-viz* each other. Neutrality thus ensured that the belligerents enjoyed a broader choice of supply sources once war had in fact begun, and anticipating which states would remain neutral on the outbreak of war formed an essential part of war planning. In turn, a useful, collateral benefit of neutrality was that it helped to confine the spread of hostilities. Therefore, the institution of neutrality was built on such *de facto* flexibilities.

As such, universal agreement as to the precise content of neutral rules could not have existed at the time of the ACW, thus necessitating the arbitration in Geneva in 1872, as is now discussed. Part 2 considers the arbitral environment, the contemporaneous standards of neutrality, relevant precedent, and state practice. Part 3 focuses on the British arbitrator's objections to the Geneva decision, in terms of traditional standards. It is concluded that the eventual success of the US in Geneva can be attributed more to its increasing geopolitical power, and ability to demand specific standards of international behavior, than to developments in the rules of traditional neutrality.

### Overview of the Law Arbitrated in Geneva

As noted above, it was acknowledged indeed by the 19<sup>th</sup> century that full-scale civil wars could warrant the application of rules of neutrality, by analogy, once high-intensity hostilities interfered sufficiently with third state trade and diplomatic relations. This extension

of neutrality to factual situations of war further consolidated the rules into two over-arching principles: abstention and impartiality. Specifically, in exchange for continued rights of peaceful trade, and in order not to be forced to ally with one or other belligerent, neutral states from the outbreak of war elsewhere were obligated to abstain from, and to be impartial towards, the hostilities, and the belligerents. The confinement of hostilities in this way permitted trade to continue despite war to the maximum extent, preserving a more comprehensive peace.<sup>11</sup> The logic of this system is unarguable, yet abstention and impartiality could still be ‘gamed,’ and the belligerents thus insisted on rights of ‘stop and seizure’ whenever it was suspected that certain neutral goods, such as munitions and other forms of ‘prohibited contraband,’ were en route for delivery to an enemy.<sup>12</sup>

Equally clear by the mid-19th century was the gradual emergence of the US as a new world force and as one capable of inflicting damage against certain British interests abroad, notably British trade,<sup>13</sup> at least in the Western Hemisphere. Nonetheless, US post-war demands for compensation from Britain after 1865 were largely ignored by GB for nearly two years after war’s end,<sup>14</sup> during which time GB maintained that its neutrality had not been compromised. One or the other state needed therefore to prevail, and the post-ACW compensation claims laid against GB by the US involved not only substantial amounts of money but also, practical political and legal questions regarding neutral conduct. Depending on the answers, traditional British interpretations of neutrality might or might not be impacted, but specific issues needed resolution.

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<sup>11</sup> See, e.g., Charles H. Stockton, "The Declaration of Paris," *The American Journal of International Law* 14, no. 3 (1920): 357. He refers to the Crimean War (1853-56) as “in fact, a practical example of that anomaly of ‘a military war and a commercial peace’”. No lawful trade was normally conducted directly between the belligerents’ citizens without special permission. G.G. Wilson, ed., *Elements of International Law: The Literal Reproduction of the Edition of 1866 by Richard Henry Dana, Jr.* (Oxford: Clarendon Press, 1936), 358. [Hereinafter Dana].

<sup>12</sup> Frederick Edwin Smith, *International Law*, The Temple Primers (London: Dent 1900), 145.

<sup>13</sup> The US and GB had already fought two wars against each other by the time of the ACW: the ‘American Revolutionary War’ (1775-83), and the so-called ‘War of 1812’ (1812-15).

<sup>14</sup> Moore, 1, 497.

Matters came to a head once a number of post-war legislative amendments in both GB and the US looked set to alter the detail of their respective neutrality laws. Therefore, the ‘wisdom’ of adjudicating the US’s financial claims after the ACW slowly became more obvious to GB. Moreover, Britain itself by 1870 had amended its own Neutrality Act of 1819 in a way which, remarkably, would reflect more the rules under which it would agree, albeit grudgingly, to arbitrate in Geneva. It was clear that to do otherwise risked “the exercise of force by bodies politic” for “the purpose of coercion,”<sup>15</sup> and with it, a potential future war against the US.

### The Arbitration

With the war over in April 1865, the Southern blockade could be lifted, which occurred on June 23 by official decree of the new US President, Andrew Johnson.<sup>16</sup> US-GB relations were fully restored by the following October.<sup>17</sup> Negotiations began soon after to bring GB to the arbitration table for its alleged negligence as regards neutrality during the ACW, and, in particular, US complaints regarding British shipbuilding for the Confederacy. As noted above, GB had refused for several years to take the US compensation claims seriously, but when it finally did, it remained unwilling to allow the issue to go forward of alleged British liability for damage caused during the ACW by British-built Confederate ships, though GB was undoubtedly prepared to express official regret for the damage caused. The British, too, had claims, and both parties finally agreed to air their differences in Geneva, under the 1871 Treaty of Washington.<sup>18</sup>

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<sup>15</sup> Dana, 11, 378 n. 171, who adds: “[m]odern civilization has recognized certain modes of coercion as justifiable.”

<sup>16</sup> Abraham Lincoln had been assassinated by John Wilkes Booth on April 14, 1865, five days after Confederate General Robert E. Lee surrendered at Appomattox Court House, Virginia.

<sup>17</sup> Chen, 8, 395. (citations omitted). He adds: “this is a simple case where fact and law coincided.” See also Quincy Wright, “The American Civil War, 1861-1865,” in *The International Law of Civil War*, ed. Richard A. Falk (Baltimore: Johns Hopkins Press, 1971), 30, 86.

<sup>18</sup> Treaty of Washington, 4. GB, the US, Brazil, Italy, and Switzerland each chose one arbitrator: Sir Alexander Cockburn (GB), Mr. C.F. Adams (US), Mr. J. Staempfli (Switz.), Baron (later Viscount) d’Itajuba (Brazil), and Count Sclopis di Salerano (It.).

Overall, the ‘theory’ of the American case rested on allegations of hostile British government “animus,” in the sense of an inclination to ignore international obligations to “affect their own course, (and) affect the action of their subordinates.”<sup>19</sup> This angle of attack effectively warned the British that they would need to defend against specific allegations of negligence that its government had not acted with a ‘due diligence’ sufficient to preserve its relations equally with both belligerents, and that the law officers of the Crown had not correctly understood, and hence, properly interpreted, their own Foreign Enlistment Act (or “Neutrality Act”) of 1819. However, to the extent that proof of hostile “animus” might depend on a particular interpretation of individual acts which under normal circumstances would form no part of the formal duty of neutral non-discrimination,<sup>20</sup> the British ignored such accusations as the establishment of Confederate agencies in England, the allegedly-open shown to the Confederate cause by the great commercial houses of Liverpool, British personal opinion and/or public pronouncements which speculated on the improbability of preserving or re-establishing the Union, as forming no part of formal neutral duties.

The US claims against the British government after the war had been roughly estimated by Senator Sumner, the then Chairman of the US Senate Committee on Foreign Relations, to be in the region of \$15 million.<sup>21</sup> The award which was handed down formally by the five-member Tribunal on September 14, 1872, and which was substantially agreed on September 2, by a 4-1 majority vote,<sup>22</sup> awarded a gross sum of \$15,500,000 in the US’s favor.<sup>23</sup> Double claims had been disallowed, as were any claims for ‘gross freights’ insofar as they were in excess of ‘net freights.’ Interest was also disallowed for the costs incurred in pursuing the

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<sup>19</sup> Moore, 1, 592.

<sup>20</sup> Ibid., 661. The duty of non-discrimination requires formal, not material, impartiality, and does not extend to neutral state expressions of sympathy with one or other belligerent. Andrea Gioia, "Neutrality and Non-Belligerency," in *International Economic Law and Armed Conflict*, ed. H.H.G. Post (Dordrecht: Martinus Nijhoff Publishers, 1994), 81.

<sup>21</sup> The Senator’s itemization of the damages claims is in Moore, 1, 511-512. It was viewed as the basis on which the US would negotiate in future. It also set the bar for public expectations.

<sup>22</sup> The award is printed in full in *ibid.*, 653-659.

<sup>23</sup> The Tribunal also allowed 6% in interest in gold. *Ibid.*, 651.

Confederate cruisers, and the loss of prospective earnings, for those were simply the costs of war. Sir Alexander Cockburn, the British arbitrator, dissented and refused to sign the award, as is discussed further below.<sup>24</sup>

### The “Three Rules of Washington”

As noted earlier, rules of neutrality at the time may indeed have been a fact of international life, but their precise content certainly was not. The observance of any particular rules tended to reflect the cost-benefit considerations of trade during particular wars, based on such factors as the geographic location of the hostilities,<sup>25</sup> and/or the locales of particular trade routes. As also highlighted above, GB agreed to arbitrate in Geneva in accordance with rules which it did not accept had been the appropriate standards required by general international law principles at the relevant time.<sup>26</sup> This meant that the ‘mutually agreed’ neutral rules in the 1871 Treaty of Washington were in fact formulated *ex-post facto* GB’s alleged negligence.<sup>27</sup>

The rules of neutral duty, termed the “Three Rules of Washington,” comprised the agreed rules of arbitration regarding the substantive law. They were inserted in Article VI (I) of the Treaty, by mutual agreement,<sup>28</sup> and were as follows:

That a neutral government is bound –  
First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace; and

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<sup>24</sup> “Sir Alexander Cockburn's dissenting opinion in the *Alabama* Claims Arbitration of 14 September 1872” was republished by the British in a “Supplement” to the *London Gazette* of September 24, 1872, by the US in *Foreign Relations* IV, no. 2 (1872): 48, as a note to Protocol No. XXXII. Page references, below, are found at trans-lex.org, “Papers Relating to the Treaty of Washington (1872), at 230 et seq.,” Accessed 18 April 2018, [www.trans-lex.org/262138](http://www.trans-lex.org/262138). See also Moore, 1, 652, 659-661.

<sup>25</sup> Cf. the consternation surrounding Swiss neutrality and that of other neutrals during World War 2. See, e.g., Herbert R. Reginbogin, *Faces of Neutrality: A Comparative Analysis of the Neutrality of Switzerland and other Neutral Nations during WW II*, trans. Ulrike Seeberger and Jane Britten (Berlin: Lit Verlag, 2009); Alex de Waal, “Dangers of Discretion,” *London Review of Books* (1999): 27; Ethel C. Phillips, “American Participation in Belligerent Commercial Controls, 1914-1917,” *American Journal of International Law* 27, no. 4 (1933): 675.

<sup>26</sup> Erik J.S. Castrén, *The Present Law of War and Neutrality* (Helsinki: Academia Scientiarum Fennica, 1954), 505.

<sup>27</sup> Katja L.H. Samual, “The Legal Character of Due Diligence: Standards, Obligations, or Both?,” *Central Asian Yearbook of International Law* 1 (approximately 17,000 words, forthcoming, 2019). Section IV.A.

<sup>28</sup> Moore, 1, 547.

also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.<sup>29</sup> Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly. To exercise due diligence in its own ports or waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Britain had agreed to arbitrate by these rules, but it expressly declared regarding Article VI (2) of the Treaty that

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of the principles of International Law which were in force at the time when the claims mentioned in Article I arose,<sup>30</sup> but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules. And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them.<sup>31</sup>

The tasks, therefore, of the Geneva arbitrators in 1872 included (re)interpreting the content of 'due diligence,'<sup>32</sup> as per the "Three Rules of Washington," and assessing for purposes of compensation the many US claims against Britain.<sup>33</sup> It was hoped that, by arbitrating, the parties would effectively coordinate their mutual conduct in such matters in the

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<sup>29</sup> Ibid., 542. The British objected strongly to the inclusion of ship "construction" alongside the prohibition of "fitting out, arming, or equipping" in the draft First Rule of Washington.

<sup>30</sup> The so-called 'Alabama claims.'

<sup>31</sup> An earlier statement read: "[i]t being a condition of this undertaking that these obligations should in future be held to be binding internationally between the two countries." Moore, 1, 544; Verzijl, X, 6, 117-118; Lauterpacht, 6, 715.

<sup>32</sup> E.g., as occurred after the *Caroline* incident of late December 1837, discussed below.

<sup>33</sup> Article VII of the Treaty of Washington, specifically, "the claims of the US against GB on account of acts committed by rebel cruisers." Moore, 1, 541.

future, and future Anglo-American relations, in fact, depended on British co-operation at Geneva.

### ‘Due Diligence’ and the *Caroline* Incident

As the rules of armed neutrality during war have always required a degree of flexibility, they have been as subject to constant challenge as any other customary practice, as is reflected by the precedent of the *Caroline* incident of late December 1837 in regard to neutral ‘due diligence.’ The case, of course, is far better known for its standard-setting role in establishing the requirement of necessity for the use of force in self-defense, but it is also of relevance to the notion and standards of neutral ‘due diligence’ that would be arbitrated in Geneva of 1872.

The facts themselves are relatively straightforward.<sup>34</sup> The incident arose during a rebellion in Canada in 1837. The vessel *Caroline*, a small, American-owned steamer, was employed by the insurgents, among other things, to carry supplies and US volunteers from the New York side of the Niagara River to the Canadian side. US neutrality measures had been expressly invoked from the outset of unrest,<sup>35</sup> but the Federal government claimed it lacked the legislative authority to enforce them, such responsibility remaining with the individual states, in this case, New York. The sheer length of the US-Canadian border and a New York State somewhat sympathetic with the rebels were among many factors that led ultimately to British accusations that US neutrality was proving ineffective. A series of British remonstrations regarding the *Caroline*’s ‘unneutral’ service went unresolved, so the British, in the dead of night, crossed the river to the New York side, set the *Caroline* alight at her mooring, cut her

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<sup>34</sup> The account that follows is a brief synopsis by Hunter Miller (annotator, citation omitted), of the following exchange of diplomatic letters: “British-American Diplomacy: The *Caroline* Case,” accessed April 18, 2018, [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp). See also D.J. Harris, ed., *Cases and materials on international law*, 3 ed. (London: Sweet & Maxwell, 1983), 655-656.

<sup>35</sup> Which included the Presidential Proclamation of Neutrality 1793, Neutrality Act of 1794, and Neutrality Act of 1818. See, e.g., Charles S. Hyneman, “Neutrality during the European Wars of 1792–1815: America’s Understanding of Her Obligations,” *American Journal of International Law* 24 (1930): 279.

loose and sent her over the Niagara Falls, killing two American citizens who were sleeping on board.

The British reliance on the inherent right of self-defense, to pre-empt more attacks as had already been facilitated by the *Caroline*, had breached the inviolability of neutral territory, which is a central tenet of neutrality. It also violated US territorial integrity, breached the principle of non-intervention, destroyed private property, and ‘assassinated’ US citizens,<sup>36</sup> all of which led to years of diplomatic exchanges and negotiations, in which redress, including the payment of damages,<sup>37</sup> was demanded. The British defended their actions on the basis that they were forced to deal with the *Caroline*’s “pirates,”<sup>38</sup> as the neutral diligence ‘due’ to Britain from the US as regards the *Caroline* had not been forthcoming.

In time, the disagreements between the two countries in both cases would teach hard lessons regarding the changing conditions and expectations of neutrality, and just as the British would replace their 1819 Foreign Enlistment Act after the ACW, with a new one in 1870,<sup>39</sup> the US also amended its neutrality laws after the *Caroline* incident, in March 1838.<sup>40</sup> The new US legislation was intended to provide the Federal government with increased authority, e.g., to use its military forces to prevent neutral violations,<sup>41</sup> and thus to enable it to demonstrate the extent of due diligence expected at the time. The new British legislation, in turn, would be

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<sup>36</sup> Miller, 34, citing a note sent immediately after the incident from Mr. Forsyth, the US Secretary of State, to Mr. Fox, the British minister at Washington.

<sup>37</sup> The US minister at London had presented a demand for reparation by May 22, 1838.

<sup>38</sup> Miller, 34, citing the forwarding to Mr. Forsyth by Mr. Fox on February 6, 1838 of a letter received from Governor Head. Consider Efthymios Papastavridis, "The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited," *Leiden Journal of International Law* 24, no. 1 (2011): 45-69. He discusses the transition in British national policy from relying on pirates to control the maritime environment, to the prohibition of unlawful “pirate-privateers”. See also Grosvenor Porter Lowrey, *English neutrality. Is the Alabama a British pirate?*, 2 ed. (Philadelphia: D.F. Randolph Publisher (H.B. Ashmead, printer), 1863). Republished Farmington Hills, Detroit: Thomson Gale, 1969, accessed April 18, 2018, <https://play.google.com/books/reader?id=UvY9AAAAYAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PA2>. The *Caroline* standard of self-defense is today memorialized in Article 51 of the 1945 UN Charter.

<sup>39</sup> 33 & 34 Vict. c.90, Royal Assent August 9, 1870.

<sup>40</sup> Roughly three months after the *Caroline* incident.

<sup>41</sup> Act of March 10, 1838, ch 31, 5 Stat. 212.

intended to improve the regulation of private British commercial activities in times of war – another facet of the diligence deemed ‘due’ by the year 1872.

Therefore, in terms of its potential value as precedent in relation to due diligence, the *Caroline* incident did indeed help to resolve some matters, at least for the time being. Both sides effectively conceded that the long US-Canadian border, and perhaps more importantly, “circumstances,” had made it inevitable that “irregularities, violence, and conflicts should sometimes occur, equally against the will of both governments.” Moreover, they agreed that

[A]ll that can be expected from either government in these cases is good faith, a sincere desire to preserve peace and do justice, the use of all proper means of prevention and that if offenses cannot, nevertheless, be always prevented, the offenders shall still be justly punished [emphasis added].<sup>42</sup>

As for the damage claims in this instance, the British “punished” no one. US reparation demands were refused on the basis that the *Caroline’s* owner had not “innocently employed” the steamer “as a passage vessel.”<sup>43</sup> Similarly, the “sincere desire to preserve peace and do justice” did not resolve the more fundamental issue that had plagued US-British neutrality since the former’s independence from the latter: who policed private neutral trade, and when, for example, as stated bluntly, in pertinent part, by US Secretary of State Jefferson to Mr. Pinckney, Minister to England, as early as September 1793,

... [W]hen two nations go to war, those who choose to live in peace retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; ...; and, in short, that the war among others shall be, for them, as if it did not exist”. To these mutual rights nations had allowed one exception – that of furnishing implements of war to the belligerents, or anything whatever to a blockaded place. Implements of war *destined to a belligerent* were treated

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<sup>42</sup> Miller, 34, “Extract from note of April 24, 1841: Office of the Secretary of State to Mr. Fox’.” See also *ibid.*, “Lord Ashburton to Mr. Webster, Washington, July 28, 1842.”

<sup>43</sup> *Ibid.*, citing the first report of Lord Ashburton in his dispatch of July 28, 1842 on the “settlement” of the case.

as contraband, *and were subject to seizure and confiscation* [emphasis added].  
...<sup>44</sup>

It is clear from the above that “seizure and confiscation” of contraband were the prerogatives of the belligerents. What is not clear, and would be disputed in 1872, as it was in 1793 and 1837, was the extent to which a neutral state government owed anything beyond the basic, formal duties of abstention and impartiality.

### The British Foreign Enlistment Act 1819

Regarding early domestic neutrality laws, both GB and the US were unusual in having dedicated statutes, for deployment as needed. On the outbreak of the ACW, GB's neutrality proclamation of May 13, 1861, was the first issued by a third state,<sup>45</sup> which recognized the war as a full belligerency. The proclamation “recalled” the prohibitions laid down in its Foreign Enlistment Act of July 3, 1819.<sup>46</sup> The statute’s twelve articles were intended primarily to prohibit (1) foreign enlistment, (2) the premeditated equipping of armed ships for use against a belligerent still at peace with Britain, and (3) the reinforcement of belligerent warships in British waters without the license of the Crown. The last two prohibitions were to prove the most difficult to monitor, and are excerpted in pertinent part as follows:

VII. ... [I]f any Person, within any part of the United Kingdom ... shall ... equip, furnish, fit out, or arm ... any Ship or Vessel, *with intent or in order that such ship or Vessel shall be employed in the service of any foreign prince ... as a Transport or Store Ship, or with intent to cruise or commit hostilities* against any Prince ... or against the Subjects or Citizens of any Prince ..., with whom Her Majesty shall not then be at War; or shall ... issue or deliver any Commission for any [such] Ship or Vessel ..., every Person so offending shall be deemed guilty of a misdemeanour ...;

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<sup>44</sup> J.B. Moore, *International Adjudications (Neutral Rights and Neutral Duties: Arbitration Under Jay Treaty (1794) Article 7)* (Oxford: OUP, 1931), 17 n. 1, citing *American State Papers, Foreign Relations I*: 239.

<sup>45</sup> Verzijl, X, 6. See Dana, 11, 439, 440 n. 208, regarding the general regulations of British ports, and special regulations for the ports in the British West Indies.

<sup>46</sup> 59 Geo. iii. c. 69 (in force June 6, by proclamation). See Dana, 11, 448, 450, 471-473. This Act was replaced by the Foreign Enlistment Act of August 9, 1870. See Verzijl, X, 6, 107. (citation omitted).

VIII . ... [I]f any Person in any part of the United Kingdom ... shall, by adding to the number of the guns of such Vessel, or by changing those on board for other guns or by the addition of any equipment for War, increase or augment ... the warlike Force of any ship or Vessel of War, or Cruiser, or other armed Vessel ... in the service of any Foreign prince ..., every such person so offending shall be deemed guilty of a misdemeanour ... [emphasis added].

Apparently, these provisions did not prohibit the private trade in armaments to the belligerents, which the government itself helped to coordinate.<sup>47</sup> Otherwise, it was considered illegal both in the US,<sup>48</sup> and in GB,<sup>49</sup> for private individuals to issue loans to “rebels” fighting the government of a friendly foreign state,<sup>50</sup> but that issue was rather obviated by GB’s proclamation and recognition of a *de facto* belligerency.

Otherwise, to preserve and protect British neutrality against allegations of unneutral service to either belligerent, and because it wanted no involvement in belligerent prize adjudications, GB moved quickly, on June 1, 1861, to prohibit, separately, the bringing into British waters of captured vessels and cargoes by the warships and privateers of either belligerent. On the other hand, GB permitted the standard neutral practice at the time of allowing the warships of both belligerents to be admitted into British harbors on an equal footing, albeit separately.<sup>51</sup> This, too, had dangers, however, and by January 1862, GB had instructed its Admiralty to prevent any belligerent hostilities occurring in British waters.

As noted above, GB eventually modified its Foreign Enlistment Act in 1870, in such a way as to conform more or less with the rules the Geneva Arbitration would employ, but amendment did not obviate its belief that the rules were new to its domestic law, and had not formed part of the law of nations during the ACW.

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<sup>47</sup> The principle allowing this practice held firm at Geneva, as no complaint was made regarding the sale of military supplies or arms in the ordinary course of business.

<sup>48</sup> *Kennet v. Chambers*, 14 Howard 38 (1852).

<sup>49</sup> *De Wutz v. Hendricks*, 11 State Trials 125 (1824), 9 Moore, 1, 586. See also Smith, 12, 133.

<sup>50</sup> The issue of private loans to a belligerent was less clear. Smith, 12, 133; Lauterpacht, 6, 743, 847.

<sup>51</sup> Known as the ‘24 hours rule,’ a gap of 24 hours must separate the exit of two opposing belligerent ships from a neutral harbor. Castrén, 26, 520, 525. Further provisions concerned the requirement of leave to enter the ports of Nassau, and other Bahama Islands. Verzijl, X, 6, 119-120.

## British Ship-Building for the Confederacy

The Geneva Arbitration would be devoted mainly to Britain's alleged negligence in permitting Confederate warships to be built in and depart from British ports. It should be recalled, however, that British neutrality law at the time only prohibited premeditated *equipping* of belligerent ships, and their unauthorized *reinforcement* in British waters, but not *shipbuilding*, per se.<sup>52</sup> British shipbuilders thus were under no legal obligation to inquire as to the ultimate purpose of a ship.<sup>53</sup> Instead, 'suspect' ships sailed from British ports, and complemented or assembled their equipment, armament and manning elsewhere, even if equipment and personnel had been sourced from their ports of departure.

For example, the *Alabama*, the subject of many claims in Geneva,<sup>54</sup> was constructed for Confederate use in Liverpool in 1862, and equipped and armed elsewhere, on the coasts of neutral Terceira (Azores), albeit with the help of two British vessels (the *Agrippina* and the *Bahama*). The Confederate ship *Florida* was constructed in Liverpool under the name *Orebo*, allegedly for the Italian Government, and acquired its fighting crew, provisions, and armaments at Green Cay, again, with the help of a British vessel, the *Prince Alfred*. The *Alexandra* was released in 1863 from Liverpool with incomplete equipment. The *Shenandoah* departed from London under the name *Sea King* as an ordinary merchant ship, and was later converted into a Confederate cruiser near the island of Madeira; her crew was augmented at Melbourne (colony of Victoria).<sup>55</sup>

Nonetheless, despite numerous (and substantiated) US allegations throughout the war regarding private British ship-building and -equipping for the Confederacy, so long as ships

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<sup>52</sup> As per The Foreign Enlistment Act of 1819.

<sup>53</sup> See *Atty. Gen'l. v. Sillem and Others*, 2 Hurlstone and Caldman 431 (1863); cf. *The British Consul v. The Ship Mermaid*, Bee's American Admiralty Reports 69. See also Castrén, 26, 505.

<sup>54</sup> Eighteen claims would become known as the 'Alabama claims.'

<sup>55</sup> Verzijl, X, 6, 118-119; Smith, 12, 137.

remained in British waters,<sup>56</sup> or were “incapable of attack and defense”<sup>57</sup> on departure, the English courts hesitated to intervene. Meanwhile, Britain continued to insist that it investigated most ‘suspect’ ships, and the government did not seem overly concerned with “mere peculiarities in construction,” as those could be misunderstood.<sup>58</sup> For example, in the case of the *Alabama*, the English court is reported to have stated in pertinent part as follows:

Because, gentlemen, I must say, it seems to me that the *Alabama* sailed away from Liverpool without any arms at all; merely a ship in ballast, unfurnished, unequipped, unprepared; and her arms were put in at Terceira, not a port in Her Majesty's dominions. The Foreign Enlistment Act is no more violated by that than by any other indifferent matter that might happen about a boat of any kind whatever.<sup>59</sup>

Accusations thus flew between the two governments, regarding the British presumption of a ship’s ‘innocence,’ prompting the US also to ‘presume’ that British-built ships were in fact destined for the Confederacy, in breach of the Southern blockade.<sup>60</sup> As the US considered them contraband,<sup>61</sup> its cruisers began to search more widely for, and to seize, vessels found merely en route to Nassau and other neutral British ports. Therefore, despite the commercial profits of British shipbuilding and blockade-running that made Confederate personnel and agents so welcome in British ports, and Federal apprehensions that GB would ‘prematurely’ recognize Confederate independence, which never happened (although it could have been conducive to wider strategic and economic considerations, such as British industrial links with Confederate

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<sup>56</sup> Verzijl, X, 6, 119.

<sup>57</sup> Smith, 12, 137.; Dana, 11, 450, 470 n. 215 (discussion of the issue of intent in this context) and 450, 474-478.

<sup>58</sup> Moore, 1, 607-608.

<sup>59</sup> Ibid., 586. See also Dana, 11, 471 n. 218, 474-477.

<sup>60</sup> The blockade was required to be “effective,” as per the Declaration of Paris 1856. See, e.g., H.W. Malkin, "The Inner History of the Declaration of Paris," *British Yearbook of International Law* 8, no. 1 (1927). Britain’s attitude was that contraband carried through the blockade constituted an “enterprise( ) which Her Majesty's Government could not undertake to prevent, and the repression of which belonged to the United States as a belligerent power.” See also D. Stick, *Graveyard of the Atlantic: Shipwrecks of the North Carolina Coast* (Chapel Hill: University of North Carolina Press, 1952), 61. (“[s]o great was the exodus of steamers from the Clyde to blockade-running activities that *The Times*, of London, said in 1863: ‘Should the demand continue at this rate, there will soon be scarcely a swift steamer left on the Clyde’”).

<sup>61</sup> Lauterpacht, 6, 819. The general rule was that a carrying vessel deemed ignorant of the ultimate destination of the cargo could not itself be seized - only the cargo. Ibid., 785 n. 4 (citations omitted).

cotton),<sup>62</sup> British concerns kept the two governments in check. For example, Canadian territorial integrity was at stake, and GB regularly protested the pursuit of American deserters and the enlistment of Canadians there to serve in the Federal army. As for the “Three Rules of Washington,” the main bone of contention remained the standard of neutral due diligence expected. Specifically, the traditional standard of due diligence required of a neutral when assessing the nature of a ship was about to be upended, as is now discussed in the context of Sir Alexander Cockburn’s dissent.

### The British View of the Diligence ‘Due’ – Cockburn’s Dissent

The British declaration of neutrality was followed by France, on June 10, 1861, Spain, on June 17, The Netherlands,<sup>63</sup> also in June, followed by Brazil, on August 1, soon joined Prussia, Denmark, Belgium, Russia, Portugal, Hawaiian Islands, Bremen, and Hamburg.<sup>64</sup> Britain thus was not alone in insisting on its rights to promote its freedom of trade despite the hostilities of others, and when Sir Alexander Cockburn, the British arbitrator, dissented from the Geneva award of September 14, 1872, in its entirety, and refused even to sign it,<sup>65</sup> he was in good company regarding the controversial substance of the “Three Rules of Washington,” particularly as regards ‘due diligence’.<sup>66</sup>

What seems at odds regarding this particular standard is that the Arbitrators did not alter the traditional rule that vessels could be built, etc., for a belligerent within neutral territory

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<sup>62</sup> Stick notes that cotton sold for approximately eight cents per pound in Southern ports, about eighty cents in Europe, and for about one dollar in the Northern states. Stick, 60.

<sup>63</sup> Dutch neutrality instruments for example excluded privateers from Dutch ports, prohibited privateering by Dutch nationals, and prescribed mandatory neutral duties for Dutch commerce. Verzijl, X, 6, 115.

<sup>64</sup> See Moore, 1, 595. regarding the declarations, decrees, and notifications issued by other maritime powers.

<sup>65</sup> The award is printed in full in *ibid.*, 652, 659-661.

<sup>66</sup> Lauterpacht, 6, 757-758., who also argues that, for purposes of international law, the accepted meaning of ‘due diligence’ is “such diligence as can *reasonably be expected* when all the circumstances and conditions of the case are taken into consideration.” This standard is similar to that agreed between the US and Britain subsequent to the *Caroline* incident. See also the more precise Article 8 of the 1907 Hague Convention XIII, which utilizes the words “to employ the means at its disposal” rather than “to use due diligence.”

if neither commissioned *directly* nor made ready for *immediate* hostilities,<sup>67</sup> and they did not disturb the rules permitting the private trade in armaments.<sup>68</sup> The US also had to concede that the Second Rule of Washington applied only “to the use of a neutral port by a belligerent for the renewal or augmentation of such military supplies or arms for the naval operations referred to in the rule.”<sup>69</sup> British liability in Geneva thus hinged on contrasting national views as to the diligence ‘due’ to belligerents, or as the British characterized it, the “good faith and honesty” with which neutrals should observe their duties, albeit in a world on the brink of globalizing trade, multi-national ownership of ships and cargoes, and embryonic industrial warfare, all of which would effect lengthening contraband lists and make unworkable certain older neutral traditions.

#### Neutral ‘Rights’ of Trade

Cockburn’s dissent cites copious authority throughout, and, importantly, makes an early distinction between neutral states assisting one or other belligerent in its war efforts, *per se*, and continuing to trade with either one. The former breaches neutrality and the latter does not. The neutral state and its subjects may continue to engage in trade, although an abstaining and impartial, neutral state does not supply either belligerent directly with war articles.<sup>70</sup> The trade of private neutral citizens is different, as noted by Cockburn, in pertinent part, as follows:

Now, the subjects of a neutral state having in time of peace the right of carrying on trade with a belligerent, on what ground of reason or justice, it may be asked, should their right of peaceful trade be taken away, and their interests, thus be damaged by reason of a war which they have had no share in bringing about, and in which they have no concern?<sup>71</sup>

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<sup>67</sup> Smith, 12, 139; Lauterpacht, 6, 714. (A ‘hair-splitting’ distinction).

<sup>68</sup> See, e.g., Verzijl, X, 6, 116; Castrén, 26, 505.

<sup>69</sup> Moore, 1, 575.

<sup>70</sup> Cockburn’s dissent, 24, 235.

<sup>71</sup> *Ibid.*, 236.

Moreover, disturbing the trade of neutral citizens would unnecessarily entangle them in matters of state. Cockburn admits that “the rights of the peaceful neutral undergo very serious diminution,”<sup>72</sup> but this is qualified by pointing to belligerent actions, e.g., blockading enemy ports, stopping and searching merchant ships at sea, and so on, and he promotes the more traditional view, that, in the absence of any special obligations beyond abstention and impartiality, it is generally the practical duty of the belligerents (rather than the neutral) to police private neutral trade in contraband. Neutral state citizens conducted such trade at their own risk. Moreover, belligerents could force private merchants “to submit to what was called the right of search, in order that the belligerent might satisfy himself whether goods of the enemy, or goods contraband of war intended for the enemy, were being conveyed in the neutral ships,”<sup>73</sup> thereby alleviating the neutral state from doing so.

Cockburn’s query as to the relative equities of the belligerents policing the private trade in contraband, on the one hand, was the opposite to the US position, on the other, which sought merely to shift the policing of neutrality onto the neutral. This shift would upend the flexibilities of neutrality, impose additional burdens on neutral governments, and remove risk from traders who otherwise would have accepted it. In contrast, the British attitude regarding neutral ‘due diligence’ in 1861, as during the 1837 *Caroline* incident, was that everything depended on good faith and ‘circumstances’ including the fact that neutral governments should have no *unnecessary* burdens thrust on them by the hostilities of others. Moreover, any applicable, neutral ‘rules’ in place at any particular time could ultimately only be as good as each state’s ability to police and enforce its preferred position within them. Adopting this flexible approach also reinforced the contextualization of ‘due diligence’ as a function of neutral state necessity,<sup>74</sup> as at the time of the *Caroline* incident.

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid., 237.

<sup>74</sup> As per the *Caroline* incident. Op. cit.

As a final point at this juncture, Cockburn makes express the view that there *could be no obligation* placed on a neutral government to prevent the private trade in contraband, or, in the context of the ACW, to prevent trade with the blockaded Southern ports,<sup>75</sup> as follows:

One thing is quite clear, and must not be lost sight of: neither the trade in contraband of war nor that carried on in defiance of a blockade constitute, practically, any violation of neutrality, *so far as the government of the neutral trader is concerned. Scarce any neutral government has ever attempted to prevent its subjects from carrying on such trade; no neutral government was ever held responsible*, as for a breach of neutrality, for such trade carried on by its subjects. This is a point as to which there has been *no difference of action among governments*, or difference of opinion as to the duty of governments among writers on public law. It is one of those things which, on the part of its subjects, a government, according to the existing practice of nations, is not called upon to prevent. It is one of those things which the belligerent, who, in furthering his own purposes is indifferent to the loss he inflicts on the neutral, must submit to *if he is unable to prevent it*, and for which he is *not entitled* to hold the neutral state responsible [emphasis added].<sup>76</sup>

In short, it was for the belligerents to police private neutral trade, which merchants conducted at their own risk in any event.

### The Issue of Changing Standards

In the context of the *Alabama* claims, the thrust of Cockburn's dissent may seem logical enough, but the issue regarding a neutral's so-called 'passive commerce' was not so clear. 'Passive commerce' entailed the sale to the belligerents by private neutral merchants, directly from their own markets and factories, of goods which, once transported by sea, would be deemed contraband.<sup>77</sup> As changing practices in one context of neutrality can foreshadow alterations in other contexts, Cockburn broaches this issue. He notes that the majority of opinion viewed such commerce as perfectly lawful, but that an authoritative minority, starting with Ferdinando Galiani (1728-1787), had begun to assert limits to such direct private neutral

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<sup>75</sup> Cockburn's dissent, 24, 239.

<sup>76</sup> *Ibid.*, 239.

<sup>77</sup> *Ibid.*, 241.

trade, such that a neutral merchant could, in fact, find himself prohibited in his own country from selling to a belligerent any war materials that might possibly be liable to seizure as contraband.

This issue of seizure as contraband, of course, sits at the crux of the *Alabama* claims, due to no doubt to the ease with which a ‘perfect’ attitude of impartiality can result in different, *material* consequences. Put another way, at what point does ‘equal’ treatment in trade become discriminatory, however indirectly? Obviously, ‘equal’ impartiality may favor the wealthier or more powerful belligerent, and as noted by Cockburn, disagreement on this point “has been revived in our day.”<sup>78</sup> Arguing against this proposition were two of Galiani’s own countrymen, Giovanni Maria Lampredi (1731-1793) and Dominico Azuni (1749-1827). Lampredi, Cockburn notes, promoted the more traditional view, that neutrals may sell anything to a belligerent *within* the neutral territory, as, until the goods have left that territory, there is no question of ‘contraband’ or its carriage. Even where articles were clearly potential contraband, their character as such could only be assumed once they departed neutral territory. Similarly, Azuni and some other eminent authorities in international law highlighted by Cockburn maintained generally the same doctrine.<sup>79</sup>

Views based on such as Galiani’s were utilized by the US in Geneva, which helps to explain its attempt to demand restitution for the wartime damage caused by British-built ships during the ACW, which demands upended ‘due diligence’ expectations, from a principle based on averting the need for belligerent necessity of self-defence or other form of self-help,<sup>80</sup> to an independent neutral duty to reduce the ability of the lesser financially-able belligerent to seek private merchants of (contraband) goods, who otherwise would be willing to accept the risks of doing so. Be that as it may, the fact remains that the British Foreign Enlistment Act of 1819,

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid., 242.

<sup>80</sup> As per the *Caroline* incident. Op. cit.

at the relevant time, put British shipbuilders under no legal obligation whatsoever to query the eventual purpose of their ships at the point of sale.<sup>81</sup> In wrapping up this part of his dissent, Cockburn, therefore, highlighted the hypocrisy of the US position, as US practice on this point traditionally had left the policing of contraband entirely to the belligerents, rather than to commercially-oriented, impartial, neutral states.<sup>82</sup> To drive the point home, he adds:

Why—*unless, indeed, on account of reasons of state affecting the interests of the neutral state itself*, in which case private interests must give way to those of the public—are the armorers of Birmingham or Liege, or the shipbuilders of London or Liverpool, to have their business put a stop to because one of their customers happens to be engaged in war with another state? [... .] From whatever cause it may proceed, increased demand is the legitimate advantage of the producer or the merchant, and it is by the advantage which periods of increased and more active demand bring with them that the loss arising from occasional periods of stagnation is balanced and made good [emphasis added].<sup>83</sup>

## US Arguments

Similar to the British Foreign Enlistment Act of 1819, the US Neutrality Acts of 1794 and 1818 did not prevent ship-building, -equipping or -arming, of ships for sale to a belligerent.<sup>84</sup> The early US Acts were intended to curtail privateering, i.e., the fitting-out of US vessels, manned by US crews, under foreign letters of marque issued during, first, the war with France against Britain, and subsequently, on behalf of the *de facto* governments of the revolted Spanish and Portuguese colonies in the Western Hemisphere, for use against Spanish and

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<sup>81</sup> To recap, the British Act only prohibited the premeditated *equipping* of belligerent ships, and/or their unauthorized *reinforcement* in British waters.

<sup>82</sup> Citing *The Santissima Trinidad*, 20 US 283 (1822), 7 Wheaton 283, at 340 (Mr. Justice Story): "...[T]here is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation." Cockburn disputes the relevance to this point of the *Gran Para*, 20 US 471 (1822), as argued for by the US legal team for the first time in Geneva. Cockburn's dissent, 24, 252. Contrast Mlada Bukovansky, "American Identity and Neutral Rights from Independence to the War of 1812," *International Organizations* 51 (1997): 209–243. And James Sofka, "American Neutral Rights Reappraised: Identity or Interest in the Foreign Policy of the Early Republic?," *Review of International Studies* 26 (2000): 599–622.

<sup>83</sup> Cockburn's dissent, 24, 253.

<sup>84</sup> *Ibid.*, 255.

Portuguese commerce. As noted in Cockburn's dissent, "building or fitting out ships of war for a belligerent had not come into question at that time at all."<sup>85</sup>

Therefore, regarding the over-arching issue at Geneva of the due diligence allegedly owed by GB to the US during the ACW, and the quite specific issue, of whether the sale of a ship of war *as a commercial transaction*, could or not be a breach, per se, of neutrality, Cockburn considered the position adopted in the "Three Rules of Washington." In characterizing the US case regarding due diligence as "vague," and as promoting a standard based "not o[n] what the law is, but of what the United States Government desire it shall be understood to be," he quotes their statement to the arbitrators:

The United States understands that the diligence which is called for by the rules of the treaty of Washington is a *due* diligence; that is, a diligence *proportioned* to the magnitude of the subject and *to the dignity and strength of the power which is to exercise it*; a diligence which shall, by the use of *active vigilance*, and of *all the other means in the power of the neutral*, through *all stages* of the transaction, *prevent* its soil from being violated; a diligence that shall in like manner *deter* designing men from committing acts of war on the soil of the neutral against its will, and thus possibly dragging it into a war which it would avoid; a diligence which prompts the neutral to the *most energetic measures* to discover *any* purpose of doing the acts forbidden by its good faith as a neutral, and *imposes* upon it the obligation, when it receives the knowledge of an intention to commit such acts, to use *all the means in its power* to prevent it. No diligence short of this would be "due"; that is, commensurate with the emergency or with the magnitude of the results of negligence. Understanding the words in this sense, the United States find them identical with the measure of duty which Great Britain had previously admitted [emphasis added].<sup>86</sup>

This is an onerous standard indeed, but it is nonetheless one that makes express that obligations are to be imposed on the basis of the *actual* knowledge of the neutral state of a merchant's *intention* to commit 'unfriendly' acts, whereas the "Three Rules" only specified that neutral due diligence applied merely to *prevent* (indeterminate) (1) the fitting out, arming,

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<sup>85</sup> Ibid., 256. See, e.g., Kevin Arlyck, "Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822," *Law & History Review* 30, no. 1 (February 2012): 245.

<sup>86</sup> Cockburn's dissent, 24, 261-62.

equipping (but not construction), or departure, in or from its jurisdiction of vessels the neutral had *reasonable grounds to believe* were intended for the war effort, (2) use of its ports or waters to serve as operational bases for either belligerent, and (3) any violation of these rules in its own ports and waters. As can be seen, the requirement of *actual* knowledge is not found in the Geneva rules.

In turn, had the British contingent utilized the requirement of *actual* rather than *reasonable* knowledge, and argued against the overly-extensive list of allegedly-‘unneutral’ acts, the arbitration in Geneva might have been decided differently, at least in relation to certain of the British-built ships. Be that as it may, the British position was further compounded by the US’s assertion that the diligence ‘due’ from a neutral was to be proportioned on the neutral government’s strength, i.e., that “there could be one measure of diligence for a powerful state, and another for a weak one.”<sup>87</sup> While such proportionality might, in certain circumstances, mirror somewhat the traditional neutral flexibilities, the notional Geneva formulation of a ‘power multiplier’ to determine the appropriate standard fundamentally altered neutrality’s traditional structure, from the interference of belligerents in neutral trade, to an attempt to force neutrals – particularly powerful ones – to ally indirectly with the stronger belligerent, against the neutral’s own merchants. The fact that applicable, neutral ‘rules’ had traditionally only been as binding as each state’s ability to enforce its own preferred position within them is thus well-represented by the Geneva decision, as its losses in the proceedings reflect how much GB’s status as a pre-eminent maritime nation and standard-setter for rules of neutrality had begun to wane, at least in the Western Hemisphere.

Otherwise, Cockburn’s published dissent enlightened the reader with a summary of what was considered the relevant heads of due diligence, relating (1) to the state of [a neutral’s] municipal law; (2) to the means possessed by it to prevent such infractions; and, (3) to the

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<sup>87</sup> Ibid., 265.

“diligence to be used in the application of such means to the end desired.”<sup>88</sup> The law of the tribunal was structured for the reader by dividing it into prohibitive law, or, as denoted by the US, the “punitive” law, and the preventive law. He followed this with the tribunal’s consideration of the parties’ respective cases of law and fact, including point-by-point highlights of eminent authoritative opinion, both for and against, the laws of other states, a ship-by-ship analysis, and consideration of a variety of other circumstances deemed relevant. He also explained that the tribunal disagreed regarding the US attempt to base its theory of the case on an over-arching, hostile British “animus” towards the Federal government throughout the war, as they pointed instead only to relatively few failures of British ‘watchfulness’.

### Conclusion

The Geneva Arbitrators did not alter the rule that vessels could be built, etc., for a belligerent within neutral territory, if not commissioned *directly* by a belligerent, or if it had not departed ready for *immediate* hostilities. The Geneva Arbitrators also did not disturb the private neutral trade in armaments.<sup>89</sup> What, then, did the arbitration accomplish? The putative success of the US in effectively re-writing the rules for the occasion, upended traditional neutrality, from a principle based on avoiding a belligerent necessity of self-defense or another form of self-help. Instead, ‘due diligence’ was to become an independent, neutral duty, capable of reducing, in material terms, the ability of the lesser financially-able belligerent to acquire contraband goods from neutral private merchants, should that neutral choose to overly-police its own traders for wider geopolitical reasons.<sup>90</sup>

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<sup>88</sup> Ibid.

<sup>89</sup> See, e.g., Verzijl, X, 6, 116, 166; Castrén, 505.

<sup>90</sup> Such indirect discrimination would prove particularly harmful to the Spanish Republican government during the Civil War of 1936-39. See “Declarations by the European Governments Constituting the Agreement regarding Non-Intervention in Spain,” discussed at The National Archives, “Spain at War: Spanish Civil War,” accessed April 18, 2018, <http://www.nationalarchives.gov.uk/cabinetpapers/themes/spain-at-war.htm>.

Over 187 pages, Cockburn re-argues the British position at Geneva, in particular as regards Britain's commercial ship-building, etc., for the Southern Confederacy. Throughout the ACW, the British government did not overly-intervene in its citizens' private affairs, including their commercial activities, pursuing the attitude instead that a neutral had a right to maintain as normal a life as possible during hostilities elsewhere in which it played no part. Nonetheless, playing no part was not the same as having no interest, and GB's 'light-touch' approach to its citizens' private commerce was beneficial to its shipbuilders, armaments manufacturers, and cotton industries, to name a few. The firm British stance nearly drew it into a direct war with the Federal government on several occasions, which was a risk both sides needed to avoid: war would have made British recognition of Confederate independence inevitable, and the geographical proximity of the US mainland to many British colonial ports would have endangered British interests.

Obviously, the US's position at Geneva was to pursue its own (financial) agenda, particularly as regards public expectations of (financial) retribution against GB, just as the American public had demanded (financial) satisfaction regarding the *Caroline* incident of 1837. Moreover, by 1872, the respective geopolitical position of the two countries was reversing, and arbitrating their differences in Geneva provided an excellent example of this particular power swap under the guise of the 'peaceful' settlement of disputes.

In conclusion, the 187 page reprint of Cockburn's dissent, intended for public consumption, in a "Supplement" to the *London Gazette* of September 20, 1872, leaves a priceless account of a decisive moment in legal history which did not so much alter anything as indicate the inherent flexibility of law, and power, over time.

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