The impact of international law on British foreign policy to the United States, 1836-1846

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September, 2018

This dissertation is submitted for the degree of Doctor of Philosophy

Preface

I am greatly indebted to my supervisor, Professor Jon Parry, for his help and support in the preparation of this thesis.

I declare that:

- This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

- It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

- It does not exceed the prescribed word limit for the relevant Degree Committee.

Charles Graham Earles

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The decade from 1836 produced major tensions in British-American relations over Canada and the role of the United States as a growing regional and maritime power. American citizens added to the danger of the Canadian rebellion of 1837 through frequent border disturbances, and there was a real risk of war in the case of McLeod. The United States made spectacular gains of territory in Texas and Oregon, and settled the north-eastern boundary controversy. Disputes with Britain arose, but American continental dominance was put beyond doubt. On the seas, pressure from the United States in the "right of search" and *Creole* incidents ultimately restricted British actions against the slave trade and slavery.

This thesis examines the impact of international law on British foreign policy towards the United States during this period. It aims to establish that international law provided the framework and principles within which British policy worked, and disputes were handled. It also intends to show that the conduct of the issues concerned demonstrates that there was a shared British-American respect for international law. These points matter because British policy has traditionally been explained mainly in terms of peace being sought for reasons of global strategy and economic benefit. The role of international law has been largely overlooked. As the thesis aims to demonstrate, however, international law was at the heart of how Britain responded to the United States. British policy, and the maintenance of peace, cannot, accordingly, be fully understood without an appreciation of this legal context.

The thesis begins by arguing that international law was able to be influential because it was part of the institutional practice of British foreign policy to the United States. Expert advice was available to the Foreign Office and a series of principles was established by which policy was to be conducted. The thesis then shows how treaties and legal principles made an important impact. A combination of treaty law and principles guided British objectives towards the United States concerning imperial possessions, commerce, the slave trade, and peace. Crucially, law also influenced the handling of issues in the British-American relationship through what was effectively a legal framework shared with the United States. The remainder of the thesis then examines in detail the impact of international law within

these themes on the most contentious issues of the period. Canada, the American expansion into Texas and Oregon, and the disputes over the "right of search" and the *Creole* are each considered separately.

The thesis does not argue that British foreign policy to the United States can be explained entirely by international law. Without an enforcing authority, the role of international law was a question of political choice and power. Rather, its main underlying contention is that the acceptance and use of international law in this decade needs to be seen as an important part of the British-American political relationship.

Abbreviations

Aberdeen Papers. The Papers of the Fourth Earl of Aberdeen, The British Library, London.

British Documents. *British Documents on Foreign Affairs Part I, Series C, North America*, *1837-1914*, Bourne, K., (editor), which contains copies of the British Confidential Print Series: Volume 1 (for Canadian affairs generally), Volume 2 (for Oregon and Texas), and Volume 4 (Central America), (University Publications of America, 1986**).**

Diplomatic Correspondence. *Diplomatic Correspondence of the United States*, series, selected and arranged by Manning, W., Canadian Relations 1784-1860, Volume III, 1836-1848, (Carnegie Endowment for International Peace, Washington, 1943).

DNB. *Oxford Dictionary of National Biography*, (Oxford: Oxford University Press, 2004).

FO. Foreign Office Manuscript Letter Books, The National Archives, Kew. The remainder of the reference is to the exact file.

HC, **HL.** Hansard, Third Series, House of Commons and House of Lords respectively.

Palmerston Papers. The Papers of Lord Palmerston, University of Southampton.

PP. Parliamentary Papers.

Peel Papers. The Papers of Sir Robert Peel, The British Library, London.

Webster Papers *The Papers of Daniel Webster: Diplomatic Papers, Volume 1, 1841-1843,* Shewmaker, K., (editor), and Stevens, K., and McGurn, A., (assistant editors), published for Dartmouth College by the University Press of New England, Hanover, New Hampshire and England (1983).

The impact of international law on British foreign policy to the United States, 1836-1846

Contents:

1. Introduction

On the 12th November, 1840, the New York State authorities arrested Alexander McLeod on a 'charge of murder and arson', for his alleged part in the 'capture and destruction' of the steam boat, the *Caroline*.[1] McLeod's apprehension revived the events of some three years earlier, when, on the night of the 29th December, 1837, British forces had crossed the Niagara river into American territory, seized the *Caroline* (killing one person), and released it ablaze into the 'cataract of the River'.[2] Britain had justified the seizure of the *Caroline* on the grounds that it had been supplying a 'hostile assemblage at Navy Island', but for the United States it remained an 'offensive' and 'unwarrantable' 'outrage'.[3] Faced with this unwelcome return of a past dispute, Britain demanded McLeod's release, but not simply because he was a subject of the Crown. Instead, what Palmerston and Fox, the British Minister in Washington, cared about was that the New York authorities had failed to recognise that the *Caroline* incident was a 'public act of persons in Her Majesty's service', which, as a matter of international law, could only be dealt with by 'discussion between the two national governments'.[4] Britain even went so far as to warn the United States of a war of 'retaliation and vengeance' if McLeod was convicted and executed, aimed at stopping any other 'nation... from again committing so monstrous a public crime'.[5] As it happened, the crisis passed after McLeod's ultimate acquittal in October 1841, but its circumstances nevertheless show how far Britain acted by reference to its understanding of how the United States should have responded under international law. Britain saw McLeod's indictment as a problem because it considered that a legal principle made him immune from personal responsibility, and it expected respect for its arguments from the United States. Strikingly, Britain also threatened to fight over the principle it believed to be at stake.

This incident matters because it suggests a British-American relationship in the period in which, at the least, international law was taken seriously as a set of rules that could influence

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[1] Fox to Forsyth, 13 December 1840, *Diplomatic Correspondence*, Vol. III, 1533.

[2] Stevenson to Palmerston, 22 May 1838, *Diplomatic Correspondence*, Vol. III, 1445; the *Caroline* was American-owned and moored for the night at Schlosser in New York State.

[3] Arthur to Sydenham, 1/2/41, FO 5/371, fols. 166-192 at fols. 170-171; Stevenson to Palmerston, 22 May 1838, *Diplomatic Correspondence*, 1445, Vol. III; Navy Island was an island in the Niagara river that was British territory.

[4] Fox to Forsyth, 13 December 1840, *Diplomatic Correspondence*, Vol. III, 1533.

[5] Fox to Aberdeen, 12 October 1841, Confidential, *British Documents*, Vol. 1, 156.

government conduct on specific issues. More widely, it also potentially indicates that there was a shared culture of respect for international law permeating the whole conduct of British foreign policy to the United States, albeit that initially Britain and the United States had differing views in the McLeod case. Moreover, the validity or otherwise of these possibilities carried clear implications for the understanding of Britain's policy to the United States, and the wider British-American relationship. Was British policy guided by legal principles, and to what extent were Britain and the United States handling issues within what might now be termed a 'rules-based system'? If so, what was the effect? This thesis arose from the fact that, despite its possible significance, the problem of the role of international law has not been sufficiently addressed in previous works covering British policy to the United States. Thus it seemed worthwhile to ask how typical was the McLeod incident, and to examine how international law was used in British-American disputes in this period.

The decade from 1836 presents the ideal period for research into this problem as it contained several diverse challenges for British policy to the United States. The Canadian Revolt of 1837 sparked border instability, and the associated incidents concerning the *Caroline* and McLeod. The unresolved Maine boundary dispute gave rise to skirmishes and threats of military intervention from the late 1830s. Furthermore, the United States expanded hugely into Texas and Oregon, and began a war that would see it take California. There were problems too away from the North American continent. The United States threatened the effectiveness of British action to suppress the African slave trade, with its defence of American shipping from the alleged interference of the Royal Navy. Isolated controversies, such as the *Creole,* also laid bare the chasm between the two nations over slavery. Yet, distinct as these matters were, all of them also appeared to involve international law. Britain pursued legal claims in the Maine boundary and Oregon disputes. The United States alleged that British actions in Texas, the Atlantic, and the *Creole* were in breach of legal principles providing for, respectively, 'non-interference', the freedom of the seas, and the 'comity of nations'. The McLeod and *Caroline* cases both centred on accusations that international law had been broken. The problem then is to understand how far Britain's approach may actually have been affected by law in these particular instances.

This thesis aims to establish that British foreign policy to the United States in the period did indeed work within a framework of international law. It contends that law influenced both what Britain sought to achieve, and how it managed the problems in the British-American

relationship. Its central point is that international law adds an important extra dimension to the way in which the main incidents in the British-American relationship of the period have traditionally been understood. The thesis begins by arguing that international law was able to have this influence because it was part of the institutional practice of British policy. Expert advice was available to the Foreign Office, and a series of settled principles instructed the conduct of policy. It then sets out the main ways in which international law actually made an impact on British policy. Treaty law and legal principles guided British objectives towards the United States concerning imperial possessions, commerce, the slave trade, and peace. Crucially, law also influenced the handling of issues in the British-American relationship, through what was effectively a legal framework shared with the United States. The remainder of the thesis then examines the effects of international law on the direction and operation of British policy in relation to Canada, American expansion, and maritime rights. In the Northeast, legal principles defending sovereignty and territory helped to maintain workable relations with the United States during the Canadian rebellions. Legal terms were used to define and resolve the critical McLeod and *Caroline* issues. Legal process and argument restricted the scope of the Maine boundary dispute, justifying perfectly Webster's gibe that it was a 'tedious matter'.[6] Similarly, in the West and South, historic rights, and the presence of common legal principles, gave Britain a greater interest in the future of Oregon than that of Texas, and shaped the course of policy to both. Lastly, in the Atlantic, existing law produced a new updated set of rules for 'visit' to American ships in the seeming conflict over maritime rights and the slave trade.

Thus the thesis claims that the acceptance and use of international law was an important part of the political relationship between Britain and the United States in the period. The British-American relationship was unique: an imperial ruler and its now independent former colony. Initially, the process of separation, and the several related treaties, generated legal issues. Others then arose from the fact that the 'new' United States was able to expand on the North American continent, and defend its shipping in the Atlantic Ocean, further challenging British regional power in both cases. International law provided a structure and language for resolving these issues peacefully, and this was appreciated by the politicians in Britain and the United States. Ministers and diplomats on both sides of the Atlantic *personally* deployed its principles. Furthermore, the role of international law also allows for a re-evaluation to be made of the nature of British-American 'political' relations. For treaty law and legal

[6] Webster to Everett, 31 May 1842, *Diplomatic Correspondence*, Vol. III, 1288.

principles were more than just a structure for defining, and resolving, disputes. They were also a unifying force revealing agreement on political choice at a deep level between Britain and the United States. The principles behind the ownership of unoccupied land are one example; another would be the main rights and obligations associated with the 'freedom of the seas', so crucial for the trading interests of both powers. There were, of course, differences in the detail, but international law extended a commonality of mindset to foreign policy discussion. Historical attention should not, therefore, be given just to the facts of the conflicts. Legal disputes need 'rules', and the 'rules', not the disputes, are, ultimately, the foundation of a relationship.

The thesis is concerned with the way in which international law permeated the objectives and practice of British foreign policy to the United States in the period. It is interested in how international law was perceived, and used, by British politicians; it is not a history of international law. The main sources used, therefore, are British diplomatic papers related to the United States, private correspondence of British politicians, parliamentary reports of debates, and articles in a range of contemporary periodicals. The remainder of this Introduction has three main purposes. Primarily, it defines what is meant in the thesis by international law, and argues why it provided a system of rules that could in principle influence British foreign policy to the United States. Next, it considers how far the current historiography of British-American relations requires reassessment as a result. It then concludes with a chapter summary.

International Law

The international law - or the law of nations - in the early to mid-nineteenth century was a combination of law said to derive from reason - or natural law, and law from agreement in

the form of treaties or custom - or positive law.[7] It provided a framework of principles for the conduct of states, and for the international relations between states, and covered war and peace, land and sea.[8] It was set out in the work of jurists, but they did not always agree and there was no independent enforcing authority for its rules. The main author referred to in this period within Britain and the United States was Emmerich de Vattel, although other writers, particularly Hugo Grotius, were also influential.[9] Importantly, Vattel extended the purview of international law beyond the position of a nation 'in its relation to others', or

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[7] The term 'international law' will be used in the thesis. Contemporary statesmen also referred to the 'law of nations' as well as 'international law', and this term will, therefore, also be found in the thesis in quotations. The use of 'international law' is not to deny that the terms 'international law' and 'law of nations' have distinct derivations. In particular, the 'law of nations' is the older term, used, for example, in the works of the eighteenth century, and which was gradually replaced by 'international law' in the nineteenth century. The 'law of nations' can also be seen as historically a wider term, encompassing domestic governance in addition to international relations. Such differences are not, however, material for present purposes. No consistent distinctions in meaning between the two terms were made in the period by statesmen, or in foreign policy practice; in other words, whatever their distinct original derivations, they were generally used in these contexts in the 1830s and 1840s to mean the same thing, or for similar purposes. Furthermore, the thesis is concerned, in any event, with the impact of principles within international law or the 'law of nations' in the widest sense, and 'international law' is used simply for convenience as an appropriate single term.

[8] Some historians maintain, though, that this traditional range needs to be extended. For example, Koskenniemi contends that the 'nineteenth-century sensibility [of international law] excluded large chunks of power from its compass, namely that exercised through private law, property and contract': M. Koskenniemi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity', p. 23, (International Relations, 2011, E.H. Carr Lecture); and Benton and Ford argue that the 'origins of international law' can also be found in the 'redesign of British imperial law' in the early nineteenth-century: L. A. Benton, and Ford, L., *Rage for Order: The British Empire and the Origins of International Law*, 1800-1850, (Cambridge, MA: Harvard University Press, 2016), p. 1.

[9] In the research for this thesis, there were more references to Vattel than other jurists in the diplomatic correspondence and parliamentary debates reviewed, although direct mention of any particular writer in such sources was rare. References occurred as follows: by the American lawyers for McLeod, to Vattel and Chitty's Notes: Sydenham to Russell, 25 February 1841, FO 5/371, fols. 236-245; by Commander Jones, in his justification of 23 October 1842 relating to his unauthorised invasion of Mexico at Monterey, to Chitty's Vattel, 4th American edition: Fox to Aberdeen, No. 44, 24 March 1843, FO 5/391, fols. 232-300 at 283; by Grattan, British Consul at Boston, in referring to a recent case in the U.S. Supreme Court, to Webster's reliance on Vattel and Blackstone: Grattan to Palmerston, 29 March 1841, *British Documents*, Vol. 1, 92; by the Texan envoy in London, Smith, in respect of an alleged British breach of neutrality, to Vattel and Wolf: Smith to Aberdeen, 10 October 1842, FO 75/5, fols. 58-65 at 61; by Hume, in the House of Commons in a debate on Canada, to Vattel: 29 January 1838, Vol. XL, 627; and by Falkland, the Lieutenant Governor of Nova Scotia, in respect of fishing rights, to Grotius and Chitty's Commercial Law: Falkland to Russell, Copy, 8 May 1841, FO 5/373, fols. 16-36 at 20. Further, Jennifer Pitts noted that Vattel's *Law of Nations*, as published in 1834, edited by Jospeh Chitty, was used within the British Empire, albeit that, she then added, Vattel's popularity in Britain began to decline after the opium war with China: Jennifer Pitts, 'Method'(Paper) at 'History, Law, Politics' Conference, University of Cambridge, 16 May 2016.

matters of war and peace, to that of 'nations considered in themselves'.[10] He, therefore, included within the *Law of Nations*, a state's duties to itself in areas such as self-preservation, cultivation of the soil, government, commerce, territory, and the sea, many of which, as will be seen, were reflected in British practice.[11] In addition to Vattel, Henry Wheaton, an American diplomat, also emerged as a 'modern' codifier of international law in the 1830s and 1840s, along with, to a lesser extent, his fellow countryman, James Kent.[12] In Britain, Robert Phillimore was the first writer of similar standing, with his major work on international law being published in the 1850s.[13] The mixed genealogy of international law is reflected in the work of these writers. Vattel favoured natural law, but saw Grotius as having tended towards a general system based instead on the 'common consent of nations'.[14] Wheaton and Kent, encompassed both traditions, supporting the idea of both natural law, and that of consent.[15]

The British and American governments of the period undoubtedly considered themselves as participants in a system of international law. Leading statesmen in Britain and the United States, therefore, frequently indicated that they were acting within a set of rules formed by treaties and general principles.[16] Chapters 2 and 3 will explore further the political support for international law within Britain and the United States, but the respect for it can be

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[10] E. Vattel, (edited by J. Chitty), *The Law of Nations or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, (London: S. Sweet... Stevens & Sons... and A. Maxwell, 1834). The quotations are from the headings in Book 1 and Book II. Vattel's work was originally published in 1758.

[11] Vattel, *Law of Nations*, Book I.

[12] Wheaton was an American diplomat based in Berlin; Kent was a former Chancellor of New York.

[13] Robert Phillimore was a future Queens's Advocate, and his *Commentaries upon International Law* was published from 1854. There were other writers before Phillimore; for example, William Manning produced a general work in 1839, *Commentaries on the Law of Nations,* and Joseph Chitty, one of Britain's then leading lawyers edited Vattel, *Law of Nations*, in 1834.

[14] Vattel, *Law of Nations*, Preface, p. vii, p. viii.

[15] J. Kent, *Commentaries on American Law*, Vol. I (New York, 1836), Part I, pp. 3-4; H. Wheaton, *The Elements of International Law, with a sketch of the History of Science* (London: B. Fellowes, 1836), Advertisement; see also in the British context: W. O. Manning, *Commentaries on the Law of Nations*, (London: S. Sweet [etc., etc.],1839), Book I, pp. 3-4; and J. Chitty, in *Vattel*, *Law of Nations*, Note 1 to S3, Preliminaries.

[16] This is also consistent with Kennedy's point that the obligation to observe international law was generally assumed by rulers in the period: D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', in *Quinnipiac Law Review*, Spring 1997, pp. 99-138, at p. 110, and pp. 116-117.

illustrated for present purposes by two examples. In 1843, Peel argued that following international law would make it easier for Britain to suppress the slave trade, noting that he was 'perfectly certain, that if you transgress the law of nations, your efforts, however well intended, will be less effectual than if you respect the rights of other countries'.[17] Similarly, Webster commented that the President felt it important to keep 'the high character which the United States now possess for the observance of those rules which govern the intercourse of nations'.[18] The bilateral diplomatic despatches make clear too that both Britain and the United States also considered the other to be liable to international law.[19] British-American relations were, therefore, unaffected by the wider question of which states were within the law's ambit, which can be seen, for example, in the nineteenth-century debate over whether international law was only for the 'civilised' state.[20] Indeed, Phillimore simply assumed that both Britain and the United States were within its scope in his 1842 public letter concerning 'the questions of international law, raised in the message of the American President'.[21] For him, the point to cherish, rather, was that it was 'the glory of the age in which we live, that the principles of international law have acquired the precision and stability of positive enactment.'[22]

There is scope for scepticism about some of the ways in which international law was conceived and used at this time. Was it simply an expression of state power, or a selection of favourable interpretations? In a letter from 1840, Sir James Stephen, Under-Secretary of

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[17] Peel, HC, 21 March 1843, Vol. LXVII, 1218-1252.

[18] Webster to Spencer, 6 August 41, *Webster Papers*, pp. 100-101.

[19] Sydenham did, though, once comment that it was 'difficult' to 'satisfy' people in Europe that the 'nature' of the American government and the 'state' of American society were 'such as to render the ordinary rules and conduct observed between the Civilised Governments of Europe in their international relations, inapplicable to them', but this was an isolated comment at the height of the McLeod matter: Sydenham to Fox, Confidential, 3 August 1841, as enclosed within CO to FO, 2 September 1841, FO 5/374, fols. 158-159.

[20] Grewe, for example, argues that the notion that international law was for 'civilised' states became more prominent in the nineteenth century, and that this was 'essentially a product of British policy and theory concerning international law': W. G. Grewe, *The Epochs of International Law*, translated and revised by Byers, M. (Berlin: Walter de Gruyter, 2000), pp. 445-446, pp. 450-453, and pp. 465-466. See further, J. Pitts, 'Boundaries of Victorian International Law', in D. Bell, (ed.), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge: Cambridge University Press, 2007), chapter 4.

[21] R. Phillimore, *A Letter to the Right Hon. Lord Ashburton suggested by The Questions of International Law, raised in the Message of the American President* (London: J. Hatchard, 1842).

[22] Phillimore, *A Letter to the Right Hon. Lord Ashburton*, p. 4.

State for the Colonies, certainly appeared to view the international law of the time as being the servant of the state:

> Whatever may be the ground occupied by international jurists they never forget the policy and interests of their own Country. Their business is to give to rapacity and injustice, the most decorous veil which legal ingenuity can weave. Selden, in the interest of England maintained the doctrine of what was called mare clausum. Vattel in the interest of Holland laid down the principle of open fisheries. Mr Marshall great as he was, was still an American, and adjudicated against the rights of Indians. All such law is good, just so long as there is power to enforce it, and no longer.[23]

Benton and Ford have recently argued that 'in the early nineteenth century... the law of nations comprised little more than a series of flexible rules about state comportment in war and treaty'.[24] As Fassbender and Peters comment, 'law might be considered as completely ancillary to political power or on the contrary as a normative power shaping the events.'[25] In a recent work on the First World War, Hull identifies Carl Schmitt as providing the 'classic account of law as a cover for Allied imperialism', whilst setting out that one of her aims was, conversely, 'to restore international law to its rightful place in the conflict'.[26]

Two specific arguments might be made to try to minimise the practical significance of international law for foreign policy in this period. Most importantly, it was not enforced by any supervisory body or entity. Indeed, in Britain, the sense that this was perceived as an issue is, perhaps, also reflected by what Sylvest describes as the attempt by scholars, in the years after 1835, to answer John Austin's argument that international law was not proper

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[23] Stephen, Minute to Vernon Smith, 28 July 1840, CO 209/4, fols. 343-344, as referred to in P. G. McHugh, 'A Comporting Sovereign, Tribes and the Ordering of Imperial Authority in Colonial Upper Canada of the 1830s', note 37, pp. 9-10, as read in final draft. This is now published in M. Koskenniemi, W. Rech, and M. Fonseca, (eds.), *International Law and Empire: Historical Explorations* (Oxford: Oxford University Press, 2017), chapter 10.

[24] Benton and Ford, *Rage for Order,* pp. 4-5.

[25] B. Fassbender, and A. Peters, (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), p. 12.

[26] I. V. Hull, I., *A Scrap of Paper: Breaking and Making International Law during the Great War* (Ithaca: Cornell University Press, 2014), p. 3, p. 13. There is also a recent discussion of the problem of power and law in the context of the Declaration of Paris, 1856, in 'Introduction: Power, Law and the Declaration of Paris', in J. Lemnitzer, *Power, Law, and the End of Privateering* (Basingstoke: Palgrave Macmillan, 2014).

binding law, but, rather, a set of moral principles ' "imposed by general opinion" '.[27] This, Sylvest observes, involved writers, such as Whewell and Phillimore, using religion 'to legitimate the existence and explain the growing acceptance of international law'.[28] Secondly, there was no clear boundary between international law and state interests. Koskenniemi observes, the 'natural starting point was always the existence of States, treated by analogy as individuals, self-sufficient, independent, and free'.[29] Furthermore, there was also no serious challenge to the dominant position of states from any other body or idea.

The argument of the thesis is that both these objections can be exaggerated. The power of states to act freely was certainly fundamental in the 1830s and 1840s, but this did not mean that they could not choose to respect international law as '*law*' in some, or all, situations - as a free act. International law could, therefore, be, as Orakhelashvili puts it, both "a tool for *Realpolitik*, as well as a check on it".[30] Indeed, the very 'ideas' that the ' "international" constitutes a separate zone of political life, with its own rules, norms, and institutions', and that it was 'in some sense *governable* ... by men', have been traced by Mazower to the period of the Revolutionary and Napoleonic Wars and their aftermath.[31] In this way, as per Orakhelashvili, historians of international law have perceived a close relationship between state power and international law, but do not, thereby, seek to deny its impact. The structure of Grewe's *The Epochs of International Law* into various ages characterised by different states suggests, for example, a connection between a state's power and the 'international legal order', not that there was no legal order.[32] Furthermore, the fact that states would

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[27] C. Sylvest, 'The foundations of Victorian international law', in D. Bell, (ed.), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge: Cambridge University Press, 2007), pp. 48-51.

[28] Sylvest, 'The foundations', p. 51; see also C. Sylvest, 'International Law in the Nineteenth Century', in *The British Yearbook of International Law* (London: Hodder and Stoughton, 2005), pp. 9-70, at pp. 22-24, and p. 28.

[29] See generally, M. Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2004), pp. 19-20. Koskenniemi was commenting on Von Martens' *Précis du droit des gens moderne de l'Europe* (noted as the 1864 edition by Verge, and the 1821 edition revised from the original).

[30] A. Orakhelashvili, 'The 19th Century Life of International Law', in A. Orakhelashvili, (ed.), *Research Handbook on the Theory and History of International Law* (Cheltenham: Edward Elgar, 2011), chapter 15, p. 454.

[31] M. Mazower, *Governing the World: The History of an Idea* (London: Allen Lane, 2012), p. 15.

[32] Grewe, *The Epochs*, pp. 443-444; see also Fassbender and Peters, *The Oxford Handbook*, p. 12, p. 21.

necessarily use the inherent flexibility of law to pursue their political interests does not mean that the law was devoid of effect. Indeed, Koskenniemi's description of international law 'as a structure of argumentative moves and positions', is useful in indicating the complex relationship between law and self-advantage.[33] What this means, in practice, for present purposes, is that the international law of the period was a system, or framework, that could be used to govern or guide international relations, either between two states, or between a larger group. Whether particular states did so use international law, in any given case, though, can only be ascertained by examining the facts of the relevant relationship.

This thesis does not seek to contend that international law affected British policy simply because it was 'law', and was followed for that reason independent of state choice. Indeed, it assumes that the use of international law in the British-American relationship was a matter within the power of each state, and was, in theory, not binding on them. Rather, the thesis starts by examining how international law was *actually* part of the practice of British foreign policy in the 1830s and 1840s, and how this affected Britain's approach to the United States. It then aims to demonstrate that there was a shared legal framework with the United States, and considers how, *in fact*, this was used as a viable medium for handling problems. Significantly, as will be seen, points of law were deployed for, and against, British positions, and it is hard to deny that this would have mattered when they were part, as they were in this case, of a real *bilateral* exchange. In this way, then, even though international law was always, in one sense, under the respective 'control' of Britain and the United States, it can nevertheless be seen as having made a practical difference to British policy. At the same time, however, it is important to understand that its deployment was consistent with wider British interests to the United States, as can now be established from an examination of current writing on British policy to that country.

Historiography

The main historiographical approaches to British foreign policy towards the United States in the period centre on the questions of why Britain aimed for peace and how war was avoided. British policy is most commonly interpreted as favouring peace because of its importance for

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[33] Koskenniemi, *The Gentle Civiliser of Nations*, p. 1, (referring to his book *From Apology to Utopia: The Structure of International Legal Argument* (1989)).

Britain's wider global strategy, Atlantic trading connections, and American cultural links. Some works draw attention too to the potential role of wider structural forces. Through looking at the most common explanations that historians have devised for British strategy, a clearer understanding of the utility of international law for policy-makers can be obtained.

The first of the main approaches positions Britain's aim for peace with the United States within the constraints of a wider strategy for maintaining global power. Most historians have worked on the uncontroversial basis that Britain saw Europe, with the possible exception of Canada, as more important than the United States and North America. Chamberlain, Bourne, and Lambert, for example, all argue that Britain pursued a general strategy in foreign policy in the nineteenth century aimed at the maintenance of the 'balance of power' through the 'equilibrium of Europe'.[34] Similarly, Clarke places wider British policy within the context of a worldwide balance of power struggle with France, in which restricting French power in North and South America was a key concern.[35] Jones and Chamberlain additionally reflect that Britain wanted to avoid France and the United States coming together in a hostile combination.[36] Under such interpretations, a war with the United States was to be eluded because it would have put at risk strategic objectives that were all, broadly, focused on preserving British power relative to other European states, especially France. As Lambert puts it, if Cuba remained Spanish and Canada was safe, Britain was 'unlikely' to want an American war, as that could 'weaken its ability to support more significant interests in Europe'.[37] Bernstein even considers that the United States was simply not within the balance of power system in Europe at all, and that this reduced British interests on the North

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[34] M. E. Chamberlain, *British Foreign Policy in the Age of Palmerston* (London: Longman, 1980), p. 90; M. E. Chamberlain, *Pax Britannica? British Foreign Policy, 1789-1914* (London: Longman, 1988), p. 13; K. Bourne, *The Foreign Policy of Victorian England, 1830-1902* (Oxford: Clarendon Press, 1970), pp. 7-11; A. Lambert, 'Winning Without Fighting: British Grand Strategy and its Application to the United States, 1815-1865', in B. A. Lee and K-F. Walling, (eds.), *Strategic Logic and Political Rationality: Essays in Honour of Michael I. Handel,* (London: Frank Cass, 2003), chapter 8, pp. 165-6.

[35] J. Clarke, *British Diplomacy and Foreign Policy, 1782-1865: The National Interest* (London: Unwin Hyman, 1989), p. 109, p. 119, p. 154, p. 160, p. 166, and p. 209.

[36] W. D. Jones, *The American Problem in British Diplomacy 1841-1861* (London, Macmillan, 1974), 'Diplomacy of Menace', chapter 1; W. D. Jones, *Lord Aberdeen and the Americas* (Athens, GA: University of Georgia Press, 1958), in which keeping peace with France and the United States is presented as a consistent theme of Aberdeen's policy; M. E. Chamberlain, *Lord Aberdeen: A Political Biography,* (London: Longman, 1980), pp. 301-305.

[37] Lambert, 'Winning Without Fighting', p. 177.

American continent.[38] Historians have, though, generally recognised the special case of Canada, albeit that the resulting British policy, as widely perceived, was not inconsistent with the overall aim for peace arising from European considerations.[39] For, as Bourne notes, the desire to retain Canada also pushed Britain to seek to 'improve... relations' with the United States.[40]

The work of many historians suggests too that the British objective for peace with the United States may also have been linked to perceived new opportunities elsewhere in the world. Darwin, for example, sees the 1830s and 1840s as the decades when 'most of the favourable conditions' behind British power until the 1940s began to 'converge'.[41] For him, these were the defeat of China in the war of 1839-42, instability in the Ottoman and Iranian empires, new countries being open for trade in South America, and industrialisation leading to an increased dependence on colonies (other than 'settler' ones).[42] In this new world situation, he continues, concerns over France, the limits of sea power, and the futile nature of any conflict were 'powerful constraints' against any conflict with the United States.[43] Others, as Chamberlain notes, emphasise that the United States and the North American continent simply assumed a position of lower importance compared to other parts of the world following independence.[44] Sexton and Hopkins by contrast argue that the United States still remained to some extent within the influence of the British Empire. Even in these works, however, peace still appears to have been an important British consideration. For Sexton, Britain used peace and cooperation to its advantage, and 'outsourced the job of Imperial expansion in North America', with the result that it gained 'the economic benefits of an

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[38] G. Bernstein, 'Special Relationship or Appeasement: Liberal Policy To America in the Age of Palmerston', *Historical Journal* (1998), pp. 725-751 at p. 726.

[39] The position of Canada is discussed further in chapter 4.

[40] K. Bourne, *Britain and the Balance of Power in North America*, *1815-1908,* (London: Longmans, 1967), pp. 57-58.

[41] J. Darwin, *The Empire Project: The Rise and Fall of the British World System, 1830-1970,* (Cambridge: Cambridge University Press, 2009), pp. 18-19.

[42] Darwin, *The Empire Project*, pp. 18-19.

[43] Darwin, *The Empire Project,* p. 32.

[44] Chamberlain notes that for historians, such as Harlow, Marshall, Hyam, Mackesey, 'the loss of the American colonies only confirmed and accelerated changes in British development which were already under way', and 'colonies of settlement in the west were becoming less important than trading opportunities in the east': Chamberlain, *Pax Britannica?,* p. 22.

expanding United States without the overhead costs of imperial wars and administration'.[45] Conversely, Hopkins's primary focus was the question of the effective independence of the United States, but his argument that the United States relied on the Royal Navy and British capital in the first half of the nineteenth century also indicates a strong ongoing relationship that would have been best preserved through peace.[46]

The historiographical consensus that Britain wanted to avoid war for reasons of strategy does not, however, imply that there was transatlantic agreement on all matters, and some historians contend that British opposition to the expansion of the United States also required the pursuit of a containment policy, albeit one that was to be followed within an overarching objective of maintaining peace. A classic early example of this is Dunning's 1914 review of one hundred years of the British-American relationship.[47] Dunning points to what was an initial period of cooperation under Castlereagh following the War of 1812, which resulted in agreements such as the 1815 Convention on commerce, or the 1817 Exchange of Notes on naval strength in the Great Lakes.[48] He then, however, gives a differing slant to British policy as it developed under Canning, arguing that it 'only remained to oppose at every point the ambition of the United States, and to be increasingly watchful of the development of her claims'.[49] For Dunning, this general line of policy then continued, under both Palmerston and Aberdeen, through to 1846. Thus, he contends that, in 1841, as Palmerston left office, the 'relations of the English-speaking peoples with one another could scarcely have been more unpleasant', and that, whilst the 'tone' improved under Aberdeen, the British 'position' was that the 'interests of Great Britain required that the expansion of the American Republic be opposed by every peaceful influence'.[50] Others too have identified the significance of

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[45] J. Sexton, 'The United States in the British Empire' in S. Foster, (ed.), *British North America in the Seventeenth and Eighteenth Centuries* (Oxford: Oxford University Press, 2013), pp. 333-4.

[46] A. Hopkins, 'The United States, 1783-1861: Britain's Honorary Dominion?', *Britain and the World,* IV, (2011), pp. 232-46, at p. 238.

[47] W. A. Dunning, *The British Empire and the United States; a Review of their Relations during the Century of Peace Following the Treaty of Ghent* (New York: C Scribner's Sons, 1914).

[48] Dunning, *The British Empire and the United States*, p.17, and p.41; see also Chamberlain, *British Foreign Policy in the Age of Palmerston*, p. 18.

[49] Dunning, *The British Empire and the United States*, p. 55.

[50] Dunning, *The British Empire and the United States*, pp. 105-106, and p. 136.

Canning, who, they argue, had responded in this way, in particular, to avoid the prospect of the new South American republics associating too closely with the United States.[51]

Although less common than work emphasising other British objectives, containment is reflected in the views of some more recent historians on British-American relations in the period. Jones and Rakestraw's analysis of the 1840s judges British policy against an objective of containment, with the comment that whilst 'the Crown had not forsaken hopes of restraining American expansion ..., the British concessions along the US-Canada boundary and subsequent neutrality in the Mexican War indicated acceptance of a continental United States and the failure of containment'.[52] More widely, Haynes and Brauer observe the then American concerns over continued British imperial ambitions. Haynes, for example, contends that the United States saw a continued risk of British territorial expansion or influence in North America, and that the western expansion up to 1846 'stemmed from geopolitical considerations'.[53] Against this background, he continues, 'resentment' of Britain 'provided an ideological scaffolding from which a national sense of self could be constructed'.[54] Similarly, Brauer notes the continued British imperial expansion in the period, and the fact that there was an American policy response to concerns over Britain's

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[51] Bourne, K., *Britain and the Balance of Power*, pp. 58-61, and pp. 64-66; Bourne refers to Canning's analysis of the ' "great danger of the time ... [as] ... a division of the World into European and American, Republican and Monarchical; a league of worn-out Govts, on the one hand, and of youthful and stirring nations with the Un. States at their head, on the other" ', as cited in Bourne, Ibid., p.66, and note 1, p. 66, as from Canning to Frere, 8 January 1825, G. Festing, John Hookham Frere and his Friends (1899). On Canning, see also Clarke, *British Diplomacy*, p. 119, p. 160, and p. 166.

[52] H. Jones and D. Rakestraw, *Prologue to Manifest Destiny: Anglo-American Relations in the 1840s* (Wilmington, Del.: Scholarly Resources, 1997), p. 267.

[53] S. Haynes, *Unfinished Revolution:The Early American Republic in a British World* (Charlottesville: University of Virginia Press, c2010), pp. 224-226.

[54] Haynes, *Unfinished Revolution*, p. 294; for a contrasting analysis in a different context, see E., Tamarkin, *Anglophilia: Deference, Devotion, and Antebellum America* (London: University of Chicago Press, 2008). It is important to acknowledge that historians have emphasised many other factors in relation to the expansion of the United States. Whilst beyond the scope of this thesis, examples from recent works include: Howe, who argues that there was an 'imperialist program' on the North American continent led by the Jacksonian Democrats in D. W. Howe, *What Hath God Wrought: The Transformation of America, 1815-1848,* (Oxford: Oxford University Press, 2007), pp. 852-85; Sexton, who comments on how Polk adapted the Monroe doctrine to Western expansion in J., Sexton, *The Monroe Doctrine: Empire and Nation in Nineteenth-Century America* (New York: Hill and Wang, 2011), pp. 95-108; and Guyatt, who observes the role of 'providential arguments': N. Guyatt,, *Providence and the Invention of the United States, 1607-1876,* (Cambridge: Cambridge University Press, 2007), p. 219.

ability to hurt the United States economically and over slavery.[55] Neither of these latter works are, of course, necessarily contending that there was an actual policy of 'containment', but their analysis of American views keeps the questions of Britain's ambitions and 'containment' firmly within the narrative of British policy.

In addition to considerations of global strategy, there is also an important historiographical approach which views Britain's aim for peace with the United States as being caused, at least to a significant extent, by a desire not to disrupt trade, or cause damage to other domestic economic circumstances. Britain certainly benefited greatly from what Potter describes as a 'single, integrated Atlantic economy'.[56] The response of many historians to the growing commercial relationship with the United States has, therefore, been to conclude that trade was a significant factor behind British policy. Chamberlain, for example, considers that Castlereagh, Canning, Palmerston, and Aberdeen all regarded trade as a 'vital interest', Bourne refers to the 'pacifying factors of Anglo-American trade', and Dunning describes the trading link as a 'powerful influence against war' in Britain.[57] Similarly, Dykstra argues that Aberdeen perceived that 'Britain might have to accept a reorientation of power in North

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[55] K. Brauer, 'The United States and British Imperial Expansion, 1815-60', *Diplomatic History,* 12, (1988), pp. 19-37.

[56] J. Potter, 'Atlantic Economy, 1815-60: The USA and the Industrial Revolution in Britain', in A. W. Coats and R. M. Robertson, (eds.), *Essays in American Economic History* (London: Edward Arnold, 1969), pp. 14-48 at p. 16; see also F. Thistlethwaite, *The Anglo-American Connection in the Early Nineteenth Century* (Philadelphia: University of Philadelphia Press, 1959), p. 3. The extent of the British-American relationship can be gauged from the following brief outline. Potter details imports from the United States as representing between 20 to 25 per cent. of total imports into the United Kingdom by value in rolling five year periods between 1836 and 1855, Potter, Ibid., Table 1, p. 19; similarly, in terms of exports to the United States, as a percentage of the total exports from the United Kingdom by value, Potter's figures range from 16 per cent. in 1836-40, before dropping to 11 per cent. in 1841-45, and then rising again to 18 and 21 per cent. respectively for the periods 1846-50 and 1851-55, Potter, Ibid., Table 8, pp. 22-23. Conversely, Buck shows imports from the United Kingdom as representing between approximately 37 and 40 per cent. of total imports of merchandise by value into the United States in rolling five year periods between 1836 and 1850, and, in terms of exports to the United Kingdom, as a percentage of total exports by value from the United States his numbers range from approximately 43 to 50 per cent. over the same periods: N. S. Buck, *The Development of the Organisation of Anglo-American Trade 1800-1850* (New Haven, 1925), Table, p. 2.

[57] Chamberlain, *British Foreign Policy*, p. 93, Bourne, *The Foreign Policy of Victorian England*, p. 50, and Dunning, *The British Empire and the United States,* p. 140. See also: J. B. Brebner, *The North Atlantic Triangle: The Interplay of Canada, the United States and Great Britain* (Toronto: McClelland and Stewart, 1968), p. 144 (in the context of the position in 1840); P. E. Myers, *Caution and Co-operation: The American Civil War in British-American Relations* (Kent, Ohio: Kent State University Press, 2008), p. 8; and C. S. Campbell, *From Revolution to Rapprochement: the United States and Great Britain 1783-1900* (London: Wiley, 1974), p. 52 (in the context of the Canadian border disputes).

America' in order to 'reap the benefits' of the United States from an economic perspective.[58] Sexton too has also recently broadened the traditional emphasis on trade by pointing out the significant investment of British capital in the United States. For him, this meant that 'the creditor-debtor relationship of Britain and the United States bonded the two nations together', and that war became 'nearly unthinkable to leaders on both sides of the Atlantic'.[59] Some historians also consider that broader financial and economic constraints limited the aims of British policy to the United States. Myers, for example, refers to 'minimalism' as an important influence, arguing that, in circumstances where British defence spending against the ongoing threat of France was being questioned, 'it would probably have taken a severe jolt to get Britain to fight the United States'.[60] Dykstra also mentions matters such as the demands of the Royal Navy, and labour and agricultural problems.[61]

Further historiographical approaches then deploy military or cultural factors, or broader structural forces, to explain the British objective of peace, or how war was avoided in practice. Bourne, Lambert and Matzke all emphasise the importance of the Royal Navy to the peaceful defence of both Canada and Britain's other possessions in North America.[62] On a different tack, Bernstein contends that British supporters of the Liberal party 'perceived a "special relationship" between the two countries, based on blood, religion, liberal traditions and trade'.[63] For him, this resulted in peace, through what was effectively 'appeasement', because these supporters 'would not contemplate the threat of war with the United States, and since no important British interest was involved, the British government usually gave way'.[64] There is certainly support for American connections in ways suggested by Bernstein.

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[58] D. L. Dykstra, *The Shifting Balance of Power: American-British Diplomacy in North America, 1842-48* (Oxford: University Press of America, c1999), p. 66. See also 'Conclusion', Ibid., p. 178.

[59] J. Sexton, *Debtor Diplomacy: Finance and American Foreign Relations in the Civil War Era, 1837-1873* (Oxford: Clarendon Press, 2005), p. 7, and p. 242.

[60] Myers, *Caution and Co-operation,* p.9, p.19; Myers argues generally that there was a growth in 'co-operation' after 1815, ibid, p. 8.

[61] Dykstra, *The Shifting Balance*, 'Conclusion'.

[62] As Bourne notes, the military advantage on land was felt to be with the United States, and on sea with Britain: Bourne, *Britain and the Balance of Power*, p. 102; R. Matzke, 'Britain Gets Its Way: Power and Peace in Anglo-American Relations, 1838-1846', in *War in History,* 8, No. 1, (2001), pp. 19-46; and Lambert, 'Winning Without Fighting', especially pp. 166-167, and pp. 173-176.

[63] Bernstein, 'Special Relationship'. p. 725.

[64] Bernstein, 'Special Relationship', p. 725.

Carwardine, for example, notes that 'British and American evangelicals constituted a lively transatlantic community', who 'saw themselves as branches of the same closely knit family'.[65] The association with the United States also extended to some social and economic beliefs, for, as Crook notes, the 'Benthamites, the liberal Whigs and liberal Tories, the manufacturers and free traders, and the dissenters remained essentially pro-American'.[66] Bernstein's argument that peace was based on an overall 'special relationship' has not, however, been supported to any material extent by other historians. Indeed, on the contrary, Thistlethwaite has questioned the real impact of these relationships and groups. As he puts it: 'The Atlantic connection concerned minority opinion and its ineffectiveness in moderating diplomatic friction between the two countries, from the War of 1812 to the Oregon crisis, needs no further comment'.[67]

Finally, others have provided an explanation for the peaceful British-American relationship in the period within surveys pointing to wider movements of historical forces. Two important recent examples are the works of Belich and Go. Belich, broadly, points to a 'rhythm', based on a 'settler revolution', of 'explosive colonisation', 'bust', and 'recolonisation' (through 'export rescue') in new frontiers, including the American West.[68] Answering Bayly's question as to why Britain and America came together over the nineteenth century, Belich suggests, accordingly, that he 'would answer this question in terms of the partial recolonisation of the United States by Great Britain'.[69] For him, this was a matter of 'economics and culture' rather than 'political hegemony' or 'alliance', with Britain providing 'money, migrants and manufactured goods'.[70] In contrast, Go considers

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[65] R. Carwardine, *Trans-Atlantic Revivalism: Popular Evangelicalism in Britain and America, 1790-1865* (Westport: Greenwood Press, 1978), p. 198.

[66] D. P. Crook, *American Democracy in British Politics*, *1815-60 (*Oxford: Clarendon Press, 1965), p. 202.

[67] Thistlethwaite, *The Anglo-American Connection,* p. 174.

[68] J. Belich, *Replenishing the Earth:The Settler Revolution and the Rise of the Anglo-World* (Oxford: Oxford University Press, 2009)*,* p. 221.

[69] Belich*., Replenishing the Earth,,*p. 479; as Belich puts it: 'After each spasm of explosive colonisation, busted Wests sought export rescue, and it was Britain, as well as the American Northeast, that provided it'.

[70] Belich, *Replenishing the Earth*, p. 479; Belich's work is also, broadly consistent with the work of Van Vugt, who concluded that the emigration to the United States from Britain was generally not caused by 'distress': W. E. Van Vugt, *Britain to America: Mid-nineteenth century Immigrants to the United States* (Chicago: University of Illinois Press, 1999), p. 3, p. 153.

the British and American 'imperial formations' through their activities in the 'ascent', 'maturity', and 'decline' 'phases of global power'.[71] In the years 1836 to 1846, in Go's terms, Britain was in its 'mature' phase, characterised by a preference for 'indirect non-territorial rule', and 'open' trade, whilst America was in that of 'ascent', identified, conversely, by 'territorial expansion' and the creation of 'ideological self-conceptions'.[72] For him, thus, in the period covered by the thesis, Britain 'had an interest in maintaining the status quo, which in turn meant influencing other states through hidden and subtle exercises of power rather than bold, direct, and provocative imperialism that might mobilise opposition'.[73] Go would, therefore, presumably, place relations between Britain and the United States within the wider context of global empires, and see the conciliation of Britain, and the expansion of the United States, in this period as better explained by these structural 'phases'.[74]

By comparison, there is a very limited historiography on the potential role of international law in the relationship between Britain and the United States in the period, despite its seemingly consistent place in the issues between them. Indeed, Stevens is the only historian reviewed who has even commented in any substantive way on the possibility of a wider systematic place for international law in the problems of the decade. He, helpfully, considers the international law aspects of some of the events related to the issues around the Canadian-American border, (in particular, the *Caroline* and McLeod affairs), but nevertheless states that in 'the nineteenth century, the act came first; then the diplomats searched for justification'.[75] Similarly, when noting the important role of Webster in promoting the concept of self-defence within international law following the *Caroline* case, he comments as follows in respect of the position up to that point:

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[71] J. Go, *Patterns of Empire: The British and American Empires 1688 to the Present* (New York: Cambridge University Press, 2011), p. 13, and p. 24.

[72] Go, *Patterns of Empire*, pp. 24-25.

[73] Go, *Patterns of Empire*, p. 229.

[74] An interesting older work that also relates to British-American relations is Semmel, who argues that the movement from an 'entrepreneurial' to 'bourgeois' economic stage around 1843 meant that a 'liberal nation' challenged the traditional strategy of using 'sea power' in a 'commercial war' (and even against the slave trade), and there was also a greater support for neutral rights: B. Semmel, *Liberalism and Naval Strategy: Ideology, Interest and Sea Power during the Pax Britannica* (London: Allen & Unwin, 1986), p. 10.

[75] K. R. Stevens, *Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837-42* (London: University of Alabama Press, 1989), pp. 25-26.

> When questions arose, statesmen turned to such authorities as Grotius, Pufendorf, and Vattel, or to latter-day interpreters, among them the American Henry Wheaton. In no way was international law binding on any country. Nations studied it and applied or ignored its principles as they chose.[76]

International law is not, however, Stevens's main theme, and, understandably, the book does not consider in any depth the effects of international law's framework of principles and treaty law in the context of the wider relationship between Britain and the United States. Apart from this work, international law is referred to by other writers considering the period only in relation to specific matters, such as, for example, by Semmel on the slave trade.[77]

The thesis is, however, able to draw on four areas of the wider historiography related to Britain, law, and international relations in the period. Primarily, the thesis is supported by work showing how law generally permeated the way in which British politics approached imperial and domestic problems. Benton and Ford's *The Rage for Order,* for example, considers what the authors term 'a sprawling attempt to reorder the early nineteenth-century world through the redesign of British imperial law'.[78] Benton and Ford's central theme concerns the role of empire as a source of international law, which they suggest has not been sufficiently emphasised.[79] The book is nevertheless highly relevant for the thesis because it shows that the British state used law to resolve what in the broadest sense were 'international' problems within the empire. Benton and Ford set out, for example, how the empire's 'centre' and 'peripheries' attempted to control 'despotic dominions' through 'a layered system of rule by law', the 'British discourse of protection used the term in new ways' affecting 'the legitimacy of British imperial jurisdiction' , and the Royal Navy relied on 'regionally specific jigsaw puzzles of law' to curtail the slave trade.[80] The given examples - of the responses of British 'imperial agents and their interlocutors' in 'many small and scattered legal conflicts' - are different from the state-to-state discussions in the thesis, but the key point of relevance is the centrality of law to issues of governance.[81]

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[76] Stevens, *Border Diplomacy,* p. 166.

[77] Semmel, *Liberalism and Naval Strategy*, chapter 3.

[78] Benton and Ford, *Rage for Order,* p. 1.

[79] Benton and Ford, *Rage for Order,* p. 21.

[80] Benton and Ford, *Rage for Order*, Chapter 2 and p. 55, pp. 89-90, and p.121.

[81] Benton and Ford, *Rage for Order*, pp. 196-197.

Moreover, law and legality have also been identified as being important to the wider conduct of British politics. Parry, for example, considers that 'law, authority and public-spirited leadership were crucial elements of early Victorian Liberalism', and Boyd Hilton that 'liberal Tories wanted the State to operate neutrally according to rule'.[82] Similarly, Kostal argues for 'the centrality of law in the world-view of the British political class of the 1860s' in his work on the Morant Bay uprising in Jamaica in 1865.[83] 'Constitutionalism' too is a significant feature of research into the period, which implicitly places law into politics through its emphasis on the 'rules' of governing. Parry, Kostal, Gibson, and Colley, for example, all set out differing ways in which the 'constitution' or 'constitutionalism' was important to British politics.[84] The presence of such a general respect for 'law' within British political culture bolsters the thesis because it indicates that the recognition of international law was not exceptional. Indeed, Chitty's comment, that his 1834 edition of Vattel 'ought to be studied by *every gentleman of liberal education, and by youth',* is illustrative of a prevailing culture

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[82] J. P. Parry, *The Politics of Patriotism: English Liberalism, national identity and Europe, 1830-1886* (Cambridge: Cambridge University Press, 2008 edn), p. 53, and A. J. Boyd Hilton, *A Mad, Bad, & Dangerous People? England 1783-1846*, (Oxford: Oxford University Press, 2008), p. 316. Respect for law is also consistent with what Boyd Hilton observes as the increasing 'professionalisation' of lawyers in the early- to mid- nineteenth century, albeit that Hoppen suggests that the relative numbers practising may have not been going up after 1850: Boyd Hilton, Ibid., pp. 144-146, and K. Hoppen, *The Mid-Victorian Generation, 1846-1886,* (Oxford: Oxford University Press, 1998), pp. 41-42.

[83] R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law*, (Oxford: Oxford University Press, 2005), p.1.

[84] See: Parry, *The Politics*, p. 43 and chapter 1 on Liberalism and the constitution; Kostal, *A Jurisprudence of Power*, p. 463, referring to the comment of James Vernon on the then view in British politics of the English constitution as 'the best in the world' (cited in note 14, p. 463, as from J. Vernon, *Politics and the People: A Study in English Political Culture, c.1815-1867*, (Cambridge: Cambridge University Press, 1993), p. 298); J. Gibson, 'The Chartists and the Constitution: Revisiting British Popular Constitutionalism', in *The Journal of British Studies*, 56, (2017), pp. 70-90, on Chartist arguments for a reading of the British constitution in the light of 'a strand of English legal theory that joined natural law ... with English common law' (pp. 73-74); and L. Colley, 'Empires of Writing: Britain, America and Constitutions, 1776-1848', *Law and History Review*, (2014), Vol. 32, pp. 237-266.

of legality by showing how he, at least, considered that the British political class would be receptive to the notion that *legal rules* - international law - could be a guide to conduct.[85]

Second, the thesis builds on work suggesting that European states generally respected and used international law to a greater extent following the end of the Napoleonic Wars. The key contention here is Schroeder's assessment that there was a 'transformation' in 'European international politics' through which 'a competitive balance-of-power struggle gave way to an international system of political equilibrium based on benign shared hegemony and the mutual recognition of rights underpinned by law'.[86] For Schroeder, crucially, this 'transformation' was one of 'system', by which he meant 'the understandings, assumptions, learned skills and responses, rules, norms, procedures, etc. which agents acquire and use in pursuing their individual divergent aims within the framework of a shared practice'.[87] International law was, thus, a part, albeit not the whole, of this new 'system'.[88] Others perceive too that there were corresponding developments in international law itself. Keene, for example, observes that there was a significant rise in the use of treaties in the nineteenth century, including a 'spike' in the 1810s.[89] Lev maintains that one result from the Congress of Vienna in 1815 was a new 'interstate sphere' in Europe in which 'state interests' were not

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[85] Vattel, *Law of Nations*, Preface by J. Chitty. This is perhaps unsurprising in the light of Bayly's observation that the period between 1763 and 1842 saw 'an epochal change in the nature of popular "claim making" and in the wider construction of political thought', which amongst other impacts, 'transformed understandings of ... the nature of international order', and which included, for example, the 'hardening of ideas about the rights of peoples, states, and nations': C. A. Bayly, 'The Age of Revolutions in Global Context: An Afterword', in D. R. Armitage and S. Subrahmanyam (eds.), *The Age of Revolutions in Global Context, c. 1760-1840*, (Basingstoke: Palgrave Macmillan, 2010), pp. 209-217 at pp. 212-214.

[86] P. W. Schroeder, *The Transformation of European Politics, 1763-1848,* (Oxford: Clarendon Press, 1994), Preface and p. 580. For Schroeder, 'political equilibrium' meant 'a balance in rights, security, and independence - between all states ... *despite the existence of permanent, unavoidable imbalances of power among them*' [emphasis added]: Ibid., p. 482.

[87] Schroeder, *The Transformation*, pp. xii-xiii.

[88] The change Schroeder envisaged embraced not only legal concepts, such as 'mutual rules and restraints', but also other wider notions such as a 'sense of inherent limits', 'common responsibility to certain standards of conduct' and 'loyalty to something beyond the aims of one's own state': Schroeder, *The Transformation*, p. 802.

[89] E. Keene, 'The Treaty-Making Revolution of the Nineteenth Century', *The International History Review*, (2012), Vol. 34, pp. 475-500.

ignored, but 'translated... into another domain in which they could not be articulated except through law'.[90]

The thesis is certainly consistent with the main theme of such research. The Treaty of Ghent, 1814 aimed at 'restoring upon principles of perfect reciprocity, Peace, Friendship, and good Understanding' between Britain and the United States, and, importantly, it was settled at the time of the negotiations ending the Napoleonic Wars in Europe. Thus, this treaty, a second phase of treaties between Britain and the United States up to 1818, and the ongoing attempts thereafter in the period to resolve outstanding issues within a framework of international law, were all undoubtedly in line with the perceived then prevailing trend. Nevertheless, it needs to be acknowledged too that the British-American relationship does not fit neatly into the suggested model for European change. American independence, the Treaty of 1783, and the Jay Treaty, 1794 were all self-evidently in the eighteenth century. In terms, therefore, for example, of what Schroeder sees as the key development in Europe - namely 'political equilibrium' based on 'a balance in rights, security and independence' - arguably this began in 1783 and 1794 when Britain and the United States mutually recognised each other's sovereignty.[91] The War of 1812, of course, pushes against such an analysis, but this was predominantly about maritime rights not security. Moreover, the circumstances of independence in themselves produced a unique range of legal issues, meaning that, to an extent, the legal relationship between Britain and the United States necessarily stood apart from Europe.

Third, the thesis is supported by research demonstrating the relevance of international law to the development of the United States. The most important aspect of this work for present purposes is that related to the American respect for international law as a framework of rules

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[90] A. Lev, 'The transformation of international law in the nineteenth century', in A. Orakhelashvili, (ed), *Research Handbook on the Theory and History of International Law* (Cheltenham: Edward Elgar, 2011), pp. 126-127. For Lev, this 'interstate sphere' was based on a 'cultural community', such as the European 'family of nations', or 'civilised' states, and 'legal construction' within the 'interstate sphere' relied on the 'introduction of an already given community into legal construction', as this 'dissolves' the 'opposition of international obligation and sovereignty': Ibid., p. 112, pp. 129-132. See, however, Koskenniemi, who argues, broadly, that the international law of that period was 'static', and 'procedural' with 'no progress or improvement - apart from the narrow sense of universal reason being sometimes less, sometimes better observed': Koskenniemi, *The Gentle Civiliser of Nations*, pp. 19-21.

[91] Schroeder, *The Transformation*, p. 482. The mutual recognition of sovereignty will be discussed further in chapter 3.

for relations between states, which is considered further in chapter 3.[92] It is, however, also significant that historians have demonstrated too that international law shaped wider domestic questions in the United States, thereby reinforcing the contention that it was respected sufficiently for it to make an impact on American foreign policy. The full range of the research concerned is beyond the scope of this thesis, but the point can be briefly illustrated. Rosen, for example, examines 'how the United States used the occasion of the Seminole War [in 1818] to advance its own vision of its national identity and approach to law', within the context of 'domestic constitutional law and the law of nations as described by Europeans'.[93] In a similar vein, Peter Onuf notes that the 'discourse' on 'the definition of the federal union' was frequently 'refreshed by referring to its natural law (law of nations) sources'.[94] Others too contend that principles of international law and treaties also partially shaped such diverse matters as worldwide American trade and the character of the frontiers of the United States. Thus, for Shoemaker, the notion of 'protection' - from Vattel - 'was fundamental to ... American global commerce in the age of sail'.[95] Conversely, Adelman and Aron observe the important effects of 'border fixing' in guiding 'the peculiar and contingent character of frontier relations'.[96]

Finally, it is important to observe that the thesis is consistent with work pointing to other significant intellectual influences on British foreign policy in the early- to mid- nineteenth century. Perhaps most significantly, a framework of international law is accordant with what historians have noted as broad differences in the ways of thinking through which the main governing parties approached policy. Brettle, for example, summarises the 'two competing

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[92] Chapter 3 focuses mainly on the period covered by the thesis. For the importance of international law to the foreign policy of the United States in the period up to the Monroe Doctrine, see, for example, D. Lang, *Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power*, (Baton Rouge: Louisiana State University Press, 1985), E. H. Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (London: Harvard University Press, 2014), and W. Oosterveld, *The Law of Nations in Early American Foreign Policy* (Leiden: Brill Nijhoff, 2016).

[93] D. Rosen, *Border Law: The First Seminole War and American Nationhood* (London: Harvard University Press, 2015), p. 9.

[94] P. Onuf, 'A Declaration of Independence for Diplomatic Historians', *Diplomatic History*, 22, (1998), pp. 71-83 at p.79.

[95] N. Shoemaker, 'The Extraterritorial United States to 1860', *Diplomatic History*, 42, (2018), pp. 36-54 at p. 51.

[96] J. Adelman and S, Aron, 'From Borderlands to Borders: Empires, Nation-States and the Peoples in Between in North American History', *American History Review*, Vol. 104, No. 3, (1999), pp. 814-841 at pp. 816-817.

foreign policy ideologies' of the 1840s as the 'Whig view' on the 'need for eternal vigilance in the protection of the hard-won liberties of the English people' (using 'public approval'), and a Conservative attitude which 'stressed the "Blue Water" global role of Britain' and the 'need to act in concert with the principles of the European balance of power'.[97] For present purposes, the key practical result from this split was that the Whig governments of the period tended to be more inclined towards foreign intervention than Tory ones.[98] This, in turn, meant that the question of when to intervene in foreign states came to be a frequent matter for British political debate. Crucially, this then drew international law (and American views on international law) directly into British politics because, as will be shown in chapter 2, the issue of interference was directly related to the legal principle of sovereignty.

Liberal Toryism, diplomatic openness, and free trade were also each compatible with international law. Boyd Hilton comments that liberal Tories 'wanted the State to operate neutrally according to rule', whereas high Tories favoured 'constant management, interference, and discretion' in 'government functions'.[99] Hence, Canning, for example, he notes, stated that 'foreign policy should be a scheme of policy regulated by fixed principles of action, and operating to produce definite and foreseen results'.[100] Such a 'rules' based approach certainly accords, on the face of it, with a legal structure for international conduct. Alternatively, Parry notes Canning's desire to get the support of public opinion on foreign affairs, and observes how he contrasted 'the openness of his own policy' with 'the secrecy of traditional diplomacy'.[101] Historians widely perceive too that Palmerston similarly sought

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[97] A. Brettle, 'The Enduring Importance of Foreign Policy Dominance in Mid-Nineteenth Century Politics', in W. Mulligan and B. Simms (eds.), *The Primacy of Foreign Policy in British History, 1660-2000: How Strategic Concerns Shaped Modern Britain,* (Basingstoke: Palgrave Macmillan, 2010), pp. 155-156. See also Parry, *The Politics*, pp. 145-157; Boyd Hilton, *A Mad, Bad, & Dangerous People?*, pp. 558-565.

[98] Indeed, Parry observes that the foreign policy of the Tory governments of the period was 'non-interventionist' under Wellington, and 'deliberately low-key and low-cost' under Peel: J. P. Parry, *The Rise and Fall of Liberal Government in Victorian Britain,* (London: Yale University Press, 1993), p. 55 and p.157. See also, Parry, *The Politics*, p.150.

[99] Boyd Hilton, *A Mad, Bad, & Dangerous People?*, pp. 315-316. See also A. J. Boyd Hilton, 'Peel: A Reappraisal', *Historical Journal*, Vol. 22, (1979), pp. 585-614 at pp. 606-611.

[100] Boyd Hilton, *A Mad, Bad, & Dangerous People?*, pp. 316-317, citing in note 35, R. Therry (ed.), *The Speeches of George Canning*, (1828).

[101] Parry, *The Rise and Fall of Liberal Government*, pp. 39-40. See also Boyd Hilton, *A, Mad, Bad, & Dangerous People?*, pp. 289-295.

public approval for foreign policy.[102] The 'public' sphere for international law to be discussed in chapter 2 is at the very least consistent with this courting of the public. Lastly, what Howe terms 'Britain's mid-century adoption and promotion of free trade' also reinforced the ongoing importance of international law with its attacks on protection.[103] Moreover, as Tully observes, legally-based argument was used too to justify foreign intervention in 'non-western societies' to ensure free trade.[104] Arbitration clauses in international treaties were also promoted by those who, conversely, emphasised the positive implications of free trade for peace.[105]

This thesis, therefore, aims to fill the resulting gap in knowledge around the influence of international law on British policy to the United States in the period. In doing so, it both gains assistance from, and supplements, this current historiography. The argument of the thesis is certainly consistent with the historiographical approaches discussed above, which seek to explain the British policy of peace. Law, clearly, will operate better, as a means of regulating the interests of different states, within stable circumstances. Interpretations, therefore, which see British policy as primarily motivated towards peace for reasons of global strategy, trade, and culture reinforce the rationale of Britain using international law as

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[102] See, for example: Brettle, 'The Enduring Importance', pp. 155-156 and Parry, *The Politics*, pp. 150-151. On the related point of the relationship between Palmerston and the Press, see, for example: L. Fenton, *Palmerston and The Times: Foreign Policy, the Press and Public Opinion in mid-Victorian Britain,* (London: I. B. Tauris, 2013), and D. Brown, 'Diplomacy and the Fourth Estate: The Role of the Press in British Foreign Policy in the Age of Palmerston', in J. Fisher, and A. Best, (eds.), *On the Fringes of Diplomacy: Influences on British Foreign Policy, 1800-1945*, (Farnham: Ashgate Publishing Limited, 2011), pp. 35-51.

[103] The quoted words are from A. Howe, 'Radicalism, Free Trade, and Foreign Policy in Mid-Nineteenth-Century Britain' in Mulligan and Simms, *The Primacy of Foreign Policy*, p. 168. Chapters 2 and 3 will point out how far principles of international law supporting protection guided British practice in the period, especially in the use of commercial treaties.

[104] For the discussion of such legal argument in relation to 'non-western societies', see J. Tully, 'Lineages of Informal Imperialism', in D. Kelly (ed.), *Lineages of Empire: The Historical Roots of British Imperial Thought,* (Oxford: Oxford University Press, 2009), pp. 10-14. It is to be noted, however, that such argument was contrary to the traditional general legal principle that commerce could be declined; as will be discussed in chapter 2, Vattel considered that a state possessed the right to decline trade. For the contrast between, for example, Palmerston and Cobden in their respective approaches to securing ' "free" trade by means of force', see Howe, 'Radicalism, Free Trade, and Foreign Policy', p. 173.

[105] See, for example: Parry, *The Politics*, p. 160; D, Nicholas, 'Richard Cobden and the International Peace Congress Movement, 1848-53', *Journal of British Studies*, Vol. 30, (1991), pp. 351-376; A. Tyrell, 'Marking the millennium: the mid-nineteenth century peace movement', *Historical Journal*, Vol. XXI, pp. 75-95; and M. Caedel, 'Cobden and Peace' in A. Howe, and S. Morgan, *Rethinking Nineteenth-Century Liberalism: Richard Cobden Bicentenary Essays*, (Aldershot, Ashgate Publishing Limited, 2006), pp. 189-207.

a major tool for resolving conflicts with the United States - particularly when, as here, the respect for it is reciprocated. British policy, and the maintenance of peace, cannot really be fully understood in the absence of this legal context. International law permeated the culture of policy to the United States. Questions of legal interpretation created their own disputes. The mechanics of peace relied on the use of legal principles.

This thesis also seeks to qualify some specific historiographical interpretations. Most importantly, it counters interpretations of 'containment' which see British policy as inherently hostile to American growth. Chapter 5 argues instead that treaty law and legal principles guided Britain towards a policy that was, broadly, permissive towards American expansion. The thesis also suggests that historiographical arguments giving prominence to the individual influence of the Earl of Aberdeen, Foreign Secretary 1841-6, on the direction of British policy should not be exaggerated. Many historians have claimed that Aberdeen was associated with a turn towards a pacific policy towards the United States.[106] Jones, for example, perceives him as wanting Britain to have an amicable relationship with the United States, with an aim of forestalling a closer Franco-American connection.[107] Similarly, Chamberlain considers that Aberdeen wanted a policy of better relations with both the United States and France.[108] Bourne also notes that Aberdeen (and Peel) considered 'the pacifying factors of Anglo-American trade' to be 'so much more important than squabble over frontiers or even national honour'.[109] Bernstein, though, is, perhaps, the most forthright, describing Aberdeen as the 'architect of the policy of appeasing America'.[110] The implicit contrast throughout all these contentions is undoubtedly with Palmerston, Foreign Secretary for nearly all the1830s, who is often considered as having been more hostile to the United States.[111] The thesis establishes, however, that there was often continuity between Aberdeen and Palmerston, and that treaty law and legal principles guided British policy in a

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[106] This reflects a generally positive analysis of Aberdeen's policy to the United States. For example, Clarke considers that: 'By far the most successful feature of Aberdeen's policy was the resolution of disputes with the United States': Clarke, *British Diplomacy*, p. 211.

[107] Jones, *The American Problem*, chapters 1 and 2, and Jones, *Lord Aberdeen and the Americas,* p. 7.

[108] Chamberlain, *Lord Aberdeen,* p. 301, p. 305.

[109] Bourne, *The Foreign Policy of Victorian England*, p. 50.

[110] Bernstien, G., 'Special Relationship', p. 727.

[111] Chamberlain comments that 'Aberdeen was more successful than Palmerston in coming to terms with the United States', Chamberlain, *British Foreign Policy*, pp. 92-93.

consistent direction. There was, for example, as will be seen, policy conformity in the McLeod and *Caroline* cases, and over maritime rights, which were all matters that were active at the time of the Aberdeen/Palmerston swap in 1841. Furthermore, even in the Maine boundary dispute, which was the subject of Palmerston's greatest criticism of Aberdeen's American policy, there was also, again as will be seen, a hidden constancy.

The thesis indicates too that the strand of comment in some works that British policy was a failure, or weak is unwarranted. The main contemporary source for this is Palmerston's fierce criticism of the Webster-Ashburton Treaty, 1842, which he famously described as 'one of the worst and most disgraceful treaties that England ever concluded', a 'humiliation', and a 'sacrifice of real interests and established rights'.[112] Much subsequent historiography has been coloured by this allegation of British weakness. British policy is defended by some historians, such as Chamberlain and Clarke, who point to the long term sense of the compromises involved.[113] Many, though, are more critical. Bernstein argues that 'the British government usually gave way', Dykstra comments that, by the 1830s and 1840s, 'London seemed to capitulate in almost every dispute', and Jones and Rakestraw refer to the 'failure of containment'.[114] Even Chamberlain observes that 'the United States became aware that Aberdeen wanted a settlement and was usually indifferent to detail', and 'took advantage of the fact.'.[115] Similar analyses have also been applied to specific issues. Bourne, for example, notes that, on the Maine boundary, 'Ashburton and Aberdeen accepted substantially less than what had been offered by the earlier Dutch award', and, more stridently, as will be seen, Galbraith and Merk refer, respectively, to the Oregon settlement as a 'surrender' and a 'capitulation'.[116] An understanding of the impact of international law suggests, however, that these characterisations of British policy are unfair, as chapters 4 and 5 will show.

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[112] Palmerston to Russell, 24 September 1842, PRO 30/22/4C, fols. 15-19; see also Palmerston, HC, 21 March 1843, Vol. LXVII, 1162-1218.

[113] See, for example, Chamberlain, *Pax Britannica?*, p.91, and Clarke, *British Diplomacy*, p. 211.

[114] Bernstein, 'Special Relationship', p. 725; Dykstra, *The Shifting Balance*, 'Introduction'; and Jones and Rakestraw, *Prologue to Manifest Destiny,* p. 267.

[115] Chamberlain, *Lord Aberdeen*, pp. 305-6.

[116] Bourne, *The Foreign Policy of Victorian England*, p. 50; the references to Merk and Galbraith are in chapter 5. Van Alstyne also refers to the Oregon settlement as a 'surrender' for Britain: R. Van Alstyne, 'International Rivalries in the Pacific Northwest', *Oregon Historical Quarterly*, XLVI (Sep. 1945), p. 249.

Structure of the thesis

The thesis comprises five main chapters.

Chapter 2 considers the place of international law as part of the institutional practice of British foreign policy to the United States in the period. It argues that international law was able to make an impact because it was part of the process through which British policy to the United States was developed. It begins by demonstrating that there was political support for international law in Britain. It then broadens out into an examination of how law also affected the business and practice of the Foreign Office. It shows how advice on international law was needed and provided. It then concludes by arguing that key legal principles, built into British policy over time, provided a framework for policy to the United States.

Chapter 3 establishes the two main ways in which international law was then able to make an impact on British foreign policy to the United States. It first looks at how international law shaped British policy objectives towards the United States concerning imperial possessions, commerce, the slave trade and peace. It contends that a combination of treaty rights and obligations, and the legal principles within British practice, guided policy aims and implementation. It then argues that international law was at the centre of how disputes were dealt with between Britain and the United States in routine business as well as high-profile cases, and illustrates this with the example of law's role in commercial relations. It ends by contending that participation in the same treaties, and American respect for similar legal principles, meant that British policy necessarily worked within a framework of law shared with the United States.

Chapter 4 examines the way international law influenced British policy in relation to the issues and tensions with the United States arising from the question of border security in Canada. It argues that the principles of self-preservation and protection guided Britain's objective of retaining Canada in the face of rebellion, and presented a public justification for British action that helped to ease tensions with the United States. It also aims to show how use of the shared principles around sovereignty and neutrality encouraged security cooperation along the border. The chapter then considers how alleged breaches of legal

principles were nevertheless central to the acute tensions with the United States that arose in the cases of the *Caroline* and McLeod, and from Britain's concern that it may need to enter American territory in extreme security situations. It establishes that policy, in these instances, necessarily worked by reference to legal argument, and solutions were reached (after McLeod's acquittal) using shared principles. Finally, the chapter demonstrates how international law was fundamental to the territorial issues over the Maine Boundary and Nova Scotian fishing rights. Both were technical disputes on interpretation that were set by previous treaty agreements, rather than fresh disputes. It argues that treaty law and legal principles, therefore, guided policy expectation, and the process and arguments adopted.

Chapter 5 considers the way international law affected the British policy response to American expansion, and the tensions with the United States over Oregon, California and Texas. The first section looks at the broad direction of British policy. It argues that prior treaty agreements envisaged American westward expansion and legal principles encouraged the maintenance of peace, with the result that the British were willing to accept American growth. Within that overarching approach, however, legal considerations nevertheless still guided how Britain acted. Historic legal rights meant that Oregon was more of a priority than Texas or California. Respect for the principles associated with sovereignty influenced Britain's decision to accept Texas joining the United States, despite the British preference for it to remain independent. The second section then considers the tensions that nevertheless arose over Oregon and Texas. It argues that Britain handled the issues concerned within the shared framework of international law. A compromise was ultimately achieved in Oregon that was consistent with the applicable legal principles, but importantly the fluctuations in the process of the dispute can also be explained by the way Britain felt the legal principles needed to be applied at given points. British respect for non-interference and neutrality helped to avoid a serious confrontation with the United States over the alleged British support for the abolition of slavery in Texas, and the sale of two 'armed' ships to Mexico.

Chapter 6, finally, examines the way that Britain worked within shared legal principles to produce workable solutions to the main practical problems presented by the conflict between the desire of the United States to protect American ships from interference by the Royal Navy, and British objectives aimed at suppressing the slave trade and defending the abolition of slavery in the Empire. It argues that there was no fundamental disagreement with the United States over the 'right of search'. Instead, British policy worked within the existing

principles associated with the 'freedom of the seas', and its treaty rights with other states, in developing instructions for when the Royal Navy could 'visit' American ships. Indeed, once the policy was fully explained to the United States, a new updated shared framework covering the issue was effectively produced, which then served as the understanding behind the agreement for joint cruising in the Webster-Ashburton Treaty, 1842. Similarly, common ground within the 'comity of nations' was used to produce an arrangement that was aimed at avoiding tensions arising, in the aftermath of the *Creole,* over the position of any slaves on board American ships forced in the future into British ports.

Note on key figures and terms

Palmerston and Aberdeen, were the British Foreign Secretaries in the period with Aberdeen taking over in September, 1841. Melbourne and Peel were the corresponding British Prime Ministers. Fox was the British Minister in Washington from 1836 to 1843, and he was followed by Pakenham. Ashburton was the special envoy sent to negotiate the treaty that became the Webster-Ashburton Treaty, 1842. On the American side, there were five appointed (as opposed to acting) Secretaries of State in the period. They were Forsyth (until 1841), Webster (1841-43), Upshur (1843-44), Calhoun (1844-45), and Buchanan (1845 onwards). Similarly, there were five Presidents, Jackson (until 1837), Van Buren (1837-41), Harrison (1841), Tyler (1841-45), and Polk (1845 onwards). Stevenson was the American Minister in London from 1836 to 1841, followed by Everett until 1845, and then McLane until 1846.

'Britain' is used to mean Britain as representing the whole of the British Empire when referring to matters of foreign policy with the United States, and 'British' should be read accordingly in this context. This in no way, however, should be taken as implying that there were no complexities within the Empire which affected policy to the United States. It is simply a recognition of the fact that the thesis is a study of British foreign policy to the United States, and that, formally, the 'British' state involved encompassed the Empire. 'Canada', 'Lower Canada', 'Upper Canada' and the names of other British possessions are adopted instead when mention is made to the specific entity or entities concerned.

2. International Law as part of the Institutional Practice of British Foreign Policy to the United States

As made clear in the Introduction, this thesis does not contend that international law can fully explain British policy towards the United States in the period. The role of international law in the exercise of power is too complex for such a straightforward analysis. Self-evidently, Britain did not decide policy in every situation concerning America by a simple reference to what the law was, and, in any event, many circumstances would have presented two or more lawful options. 'Grey' areas within the law were also open to exploitation. Rather, the thesis argues that the acceptance and use of international law needs instead to be appreciated as being a fundamental part of the British-American *political* relationship. Viewed from this perspective, international law can, then, be seen to have made an impact because it provided the framework and principles within which British policy worked and disputes were handled. The purpose of this chapter is to establish how international law was able to have this effect by examining its role in the practical operation of foreign policy to the United States.

The central contention of the chapter is that international law matters because it was integral to the making of British foreign policy towards the United States - or, in other words, because it was part of its institutional practice. Most obviously, this position was founded on political support in Britain for international law. British governments of the period worked on the basis that Britain's relations with the United States operated within an international legal system. This affected practice, gave policy a 'public' sphere, and sanctified treaties. Britain's role in enforcement also enmeshed law into political debate. Equally important, however, was the role of international law behind the immediate political arena. International law was involved in the business and practice of the Foreign Office, providing the necessary backup for this political support to have real meaning. Expertise in international law to guide policy was not only needed, but, vitally, it was also sought and available within an established process. The crucial end result was that principles of international law provided a framework for British foreign policy to the United States. This structure was made up of 'cornerstone' principles built into British foreign policy as a consequence of the role of international law over time within the practice of the Foreign

Office. They did not make the policy themselves, but they were the building blocks on which it was based and help to explain its trajectory.

Political support and politics

British foreign policy to the United States in the period operated on the premise that Britain was within a system of international law. Whig and Tory ministers alike publicly acknowledged its presence in comments concerning American matters. Palmerston, for example, spoke of what he termed 'a doctrine of international law' and 'the principles of international law' when considering how nations 'dealt with each other'.[1] Similarly, Peel had occasion to exhort Parliament not to 'disregard the great principles of public law to which all nations alike are subject'.[2] Whilst such specific mentions of international law by ministers were infrequent, they are nevertheless significant as hallmarks of its wider impact. British ministers also tended towards a positivist conception of international law when dealing with the United States, as opposed to one driven by natural law. Palmerston referred on different occasions to 'established usages', 'universal practice', and the 'strict rules of international practice'.[3] Peel, in turn, mentioned a 'usage of public law' when in the process of ratifying the Texan treaties.[4] Conversely, there was scarcely even a brief express glance made to an international law based on any wider notion of universal 'justice'. Palmerston did once propound the view that Britain should act on 'just grounds' in international matters in a speech on general foreign policy, but this comment did not relate specifically to international law.[5]

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[1] Palmerston, HC, 26 August 1841, Vol. LVIII, 265-270.

[2] Peel, HC, 21 March 1843, Vol, LXVII, 1218-1252.

[3] Palmerston to Fox, 19 January 1841, *British Documents*, Vol. 1, 65, pp. 114-115; Palmerston to Fox, 9 February 1841, *British Documents*, Vol. 1, 66, pp. 115-116; Palmerston, HC, 2 May 1843, Vol. LXVIII, 1225-1238.

[4] Peel, HC, 30 June 1842, Vol. LXIV, 787-788. The context was the duty to ratify the treaties agreed by the previous government with Texas.

[5] Palmerston, HC, 7 August 1844, Vol. LXXVI, 1870-1885 at 1874.

British governments also embraced the idea that Britain was within this framework of international law as a member of the 'family' of 'civilised states'.[6] Ministers, unsurprisingly, pondered little on the theoretical aspects of international law, but they did nevertheless make frequent references to the notion of 'civilised' states in the context of international law and policy to the United States. Palmerston, for example, referred to 'the established usages of civilised nations' and 'the universal practice of civilised nations' in the McLeod matter.[7] Similarly, Aberdeen wanted to make sure, in the Oregon question, that he was able to 'secure the approbation also of every state in Europe, and of the whole civilised world'.[8] Peel too made clear that he believed Britain to be one of a group of 'civilised governments'.[9] British ministers appear to have made a much stronger public link between international law and the 'civilised', than they did with Christianity.[10] For example, in the matters reviewed pertaining to the United States, only Palmerston mentioned the latter, justifying the principle of state responsibility as preventing war practice 'banished' by 'civilisation and Christianity'.[11]

The understanding that British foreign policy to the United States operated within a system of international law was reflected too by more general discussions in the major political quarterlies. *The Edinburgh Review,* from a Liberal and Whig perspective*,* ran the most significant article of the period on the place of international law, with a piece by Nassau Senior reviewing Wheaton's 'History of the Progress of the Law Of Nations'.[12] Senior set out a broad conception of international law with naturalist and positivist principles. The former, which he termed 'international morality', were the 'rules of international conduct which we believe to be commanded by the Deity', whilst the latter were 'the rules of conduct

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[6] For example, see the reference to the 'family of civilised nations', *Edinburgh Review*, Vol. LXXIII, (1841), Article X, 'The Republic of Texas', pp. 241-271, at p. 267.

[7] Palmerston to Fox, 19 January 1841, *British Documents*, Vol. 1, 65, pp. 114-115; Palmerston to Fox, 9 February 1841, *British Documents*, Vol. 1, 66, pp. 115-116.

[8] Aberdeen, HL, 17 March 1846, Vol. LLXXXIV, 1118.

[9] Peel, HC, 21 March 1843, Vol. LXVII, 1218-1252.

[10] This lack of public emphasis on Christianity contrasts with what Sylvest describes as an increasing emphasis on religion and international law by legal writers in the period from 1835: see chapter 1.

[11] Palmerston to Fox, 9 February 1841, *British Documents*, Vol. 1, 66, pp. 115-116.

[12] 'History of the Progress of the Law of Nations in Europe from the Peace of Westphalia to the Congress of Vienna', by H. Wheaton', *Edinburgh Review*, Vol. LXXVII, (1843), Article I, pp. 303-372. The letter, Nassau Senior to Macvey Napier, 20 February 1843, indicates that this article was written by Nassau Senior: M. Napier, (ed.), *Selection from the Correspondence of the late Mackey Napier, esq.*, (London: Macmillan, 1879), p. 423, note 1.

which are dictated or permitted by the public opinion of nations'.[13] Whilst the tenor of the article was sceptical of the notion of 'progress' in international law, it nevertheless assumed that Britain was still firmly within its ambit. Picking out for special attention the right of one state to interfere in the affairs of another, it drew 'some comfort' that Britain 'denied that any general right of interference against revolutionary movements in independent states was sanctioned by the Law of Nations'.[14] Further, it contended for an expansive interpretation of international law in the context of the slave trade, arguing, contrary to the position of the United States and others, that there was a right of search for 'inquiry' - or 'right of visit' - against vessels suspected of slave trading.[15]

Other political quarterlies also shared the approach of assuming Britain's place within a system of international law, even if they sometimes took different positions on the same legal questions. *The Quarterly Review,* from a Tory viewpoint*,* for example, criticised Palmerston for his failure to respect international law on the question of intervention in the domestic affairs of other states. It attacked, in particular, Palmerston's support for the Spanish government in the 1830s, noting that 'failure or success does not affect the principle of intervention while the matter is in dispute; such statesmen as now hold the British helm know little and care less about Grotius and Puffendorf'.[16] It then returned to this theme in a later article on foreign policy, accusing Palmerston of being 'so mischievously active in violating the old law of nations and disorganising the political, moral, and social condition of the Peninsular monarchies'.[17] Similarly, *The Westminster Review*, a radical periodical, argued strongly that international law should govern Britain's approach to the slave trade. Echoing a famous judgement of Lord Stowell, its view was that: 'we have no right to force our convictions upon others. The end we propose is good, but that does not justify us in arriving at it by unlawful means'.[18]

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[13] *Edinburgh Review*, 'History of the Progress of the Law of Nations', pp. 304-306.

[14] *Edinburgh Review*,'History of the Progress of the Law of Nations', pp. 357-358.

[15] *Edinburgh Review*, 'History of the Progress of the Law of Nations', pp. 369-372.

[16] 'Texas', *Quarterly Review*, Vol. 61, No. CXXII, (1838), Article III, pp. 326-362, at pp. 327-328.

[17] 'Foreign Policy', *Quarterly Review,* Vol. 67, No. CXXXIII, (1840-1841), Article VIII, pp. 253-302 at p. 257.

[18] 'The African Slave Trade', *The Westminster Review*, Vol. 34, (1840), Article IV, pp. 125-165 at pp. 155-156.

This political acceptance that Britain participated in a system of international law mattered for policy towards the United States because it meant that issues were handled in a manner that embraced legal principles and concepts. There were several aspects to this evident from the British-American relationship in the period. The simplest manifestation can be seen in the way that ministers argued so many disputed points in legal terms, as will be observed in the examples given throughout the thesis. Much more fundamental, however, was the fact that international law was by the 1830s embedded within the practice of the Foreign Office. Expert advice on international law was both required by, and available to, ministers. Principles of international law were adopted for the conduct of policy. Both of these latter contentions are so central to the thesis that they are each examined separately in further detail in the next sections of the chapter. For present purposes, however, the key points are that British governments were able to be informed consistently on questions of international law, and that policy was made within a framework derived from legal principles. These were important pre-conditions for international law to able to have any meaningful influence on the development of policy towards the United States.

A further effect of British involvement in the international legal system was the idea that foreign relations took place in a 'public' sphere, and were as a result liable to the opinion of the 'world', or at least the 'civilised' world. British ministers at the time, particularly Peel and Aberdeen, certainly spoke of international law as 'public' law. Aberdeen, for example, referred to 'public justice' and 'public laws', and Peel, as already noted, proclaimed 'the great principles of public law to which all nations alike are subject'.[19] What this meant, in practice, was that ministers tended to place importance on the question of how Britain's actions would be 'publicly' viewed in the light of international law. This increased the significance given to international law in political debate. Peel, for example, was concerned in the dispute over Britain's alleged 'right of visit', and the consequent risk of war, by the question as to 'which party has the public law on its side?'[20] Similarly, Aberdeen was keen that the instructions to naval commanders, arising from his 1842 'commission' on the slave trade, should be based, first, on the 'law of nations', and 'be such as may be published, if

[19] Aberdeen, HL, 7 April 1843, Vol. LXVIII, 654-661, and HL, 17 May 1844, Vol. LXXIII, 1228-1229; Peel, HC, 21 March 1843, Vol. LXVII, 1218-1252.

[20] Peel to Aberdeen, 25 October 1841, Aberdeen Papers, Add. MS 43061, fols. 297-301.

necessary, to the whole world'.[21] Palmerston too was keen not to disclose the view that the British involvement in the blockades in the dispute between Monte Video and Buenos Aires from 1845 had been in breach of international law.[22]

The 'public' sphere for foreign policy also had a further aspect in the manner by which British 'honour' became linked, at times, to the upholding of international law. 'Honour' was, undoubtedly, a central ongoing concern of British foreign policy in the period, a point exemplified by Brougham's 1843 evocation of Charles Fox's comment that: 'the sacrifice of national honour must lead to the downfall of the country'.[23] Indeed, as Otte observes for the Victorian period from 1865, this was based in 'the acknowledgement that ... "honour" and "prestige" were a form of "soft power", and a currency readily convertible into real influence'.[24] Whilst, as a concept, 'honour' certainly embraced much more than issues of international law, the British approach to the United States was clearly impacted by the perception of ministers that the 'public' upholding of Britain's rights and obligations under the 'public' international law was one aspect of it. Again, this increased the potential for international law to influence policy. Peel, for instance, saw the obligations to defend Canada and uphold British rights in Oregon as being ones of 'honour'.[25] As he asked Aberdeen, when concerned by a possible breach of treaty by the United States over Oregon: 'What shall we do, in order to be on our guard against infraction or palpable evasion of the treaty - or some act [implying] insult and defiance?'[26] Another example is the consistent British support for arbitration to settle disputes with the United States on what ministers regarded as 'points of honour'.[27]

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[21] Aberdeen to Lushington, Bandinel, Denman, and Rothery, 14 December 1842, Peel Papers, Add. MS 40453, fols. 277-290.

[22] As noted in Grewe, *The Epochs,* p. 528, referring to a letter from Palmerston to Normanby in 1846, citing in Note 14, Dalling, *Life of Palmerston*, Vol. 3, p. 327.

[23] Brougham, HL, 7 April 1843, Vol. LXVIII, 599-641. For further examples of references to 'honour', see: Palmerston, HC, 7 August 1844, Vol. LXXVI, 1870-1885 at 1870-1871; Peel, HC, 7 August 1844, Vol. LXXVI, 1877; and Melbourne, HL, 18 January 1838, Vol. XL, 223.

[24] T. G. Otte, *The Foreign Office Mind: The Making of British Foreign Policy, 1865-1914* (Cambridge: Cambridge University Press, 2011), pp. 396-397.

[25] Peel to Aberdeen, 16 May 1842, Aberdeen Papers, Add. MS 43062, fols. 48-54; Peel to Aberdeen, 23 January 1845, Aberdeen Papers, Add. MS 43064, fols. 178-181.

[26] Peel to Aberdeen, Aberdeen Papers, Add. MS 43064, 23 January 1845, fols. 178-181.

[27] The boundary disputes concerning Maine and Oregon are examples of this approach. These are discussed in chapters 4 and 5.

The acceptance that Britain was within an international legal system also meant that British foreign policy placed great emphasis on the upholding of treaties. British ministers accepted that international treaties entered into by Britain provided rules of international law from which the state gained binding rights and obligations.[28] In an immediate sense, this is, of course, a commonplace. Treaties were agreements which, unsurprisingly, bound Britain when it entered into them. Palmerston, accordingly, referred in 1843 to the agreement on the location of the river St Croix, following a commission set up under the Jay Treaty, 1794, as something on which 'the faith of the country having been pledged, there was no possibility of retracting the acquiescence thus given'.[29] For him, 'a treaty does bind, and would bind'.[30] Peel even made clear that Britain was bound from signing and not ratification. Faced on coming into office in 1841 with unratified treaties with Texas, for him, therefore, 'it was not necessary... to state whether he considered those treaties wisely conceived'.[31] The position rather was simply that 'the present Government ... had felt it their duty ... to ratify those treaties'.[32] Whilst such attitudes are predictable in themselves, they did, however, have the important wider consequence that ongoing British foreign policy needed to be made subject to the specific terms of the treaties to which the Britain was already a party. This was highly significant in the treaty-rich British-American relationship, as will be discussed in the next chapter.

Finally, the need for political action to be taken in order to enforce principles within the international legal system also gave law an extra influence over policy. This requirement was the result of the fact that there was no superior body able to undertake such a role. The basis for John Austin's theoretical question as to the status of international law as 'law' was, thus, demonstrated by this practical situation.[33] States had to demand compensation, or even take military action, themselves in response to breaches of international law. Such methods of enforcement were also often combined with a consideration of the position of 'public'

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[28] For a statement of the general principle, see Vattel, *Law of Nations*, Book II, S221.

[29] Palmerston, HC, 21 March 1843, Vol. LXVII, 1162-1218.

[30] Palmerston to Melbourne, 12 January 1836, Palmerston Papers, ME/518.

[31] Peel, HC, 13 June 1842, Vol. LXIII, 1490-1491.

[32] Peel, HC, 30 June 1842, Vol. LXIV, 787-788.

[33] John Austin's position is discussed briefly in chapter 1.

opinion. Like other states, Britain could take measures itself to enforce international law, or it could have similar action taken against it by other states. One area, for instance, in which Britain both used and faced extensive enforcement action was that of maritime rights, particularly in the context of the slave trade. Again, ever the practical politician, Peel explained in the course of a parliamentary speech, partly on the slave trade that: 'if you attempt to exercise your power with a disregard of the obligations of the law of nations, you will be called upon for compensation for any acts unwarranted by that law'.[34] It is important to recognise, however, that British military power, especially that derived from the Royal Navy, nevertheless gave Britain a practical ability to effect enforcement to a greater extent than that enjoyed by many other states. The role of international law was not, however, merely a question of the availability of such direct power. Legal questions aside, Britain, for example, could have enforced its will to a greater extent in respect of the 'right of search' and the slave trade.[35]

British foreign policy was, though, drawn closer to international law because of the nature of this method of enforcement. The lack of a central authority meant that ministers were more able, as a practical matter, to weigh the international law consequences in the balance with other factors in any given set of circumstances. International law, in this sense, then became one of the factors in the political choices involved in foreign policy. This did not appear to manifest itself in any systematic habit for policy to override specific advice when taken on a matter of international law, a point which will be considered further below. On the contrary, British governments, as argued above, respected Britain's position as part of an international legal framework. Rather, it showed itself more in a willingness, where necessary or desirable, to take or defend contentious positions within the system. 'Grey' areas could be exploited, as, for example, in the British interpretations of some maritime rights.[36] In other, usually weaker, cases, cover could be sought by seeking to reduce the risk of other states taking enforcement action against Britain. An instance of the latter is provided by Peel's

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[34] Peel, HC, 21 March 1843, Vol. LXVII, 1218-1252.

[35] Indeed Martinez notes: 'Over time ... Britain found it could not rely on its military power alone but instead had to utilise that power in conjunction with co-operative legal action to achieve its goal': Martinez, J. S., *The Slave Trade and the Origins of International Human Rights Law*, (New York: Oxford University Press, c2012), p. 14.

[36] A further example would be Aberdeen's comment that it would be 'desirable to attempt to obtain from the Chinese government some [assurance] or pledge which would give me a better right to act' in the case of Chusan in 1845: Aberdeen to Peel, 18 October 1845, Peel Papers, Add MSS 40455, fols. 249-250.

reflections on wanting to intervene in the battle between Buenos Aires and Monte Video in 1843. He knew that, in that case, 'interference' was 'opposed to principle', but wanted action to avert 'a great present evil'.[37] His solution was to consider intervention, but only 'in concert' with France and Brazil.[38]

International law in this way became part of broader British domestic political strategies. Governments and oppositions used it to support or supplement arguments in favour of a particular foreign policy position. A good example of this is provided by the question of the right of interference in another state in the context of Palmerston's foreign policy.[39] Parry identifies the 'centrality of patriotic themes to the identity of the Victorian Liberal party', and contrasts this with the fact that from 'Wellington onwards, the Conservative Party seemed too feeble and passive in foreign and domestic policy'.[40] Palmerston certainly attacked the Conservatives for adopting a 'system' which would not promote British 'interests' or 'honour', arguing that ministers 'appear to shape their policy... from a consideration of the effect... upon the position of foreign governments'.[41] There were certainly substantive debates about the merits of actual policies behind this assault. Peel, however, chose, in part of his reply, to criticise Palmerston for interfering overseas too much, implicitly raising the question in doing so of whether he had any such right:

> I perfectly admit that we have not pursued that course which the noble Lord was inclined to pursue, namely - that while he disclaimed all intervention or right of interference in the domestic affairs of other countries, he should so intervene more actively than any of his predecessors, Our intervention in the domestic affairs of foreign states may have been less than that of the noble Lord, but not less, I contend, than was required to effect any object rendered necessary by the interests of England or the world.[42]

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[37] Peel to Aberdeen, 26 November 1843, Aberdeen Papers, Add. MS 43063, fols. 80-86.

[38] Peel to Aberdeen, 26 November 1843, Aberdeen Papers, Add. MS 43063, fols. 80-86.

[39] The words 'intervention' and 'interference' were both used in political discussion of this question at the time without clear distinction. Bourne notes that Palmerston's 'strictures on the use of "intervention" instead of "interference" are famous': K. Bourne, *Palmerston: the Early Years, 1784-1841* (London: Allen Lane, 1982), p. 424. Nevertheless, Palmerston's preference is not considered further, as both terms were clearly used by contemporaries, and it is not relevant to the point being made on the political debate relating to 'interference' or 'intervention'.

[40] J. P. Parry, *The Politics*, pp. 388-389.

[41] Palmerston, HC, 7 August 1844, Vol. LXXVI, 1870-1874.

[42] Peel, HC, 7 August 1844, Vol. LXXVI, 1881-1882.

Peel here was cleverly raising the legal point as a precursor to his further argument that Conservative policy had in any event been more effective without such interference. Another example of international law being raised in a similar manner to support a political position is that of the opposition of some Radicals to certain of the measures discussed for taking action against the slave trade.[43]

Most political debate around the extent to which a given policy was operating in accordance with international law was not, however, the result of a serious difference between the participants as to the role of international law. Both the Melbourne and Peel governments worked on the basis that Britain was within a system of international law, as has been argued earlier in the chapter. International law was instead brought into British political debates because of its availability as a body of principles with both wide recognition and political effect. Peel's deployment of such an argument, in the debate mentioned above, reflected the fact that the international law question around interference was one of the main methods used to attack Palmerston's foreign policy, as indeed has already been seen earlier in the chapter. It was not a rejection of interference, as such, in all circumstances, and indeed the Conservatives also showed themselves willing to interfere in difficult legal circumstances, such as those involving Monte Video.[44] International law was, then, used as a political weapon as well as being accepted as a method of regulation.

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[43] Radicals were generally more sceptical than Whigs or Liberals about the cost of the British measures against the slave trade. For example, see the arguments in *The Westminster Review,* a radical quarterly, in 1840 against Macaulay's strong proposals for eradicating the slave trade, partly on the grounds of the maintenance of international law: *The Westminster Review*, 'The African Slave Trade', at pp. 153-156.

[44] See for example, Peel to Aberdeen, 26 November 1843, Aberdeen Papers, Add. MS 43063, fols. 80-86.

Foreign Office practice

The support of British governments for the system of international law was backed up by the institutional practice of the Foreign Office.[45] This is a critical point because the impact of international law would necessarily have been limited without a realistic ability to influence policy, whether in matters related to the United States or more generally.[46] The practical role of international law in British foreign policy developed from the fact that it touched several branches of the business of the Foreign Office, resulting in a regular need for advice. A process thereby arose under which the Foreign Secretary requested legal advice when he considered it was required. Crucially, this advice was then delivered by experts in international law, who also had available to them extensive and suitable research facilities. Whilst the advice given may not always have represented internationally 'agreed' legal principles, what matters is that the system of international law was integral to the serious business whereby Britain acted in the world. This form of practice potentially covered, of course, the whole range of Britain's global foreign interests and not just the United States, but, throughout, it ensured that international law was able to function as a moving reality, that is as a part of day-to day business. In other words, it allowed British policy to work within a framework of international law in both theory and practice.[47]

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[45] This chapter draws heavily on three works relating to the provision of legal advice to the Foreign Office, and, although reference is made to these as appropriate, my general debt to the authors involved needs to be acknowledged at the start. The works are: A. D. (Lord) McNair, *International Law Opinions,* Vols. I, II and III (Cambridge: Cambridge University Press, 1956), which summarises law officers' opinions on international law from approximately 1782 to 1902; C. Parry, (ed.), *Law Officers' Opinions to the Foreign Office, 1793-1860*, Vols. 1-97, (Farnborough: Gregg International Publishers Limited, 1970-1973), which reproduces, and provides commentary on, the opinions referred to; and, C. Parry, (ed.), *A British Digest of International Law*, Vol. VII (Organs of State), (London: Stevens, 1965).

[46] This section is concerned with the methods by which the British state involved international law in the practical process of foreign policy. This is a distinct point from the fact that the resulting actual British practice was itself, of course, a source of international law - as evidence of state practice.

[47] British foreign policy falls, thus, to be considered within the context of international law for, as McNair comments: 'It is a delusion affecting the minds of many laymen and not a few lawyers that governments in the conduct of foreign affairs act independently and capriciously and without reference to legal principle. Those who have worked in, or the archives of, the Foreign Offices of well-established States realise that the ordinary, routine, non-political business of the world is carried on by Ministers of Foreign Affairs and their diplomatic agents against a background of law, slowly built up in Western Europe during the past three or four centuries and in the United States since they became independent, and gradually spreading throughout the civilised world', McNair, *International Law Opinions*, Vol. I, Preface, p. xvii.

The starting point for this institutional role was that international law was central to the work of the Foreign Office in the early to mid-nineteenth century. The Foreign Secretary exercised, in practice, the prerogative power of the Crown in foreign relations. The Crown's role in foreign affairs, as described by the *British Digest* for 1965, was that, amongst other things, it 'accords recognition to foreign States and Governments', 'declares war and makes peace and both authorises the negotiation of treaties and ratifies them', and 'annexes' and 'cedes territory'.[48] As the *British Digest* also sets out, the Crown acted in these, and other similar matters, 'through' the Foreign Secretary, and 'subject always to the collective advice of the Cabinet'.[49] International law mattered in the discharge of these functions because it was made up by treaties, rules, and customs which were concerned with the intercourse of states on such issues. International law was also unique in its ostensible relevance in regulating the business of the Foreign Office. There was no such other body or system even purporting to have such a role. As again noted in the *British Digest*, Parliament possessed no direct powers over the Foreign Secretary, and domestic courts could not then interfere with 'acts of state'.[50]

The Foreign Secretary's practical need to be informed about international law in exercising the Crown's powers arose in several ways. Certainly, the Foreign Secretary required advice for political reasons. As has been noted, international law was an international system, and contemporary diplomatic and parliamentary exchanges made frequent references to it. In

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[48] Parry, *British Digest*, p. 17. *British Digest* (in this volume) was published in 1965 and is commenting, therefore, on the legal position of the Crown as developed at that time. It is nevertheless a suitable point of reference for the brief general constitutional points being made in this paragraph and below on the position of the Crown in the period 1836 to 1846. There is no suggestion in *British Digest*, or any of the other works reviewed, that the Crown's powers on these basic constitutional points, had been in a process of material change in the period from the nineteenth century up to 1965. See also the description of the business of the Foreign Secretary by Jeremy Sneyd, Chief Clerk of the Foreign Office, to the Commission on Fees, 1785, as referred to in *The Records of the Foreign Office, 1782-1939* (London, HMSO, 1969), p. 3.

[49] Anson, *Law and Custom of the Constitution*, Vol. 2, *The Crown* (4th edn, 1935), Part II, p. 131, as cited in Parry, *British Digest*, p. 18. See also *The Records of the Foreign Office*, pp. 51-52, which indicates that important despatches and drafts were circulated to the Prime Minister and sovereign, and available, or circulated, for the Cabinet.

[50] Most importantly, Parliament had no direct means of declaring or ending a war: Parry, *British Digest*, p. 26. Parliament also, crucially, did not have a constitutional role as respects the Crown's treaty-making powers, subject to the over-arching 'constitutional principle' that 'the Crown alone may not alter the law of the land', Ibid., p. 39. As to 'acts of state', in 'terms of domestic law an act of the Crown in relation to foreign affairs is an "act of state"... . Such an act, as "an exercise of sovereign power... cannot be challenged, controlled, or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal courts must accept it, as it is, without question." ', Ibid., p. 25, referring to Salaman v. Sec. of State for India [1906] 1 KB.

this political context, the question of international law's nature in legal theory as true ‘law’ or not was irrelevant. An example of the type of political need which could arise can be seen in a speech of Peel in the House of Commons in 1843, in circumstances where he was required to respond to criticism of the government's policy of caution in intercepting American vessels in the context of the slave trade. Peel argued:

> I am perfectly certain, that if you transgress the law of nations, your efforts, however well intended, will be less effectual than if you respect the rights of other countries. This is all I contend for. I say, employ all your naval power, and let no consideration of expense prevent you from enforcing the rights of humanity, but do not disregard, if your intervention is to be ultimately effectual, if you wish to conciliate the good opinion of other countries and induce them to co-operate with you, do not disregard the great principles of public law to which all nations alike are subject.[51]

Information on the relevant international law would have been clearly needed in this case, both to respond to the United States (on the ‘rights of other countries’), and to deal with Parliament (on the question of ‘your [ie Parliament's] intervention’).

The Foreign Office also required assistance in relation to international law for legal reasons. Advice may have been sought to determine the legality of a given action, or to respond to a diplomatic note. Although, as the *British Digest* notes in the context of the period 1860 to 1914, the Foreign Secretary was, in theory, not ‘bound’ by international law in deciding policy, there seems to have developed a practice near to having such effect:

> There is not, it would seem, any absolute constitutional duty upon H. M. Government, or upon the Secretary of State for Foreign Affairs, to follow the advice of the Law Officers .... Nevertheless, as this work must abundantly testify, the Foreign Office or H.M. Government has consistently considered itself in practice precluded from ordering 'policy’ otherwise than as the 'law’, or rather the exposition of it the Law Officers have given, dictates.[52]

There is no definitive similar comment on the period covered by this thesis, but the previously mentioned circumstances surrounding Britain's relations with the United States regarding the slave trade provide a revealing example of how, at least, Aberdeen saw his role in such terms. Facing discussion in the House of Lords on his instructions to the Royal Navy following the advice of the law officers in the context of the capture of American ships,

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[51] Peel, HC, 21 March 1843, Vol. LXVII, 1218-1252.

[52] Parry, *British Digest*, p. 271.

Aberdeen commented that: 'having had statements from the law officers of the Crown, warning me that such proceedings could not be maintained by the law of nations, of course it was my duty to apprise the captains of our cruisers of such an intimation'.[53] This does not mean, however, that the Britain always acted in accordance with international law. Many actions of the British state would necessarily have been undertaken without specific legal advice, and some undoubtedly would have been in breach of international law. Rather, it is noting that the practice was nevertheless for such actions not to be part of 'ordered' policy.

Three types of court also potentially gave the Foreign Secretary legal reasons to be informed about international law in the early to mid-nineteenth century, and to an extent they can be seen as providing additional enforcement mechanisms for it.[54] Prize courts only became active in the period in war by specific commission adding to the jurisdiction of the admiralty courts.[55] They nevertheless had a potentially crucial role in those circumstances in enforcing what could or could not be seized as 'prize' by a belligerent according to international law.[56] Other countries also operated prize courts. The question of 'prize' was fundamental to the operation of British foreign and security policy at the time in that it could affect either the war effort if Britain was a belligerent, or trade if it was a neutral. Two references by the prize judge, Stephen Lushington, in the context of the Crimean War, highlighted by Waddams, illustrate Britain's dual interests.[57] Britain's war effort was helped, Lushington stated, by the right in the 'law of Nations' to 'the capture of the mercantile navy of the enemy'.[58] Conversely, he added in a different case, the 'Court of Prize' aimed to ' preserve,

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[53] Aberdeen, HL, 7 April 1843, Vol. LXVIII, 654-661.

[54] A broad distinction is made here between courts of law and equity, which applied English law, and courts, such as prize, which applied international law. In the former, international law could, in certain circumstances, such as, broadly, where there was no conflict with common law or statute, 'be part of English law', but such courts would, nevertheless, still be applying English law: see generally W. S. Holdsworth, *A History of English Law*, Vol. XIV (London, 1964), pp. 24-33. The jurisdiction of these courts of law and equity, applying English law (whether or not international law was a 'part' of that law), was, though, largely irrelevant to the business of the Foreign Secretary and is not considered further.

[55] W. S. Holdsworth, *A History of English Law*, Vol. I, (3rd edn, 1922), p. 564.

[56] Waddams nevertheless comments that Lushington tended to favour British interests: S. M. Waddams, *Law, Politics, and the Church of England: the Career of Stephen Lushington* 1782-1873, (Cambridge: Cambridge University Press, 1992), pp. 223-224.

[57] Waddams, *Stephen Lushington*, p. 224.

[58] The quote is from the decision of Lushington in *The Baltica* (1855), as cited in Waddams, *Stephen Lushington*, p. 224.

undiminished, the rights of the subjects of neutral states'.[59] Even if Britain was at peace, thus, the nature of prize law, meant that it had the potential to affect British shipping and trade in military conflicts around the world, both then and in the future. The Foreign Secretary can be reasonably supposed on this basis to have retained a standing interest in many international situations with potential prize ramifications.

The role of 'mixed commissions' in enforcing the slave trade treaties entered into by Britain in the nineteenth century has also been emphasised by Martinez.[60] As she comments: 'Called the "Mixed Commissions" because they consisted of judges from different countries, the slave tribunals sat on a permanent, continuing basis, and they applied international law'.[61] Benton and Ford have recently questioned Martinez's wider argument in relation to the role of the action against the slave trade in the history of human rights law, but this does not detract from her point that the mixed commissions used international law.[62] The main commissions referred to by Martinez were under the British slave trade treaties with Spain, Portugal and the Netherlands, and they sat in Sierra Leone, Cuba, Brazil and Suriname.[63] They were also not redundant, for, as Martinez continues, 'the Sierra Leone courts', for example 'emancipated approximately 65,000 slaves between 1819 and 1846' according to 'British logbooks'.[64] For present purposes, however, what is particularly relevant is that Martinez's work also reveals that the Foreign Secretary became involved in matters concerning international law and these courts. For example, she points to instances of the Foreign Secretary sending opinions of the King's Advocate on points requested by the

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[59] The quote is from the decision of Lushington in *The Leucade* (1855), as cited in Waddams, *Stephen Lushington*, p. 224

[60] See generally, Martinez, *The Slave Trade and the Origins of International Human Rights Law.*

[61] Martinez, *The Slave Trade and the Origins of International Human Rights Law*, p. 6.

[62] See generally, Benton and Ford, *Rage for Order,* pp. 4-5, p. 20, and chapter 5.

[63] Martinez, *The Slave Trade and the Origins of International Human Rights Law,* p. 69.

[64] Martinez, *The Slave Trade and the Origins of International Human Rights Law,* p. 79.

judges.[65] She also gives an example of Palmerston commenting on the correctness or otherwise of the commission's decision under principles of international law.[66]

The admiralty courts may also have had some relevance for the business of the Foreign Office in this period as they too concerned international law, although not as directly as those of prize and the slave trade commissions. The Court of Admiralty in London was, as Wiswall observes, 'an instrument of the office of the Lord High Admiral', and it was distinct from the courts of common law and equity.[67] It applied admiralty law, which the Report of the Ecclesiastical Courts Commission in 1835 noted was 'founded' on 'the principles of the Civil Law'.[68] Wiswall comments on how the views of its judges changed over the course of the nineteenth century as to whether it was, in fact, a court of international law, as opposed to "municipal" law, in its 'instance' jurisdiction.[69] Routine 'instance' business was not, however, likely to have been of concern to the Foreign Office. More important, for present purposes, was the Slave Trade Act 1824, which, as Wiswall further points out, gave the Admiralty Court the power of jurisdiction in cases of bounty payments concerning the slave trade.[70] The business of the admiralty courts was also potentially material to the Foreign Secretary because of their extensive range across the world. In addition to the Court of Admiralty in London, there were the vice-admiralty courts in many overseas British

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[65] Palmerston to Commissioners to Rio de Janeiro, 26 March 1836, as cited in Martinez, *The Slave Trade and the Origins of International Human Rights Law,* note 75, p. 209, which refers, in turn, to the Correspondence with British Commissioners Relating to the Slave Trade.., Class A, 314, in B.P.P. Vol. 14.

[66] Palmerston to Commissioners to Rio de Janeiro, 8 October 1834, as cited in Martinez, *The Slave Trade and the Origins of International Human Rights Law*, note 74, pp. 208-9, which refers, in turn, to the Correspondence with British Commissioners Relating to the Slave Trade..., Class A, 147, in B.P.P. Vol. 14.

[67] F. L., Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800: an English study with American comparisons,* (Cambridge: Cambridge University Press, 1970)*,* p. 4.

[68] Waddams, *Stephen Lushington*, p. 17, citing The Report of the Ecclesiastical Courts Commission 1835, p. 65.

[69] For Wiswall, Stowell and Sir John Nicholl considered 'the Court of Admiralty in instance was a court of International Law', whereas Lushington did not: Wiswall, *The Development of Admiralty Jurisdiction,* p. 69. See also Holdsworth, *A History of English Law*, Vol. I, (3rd edn, 1922), p. 559. Wiswall notes that Browne's *Law of Admiralty* (published in 1802) listed the court's 'instance' jurisdiction as including matters such as salvage, maritime contracts made upon the sea, wages, torts at sea, and possession and restraint. Thus, as Wiswall notes, this 'instance' jurisdiction was distinct from those related to prize and certain other specific jurisdictional powers: Wiswall, *The Development of Admiralty Jurisdiction,* pp. 7-11.

[70] Wiswall, *The Development of Admiralty Jurisdiction,* p. 23.

possessions.[71] Many of these courts did not sit regularly, but equally, on the other hand, some, like Halifax, were in major maritime centres.[72]

The extensive requirement for advice on matters of international law within the Foreign Office is, in any event, evidenced by the huge numbers of legal opinions that were in fact provided to that department. McNair, in presenting his magisterial three volume 'representative selection' of the written opinions of the law officers of the Crown concerning international law, comments that 'the number of the opinions on questions of international law so obtained... runs into many thousands'.[73] Similarly, the *British Digest* refers to a letter from Sir John Harding (then, Advocate-General) to Russell in 1854, in which he estimated that the number of law officers' opinions since 1793 concerning international law 'would probably not fall much short of 7,000'.[74] The *British Digest* identifies a letter of Lord Westbury which sets out the purpose of these opinions. They were, as put by him, designed to produce 'a clear rule of action' for the government.[75] This was, Westbury continued, because 'the opinion is not to convince; it is to guide, conduct and relieve from responsibility'.[76] Apart from their use in indicating the role of international law in specific matters, the opinions also, as the *British Digest* makes clear, need to be considered as part of

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[71] A record of appointments to the vice-admiralties between 1832 and 1865 demonstrates the sheer breadth of this legal framework. There were vice-admiralty courts in this period, for example, in Antigua, Barbados, the Bahamas, Bermuda, Bombay, Calcutta, the Cape of Good Hope, Ceylon, Gibraltar, Halifax, Jamaica, Madras, Malta, Mauritius, Newfoundland, New South Wales, Sierra Leone, Tortola, British Guiana, St Helena, Canada, South Australia, New Zealand, Hong Kong, Vancouver Island, and Victoria! See HCA 30/1010, List of Appointments by place in Vice-Admiralties (1832-65), The National Archives.

[72] See, for example, the entry for Samuel Archibald concerning the vice-admiralty court at Halifax: Dictionary of Canadian Biography, Vol. VII, pp. 21-25.

[73] McNair, *International Law Opinions*, Preface, p. xix.

[74] Parry, *British Digest*, p. 269, referring to Harding to Russell, 13 September 1854, in FO 83/2280. As further evidence, Parry's edited reproduction of the law officers' opinions to the Foreign Office from 1793 to 1860, as referred to above, runs to 95 volumes, with two further volumes containing an index and commentary. Within this work, there are, for example, 78 opinions listed as concerning the United States alone between 1838 and 1845, and a further 86 for the period 1846 to 1853.

[75] Parry, *British Digest*, p. 265, referring to a letter from Lord Westbury, then Lord Chancellor, to Sir Robert Phillimore on his becoming Queen's Advocate in 1862, Westbury to Phillimore, 22 September 1862, as cited in Nash, *Life of Lord Westbury*, Vol. II, p. 48.

[76] Parry, *British Digest*, p. 265.

the British practice of foreign policy, which was itself a 'source of the law'.[77] The demand for legal involvement is also indicated by the fact that, in addition to the *written* opinions, some advice on international law appears to have been given orally in meetings.[78]

The regular need for advice on international law also resulted in a process within the Foreign Office for opinions to be requested and delivered. The two Undersecretaries of State were the individuals, as a matter of record, who instructed the law officers (by letter), but the decision on whether to take such legal advice was nevertheless it appears that of the Foreign Secretary.[79] In the case of the *Caroline*, for example, Palmerston instructed: 'Send these papers and all others received on the same subject to the Law Officers of the Crown for their early consideration and report with reference to the points adverted to in Col Off letter of 17 February'.[80] There does not, however, seem to have been any special method used by the Foreign Office for giving instructions to the law officers once it was decided to take advice. On the contrary, the evidence from the *British Digest* from a slightly later time indicates that probably the papers on relevant matters would simply have been sent to the law officers with a request for their opinion.[81] This is also consistent with Sir William Harcourt's comment from the 1870s that 'anything that was not very clear was put into a big canvas bag at the

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[77] Parry, *British Digest*, p. 243. As Parry states: 'They are produced, usually with full reference to a precise factual situation, in the full knowledge on the part of their authors that the State may, and very probably will, act on them. And they are produced by persons who are, normally, officers of State, and thus participate in the process whereby States act in the law. If their opinions do not represent the actual practice of States, which is a source of the law, they are thus nevertheless an element, or an element in the expression, of that practice'.

[78] The fee notes held in the records of the Treasury Solicitor from 1844 to 1846 indicate that advice was given in meetings, at least in that period. See for example, the following entries: TS 7/1, p. 12, and TS 7/3, p. 1, The National Archives.

[79] This is indicated by the descriptions of Bourne of the way that the Foreign Office dealt with incoming papers in this period: Bourne, *Palmerston: the Early Years*, pp. 417-418. See also the summary of a draft report into the business of the Foreign Office from 1850 and general description in *The Records of the Foreign Office,* pp. 4-5, pp. 47-48.

[80] FO 96/19/22, p. 834. See also McNair, in *International Law Opinions*, Vol. 1, p. 268, who gives a further example in which Palmerston, in a note of 15 August 1832, gives instructions to ask the King's Advocate 'whether we should not be entitled to treat as Pirates or as Enemies any Guarda Costa which captured British vessels beyond a certain distance from the Spanish coast'.

[81] Parry, *British Digest*, p. 259, referring to evidence of the Chief Clerk of the Foreign Office to the Select Committee of the House of Commons on the Diplomatic and Consular Services 1870, Report, 1870, Minutes of Evidence, 138 (C.382) (Mr Alston).

Foreign Office and sent to the law officers'.[82] On the other hand, not all instances where international law was concerned would necessarily have required specific legal advice, as opposed to instructions being issued by the Foreign Secretary based on his general knowledge of international law.[83]

The vital factor in the establishment of a serious institutional process to take account of international law was, however, that the Foreign Secretary was able to call upon professionals with suitable expertise in international law to provide legal assistance. As McNair makes clear, the Queen's Advocate (or Advocate-General) was the law officer of the Crown who provided the Foreign Secretary with the most advice on matters of international law in the early to mid-nineteenth century.[84] McNair summarises the background to the office as being that:

> in the sixteenth century the Crown developed the practice of consulting groups of civilians, members of Doctors' Commons, upon questions of international law which arose in the conduct of foreign affairs .... From about 1600 until the retirement of the last holder of the office, Sir Travers Twiss, QC, in 1872, the Crown's standing adviser on these questions was the Queen's (or King's) Advocate, who was always (or with rare exceptions) a civilian and member of Doctors' Commons.[85]

This specific role for the Queen's Advocate was probably also assisted by the fact that the office tended to be held by the same person for several or many years, as the post did not change with ministries.[86] Apart from the fact that many opinions were produced, the real depth of the Queen's Advocate's role in the period is indicated too by the high number of consultations revealed in accounting records of fees paid within the archives of the Treasury Solicitor. In three (roughly) quarterly periods from 1844 to 1846, the Queen's Advocate was

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[82] Parry, *British Digest*, pp. 262-263, referring to, and quoting from, evidence of Sir W. Harcourt to the Departmental Committee on the Legal Business of the Government, 1875, Report, 1877 (C.199) Minutes of Evidence, 460, 471-2.

[83] See, for example, a minute of Palmerston in February, 1838 instructing the Royal Navy as to what to say if they came across sealers from the United States in terms of 'the full assertion of all rights which by the Law of Nations attach to sovereignty': Palmerston 23 February 1838, FO 96/19/22, p. 1188.

[84] McNair, *International Law Opinions*, Vol. I, Preface, pp. xvii-xviii.

[85] McNair, *International Law Opinions*, Vol. I, Preface, pp. xvii- xviii.

[86] Sir John Dodson, for example, was the Queen's Advocate from 1834 to 1852, thereby holding the position throughout the whole period covered by this thesis: McNair, *International Law Opinions*, Vol. III, Appendix, pp. 402-406.

consulted a total of 190, 189, and 192 times respectively, of which 76, 67, and 36 of these 'attendances' appear to be on matters which originated from the Foreign Office.[87] These periods may, of course, not be representative, but what they suggest is consistent with the impression gained from the volume of the opinions, namely that the Queen's Advocate was regularly consulted as part of the ordinary business of the Foreign Office. The central part played by the Queen's Advocate in providing such advice is also perhaps unsurprising in light of the fact the Foreign Office had a relatively small total staff in the period.[88] Indeed, it did not obtain its own internal legal adviser until 1876.[89]

Importantly too, the Queen's Advocate was a specialist. As indicated by McNair above, the person holding the office was drawn from the members of what was then the College of Advocates, based physically in an area of London known as Doctors' Commons.[90] The members of this college were known as 'civilians', and were required to have a doctorate.[91] They practised mainly in the areas in which they had exclusive rights, which were those relating to admiralty and ecclesiastical law.[92] Some also became experts in international law, which was closely related to admiralty law. 'Civilians' were distinct from barristers, who, by contrast, worked in the courts of common law and equity.[93] The civilian advocates were also very few in number. For example, the College admitted only 66 members in the 76 years

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[87] The periods of account which have been examined are those from the 6th November, 1844 to the 31st March, 1845, 30th June, 1845 to 30th September, 1845, and 31st December, 1845 to 31st March, 1846. See generally, The National Archives, Kew, TS 7/1, pp. 1-75, TS 7/2 pp. 1-76, TS 7/3 pp. 1-69.

[88] The total staff of the Foreign Office, excluding the Foreign Secretary and the two under-secretaries, is given as 30 in 1822, and 64 in 1854: *The Records of the Foreign Office,* p. 7.

[89] Sir Julian Pauncefote was appointed Legal Assistant Under Secretary in 1876: *The Records of the Foreign Office*, p. 11, and S. Gaselee and J. A. C. Tilley, *The Foreign Office* (London: G. P. Putnam's, 1933), p.115.

[90] As to the history of the College generally see G. D. Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law*, (Oxford: Clarendon Press, 1977).

[91] See generally, D. R. Coquillette, *The Civilian Writers of Doctors' Commons, London: three centuries of juristic innovation in comparative, commercial and international law,* (Berlin: Duncker & Humbolt, c1988), and Squibb, *Doctors' Commons*, p. 54.

[92] See: D. R. Coquillette, *The Anglo-American Legal Heritage: introductory materials* (Durham, N.C.,: Carolina Academic Press c2004), p.209; Waddams, *Stephen Lushington,* p. 17, referring to p. 65 of the Report of the Ecclesiastical Courts Commission 1835 on the connection between admiralty and ecclesiastical law; and Squibb, *Doctors' Commons*, chapter VIII, for a discussion of when the exclusive rights of the 'civilians' were removed.

[93] Some members of the College were also barristers, but being called to the Bar and being admitted to the College of Advocates were separate matters giving different practising rights.

from William Scott, (the future Lord Stowell, and the brother of Lord Eldon), in 1779, to that of the last member in 1855.[94] The members of the College undoubtedly derived much work from ecclesiastical matters, which was, by nature, unconnected with international law. Nevertheless, McNair argues that the link between the 'civilians' and the provision of advice to government on international law was established early.[95]

The Queen's Advocate also advised the Foreign Secretary in some cases jointly with the Attorney-General and the Solicitor-General.[96] Evidence given to the Select Committee of the House of Commons on the Diplomatic and Consular Service in 1870 indicates that these tended to be the more important matters, or ones which also involved points of English law.[97] The Attorneys- and Solicitors- General were generally MPs and in the government, unlike the Queen's Advocate.[98] Due to changes in ministries and promotions within them, there could be a relatively quick turnover in these positions. There were, for example, eight different Attorneys-General, and ten Solicitors-General, in the period from 1834 to 1852, the years marking Sir John Dodson's period as the Queen's Advocate.[99] Again, in contrast to the civilian background of the Queen's Advocate, the Attorneys- and Solicitors- General were barristers, with backgrounds in the courts of common law and equity. The Lord Chancellor and the Judicial Committee of the Privy Council were also available, at least in theory, to give advice on international law.[100]

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[94] Appendix III, Squibb, *Doctors' Commons.* Squibb also makes clear in chapter VIII that effectively the end for the College came after the members lost their exclusive practising rights in 1857 and 1859, with the final meeting of the fellows being in 1865, albeit that technically the College continued until the death of its final member in 1912.

[95] See generally, A. D. (Lord) McNair, 'The Debt of International Law in Britain to the Civil Law and the Civilians', in McNair*, International Law Opinions*, Vol. III, Appendix, pp. 407-430.

[96] McNair, *International Law Opinions*, Vol. I, Preface, p. xvii -xviii.

[97] Parry, *British Digest*, p. 259, referring to the testimony of the Chief Clerk of the Foreign Office to the Select Committee of the House of Commons on the Diplomatic and Consular Services in 1870.

[98] See generally, Parry, *British Digest*, pp. 249-252.

[99] Computed from the information in McNair, *International Law Opinions*, Vol. III, Appendix, pp. 402-406. These are the number of individuals (i.e. a person holding the same office twice in the period has only been counted once).

[100] Parry*, British Digest*, pp. 248-249.

The Foreign Office also made use of other members of the College of Advocates on matters involving international law.[101] Sir Stephen Lushington (admitted 1808) was appointed as the judge of the Admiralty Court from 1838.[102] Lushington was an anti-slavery campaigner, and assisted the government by 'presiding over a committee in 1842 to draw up a code of instructions for British naval officers, and negotiating a treaty with France on this question in 1845'.[103] Joseph Phillimore (admitted 1804) was the King's and Queen's Advocate in the Admiralty Court from 1834 to 1855.[104] The *British Digest* notes that the Foreign Office sometimes consulted the holder of this office when the Queen's Advocate was unavailable.[105] Other members of the College who performed services include William Adams (admitted 1799), who assisted with treaty negotiations with the United States in 1814 and 1815, and Sir James Parker Deane (admitted 1840), who wrote on the law of blockade and became external legal adviser to the Foreign Office in 1872.[106] Finally, Sir Robert Phillimore (admitted 1839) and Sir Travers Twiss (admitted 1841), both of whom ultimately served as Queen's Advocate, also wrote on matters concerning international law and the United States in the 1840s, as will be seen in later chapters.[107]

Lastly, it can also be reasonably inferred that the law officers would have had the satisfactory research facilities necessary for them to give the requisite specialist opinions. Advice on international law was at the time based on treaties, evidence of past practice, and major works by noted authorities. Apart from any private library, the Queen's Advocate would have had the use of the extensive library of Doctors' Commons. The *Catalogue of the Books in the Library of the College of Advocates in Doctors' Commons* (London, 1818) shows that,

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[101] The members of the College of Advocates referred to in this paragraph were identified from Appendix III, Squibb, *Doctors' Commons.*

[102] *DNB*, Vol. 34 (Oxford, 2004), pp. 792-794.

[103] *DNB*, Vol. 34 (Oxford, 2004), pp. 792-794.

[104] *DNB*, Vol. 44, (Oxford, 2004), pp. 76-77.

[105] Parry, *British Digest*, p. 253.

[106] *DNB* Vol. 1 (Oxford, 2004), p. 272 for Adams; *DNB* Vol. 15 (Oxford, 2004), p. 636 for Parker Deane.

[107] *DNB* Vol. 44 (Oxford, 2004), pp. 78-80 for Sir Robert Phillimore, and *DNB* Vol. 55 (Oxford, 2004), pp. 736-739 for Sir Travers Twiss. Their relevant publications are discussed later in the thesis.

in 1818, the library contained many books on international law.[108] These included works by Bynkershock, Gentilis, Grotius, Heinecci, Pufendorf, Seldenus, Vattel, and Zouch, as well as 66 volumes on cases on appeal in prize from 1780 to 1817.[109] The research position for the Attorney- and Solicitor- General is not so clear, but Lord Campbell's comment that he had given an opinion on a matter of international law after 'reading all that is to be found upon the subject' would indicate that he, at any rate, was able to access satisfactory resources when needed.[110] The law officers do not, however, appear to have been assisted by any regular system of formalised records or archives relating to their offices.[111] Copies of their reports were nevertheless retained in the relevant files of the Foreign Office, where they would have been available for departmental research.[112]

Moreover, the Foreign Office itself also contained research materials on matters of international law. It would appear from the first catalogue of printed books in the Foreign Office in 1864 that the Foreign Office Library was well-stocked with relevant works.[113] The subject index of this book listed 105 works under 'International Law', although it is not

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[108] *Catalogue of the Books in the Library of the College of Advocates in Doctors' Commons* (London, 1818), reviewed in the Guildhall Library, London. The reference for this work was obtained from Squibb, *Doctors' Commons,* p. 91.

[109] *Catalogue of the Books in the Library of the College of Advocates in Doctors' Commons* (London, 1818), reviewed in the Guildhall Library, London. Interestingly, it appears from the *Catalogue* that the library did not then include works by von Martens, Kant, Kluber, Mackintosh or Wolf, though they could, of course, have been added before or during the period covered by the thesis.

[110] Mrs Hardcastle, (ed), *The Life of Lord Campbell*, Vol. II (London: John Murray, 1881), p.119. Campbell was the Attorney-General from 1834 to 1841.

[111] Although it concerned a somewhat later period than that covered by this thesis, see the amusing account by Sir William Harcourt of the problems he faced in terms of departmental records: 'What happened when I was Solicitor-General [1873] was, that two cabs arrived filled with a great number of miscellaneous odd volumes, which were tumbled out into the street, and were ultimately brought up into my room; these were called the archives of the Solicitor-General. Instead of there being, as you would naturally suppose, some office where the opinions of the former law officers would be filed...the whole thing was in the greatest confusion', Parry, *British Digest*, p. 267, quoting Sir William Harcourt's testimony to the Departmental Committee of 1875, Report etc., Minutes of Evidence, 453-4.

[112] See G. Marston, 'Law Officers' Opinions to the Foreign Office 1793-1860 - The History of the F.O. 83 Series', in Parry, *Law Officers' Opinions*, Vol 96, pp. xxi to xxviii though, for a summary of the process under which the law officers' opinions were removed from the relevant Foreign Office files in the early twentieth century.

[113] *Catalogue of Printed Books in the Library of the Foreign Office, 31st December, 1864,* (London, 1864). A telephone discussion on 22/3/16 with Foyle's Special Collection Library at King's College, London, which houses the historic Foreign Office Library, confirmed that this 1864 publication was, as far as they were aware, the first printed catalogue.

possible to know when these were acquired. The works possessed by the library at that point included, for example, works by Pardessus, Grotius, Selden, Pufendorff, Vattel, von Martens, Kluber, Manning, Wheaton, Phillimore and Twiss. It is nevertheless unclear, however, to what extent the books in the library were actually used, in practice, for researching international law in this period. The majority of such advice was, as seen, provided externally by the Queen's Advocate. More fundamentally, later comments, by Edward Hertslet (Librarian of the Foreign Office from 1857 to 1896) and Lord Hammond (Permanent Under-Secretary of State of the Foreign Office from 1854 to 1873), suggest that there was no adequate classification system in the library, which may have prevented it being used in any event for serious research.[114]

The Foreign Office was able, however, to provide internal research into treaties and past correspondence on matters involving international law. Lewis Hertslet, the Librarian from 1810-1857, introduced the publication of two series, *British Foreign and State Papers*, and *Hertslet's Commercial and Slave Trade Treaties*.[115] As Hertslet's *Recollections of the Old Foreign Office* reports, this seems to have led, in turn, to a research role for Lewis Hertslet himself:

> In consequence of this deep research into treaties, Lewis Hertslet soon became the standing authority on all subjects involving international, historical, or geographical points which affected British interests, and the numerous reports... are carefully preserved in the archives of the Foreign Office, and fully indexed.[116]

This type of internal research could also, on occasion, involve others more widely across the Foreign Office. Bourne, for example, notes Hertslet as recalling that, at the time of the Don Pacifico matter in 1850, 'they all had to search through some two or three thousand volumes of manuscripts'.[117] Thus, as the *British Digest* notes, 'much that was in reality legal work

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[114] See E. Hertslet, *Recollections of the Old Foreign Office*, (London: J. Murray, 1901, pp. 27-28, and citing Lord Hammond, in evidence before the Committee of the House of Commons on Diplomatic and Consular Services, 1878.

[115] Hertslet, *Recollections*, pp. 145-146. The dates for the start of these publications are given in *The Records of the Foreign Office 1782-1939*, p.20, as 1824 and 1820 respectively.

[116] Hertslet, *Recollections*, p. 147.

[117] Bourne, *Palmerston: The Early Years*, p. 419.

was done in the Librarian's Department, as the numerous Library Memoranda reproduced in every volume of this work must abundantly show'.[118]

'*Cornerstone' principles*

The combination of the political acceptance of the system of international law, and the associated workings of the Foreign Office, also had one vital further consequence. This was the emergence of a framework of legal principles upon which British foreign policy practice to the United States was based. These principles arose naturally from the process of ministers requesting advice over time on international law in respect of a wide range of international situations. The resulting opinions matter because they were grounded upon the principles of international law accepted by the law officers of the British state. Taken together, therefore, they gave rise to a legal framework for British policy, albeit that particular ministers may not have acknowledged, or even been aware of, the origins of the legal structure within which Britain was operating. Significantly, the core principles involved were also not just those consistent with the current positivist-leaning conception of international law of the then British ministers. They were instead based on the long-term application to the facts by the Foreign Office of the 'law of nations', and they, thereby, also contained natural law elements concerning the duties of one's own state, as well those applicable to the relations between states.[119] As will be seen, this point was to be very material for policy concerning the United States.

This section sets out the 'cornerstone' principles which are considered to form the framework for the 'institutional practice' of Britain within the British-American relationship. For ease of analysis, these have been placed into six themes. The themes are not original in themselves. They are formulated, in the light of the primary sources reviewed, from the subject categorisations and selected extracts in McNair. Rather, the aim is to take the work of McNair from a legal discipline, and put it into into a form which can then be used in political history to consider the influence of international law upon foreign policy. A further intention of the section is also to demonstrate the link between the main principles in each

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[118] Parry, *British Digest*, p. 174.

[119] For example, the principles considered in British foreign policy to govern the ownership of territory in the North American continent were derived from natural law, as discussed below.

theme and the work of Vattel.[120] The purpose of this is to show that British practice was, at the very least, reflective of ideas within wider international law, even if the positions taken in Britain were not always internationally agreed. The actual manner in which these principles impacted on the particular objectives of British foreign policy to the United States will then be considered in the next chapter.

First, is the notion of the 'state'. British foreign policy worked from the basic principle that international law applied to states, at least when a state was, as in the case of the United States, a member of the family of 'civilised' nations.[121] This in itself was uncontroversial, and was consistent with Vattel's comment in his Preliminaries that: 'The Law of Nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights'.[122] The British 'state', for the purposes of foreign policy, encompassed the territory of Britain together, broadly, with its empire.[123] Similarly, the territory within a federation, such as the United States, was also regarded as being within a single 'state'.[124] There was also, though, an idea of the state in the abstract as a 'legal person' separate from territory, ruler, or people, but nevertheless in what was, from a practical viewpoint, a necessary relationship to them. Marriott, the King's Advocate in 1764, expressed the distinction in an opinion by arguing that 'Sovereigns' were 'Heads of a

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[120] Vattel was selected because, as noted in footnote 9 of the Introduction, he was the main jurist of international law referred to in the diplomatic correspondence etc. reviewed for this thesis. Chitty's 1834 edition of Vattel has been used for this purpose: it was a British edition close in time to the period, it also contained practical notes by Chitty, and it was recommended at the time by Manning, in *Commentaries on the Law of Nations*, p. 36. See also footnote 9 of the Introduction.

[121] See the discussion above in the section '*Political support and politics*' on the issue of the 'civilised'.

[122] Vattel, *Law of Nations*, Preliminaries, S3.

[123] British possessions overseas (except India) were described for the period 1860-1914 as being ' regarded both internationally and internally as forming part of the State': Anson, *Law and Custom of the Constitution*, Vol. 2, *The Crown* (4th edn, 1935), Part II, p. 131, as referred to in Parry, *British Digest,* p. 16. This was the formal practice by which Britain conducted its international relations, and, as such, is distinct from the argument of Benton and Ford that viewing empires as simply single 'states' misses the significance of their role in the development of international law: Benton and Ford, *Rage for Order,* pp. 20-21.

[124] McNair refers to the McLeod case, discussed below, in chapter 4, and an opinion of Dodson concerning claims against the government of Brazil in 1839, which assumed that Monte Video was part of the Brazilian Empire, Dodson, 17 December 1839, FO 83//2237 [Brazil]: McNair, *International Law Opinions*, Vol. I, p. 36.

general Body of whose National Rights committed to their Trust by Providence they are the sacred Depositories and perpetual Guardians'.[125]

This idea of the state as a 'general Body' was consistent with two further related principles, which were important for British foreign policy to the United States. The first was that it allowed a legal analysis that obligations entered into at any time by a state were 'national' to that state, as opposed to 'personal' to an individual ruler or government.[126] Marriott argued, in the same opinion as just referred to, that this was necessary both for 'confidence' in international relations and 'security of property' in commercial treaties. He wrote:

> [Personal obligations] were rejected. Because it cannot fail to place on the most unstable Foundations the repose of Europe and to destroy that Confidence among all Orders of Mankind which is necessary to the Glory of Sovereigns, and the Intercourse of Nations.
>
> And Treaties of Commerce would become Engagements of the most uncertain Nature possible; thereby destroying that which is the Foundation or rather the very Life and Soul of all Commercial Connections, Security of Property.[127]

This principle was particularly relevant for Britain in the Western Hemisphere, given the plethora of new states and changes of constitution following the breakdown of the Spanish Empire in the early nineteenth century. It allowed Britain to forge with confidence trading relations with new states in the Americas. As Dodson later argued in the context of a British dispute with Mexico in 1847: 'A Nation cannot by a change of constitution, or form of government, shake off its liabilities, pecuniary or otherwise'.[128]

The second principle related to the idea of the state as a 'general Body' was that the state itself had a duty of self-preservation. This notion only made real sense in the context of a state which was a 'legal person', or, in other words, an entity free from life and death. Jenner, the then King's Advocate, wrote, in an 1829 opinion, that 'the first and paramount

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[125] McNair, *International Law Opinions*, Vol. I, pp. 4-5, referring to the report of Marriott, 30 November 1764.

[126] McNair, *International Law Opinions*, Vol. I, p. 4.

[127] McNair, *International Law Opinions*, Vol. I, p. 4-5, referring to the report of Marriott, 30 November 1764.

[128] Dodson, FO 83/2304 [Mexico], as referred to in McNair, *International Law Opinions*, Vol. I, p. 6-7.

duty of every nation is that of self-preservation'.[129] This had clear implications for the remaining British possessions in the Western Hemisphere. Again, British practice here was consistent with Vattel, who also linked the duty of self-preservation to the state's duty of protection to its members by stating that: 'If a nation is obliged to preserve itself, it is no less obliged carefully to preserve all its members'.[130] Indeed, for Vattel, a state could not 'abandon a province, a town, or even a single individual', except on grounds of 'necessity' or 'public safety'.[131] The 'due return' for this protection in Britain, according to Chitty in his 1834 edition of Vattel, was the British concept of the permanent allegiance of the subject.[132] British practice also recognised that the duty of self-preservation could itself justify action by the state which would otherwise be unlawful under international law. Jenner made this clear, when he continued in the above opinion, that 'the law of nations will sanction the adoption of any measure, which may be necessary to secure this great object [self-preservation], although it may in some degree infringe upon the rights of others'. [133] Indeed, McNair identifies the justifications of 'self-defence or self-preservation or state necessity' as being present in British practice.[134]

Second, is the 'sovereign', or independent, nature of the state. The principle that a state had the sole right to conduct affairs on its territory was an important influence on British foreign policy in this period. Its chief consequence, in the Western Hemisphere and elsewhere, was in the respect considered as due to British territory by others, or, conversely, by Britain to the territory of another state. This was highly relevant in the disputed border areas between the United States and Canada. McNair sets out extracts from the legal opinions provided to the Foreign Office, which make it clear that British practice was that no state possessed the right to take 'executive', 'administrative' or 'judicial' 'action' in the territory (or jurisdiction) of

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[129] Jenner, 31 October 1829, FO 83/2302, [Mexico], as referred to in McNair, *International Law Opinions*, Vol. II, p. 231.

[130] Vattel, *Law of Nations*, Book 1, S17.

[131] Vattel, *Law of Nations,* Book 1, S17.

[132] Vattel, *Law of Nations,* Book 1, Note 15, S17.

[133] Jenner, 31 October 1829, FO 83/2302, [Mexico], as referred to in McNair, *International Law Opinions*, Vol. II, p. 231.

[134] McNair, *International Law Opinions*, Vol. II, p. 221.

another.[135] This practice was consistent with Vattel's idea of 'empire', in which the 'empire' or 'right of sovereign command' was that 'by which the nation directs and regulates at its pleasure everything that passes in the country'.[136] For Vattel, 'empire' was integral to the establishment of the state, which was itself justified by the necessity of land appropriation for cultivation, and where the duty of cultivation itself was 'an obligation imposed by nature on mankind'.[137] 'Respect' for territory, and the related 'empire', were central to Vattel, and, accordingly, he called on all to 'abstain from every act contrary to the rights of the sovereign', bearing in mind that 'there is nothing more generally acknowledged as an injury that ought to be vigorously repelled by every state that would not suffer itself to be oppressed' than 'a violation of territory'.[138]

British practice also recognised the associated principle that 'sovereignty' meant that one state should not interfere in the internal affairs of another. Jenner, the King's Advocate, expressly referred to Vattel when he set out one aspect of the principle in an 1831 opinion. He wrote:

> 'Foreign Nations' says Vattel (Book III, c.18, s296) 'are not to interfere in the constitutional Government of an independent State. It is not for them to judge between contending citizens - nor between the Prince and his subjects - to them the two parties are equally independent of their authority.'[139]

Indeed, Vattel saw the right to govern without foreign interference as 'an evident consequence of the liberty and independence of nations', and for him, thus, 'no state has the smallest right to interfere in the government of another'.[140] The principle, known as one of 'non-interference' became a central tenet of British foreign policy in this period.[141]

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[135] McNair, *International Law Opinions*, Vol. I, pp. 69-88. McNair's full list of categories is: 'legislative function', 'executive and administrative action', 'judicial action', 'action by armed forces... and public ships', and action by 'diplomatic agents'.

[136] Vattel, *Law of Nations,* Book 1, S204.

[137] Vattel, *Law of Nations,* Book 1, S81, S203, S204. The references to 'nature' in S81 indicate the natural law origins of Vattel's thinking on this point.

[138] Vattel, *Law of Nations*, Book II, S93.

[139] Jenner, 18 May 1831, FO 83/2230 [Austria], as quoted by McNair, A., *International Law Opinions*, Vol. II, p337-338.

[140] Vattel, *Law of Nations,* Book II, S54.

[141] Castlereagh's State Paper of May, 1820 is one example.

Palmerston was, therefore, simply expressing in political terms the legal analysis of Jenner and Vattel when he wrote in 1836 that:

> The despotic powers contend that they have a right to proscribe to other nations what shall and shall not be their form of government. In England to the contrary, it has always been maintained by all with few exceptions, that every nation has a right to choose its own form of government and institutions, provided always that it abstained from attacking its neighbours.[142]

Nevertheless, as already mentioned, the principle of 'non-interference' became controversial in British politics because, despite its apparent clarity, it was always considered subject to 'the universal exception, that every state has a right to protect itself against great mischief, or even imminent danger, arising out of the domestic affairs of another'.[143] A further additional difficulty was the question of what did and what did not constitute 'interference', which, as will be seen, was to be particularly relevant in policy to the United States concerning Texas. Whilst these points did not destroy the general principle, they gave great scope for political argument on the facts and circumstances of particular situations.

Third, is the ownership of 'unoccupied' land.[144] The principle that the territory of a state could be added to through the 'effective occupation' of unoccupied land was an important part of the practice of British foreign policy.[145] It provided a distinct and extra right to that of the gaining of territory by treaties of 'cession on conquest', or as part of wider agreements.[146] It was of global significance to Britain because it both underpinned the British ownership of existing possessions, and allowed for further expansion, at a time when much land in the world was, of course, still considered as unoccupied. The principle was also of central importance in the dispute with the United States over Oregon. The main defining position in British practice in this period was that 'effective occupation' was necessary to secure the ownership of unoccupied land, as opposed to the mere 'discovery' of

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[142] Palmerston to Melbourne, 24 May 1836, Palmerston Papers, ME/523.

[143] *Edinburgh Review*, 'History of the Progress of the Law of Nations', pp. 364-366.

[144] 'Unoccupied' can be taken as meaning, for present purposes, not under the sovereignty of a state recognised by Britain.

[145] See generally, McNair, *International Law Opinions*, Vol. I, p. 285; Grewe, *The Epochs,* p. 545.

[146] See generally, McNair, *International Law Opinions*, Vol. I, p. 289.

it.[147] Dodson, the then Queen's Advocate, for example, argued this in the context of Kerguelen Island, which was the subject of discussion between Britain and France in 1842.[148] Placing his analysis on the authority of Vattel, he stated:

> The French, it is true, were the first to discover and take formal possession of Kerguelen; and if they had followed this up by a real occupation of it, within any reasonable space of time, there could be no doubt that their title would have been good and valid; but inasmuch as the Island was unoccupied when visited and surveyed by the English Commander (Captain Cook) in 1777, and has remained so ever since, I conceive that it is now open to any nation to appropriate the Island to itself by actually occupying the same (Vattel, liv, I, c.18, ss207,208).[149]

British practice also worked on the premise that the ownership of unoccupied land could, under international law, be taken from indigenous peoples. This appears simply to have been assumed.

British practice on unoccupied land was consistent with Vattel, as suggested by Dodson's opinion on Kerguelen Island. Vattel, again, appears to have grounded his ideas in natural law, as with the 'right of empire'. He saw 'the cultivation of the soil' as 'an obligation imposed by nature on mankind', and from which arose the rights of 'property' and 'dominion' over 'portions of land'.[150] For him, thus, it was the use of the land which justified the 'property' and 'dominion', and this, in turn, also then formed the basis of his positions on effective occupation and indigenous peoples. In the section referred to by Dodson on Kerguelen, Vattel, accordingly, emphasised the requirement for 'use', stating that:

> it is questioned whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy ... . It is not difficult to determine that such a pretension would be an absolute infringement of the natural rights of men, and repugnant to the views of nature, which ... gives no nation a right to appropriate to itself a

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[147] McNair summarises the position as follows: 'The Reports by the Law Officers are surprisingly scanty. They may be said to reflect or support the general opinion that discovery in itself is not a root of title but merely creates a right, which perishes after the lapse of a reasonable time, to establish a title to sovereignty by means of an effective occupation; and that effective occupation involves some course of administrative action of a permanent or frequently repeated character and, where it is humanly possible, a permanent settlement', McNair, *International Law Opinions*, Vol. I, p. 285.

[148] Kerguelen Island is in the southern Indian Ocean.

[149] Dodson, 27 April 1842, FO 83/2269, as referred to in McNair, *International Law Opinions*, Vol. I, p. 285-286.

[150] Vattel, *Law of Nations*, Book I, S81, S203.

> country, except for the purpose of making use of it... . The law of nations will, therefore, not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use.[151]

Similarly, Vattel placed 'use' at the centre of his defence of the taking of land from indigenous peoples, arguing that:

> Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands.[152]

Thus, for him, there was a clear conclusion that: 'the people of Europe, ... finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies'.[153]

Fourth, is the system of international commerce. Britain was a maritime power, and this, therefore, mattered throughout the world. The leading principle was that states possessed the right to decide whether or not to allow their subjects or citizens to trade with those of a foreign state.[154] This was so central a point of international law in the period that it appears to have been assumed in British foreign policy practice. Chitty, at least, nevertheless expressly confirmed his recognition of the principle by stating in his 1834 edition of Vattel that 'in truth each state has a right, when so disposed, to decline any commercial intercourse with other states'.[155] British acceptance of the point can also be inferred from the system operated by Britain in its own empire, under which British possessions were not able to trade freely with foreign states.[156] Similarly, international law did not restrict, through general principles, the right of a state to regulate its trade with other states through the use of duties or other stipulations, as well as by direct prohibition. This position again reflected Vattel,

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[151] Vattel, *Law of Nations*, Book 1, S208.

[152] Vattel, *Law of Nations*, Book I, S81.

[153] Vattel, *Law of Nations*, Book 1, S209.

[154] There was, however, as noted in the Introduction, a contrary argument in the context of British policy to 'non-western societies': see footnote 104 of the Introduction and the associated discussion.

[155] Chitty, note 36, Vattel, *Law of Nations,* Book 1, following S87.

[156] Chitty, note 37, Vattel, *Law of Nations,* Book 1, following S92.

who considered that, whilst there was a 'general obligation incumbent on nations reciprocally to cultivate commerce', the obligation on one state to trade with another was merely 'imperfect', meaning, in turn, that the corresponding trading right of the other state was also 'imperfect'.[157] For him, therefore, it was up to an individual state 'to permit... [trade with another]... under such conditions as she shall think proper'.[158] It is important to recognise, however, that this only concerned a state's own trading position. International law did not, in peace, permit one state to restrict or prevent any trade between other states, a point termed by Chitty as 'freedom of trade'.[159] Consistently with this, the slave trade was not unlawful under the general principles of international law.[160]

The principles of international law underlying this commercial system gave rise to two further associated features of British foreign policy practice. The first of these was that Britain used commercial treaties with other states as a way of securing trading rights, which were not otherwise available under general international law.[161] This was a common international practice in the period, and the use of such treaties was considered to be one way in which 'perfect' trading rights could acquired.[162] The result was that the negotiation and operation of such treaties came, in many instances, to be at the heart of British foreign policy. As will be seen in the next chapter, these agreements included ones between Britain and the United States. The other feature was that Britain was largely unconcerned by the commercial position undertaken by those investing or trading overseas. There was certainly no general protection under international law for ordinary commercial risk, and the British

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[157] Vattel, *Law of Nations,* Book II, S21-S25.

[158] Vattel, *Law of Nations,* Book 1, S92.

[159] Chitty, note 98, Vattel, *Law of Nations,* Book II, re S24.

[160] An example of a Report carrying the British view is that of Dodson, Campbell, and Rolfe, 9 September 1837: 'There is no occasion to deny that slavery may be a lawful status, or to contend that the transport of slaves from one state to another according to the municipal law of the state is contrary to the law of nations', re the *Enterprise*, as quoted by McNair, *International Law Opinions*, Vol. II, pp. 83-84.

[161] Commercial treaties were popular because, 'the principles on which commercial treaties ought to be framed' were 'to remove restraints, to ensure a reciprocity as relates to shipping, to promote exchanges, to give to foreigners the means of selling in our ports that they may have inducements and means to buy': 'Foreign Policy of the Government', *Edinburgh Review*, Vol. LXXI, (1840), Article VIII, pp. 545-593 at p. 569.

[162] Vattel, Book 1, *Law of Nations*, S93.

state, accordingly, generally accepted no responsibility for this type of commercial loss.[163] Vattel, though, as Miles observes, did provide the basis for a potential right for the state to intervene in certain cases if someone 'uses a citizen ill'.[164]

Fifth, is the freedom of the high seas. British practice supported the principle of international law that the high seas were available for use by the vessels of all states, which was clearly of global importance to a commercial maritime state such as Britain. This notion of free use was grounded on the view, in turn, that the high seas were not subject to ownership by any state. As Nicholl, the then King's Advocate, stated in an opinion from 1806: 'The general principle is that the High Seas are extra-territorial. There is no occupancy and possession of them, which is the basis of territorial dominion'.[165] British practice here was reflecting what Bederman sets out as the result, in favour of the freedom of the seas, of the seventeenth-century conflict between the ideas of, in particular, Grotius in *Mare liberum* and Selden in *Mare Clausum.*[166] It was also again, consistent with Vattel, who viewed the use of the high seas as being for navigation and fishing, and who stated that:

> It is manifest that the use of the open sea ... is innocent and inexhaustible.... No nation, therefore has the right to take possession of the open sea, or claim the sole use of it, to the exclusion of other nations.[167]

British practice, however, also supported the associated principle that the seas within three nautical miles of a coast were, generally, as an exception, to be regarded as 'territorial' waters, with only the seas beyond thereby being the 'high seas'.[168] Again, this was a

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[163] For example, see the comment by Palmerston in respect of those with losses on Mississippi State bonds: 'Persons who buy Foreign Securities do is at their own risk and must abide the consequences': Palmerston note, 23 May 1841, FO 5/372, fol. 198. See also, Jenner, 27 July, 1831, McNair, International Law Opinions, Vol. II, p. 201.

[164] Miles, K., Paper presented in the 'Legal Histories beyond the State' series, Lauterpacht Centre, University of Cambridge, 29 November 2017, 'Constructing International Law: Property, Commerce, and "Expectations" ', referring to Vattel, *Law of Nations*, Book II, S71.

[165] Nicholl, 17 November 1806, as referred to in McNair, *International Law Opinions*, Vol. I, p. 331.

[166] D. Bederman, 'The Sea', in Fassbender and Peters, *The Oxford Handbook*, Part II, chapter 15, pp. 365-369.

[167] Vattel, *Law of Nations*, Book 1, S281, S282.

[168] McNair refers to an opinion of Dodson, in the context of relations with Russia, which asserts the three mile limit: Dodson, 28 November 1836, FO 83/2332: McNair, *International Law Opinions*, Vol. I, pp. 230-231.

position which reflected Vattel, who considered that coastal waters could be treated as within the 'dominion' of the adjacent state up to the range of a 'cannon shot', justified on the grounds of 'safety' and it being 'as far... as her power is able to assert it [the dominion]'.[169]

Importantly, the law officers of the Crown also appear to have, broadly, defended the principles behind the 'freedom of the seas' in two contentious situations in the early to mid-nineteenth century. The most important example, for present purposes, concerned the so-called British claim for a 'right of visit' in order to check the nationality of a ship suspected of raising American colours falsely, which arose in the context of the slave trade. The developments on this issue concerning the United States, and the role of international law within them, are discussed further in chapter 6. For present purposes, however, it suffices to say that British policy to the United States followed the principle that, as put by Dodson, the then King's Advocate, in 1836: 'the right of visitation and search upon the high seas does not exist in time of peace unless specifically conceded by treaty'.[170] Thus, when Lambert rightly comments that 'Britain refused to compromise' on the question of 'legal control' of the seas, this must nevertheless be seen within the context that, at least in this case, the British state did nevertheless conform its practice to legal advice.[171] A further instance is provided by the concept of 'piracy'. 'Piracy' was significant because, as Harding later confirmed in an opinion, British practice recognised that the ships of pirates could be seized by the forces of any state on the grounds that piracy under international law was 'an offence against all nations, and punishable by all nations'.[172] Indeed, Grewe comments that the British used the concept of piracy to 'adopt the role of an international maritime police force'.[173] Nevertheless, the law officers of the Crown do not appear, from the examples set out in

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[169] Vattel, *Law of Nations*, Book 1, S289.

[170] Dodson, 18 June 1836, FO 83/2286, as referred to in McNair, *International Law Opinions*, Vol. I, p. 231.

[171] Lambert, A. 'Winning without Fighting', p. 167.

[172] Harding, 15 February 1854, FO 83/2209, as referred to in McNair, International Law Opinions, Vol. I, pp. 271-272.

[173] Grewe, *The Epochs*, p. 552

McNair, automatically to have given the term an expansive meaning.[174] Chapter 4 also gives a further example of rejection in the context of the Canadian border disturbances.

Sixth, and finally, is the effect of war on trade. British practice supported the principle within international law that trade was illegal between the subjects of the particular states at war.[175] Nicholl, the then King's Advocate, stated the British view of the position in an 1806 opinion:

> By the rule of the law of nations, to which I refer, all commercial intercourse between subjects of belligerent states becomes interdicted immediately on the existence of war... . Any subject, carrying on such an intercourse, violates his own allegiance to his own sovereign, and his duty to his own state.[176]

This provided, self-evidently, a strong reason for avoiding war if at all possible with any states throughout the world with whom Britain had a strong trading relationship. British practice nevertheless, conversely, also supported other legal principles which gave significant additional rights to states at war, all of which had the potential to disrupt the trade of an enemy. Lambert highlights the importance of blockade, commenting that it 'enabled the British to sweep the seas of enemy commerce, capture their seamen and destroy their economies'.[177] McNair also includes a summary of the 'principles and practice followed by British prize courts', as sent to Jay of the United States, by Scott and Nicholl, on the 10 September 1794.[178] These make clear that British practice was that war gave a belligerent the right to seize the ships of enemies and the property onboard as prize (excluding the property of neutrals unless it was contraband). Significantly, the principles also included a

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[174] McNair gives three examples of the law officers stating that matters were not piracy: from 1832 concerning a query by Palmerston to treat Spanish Guarda Costa as pirates, from 1847 concerning persons guilty of robbery in rivers in Turkey, and from 1848 regarding a 'rebel Venezuelan warship': McNair, *International Law Opinions*, Vol. I, pp. 268-271.

[175] Grewe comments that the British-American conception of war 'was guided by the idea of a maritime war aimed at exerting economic pressure', which 'also affected legal relations between individuals', and contrasts this to a continental conception of war as a 'dispute between states', which did not 'affect legal relations between the individual subjects of the belligerent parties': Grewe, *The Epochs*, pp. 534-535.

[176] Nicholl, 9 November 1806, FO 83/2332, as referred to in McNair, *International Law Opinions*, Vol. III, pp. 17-18. See also Chitty, note 147, Vattel, *Law of Nations*, Book III, in respect of chapter 5.

[177] Lambert, A., 'Winning without Fighting', p. 167.

[178] McNair, *International Law Opinions*, Vol. III, pp. 64-66.

right for belligerents in war to search the ships of neutrals for contraband or, in this period (prior to the 1856 Paris agreement) other enemy property.

British practice also supported the related principles of international law concerning the position of neutrals during war. These were of particular relevance for Britain in the period under consideration, as this was a time when it was not involved in a war with a major power. There were two principles of particular relevance for present purposes. The basic position was that a state not involved in a particular war was considered to have duties of neutrality between the belligerents. Jenner, the then King's Advocate, referred to this in an 1829 opinion when he stated that:

> Now one of the first duties which the law of nations imposes upon a neutral power is, that it shall carry itself equally between both belligerents, and that it shall not permit its territory to be made use of by either party for the purposes of war against the other.[179]

The second point is that, as Jenner also highlighted in a further opinion, this principle was not, however, considered as preventing 'the subjects of the neutral nations' from nevertheless being allowed to trade with parties within both belligerent states.[180] This, Jenner made clear, applied equally to trade in contraband and non-contraband goods, on the grounds that the 'remedy' within the 'law of Nations' for any supply of contraband was instead the right of the belligerent to search for, and seize, it.[181]

Conclusion

This chapter has established that international law was part of the institutional practice of British foreign policy to the United States in the period. Ministers supported the use of international law. The Queen's Advocate and other law officers advised the Foreign Office regularly on points of international law. British foreign policy practice drew on a settled framework of legal principles established over time. Undoubtedly, thus, international law

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[179] Jenner, 18 March 1829, (FO 83/2322), as referred to in McNair, *International Law Opinions*, Vol. II, pp. 340-349.

[180] Jenner, 19 July 1832, (FO 83/2323), as referred to in McNair, *International Law Opinions*, Vol. III, pp. 136-137

[181] Jenner, 19 July 1832, (FO 83/2323), as referred to in McNair, *International Law Opinions*, Vol. III, pp. 136-137.

occupied a position within the British state that meant that it was capable of making an impact on policy to the United States. How it made that impact will be examined in the next chapter, but this role at least makes clear why Chitty envisaged in the Preface to his 1834 edition of Vattel that international law would form part of the 'study of sovereigns and statesmen'.[182]

[182] Vattel, *Law of Nations*, Preface.

3. **The Ways in which International Law made an Impact on British Foreign Policy to the United States**

When British governments of the period encountered the United States, they met within the bounds of a relationship framed by international law. Treaties governed how Britain and the United States interacted on many of the practical issues arising from American independence. Indeed, the agreements made after the War of 1812 had even effectively refreshed the aim in 1783 for a 'beneficial and satisfactory intercourse'.[1] Furthermore, principles of international law effectively circumscribed how Britain could act in its relations with the United States. Britain's overall support for the system of international law placed inevitable constraints on policy derived from the legal rules within its practice. Lastly, British diplomatic records make clear that Britain faced, in disputes with the United States, an adversary respectful of international law. The United States was, of course, necessarily a party to the treaties it had entered into with Britain, but it also regularly raised points of legal principle in contentious matters within the British-American relationship. The purpose of this chapter, then, is to examine how, from this widely-based level of presence, international law made its impact on British policy.

The chapter develops two main arguments. The first contends that international law influenced the nature of British objectives towards the United States - or, in other words, shaped the way in which Britain sought to relate to American issues. A combination of Britain's treaty rights and obligations, and the principles of law within British practice, guided both the direction of the policy aims, and how practically they could be achieved.[2] British objectives concerning imperial possessions, commerce, the slave trade, and peace, operated, as a result, within broadly defined limits - simply because so much had already been decided or become established within British practice. Importantly, British objectives also had to accommodate the aspiration to resolve technical disputes over the interpretation of several treaty provisions, which were points entirely derived from international law. The second argues that international law also affected policy - in the way it operated - because it was at the heart of how disputes were handled in the British-American relationship. Reciprocal treaty rights and obligations, and American support for similar key legal

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[1] Preamble to the Definitive Treaty of Peace, 1783.

[2] The main principles of international law concerned within British practice were summarised in the last section of chapter 2.

principles, resulted in British policy working within what was effectively a legal framework shared with the United States. Law and legal rights found themselves, therefore, at the centre of the way Britain dealt practically with the United States on a day to day basis.

Introductory Points

Before developing these contentions further in the main sections, there are, however, three brief general points on the nature of the arguments in the chapter which can usefully be made by way of introduction.

First, the chapter uses a four-way categorisation of the main British objectives towards the United States in the period. In the order of presentation, these are the maintenance of the British possessions in North America, the expansion of commerce, the suppression of the slave trade, and the keeping of peace. This list of objectives is not intended to be novel, but is, rather, simply a broad summary of the principal policy aims apparent from the British diplomatic papers concerning the United States and the relevant historiography. Indeed, why these objectives mattered to Britain is well-covered ground. The retention of Canada and the Maritime Provinces was viewed as essential to the British control of the Atlantic Ocean, as well as being important in its own right.[3] Trade was at the heart of British action in the Western Hemisphere.[4] The suppression of the Atlantic slave trade was a wider British policy, which only affected British-American relations because the United States was perceived to be blocking its success through disputes over maritime rights.[5] Lastly, as an overall objective, peace gave greater security to the British possessions on the North American continent, favoured trade, and was more likely than war to preserve a favourable

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[3] On the perceived importance of Canada and the Maritime Provinces: Lambert points out that the British government wanted to retain Canada for, amongst other things, its wood and food resources, and commercial marine, 'Winning without Fighting', p. 172; Bourne notes the 'very special attention' given to Halifax and Bermuda, and the view that Canada and the Maritime Provinces were important for British naval power, *Britain and the Balance of Power,* p. 47, p. 54, and p. 57.

[4] British trading and investment interests involved both the United States and the newly independent states in central and southern America formed after the collapse of Spanish America.

[5] On the British-American dispute over the slave trade, see the further discussion in chapter 6, and on the wider British policy against the slave trade, see Martinez, *The Slave Trade and the Origins of International Human Rights Law*.

status quo.[6] Others may, of course, present British objectives differently for distinct purposes, but the chapter is not concerned with possible varying classifications. The objectives are merely a convenient and reasonable means through which the influence of international law can be demonstrated.

Second, the chapter brings out the twofold impact on policy of the treaties between Britain and the United States. Primarily, of course, the agreements constructed a British-American relationship that was both initially established, and then largely defined, by treaty law. In total, eight major aspects of the British-American relationship were covered in the seven main agreements.[7] The matters dealt with included mutual recognition, territory, trade, indigenous peoples, slavery, defence, fishing, and arbitration, with many clauses providing for the practical effects of separating the United States from the British Empire. In effect, therefore, the treaties created an enormous 'contract' governing how Britain and the United States were to relate to each other. British policy objectives going forward, necessarily, also needed to be developed around all the resulting treaty rights and obligations. In this way, the wide scope of the treaties highlights, too, the significant level of agreement that was embedded within the British-American relationship. The other impact was more subtle. It can be seen in the fact that some of the ongoing important disputes between Britain and the United States in the period were centred on the meaning of particular articles or words in the various agreements.[8] Thus, whilst the central issue at hand was meant to have been covered by the treaty, the argument had turned instead to what was the right interpretation of the relevant words in the circumstances. Policy, as a result, became directed towards what were fundamentally technical disputes of a 'legal' nature.

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[6] The favourable status quo was that Britain was the only European power with major territory in the Western Hemisphere by the 1830s. This dominant situation had arisen following the French loss of territory during and after the French revolutionary wars, the collapse of Spanish America, and the effective withdrawal of Russia from the North American continent. The one important exception was Cuba, which remained a Spanish possession.

[7] The seven agreements are: The Definitive Treaty of Peace, 1783 (the '1783 Treaty'), the Treaty of Amity Commerce and Navigation, 1794 (the 'Jay Treaty, 1794'), the Treaty of Peace and Amity, 1814 (the 'Treaty of Ghent, 1814'), A Convention to regulate the Commerce between the Territories of the United States and of his Britannick Majesty, 1815 (the '1815 Convention'), the Exchange of Notes Relative to Naval Forces on the American Lakes, 1817 (the 'Exchange of Notes, 1817'), the Convention of 1818 (the '1818 Convention'), and the Conventions of 1827 (the '1827 Convention').

[8] The main examples to be discussed in the thesis are the disputes over the Northeastern boundary, fishing off the coast of Nova Scotia, and rough rice.

Finally, third, the chapter allows British foreign policy to the United States to be better understood through a greater appreciation of the role of international law. Fundamentally, international law draws out that there was a greater level of political agreement between Britain and the United States than has been traditionally acknowledged. Treaties and legal principles encouraged the development of objectives - on British possessions, commerce, and the slave trade - which were based on a premise of Britain working *with*, rather than *against*, the United States. Key principles were also shared, reflecting political agreement at a deep, underlying level. The overall British objective of peace captures and reflects this trend. International law also, however, resulted in a long-term continuity to British policy objectives, which can be overlooked by focusing on the disputes in isolation. Palmerston and Aberdeen were, ultimately, bound by the same treaties and worked within the same legal principles. Thus, whilst their styles may have differed, the influence of international law helped to give a consistency to their policies on the central issues on which they directly overlapped. This chapter demonstrates that international law had an even influence on British objectives over the period. Furthermore, as will be seen in the later chapters, Palmerston and Aberdeen shared the same approach to McLeod, and worked within the same constraints on the slave trade. The objectives of both were also set within the limits permitted by legal argument on the Northeastern boundary. Significantly, from their public comments, they additionally do not appear to have differed greatly on the other major problems of the period concerning the Canadian rebellion, Texas, and Oregon, where their policies were, in any event, less entwined.

The Objectives of British Foreign Policy to the United States

There were several legal principles from within British practice which provided the basic framework for policy towards the United States in relation to the objective of maintaining Britain's possessions on the North American continent. The principle of the self-preservation of a state was, of course, central, and indeed is mirrored in the description of the objective itself. It also mattered that the duty to preserve the state extended under international law to the whole empire, meaning, in Britain's case, that all of its existing imperial possessions fell within its ambit. The principles involving the ownership and

occupation of land were also clearly relevant to claims for new territory. Policy was guided too by those principles associated with sovereignty which emphasised territorial independence and 'non-interference' in foreign states. These principles did not always provide absolute rules, but they set a structure for policy to operate within. Importantly, they both shielded sovereign territories from foreign incursions and meddling, and restricted what a state itself could do in foreign countries. Furthermore, the role of international law was heightened by the fact that ministers and a broader group of politicians also appeared to associate the upholding of British legal rights concerning imperial possessions with wider perceptions of British power and honour.[9]

Taken together, these general principles influenced both the overall direction, and specific choices, of British policy towards the United States in relation to imperial problems concerning the North American continent. Most importantly, Britain used principles associated with sovereignty, and the relations between independent sovereign states, to encourage the United States to remain out of Canada following the revolt of 1837. Furthermore, Britain embraced Canada within its duty of protection, and politicians used reasoning derived from legal principles to justify the defence of the provinces.[10] Indeed, this conception of British duty had a long trajectory of being applied to Canada, as can be seen from the jurist, Sir James Macintosh's use of it in a parliamentary debate in 1828.[11] Elsewhere on the continent, Britain took a deep interest in the future of Oregon because it possessed legal rights there, which it wanted to be seen to uphold, and the Oregon question itself became centred on the principles around occupation and ownership. In contrast, Britain gave a lower priority to Texas, where it possessed no territorial claims, and was ultimately limited in what it could do by the legal principles of 'non-interference' and neutrality. These themes are examined further, in relation to Canada, Texas, and Oregon, in chapters 4 and 5.

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[9] See the discussion in the first section of chapter 2.

[10] This reasoning also worked as a counter to those British politicians arguing at this time against empire. For an example of the debate, see 'An Essay on the Government of Dependencies' by G. Cornewall Lewis, *Edinburgh Review*, Vol. LXXXIII, (1846), Article X, pp. 512-554.

[11] Sir James Mackintosh said,, after noting Huskisson's term for the Empire as the 'Great British Confederacy': 'I hold ... that all the different portions of that Confederacy are integral parts of the British Empire, and as such entitled to the fullest protection', HC, 2 May 1828, as referred to in R. J. Mackintosh, (ed.), *The Miscellaneous Works of the Right Honourable Sir James Mackintosh* (London: Longman, Brown, Green, and Longmans, 1851), p. 769.

Treaties also made three important contributions to the way in which Britain sought to maintain its existing possessions on the North American continent. The most fundamental of these arose from the fact that it was the treaties that contained the actual mutual recognition by Britain and the United States of each other's sovereignty. The key agreement was, of course, the acceptance by Britain of the independence and sovereignty of the United States in the 1783 Treaty. Here, it was provided that: Britain [through the Crown] 'acknowledges' [the thirteen original states] 'to be free sovereign and independent states' and 'relinquishes all claims to the government, propriety, and territorial rights' of them.[12] Significantly, however, the United States also, effectively, recognised British sovereignty in Britain's North American possessions. This was not really done expressly in the 1783 Treaty, which merely referred to a peace between the Crown and the United States, and their subjects and citizens respectively.[13] Rather, the clearer references were in the Jay Treaty, 1794, the Treaty of Ghent, 1814, and the 1815 Convention.[14] The Jay Treaty and the Treaty of Ghent both refer to a peace between the Crown and the United States, and also 'between their respective Countries, Territories, Cities, Towns and People of every Degree'.[15] More definitively, The Jay Treaty makes express reference to *the* British 'territories' on the 'continent of America'.[16]

This mutual recognition of sovereignty was central to the operation of British and American policy in the period - largely because, as seen, sovereignty was at the heart of so many of the general principles associated with dealing with the problems of the North American continent. British policy was also affected, however, by a highly technical point relating to the manner in which sovereignty had been recognised. This arose from the position that Britain and the United States had not specified in the 1783 Treaty any formal basis for their separation. Instead, Britain had merely 'acknowledged' the independence and sovereignty

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[12] Article 1, 1783 Treaty, accessed through Project Avalon, Yale Law School, on 19/05/16; all references to the 1783 Treaty are to this version.

[13] Article 7, 1783 Treaty. Indeed, only Newfoundland can, from the 1783 Treaty, be inferred definitely to constitute a British 'dominion' in America, for, although reference is made to 'all other of his Britannic Majesty's dominions in America', they are not named and the definite article is not used: Article 3, 1783 Treaty.

[14] The Jay Treaty, 1794, and the Treaty of Ghent, 1814, accessed through Project Avalon, Yale Law School, on 19/05/16, and the 1815 Convention, accessed through Project Avalon, Yale Law school, on 23/05/16; all references to these agreements are to these versions.

[15] Article 1, Jay Treaty, 1794; Article 1, Treaty of Ghent, 1814.

[16] Article 3, Jay Treaty, 1794.

of the United States. The crucial question that this masked was whether or not the 1783 Treaty was, as later contended by Britain, a treaty of cession, in which Britain 'ceded' the 'United States', or, conversely, as argued by the United States, a treaty of partition between *already* sovereign states. This was not just a matter of legal theory with constitutional significance in relation to the foundation of the United States. It also became a point of real practical relevance in the disputed territory around the Northeastern boundary, because, as will be discussed further in chapter 4, Britain argued that, in cessions, sovereignty remained with the ceding party until any dispute was resolved.[17] Britain's approach to the 'disputed territory' was, accordingly, directed to the formal maintenance of sovereignty until a final agreement was reached.

Importantly, the treaties also pushed Britain towards a policy that was accepting of continued American westward expansion on the North American continent. The treaties did not do this expressly, but they nevertheless implicitly embedded the prospect of material American growth. In the 1783 Treaty, Britain, as noted, gave up all the 'territorial rights' *of* the thirteen states. This mattered because it ensured that any rights held by the states to further territory would not also be claimed by Britain. Crucially, these included the claims for territory west of the original states on the principle of 'continuity' in international law.[18] Furthermore, the 'boundaries' of the United States in the 1783 Treaty were defined as those of the 'United States' taken as a whole.[19] This was significant because these boundaries, as will be seen, extended significantly beyond the actual land within the thirteen states as they were then formed.[20] Britain had, thus, in effect, accepted from 1783 that the 'United States' of the

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[17] See, for example, the correspondence between Aberdeen and Lawrence in 1828, in 'Memorandum, shewing what has passed between the Governments of Great Britain and the United States, upon the Question of the Occupation, Sovereignty, and Jurisdiction, of the disputed Territory on the North-Eastern Boundary of the United States', Foreign Office, April, 1839, *British Documents*, Vol. 1 (hereafter 'Northeastern Memorandum'), pp. 45-52.

[18] 'Continuity' is discussed in chapter 5.

[19] Article 2, 1783 Treaty.

[20] Indeed, Chalmers asked in 1814: 'Why relinquish, under the pretence of settling boundaries, countries larger than Great Britain, to which the United States had no pretensions?', 'Opinion of Mr Chalmers on the legal effects resulting from the acknowledgement of the Independence of the United States' in W. Forsyth, *Cases and Opinions on Constitutional Law and various points of English Jurisprudence* (London, 1869), pp. 279-280.

treaty was of a significantly larger size than the thirteen states.[21] Finally, Britain agreed in the 1818 Convention both to a border across to the Rocky Mountains and a joint occupation of Oregon, and showed itself willing, in the negotiations over Oregon, to accept a partition extending the United States to the Pacific Ocean.[22] In the light of these treaty provisions, British policy was, thus, unlikely to oppose American expansion simply for its own sake. Nor does a British policy objective of the containment of the United States in a simple, unqualified form make sense. On the contrary, the treaties show a Britain that appears tolerant of the growth of the United States, provided that existing British possessions and rights were protected and upheld. In practice, this was most evident in the British approach to the problems of Oregon and Texas, as to be discussed in chapter 5.

This shaping of British policy to be permissive of American expansion is also supported by the treaty provisions on the approach of Britain and the United States to the position of the indigenous peoples of the North American continent. The first major provisions expressly concerning indigenous peoples following independence were, in fact, in the Jay Treaty, 1794, but these simply conferred travel, navigation, and trading rights corresponding to those given to the citizens and subjects of the United States and the British Empire respectively.[23] Much more fundamental were those in the Treaty of Ghent, 1814 by which the United States and Britain agreed, respectively, to end 'hostilities' with the 'tribes' or 'nations' of 'Indians', and to return their 'possessions, rights and privileges' to the position as of 1811 before the 'hostilities'.[24] Whilst this was first and foremost dealing with the aftermath of the War of 1812, indigenous peoples were nevertheless, as a result, being drawn out of the British-

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[21] The Jay Treaty, 1794 also confirmed the right of the United States to extend its settlements within these boundaries: Article 2, Jay Treaty, 1794. This is an interesting provision in the light of Marshall's comment that Britain initially assumed after 1783 that western settlement would favour it: P. J. Marshall, *Remaking the British Atlantic: the United States and the British Empire after American Independence* (Oxford: Oxford University Press, 2012), p. 56, p. 132.

[22] Memorandum relative to the Territorial Rights claimed by Great Britain in the Oregon Territory; and of the Negotiations between Great Britain and the United States which led to the conclusion of the Convention of the 15th June, 1846, Foreign Office, 1872, (hereafter, "Northwestern Memorandum"), *British Documents*, Vol. 2, pp 61-76.

[23] Article 3 confirmed, from the perspectives of Britain and the United States, the ability for 'Indians' to pass between the territories and countries of each (excluding the Hudson's Bay Company) on the North American continent; similarly, it also made clear, for indigenous peoples, the rights of inland navigation, and to trade with each other and the other inhabitants of the United States and the British Empire: Article 3, Jay Treaty, 1794.

[24] Article 9, Treaty of Ghent, 1814.

American conflict. This, in turn, made it less likely that Britain would seek to use the position of the indigenous peoples to block American expansion.

Finally, the territorial settlement in the treaties resulted in the objective of maintaining the British possessions being concentrated on very specific disputes within an otherwise, broadly, accepted geographical framework. Overall, the British-American boundary was provided for in all of the seven major treaties, other than the 1815 Convention and the Exchange of Notes, 1817.[25] As a result, Britain and the United States had agreed, effectively, on the northern, western, and southern boundaries of America, subject only to defined technical disputes over the Northeastern border, Oregon, and territorial fishing rights. British policy, as a consequence, was not directed towards recovering major territory from the United States, and there was a stable division of territory. Furthermore, the remaining disputes were of a legal nature, and heavily influenced by the precise treaty provisions. Except in Oregon, what was being contended was the meaning of what had already been 'agreed'. Policy, as a result, became centred on legal argument. This does not mean that the issues concerned were not informed by what suited British and American wider interests, but rather that the matters were contested within a legal framework. Furthermore, even in Oregon, the treaties also still made a decisive impact by providing, in that case, the process to which policy had to respond.

It is important, first, to appreciate the scale of what had already been agreed in the treaties and was uncontested. The northern boundary was settled through the agreements of 1783 and 1818. The 1783 Treaty set out originally that the boundary was to go 'from thence [the northwesternmost point of the Lake of the Woods] on a due west course to the river Mississippi'.[26] This could not, however, stand as the final agreement because it was premised on the incorrect assumption that the source of the river Mississippi was north of the 'northwesternmost point' of the Lake of the Woods. Before long, there was, therefore, uncertainty as to whether the river Mississippi was, in fact, 'due west' from the

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[25] The agreements were only between Britain and the United States, and any rights of other states were, thereby, formally unaffected by them. The provisions of Article 1, Treaty of Ghent, 1814, expressly restored the territorial position to what it was before the War of 1812, which meant that none of the then known territorial disputes were changed by that peace. See also, Bourne, *Britain and the Balance of Power*, p. 11.

[26] Article 2, 1783 Treaty. The river Mississippi was the original western border as discussed below. The Louisiana Purchase had not occurred at the time of the 1783 Treaty. The 1783 Treaty also provided that Britain would have free navigation of the river Mississippi, presumably on the basis that its source was assumed to be in British territory to the north of the border: Article 8, 1783 Treaty.

'northwesternmost point' of the Lake of the Woods, and a joint survey to establish the facts was allowed for under the Jay Treaty, 1794.[27] In the end, the matter was only formally resolved in the 1818 Convention. Significantly, though, this convention was entered into after the Louisiana Purchase of 1803, under which the United States had acquired the possession of Louisiana from France and, thus, extended its territory westwards from the river Mississippi. An extended northern boundary was, accordingly, needed, in any event, on account of the fact that the precise extent of Louisiana northwards was uncertain.[28] The 1818 Convention settled the matter by agreeing that the 49th parallel of latitude was to be the new 'line of demarcation' between the territories of the United States and Britain from the 'most North Western Point of the Lake of the Woods' to the Rocky Mountains.[29]

The western and southern boundaries of the United States were also agreed without giving rise to major subsequent dispute. The 1783 Treaty had defined the western boundary of the United States as the middle of the river Mississippi until it reached the 31st degree of latitude.[30] The Louisiana Purchase, however, meant that the territory of the United States extended west at least to the Rocky Mountains, and as far north as the territory of Louisiana rightfully went. This part of the 1783 Treaty definition, therefore, only remained relevant, from a British perspective, for any territory that was west of the river Mississippi and within the claim of the Hudson's Bay Company. This gave rise to a potential conflict as any such territory could also conceivably have been within the claim of the United States from its possession of Louisiana. Ultimately, the issue was removed, in practice, by the agreement in the 1818 Convention to adopt the 49th parallel as the northern boundary. The southern boundary in the 1783 Treaty simply took account of the then boundaries of Louisiana and Florida until the Atlantic Ocean was reached.[31]

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[27] Article 4, Jay Treaty, 1794.

[28] A northern boundary was needed because the claim of Louisiana over territory northwards clashed potentially with the claim of the Hudson's Bay Company to territory southwards.

[29] Article II, 1818 Convention; 1818 Convention, accessed through Project Avalon, Yale Law School, on 23/05/16, and all references to the 1818 Convention are to this version. This article also made it clear that, if the 'northwesternmost point' of the Lake of the Woods was not, in fact, on the 49th parallel, then the boundary was to be due north or south from that point until the 49th parallel was met, and then along the 49th parallel westwards as intended.

[30] Article 2, 1783 Treaty.

[31] At this point in 1783, Louisiana was a Spanish possession having been transferred to Spain from France in 1764, and Florida was also a Spanish possession, having been transferred from Britain to Spain in 1783.

British policy, accordingly, became drawn to what was *not* accepted as agreed from the treaties, which, in practice, meant the issues of the Northeastern boundary, Oregon and fishing rights. In each of these instances, treaty law either constructed, or changed, the nature of the dispute. The most long-running matter was the question of the Northeastern boundary, which, for present purposes, can be taken, broadly, as spanning from the river St Croix to the Lake of the Woods.[32] Despite having been defined in the 1783 Treaty, large sections of this boundary were nevertheless still the subject of major disagreement at the start of the period.[33] This was not, however, for want of an enormous amount of trying. Following initial disagreements, the Treaty of Ghent, 1814 had contained provisions allowing for determinations of the contested parts of the boundary to be made by commissioners.[34] As nothing was, however, settled by 1827, use had then been made of the fact that the Treaty of Ghent also allowed for a 'friendly sovereign or state' to be appointed as arbitrator.[35] Again, however, there was no resolution - in this instance because the proposed compromise of the chosen arbitrator, the King of the Netherlands was rejected by the United States.[36] By 1836, therefore, British policy was firmly focused on resolving what was an enormous legal problem.

Crucially, however, British policy objectives within the resulting dispute were nevertheless still framed by the 1783 Treaty provision. Chapter 4 will consider the process leading to the settlement of the issue in the Webster-Ashburton Treaty of 1842 in more detail, but, for present purposes, what matters is the point that the existing words of the 1783 Treaty were important, not only, obviously, to the attempts to find their meaning, but also in the negotiations for a new compromise. This is because the words not only created the issues at

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[32] The river St Croix river is on the eastern coast of the United States, and the Lake of the Woods is split between the present day U.S. state of Minnesota and Canada. At the time of the 1783 Treaty, this section of the United States boundary provided part of the borders for the then states of Massachusetts Bay, New York, New Hampshire, and Pennsylvania. Subsequently, Massachusetts Bay joined the United States under the 1787 Constitution as Massachusetts. The territory of Maine then became a separate state of the United States in 1820, from being part of Massachusetts. Vermont also joined the United States as a state in 1791, and is situated geographically between the states of New York and New Hampshire. Further land to the south of the remainder of the boundary westwards fell within what was to become the Northwest Territory, which was formed under the Northwest Ordinance, 1787.

[33] The Northeastern boundary was defined in Article 2, 1783 Treaty.

[34] Articles 5, 6, and 7, Treaty of Ghent, 1814.

[35] See, for example, Article 5, Treaty of Ghent, 1814.

[36] Northeastern Memorandum, *British Documents*, p. 45, pp. 57-58.

stake through their ambiguity, but also limited the extent of the solutions to those that were possible within their realistic meanings. As a consequence, the 1783 Treaty made a fundamental impact on the dispute because it provided the entire structure through which Britain approached the problem. Wider British and American interests, of course, mattered, as to why and how particular arguments were pursued, but policy was developed within a context driven by what had inescapably *already* been agreed. What ultimately counted was where, at the extremes, Britain and the United States felt they could be under the 1783 Treaty.

The way in which the words in the 1783 Treaty constructed the nature of the dispute can be illustrated, briefly, by reference to the most contested parts of the definition. The core issue was over the section of the boundary from what was described as the 'northwest angle of Nova Scotia' to the 'northwesternmost head of the Connecticut River'. Here, the 1783 Treaty provided as follows:

> From the northwest angle of Nova Scotia, viz., that angle which is formed by a line drawn due north from the source of the St.Croix River to the highlands; along the said highlands which divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean, to the northwesternmost head of the Connecticut River.[37]

In this instance, both the issue itself, and the possible boundary limits, were set by the ambiguity, and the realistic meanings, respectively, of the words 'the highlands', the 'northwesternmost head of the Connecticut River', and the answers to the questions of which rivers were 'St. Lawrence' or 'Atlantic' rivers. Similar considerations then applied to the part of the definition taking the boundary from the river Connecticut to Lake Superior. This, broadly, provided that, from the river St. Lawrence, the boundary was to be along the middle of that river until Lake Ontario, and, from there, through the middles of the Lakes Ontario, Erie, Huron, and the 'water communication [s]' between them, until Lake Superior. [38] Here, what was meant by the 'middle' in the appropriate contexts, allowed disputes to develop over which side of the boundary some - but importantly, given the realistic meaning of the word 'middle', not all - islands fell.[39]

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[37] Article 2, 1783 Treaty.

[38] Article 2, 1783 Treaty.

[39] The contested meaning of 'middle' is referred to in Article 6, Treaty of Ghent, 1814.

Lastly, the inexactness of the words used also caused a further issue around meaning in the final section of the Northeastern boundary passing from Lake Superior to the Lake of the Woods. In this instance, the 1783 Treaty provided that the border was to go:

> thence through Lake Superior northward of the Isles Royal and Phelipeaux to the Long Lake; thence through the middle of the said Long Lake, and the water communication between it and the Lake of the Woods, to the said Lake of the Woods, thence through the said Lake to the most northwesternmost point thereof.[40]

The key words which became disputed here were the opening ones, 'thence through Lake Superior northward of the Isles Royal and Phelipeaux to the Long Lake'. As the matter developed, the question became where the boundary went after passing north of the 'Isles' on its way to the Long Lake. Britain's case was that it stayed in Lake Superior - 'thence through Lake Superior' - until it reached the furthest point west, before then finding its way to the Long Lake. This meant a boundary that would have gone south-west through the lake to then go north-west once land was arrived at back to the Long Lake. Conversely, the claim of the United States was for a boundary that, once north of the 'Isles', broadly, stayed around the same parallel of latitude and went simply, thereafter, westwards to the Long Lake. The limits of the claims were set, accordingly, and the dispute, as framed by the treaty, came to be about a triangular area of territory.

The other main territorial question between Britain and the United States concerned the area west of the Rocky Mountains known as Oregon. Importantly, in this instance, the main claims for ownership by both Britain and the United States were based on general principles of international law rather than the meaning of a definition of a boundary in a treaty. Nevertheless, treaty law still had an important influence on the shape of the dispute. Following the failed attempt to negotiate a settlement for Oregon, the 1818 Convention had provided for a temporary holding position amounting, in effect, to a joint occupation. Under this, Oregon (including its harbours and rivers) was to be 'free and open' to the 'vessels, citizens, and subjects' of both Britain and the United States for a ten year period, with existing claims preserved.[41] A further convention in 1827 had then extended this indefinitely, subject to a notice period of one year.[42] These features gave rise to two important consequences. Treaty law made clear that all settlers from the United States and

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[40] Article 2, 1783 Treaty.

[41] Article III, 1818 Convention.

[42] Northwestern Memorandum, *British Documents*, p. 76.

Britain had a *legal* right to come to *all* of Oregon. As will be seen, the arrival of large numbers of American settlers in Oregon in the early 1840s was to prove a crucial turning point in the dispute. Whilst it cannot be known what would have happened in its absence, having the legal right to settle under a treaty at least effectively removed the potential question of legality of settlement from British policy. More fundamentally, the dispute also ultimately became centred on whether or not the United States would trigger the one year treaty notice period, and, if it did, the implications of that. An act in a legal process, thus, became in itself a matter for policy to interpret.

The last of the territorial disputes, over fishing rights, again turned on the technical interpretation of treaty provisions. The issue following independence, in the case of fishing, was not the right of American fishermen to fish in the 'high seas', as this was a general right under international law. Rather, it was concerned with the fishing that American fisherman had traditionally undertaken within what were then (to them) the foreign coastal territorial limits of the Maritime Provinces, as well as the general use their vessels had previously made of that coastline to dry fish, get water and provisions, and perform repairs. The 1783 Treaty had dealt with these activities, but, crucially, the fishing provisions in it had been annulled by the War of 1812.[43] What was being contested, therefore, were the rights within the 1818 Convention - and, importantly, these were generally much more restrictive than the earlier ones.[44] Thus, the main tensions in the period were over the effect of the introduction of a three mile coastal water exclusion in 1818 to American fishing rights off Nova Scotia, and the dispute concerned the meaning of the exact words of the treaty when applied to the facts of the coastline concerned.[45] Again, therefore, policy became pushed towards an argument over the meaning of what had already been agreed. The dispute over fishing rights is considered further as part of chapter 4.

International law also had a significant impact on the way in which Britain pursued its objective of growing trade in relation to the United States. As with the previous objective of

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[43] The provision on fishing rights was Article 3, 1783 Treaty. On its annulment by the War of 1812, see Dodson and Wilde to Palmerston, 30 August 1841, FO 83/2207, fols. 181-186.

[44] The provision on fishing rights was Article 1 of the 1818 Convention.

[45] Interestingly, Falkland noted, referring to Rush's Memoirs, p. 400, that the United States seemed to have mistakenly believed in 1818, when agreeing to the three mile limit, that fishing could be undertaken beyond the three mile limit, whereas, in practice, mackerel and herring could not be fished that far out: Falkland to Russell, 8 May 1841, as contained in Stephen to Backhouse, 18 June 1841, FO 5/373, fols. 14-61 at fol. 34.

maintaining the British possessions on the North American continent, the main overall legal influence came from general principles accepted within British practice. This had the crucial effect that policy to the United States operated, as a result, within a framework which permitted protection. Commercial treaties between Britain and the United States, however, then also played an important role in defining the various bases upon which British-American trading relations could operate within this context.[46] As well as representing past policy in the form of legal provisions, these treaties necessarily guided future British commercial policy towards the United States by setting rules for how trade was to be conducted. Importantly, the treaties also provided a legal basis for Britain or the United States, respectively, to challenge policy in the other which was perceived to be inconsistent with the rights and obligations contained within them. Finally, as will be commented on in the next section, Britain also used other general principles of international law as a means of regulating its wider global commercial relationship with the United States.

British policy in relation to trade with the United States was, of course, formed against the backdrop of a starting position radically changed by the independence of the United States. From then, the vital difference was that Britain and the United States traded with each other as foreign states, as opposed to constituent parts of the British Empire with the benefit of any applicable colonial preferences. Under the general legal principles of the global trading system, therefore, both Britain and the United States were able to regulate their respective sides of any British-American trade in a manner of their choosing. Tariffs were, accordingly, a major tool available to both for the protection of their domestic trades from foreign competition. Further, the then applicable British Navigation Laws also meant that trade from the United States to the British territories in the West Indies was, in effect, restricted to that being conducted in British vessels.[47] Finally, the United States became free to trade as it wished with the rest of the world without the restrictions imposed on it from being part of the British Empire. This made American vessels and trade potentially available to British enemies, at a time when Britain was at war, in a way that they simply had not been before independence.

British foreign policy to the United States was, therefore, necessarily influenced by a global system which permitted protection and placed domestic tariffs outside the jurisdiction of

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[46] These were: The Jay Treaty, 1794, the 1815 Convention, and the 1818 Convention.

[47] For early attempts to mitigate this following independence, see Boyd Hilton, *A Mad, Bad and Dangerous People?*, p.87, p. 189.

international law. Whilst the details of the economic and other factors as to why a particular policy may have been chosen are outside the scope of this thesis, it is at least, accordingly, relevant to record that a British objective aimed at a reduction in American tariffs was built upon the legal principles associated with protection. Simply put, British foreign policy needed to take account of the fact that the United States had the basic freedom under international law to set its own trade - and tariff - policy. Indeed, this was to become a particularly important issue in British-American relations in the period from 1841 when the Peel government began on a policy of its own widespread domestic tariff reform.[48] It is unsurprising, therefore, that there is evidence that policy towards the United States was affected by the perceived potential impact of a course of action on tariffs. Britain, for example, appears to have rejected an enhanced trade treaty with Texas in the early 1840s, at least partly on the basis of expected American objections.[49]

Undoubtedly, however, the more direct influence of international law on British policy to the United States concerning trade was through treaty law. Commercial treaties were, as seen, used within British practice as a means of modifying the operation of the global trading system.[50] In the case of British trade with the United States, this was especially significant given the restrictions and complications arising from American independence. By the start of the period in 1836, the course for future policy had been set, first, by the Jay Treaty, 1794, and, then, the Convention of 1815, both of which provided basic terms for the conduct of British-American trade in many of the main regions of the world.[51] Indeed, the fact that it was self-evidently deemed important enough to replace the expired Jay Treaty with the 1815 Convention is in itself an indication that the commercial agreements made in the treaties mattered. Importantly, as well, the treaties contained more than just scant references to trade. They were, instead, an attempt to provide a comprehensive basis for where, and how, Britons

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[48] It may also have been relevant that this period coincided with the presence of a strand of thought in the United States that favoured domestic policy, as opposed to commercial treaties, as a means of implementing tariff policy: see, for example, Webster, copy of speech by Webster, 18 May 1843, FO 5/398, fols. 40-45, where Webster argued that such a role for domestic policy gave a role to the House of Representatives in tariff policy.

[49] This is referred to further in chapter 5.

[50] Britain was also clearly aware that the United States also used commercial treaties as part of its foreign policy. For example, Fox sent a copy of the newly negotiated U.S./Portuguese Treaty on navigation and commerce in 1841 to the Foreign Office: 21 July 1841, FO 5/373, fols. 204-205.

[51] The commercial provisions within the Jay Treaty, 1794 expired without renewal. The commercial provisions within the 1815 Convention were renewed by the 1818 and 1827 Conventions, in the latter case indefinitely, subject to notice.

and Americans could trade in Europe, the North American continent, the West Indies and the East Indies. In this way, then, they prescribed the foundation upon which British policy aimed at increasing trade with the United States needed to operate.

The most important of the commercial treaty provisions concerned trade between the British mainland and the United States.[52] Both the Jay Treaty, 1794 and the 1815 Convention provided for a 'reciprocal' 'liberty of commerce'.[53] In the 1815 Convention, this, broadly, confirmed the 'liberty' of the inhabitants of Britain and the United States, respectively, 'to come with their ships and cargoes' to ports in the other to which 'other foreigners' could come, and to 'remain and reside there', and that 'generally' the 'merchants' of each 'shall enjoy the most complete protection and security for their commerce', subject to relevant domestic laws.[54] This was not immaterial in a global system where the freedom to trade with any state was not, as seen, absolute under international law. More significantly, perhaps, the Jay Treaty, 1794, and then the 1815 Convention, also gave some protection to Britain and the United States against the effect of the other's domestic laws in the form of a 'Most Favoured Nation' clause.[55] In the terms of Article 2 of the 1815 Convention, which was the agreement being applied in the period, this was designed to ensure that 'articles the growth, produce or manufacture' of Britain or the United States, respectively, would not, when imported into the other, be subject to 'higher' or 'other' duties than the duties paid on the 'like articles' of any other foreign state.[56] This clause proved to be important, and was used as a means of regulation by both Britain and the United States - as the rough rice dispute to be discussed in the next section will demonstrate.

Britain was, additionally, also prepared to use the 'Most Favoured Nation' clause pre-emptively within its policy aims as a means, in turn, of influencing future American policy. This is shown by the British action on the occasion of the United States signing a commercial treaty with the *Zollverein* in 1844. In this instance, the British concern was that 'articles the growth, produce, or manufacture' of the *Zollverein* were to be allowed into the

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[52] The provisions formally covered the British territories in Europe.

[53] Article 14, Jay Treaty, 1794; Article 1, 1815 Convention.

[54] Article 1, 1815 Convention.

[55] Article 15, Jay Treaty, 1794; Article 2, 1815 Convention.

[56] Article 2, 1815 Convention.

United States under the new treaty at a lower duty than 'like articles' from Britain.[57] In a move which also illustrates the role of legal advice within the Foreign Office, an opinion was taken from the Queens' Advocate on the effect of the *Zollverein* treaty in relation to Article 2 of the 1815 Convention. As it turned out, Dodson's view on the point appears to have been cautious, probably reflecting the fact that he seems to have been sent (at this stage anyway) only the 'heads' of the *Zollverein* treaty. If, he opined, the provision was limited to 'articles the growth, produce, or manufacture' of the countries within the *Zollverein*, then Britain would have a valid claim for the 'same rate of duties for British commerce in the ports of the United States'.[58] Conversely, he continued, if, however, the provision was 'extended to importations' from the *Zollverein* into the United States of 'articles the growth, produce, or manufacture' of other 'foreign countries', the 'question might be open to very great doubt'.[59]

What matters, though, for present purposes, is that Aberdeen appears to have been happy to use the stronger of Dodson's possible interpretations as a means of trying to affect American policy. The basic British idea appears to have been to make Dodson's view of the legal position known in the United States, and then try to move American policy from there in the way best suited for Britain. Aberdeen, accordingly, informed Pakenham that Dodson had advised that Britain would have a valid claim under Article 2 of the 1815 Convention for lower duties should the *Zollverein* treaty be ratified, and told him to 'immediately claim' 'parity' of treatment for Britain with German goods in that event.[60] Crucially, however, Aberdeen also specified that Pakenham was, in the meantime, to pass on the British view, 'in a private manner', to the American government and 'influential members of Congress'.[61] Aberdeen's suggestion was, then, that Pakenham should encourage adoption of the treaty by the Senate if he thought it likely that Britain would get the desired parity, but, conversely,

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[57] Aberdeen to Pakenham, Draft, No 17, Confidential, May, 1844, FO 5/390, fols. 39-42. The matter was also raised in Parliament: Bowring, HC, 23 April 1844, Vol. LXXIV, 212-214; and Peel, HC, 23 April 1844, Vol. LXXIV, 212-214.

[58] Dodson to Aberdeen, 2 May 1844, Parry, *Law Officers' Opinions,* Vol. 4, pp. 228-230.

[59] Dodson to Aberdeen, 2 May 1844, Parry, *Law Officers' Opinions,* Vol. 4, pp. 228-230.

[60] Aberdeen to Pakenham, Draft, No. 17, Confidential, May, 1844, FO 5/390, fols. 39-42. There is no evidence from the the law officers' opinions that further advice was given by Dodson, so Aberdeen may have satisfied himself on the point or taken unrecorded oral advice.

[61] Aberdeen to Pakenham, Draft, No. 17, Confidential, May, 1844, FO 5/390, fols. 39-42.

push for its rejection if he doubted this.[62] As it happened, Pakenham later advised Aberdeen of reports that the Senate would reject the *Zollverein* treaty.[63] Whatever the role played by the British position in the United States in the period up to Pakenham's despatch, though, international law, at least, had made an impact on Aberdeen's policy.

Treaty law also affected British policy in relation to trade between the United States and the rest of the British Empire outside Europe, albeit that the position was different for each of the significant global geographical areas. The most immediate points of contact were those on the North American continent itself, and here the Jay Treaty, 1794 affirmed the future policy course as being permissive of inland trading.[64] Citizens and subjects, of the United States and the British possessions, respectively, were, broadly, confirmed as free to move between the two states, and also to trade inland with each other using all lakes and rivers.[65] Similarly, the trade in goods on the North American continent was allowed - provided it was on, broadly, non-discriminatory terms.[66] Accordingly, citizens of the United States were able to import goods and merchandise into the British possessions on the payment of duties that were no higher than if they had been imported from Europe, and British subjects could import goods and merchandise into the United States on payment of duties no higher than if they had been imported in American vessels. These provisions may have merely regularised an already existing position, but they were nevertheless still important in setting a clear framework for future British policy.[67]

The other main areas dealt with were the East and West Indies, where treaty law affected British-American trading interests differently. The 1815 Convention followed the Jay Treaty, 1794 in giving citizens of the United States certain rights to trade with British possessions in

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[62] Aberdeen to Pakenham, Draft, No. 17, Confidential, May, 1844, FO 5/390, fols. 39-42.

[63] Pakenham to Aberdeen, No. 51, 29 May 1844, FO 5/ 405, fols. 121-129.

[64] Article 3, Jay Treaty, 1794 was stated to be permanent: Article 28, Jay Treaty, 1794.

[65] Article 3, Jay Treaty, 1794.

[66] Article 3, Jay Treaty, 1794.

[67] On what may have been the limited immediate practical effect of this provision, note Brebner's comment that the 'restrictive British laws of trade and navigation had never amounted to much west of the Richelieu', Brebner, *The North Atlantic Triangle*, p. 148.

the East Indies.[68] Important restrictions applied, such as, for example, the requirement that exports from the East Indies were only for direct import into the United States, but the treaty nevertheless gave a direction for British policy that was favourable to American trade in the East.[69] In contrast, treaty law gave no guide for British-American trade in the West Indies by the start of the period in 1836. The Jay Treaty, 1794 had introduced some limited relief against the restrictions on American shipping arising from independence, but that agreement only ran for a limited period, and it had not been renewed.[70] In contrast, the 1815 Convention made no special provision for trade between the United States and the British possessions in the West Indies, stating merely that both parties were to keep their respective rights.[71] In practice, this removed the issue of whether to ease restrictions to the domestic law of Britain and the United States respectively.[72]

A final commerce-related issue which treaty law did not, however, succeed in dealing with was the new problem mentioned earlier of American ships being free to trade with the rest of the world at a time when Britain was at war. As seen in chapter 2, Britain claimed the legal rights, in war, to intercept neutral shipping and to seize both enemy goods and contraband. The Jay Treaty, 1794 had provided for Britain and the United States to reach a future agreement on certain related contested points in its article dealing with trade involving the West Indies.[73] It had also tried to deal with ongoing issues through other provisions covering enemy property and prize, contraband of war and blockade, privateering, pirates, letters of

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[68] Article 3, 1815 Convention. The provision in the 1815 Convention was itself only originally applicable for four years, but this was extended for a further ten years by the 1818 Convention, and then again indefinitely by the 1827 Convention. The previous (expired) provision was in Article 13, Jay Treaty, 1794.

[69] Article 3, 1815 Convention.

[70] Articles 12, 28, Jay Treaty, 1794. The relief affected American ships up to 70 tonnes.

[71] Article 2, 1815 Convention.

[72] Bourne notes, for example, the difficulties of the 1820s following the British Orders in Council of 1826, which 'closed the West Indian ports absolutely to American ships': Bourne, *Britain and the Balance of Power*, p. 28. Overall, the situation appears to have been eased from 1830 through a proclamation of President Andrew Jackson Oct. 5, 1830 (4 Stat. 817), and a British Order in Council of Nov. 5, 1830 (British and Foreign State Papers, vol. 17, P. 893), as cited in tcc.export.gov, (accessed on 25/4/18), in its copy of the 1815 Convention.

[73] Article 12, The Jay Treaty, 1794.

marque and reprisals.[74] These articles had, however, expired, and no further agreements were subsequently reached.[75] British policy was, as a result, left relying on what were disputed general legal principles in the absence of any applicable treaty law. This meant, in turn, that American trade with neutral countries continued to possess the potential to cause conflict whenever Britain was at war, and indeed maritime rights were a cause of the War of 1812.[76] Concern over the impact of the law in this area was to be one of the main factors behind the British objective for peace, as will be seen later in the section.

International law also guided British policy objectives to the United States in relation to slavery and the eradication of the slave trade. Core principles within British practice around which policy needed to work included those that neither slavery nor the slave trade were unlawful under the general rules of international law, and that interference was generally not permitted in the domestic affairs of other sovereign states.[77] Britain certainly appears to have accepted that it had no rights to interfere in the domestic laws of the United States concerning slavery. When, therefore, for example, Louisiana introduced a statute stopping entry for 'free persons of colour', Dodson told Aberdeen that 'it cannot be denied that every independent State or nation is entitled to admit or exclude from its territories' such foreigners as it wanted.[78] International law was also at the centre of the British aims in the *Creole* incident in 1841, which followed from the arrival in the Bahamas of an American ship on which the slaves had revolted and taken control. The main legal issue at stake in that instance was how far international law required Britain to respect the American domestic law on slavery when a ship found itself in British territorial waters in such circumstances. Given its importance, the *Creole* is examined separately in chapter 6.

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[74] For example, Articles 17 to 25, The Jay Treaty, 1794. McNair notes that a summary of the 'principles and practice followed by British prize courts' was sent to Jay, by Scott and Nicholl, on 10 September 1794, McNair, *International Law Opinions*, Vol. III, pp. 64-66.

[75] No further agreements were reached, either in the Treaty of Ghent, 1814, following the War of 1812, or subsequently up to the end of the period being considered in 1846. McNair notes that Britain and the United States corresponded on the subject of the seizure of enemy private property at sea during war in 1827 as part of the then negotiations for a convention: McNair, *International Law Opinions*, Vol. III, p. 9. No agreement, though, appears to have been reached.

[76] Chamberlain, *British Foreign Policy in the Age of Palmerston*, p. 17.

[77] See the discussion of British practice in the final section of chapter 2.

[78] Dodson to Aberdeen, 4 August 1843, Parry, *Law Officers' Opinions*, Vol. 4, p. 192, where Dodson also observed that this was subject to any applicable treaty. For parliamentary statements also illustrating British acceptance of the principle that it could not interfere in the domestic affairs of the United States, see Brougham, HL, 4 March 1844, Vol. LXXIII, 491-492, and Denman, HL, 18 March 1844, Vol. LXXIII, 1156-1159.

International law was even more directly involved, however, in British policy to the United States in relation to the suppression of the slave trade. The point at the core of the tensions with the United States in the period was that Britain possessed no peacetime 'right of search' over American ships. No such right existed under the general principles of international law, and Britain did not have a bilateral treaty with the United States giving mutual 'rights of search'. A series of of high-profile incidents, in which the Royal Navy had stopped American ships, therefore, led inextricably to a technical dispute with the United States about the extent of the applicable international law on the 'right of search'. Crucially, however, Britain, was mindful of the restrictions of international law throughout. Again, given its significance, chapter 6 explores further the intricate relationship between legal principle and policy objectives in this case. Importantly, though, British policy was also made within the overall context of a joint obligation in the Treaty of Ghent, 1814 for Britain and the United States to 'use their best endeavours' to achieve the 'entire abolition' of the slave trade.[79] Whilst the article concerned required no particular action to be taken, it can nevertheless be reasonably assumed that it did provide some loose incentive for *something* ultimately to be agreed. This is certainly consistent with both the reference to it in the Preamble to the Webster-Ashburton Treaty, 1842, and Palmerston's subsequent contention that the 'best endeavours' obligation had not, in any event, been fulfilled by the joint cruising provisions of that treaty.[80]

Finally, international law also certainly contributed to the keeping of peace with the United States becoming an overall objective embracing British policy. Indeed, the aim of maintaining peace is a theme of British policy that is apparent throughout all the tensions covered in the later chapters, and it is, therefore, important that the role of international law in this is appreciated. Britain was, of course, formally in amicable relations with the United States under the Treaty of Ghent, 1814, following the end of the War of 1812. Two further features of treaty law, however, were significant in pushing policy into the direction of peace. Primarily, treaty law, had defined, as seen, a relatively stable, broad, division of territory on the North American continent, albeit that there were, as seen, some outstanding technical disputes. Crucially, this settlement had also been reaffirmed after the War of 1812 in the Treaty of Ghent, 1814, when the territorial position had been restored to what had been before the war. This effectively renewed and refreshed the sanctity of the 1783 settlement.

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[79] Article 10, Treaty of Ghent, 1814.

[80] Preamble, Webster-Ashburton Treaty, 1842; Palmerston, HC, 2 May 1843, Vol. LXVIII, 1225-1238.

The other influence was that, again, as noted, the treaties implicitly acknowledged the process of American expansion. Whilst this did not mean that Britain could not oppose American expansion on the North American continent, it made it less likely that they would use force to do so - because in effect, the principle of territorial growth had been conceded in 1783 and followed in later agreements.

General principles of international law are also, however, important in explaining why peace was such a central objective of British policy. Most significantly, British practice included the principle that trade with an enemy state was unlawful. War with the United States would, thus, have had an immense effect on Britain given the growing size of British-American trade. Whilst trade is often acknowledged as a motive for peace between Britain and the United States, the role of international law in explaining why this was the case is not generally emphasised. International law was, however, one of the key reasons why war was so disruptive to trade. The other main principles which pushed British policy towards peace were those associated with the maritime rights claimed by Britain in war. By the 1840s, Britain was aware of French concerns that a British war with the United States would result in France joining the American side of the conflict over the issue of maritime claims.[81] Fear of such a result would certainly have been a further motive for peace with the United States given the general British concern about the United States and France becoming more closely associated. Indeed, Aberdeen made the British aim of detaching the United States from France strikingly clear when he wrote to Peel about the potential impact of President Polk's December, 1845 message for 'the separation of France in feeling and interest from the United States'.[82]

The presence of an underlying role for international law in making peace a key objective is, at the least, also consistent with the similar approaches of the Melbourne and Peel governments to the prospect of a war with the United States. Both certainly regarded the overall possibility very badly. Palmerston commented on war with the United States that: 'for sure I am that nothing could be more calamitous to both countries'.[83] Similarly, Peel

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[81] For the French concern, see Cass to Webster, 15 March 1841, *Webster Papers*, pp. 44-45. Aberdeen seems to have been aware of the issues given the presence in his papers of a copy of a further letter from Cass to Webster: Cass to Webster, 12 March 1842, Aberdeen Papers, Add. MS 43123, fols. 97-105.

[82] Aberdeen to Peel, 30 December 1845, Aberdeen Papers, Add. MS 43065, fols. 129-130.

[83] Palmerston, HC, 21 March 1843, Vol. LXVII, 1162-1218.

wrote of the 'manifold evils of war with the United States'.[84] Russell even told Ellice that he was 'for peace with America, beyond any other nation'.[85] Significantly, however, consistency is also apparent in the way that both governments also accepted that peace with the United States could not, however, be preserved in all circumstances. The closest occasion to war in the period was over the McLeod matter, where the problem, as it happened, was centred on the application of international law. Crucially, as will be seen, the British approach to the real prospect of war in McLeod remained the same over the transition from Palmerston to Aberdeen. The McLeod tensions are themselves considered further in chapter 4.

This similar approach, however, matters because much has traditionally been made of the difference between Palmerston and Aberdeen in terms of their respective attitudes to peace. Undoubtedly, such a distinction would tend to downplay any real influence for international law to the extent that it had had a major effect on the British policy objective of peace to the United States, as the same legal framework and influences would have affected both men. In terms of their approach to peace, however, the distinction was more one of method. Aberdeen and Peel prioritised peace as the way to achieve all their objectives concerning the United States. Peel made this apparent when he said to Aberdeen in 1841 that 'the only question we have to consider is - what instrument will be most calculated to effect our object - the conciliatory adjustment of unsettled differences with the United States'.[86] Aberdeen, in turn, made it clear that he wanted to settle all outstanding issues with the United States in order 'to secure the lasting union and friendship of the two countries'.[87] By contrast, Palmerston desired peace, but was prepared to go through more to get it. As he put it:

> With such cunning fellows as these Yankees it never answers to give way ... and what we dignify by the names of moderation and conciliation, they naturally enough call fear ... they will give way when in the wrong, if they are firmly and perseveringly pressed.[88]

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[84] Peel to Aberdeen, 16 May 1842, Aberdeen Papers, Add. MS 43062, fols. 48-54.

[85] Russell to Ellice, 11 October 1842, as referred to in J. Prest, *Lord John Russell*, (London: Macmillan, 1972), p. 192, Note 97.

[86] Peel to Aberdeen, Private, 17 November 1841, Aberdeen Papers, Add. MS 43061, fols. 343-344. The immediate context was the position of Fox, the incumbent British minister in Washington.

[87] Aberdeen to Fox, *British Documents*, Vol. I, 18 November 1841, 161.

[88] Palmerston to Russell, 19 January 1841, PRO 30/22/4A, fols. 63-66. The context was the Maine boundary.

Furthermore, Palmerston's approach also needs to be seen in the context that he did not consider the risk of the United States declaring war on Britain to be a serious one. As he wrote to Monteagle in 1842: 'the question was not between peace and war; for the Americans had neither the intention desire nor means to make war, being bankrupt in finance and having no navy that could be put to sea - not above 10 or 12 sail of the line altogether'.[89]

Working Within a Framework of International Law Shared with the United States

International law made its most immediately obvious impact on British policy to the United States through the handling of disputes. Britain was affected by international law in this way simply because every major American problem in the period was either conducted using legal principles or involved technical argument on a narrow point of treaty interpretation. International law, however, permeated wider and deeper into the British-American relationship than just high-profile issues. Importantly, it was also used for routine business. From a British perspective, this involvement, of course, followed naturally from the institutional role of international law. If treaties and principles provided rules and influenced objectives, this made it more likely, in turn, that international law would steer disputes. In terms of contact with the United States, however, the vital additional factor that made it possible for international law to have such an impact, in practice, was that the British-American relationship operated within what was effectively a shared legal framework. The United States, too, supported international law, and adopted many of the same key principles as Britain. International law, as a result, was able to be at the heart of how Britain interacted with the United States, and British support for it was much more meaningful than it would otherwise have been.

The key direct influence of international law on British policy arose, then, from the way in which problems with the United States were approached, argued, and resolved in legal terms. Within the conduct of the disputes themselves, it also mattered that Britain valued the upholding of its rights under international law. The resulting relationship between policy and international law in the significant issues presented by Canada, Texas, Oregon, and the

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[89] Palmerston to Monteagle, 28 October 1842, Palmerston Papers, MO/131. Palmerston had initiated inquiries to British consuls in the United States as to the state of the U.S. Navy in, at least, 1838 and 1841: Palmerston to Fox, 4 April 1838, Draft, FO 5/321, fols. 20-21, and Palmerston note and Bidwell circular, February, 1841, FO 5/368, fols. 120-122. There is some support for Palmerston's analysis in Bourne, *Britain and the Balance of Power,* pp. 50-51, p. 102.

slave trade is, thus, at the centre of thesis and will be examined in the later chapters. It is important, however, to be clear initially that, whilst, understandably, the main focus will be on such fundamental issues, the influence of international law on policy also went beyond them. Crucially, international law had a wide reach in the British-American relationship, and mundane matters too were within its ambit. The role of law, therefore, was more extensive than simply being 'brought in' for special matters - it was systemic, ranging across the various ways within which Britain and the United States interacted. As a result, the British-American relationship as a *whole* effectively operated within a framework of international law.

The broad scope and real depth of this legal framework can both be illustrated, briefly, for present purposes, by reference to Britain's extensive commercial relations with the United States. Trade was undoubtedly a major context for relations between Britain and the United States, and British trading activities around the world brought frequent contact with corresponding American interests. It is, therefore, significant that international law worked in this broad global context as a set of principles through which the resulting commercial competition could, to some extent, be regulated. An article in *The Quarterly Review* gives one example of how international law was deployed.[90] This noted that the 'short blockade of two or three days of the Canton river' by the British ship the *Volage* resulted in a complaint from twelve 'free and independent citizens' of the United States.[91] The article then quoted the complaint as stating that:

> 'the right of such a blockade cannot be recognised by the undersigned; and, if attempted to be carried into effect to their injury, or the injury of American shipping and interests, will be considered by the undersigned, and by their countrymen, an infringement of their legal and just rights; it being contrary to the laws of nations, existing treaties, illegal, and without precedent'.[92]

International law was, thus, central to the the issue being contested here, with British practice being questioned against the 'laws of nations'. Conversely, in a further case, it was Britain that was concerned by allegations that the trading interests of British subjects were being

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[90] 'Chinese Affairs', *Quarterly Review*, Vol. 65, No. CXXX, (1839-40), pp. 537-581.

[91] *Quarterly Review*, 'Chinese Affairs', p. 575.

[92] *Quarterly Review*, 'Chinese Affairs', p. 575.

detrimentally affected, this time by the actions of American settlers in Liberia.[93] Subsequent British enquiries to the United States were directed to the matter of the legal status of Liberia, which was considered relevant to the issue of how Britain could respond. Again, international law was perceived as being involved, with legal advice being taken following a letter from the United States, and Dodson advising that the American settlers were 'in the position of a mere private association' and had no 'rights' or 'powers' over 'other previous settlers'.[94] Other examples from the period involving international law and British-American global trading interests include matters concerning Cuba, New Zealand, and Monte Video.[95]

In contrast, the depth of the role of international law is evident from the way British policy dealt with disputes over the impact of the Most Favoured Nation clause in the 1815 Convention. These involved generally relatively small-scale routine matters, but policy was nevertheless conducted so that the detail conformed to British treaty obligations. In other words, the framework of international law was being applied, on a day to day basis, to the complexity of facts on minor matters, as well as issues of grand strategy. A good example from the period is provided by the way international law clearly influenced the British response in the long-running dispute over American rough rice.[96] This case concerned the low duty of 1 penny per quarter applied to 'rough rice imported ... from the West Coast of

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[93] FO to CO, Draft, 16 September 1841, FO 5/374, fols. 182-183. See generally: Palmerston to Fox, 30 November 1840, FO 5/347, fols. 205-206, Stephen to Canning, 2 October 1841, FO 5/374, fols. 253-256, Aberdeen to Fox, 20 August 1842, FO 5/376, fols. 70-73, Aberdeen to Fox, 18 July 1843, FO 5/390, fols. 83-84.

[94] Dodson to Aberdeen, 23 March 1844, FO 83/2207, fols. 305-308.

[95] In Cuba, the United States complained that a British ship had plundered an American ship off the coast, but a British investigation found that the British ship was not guilty of plundering or of 'infringing the Laws of humanity or the Laws of Nations as subsisting between friendly powers': Report and documents, FO 5/372, fols. 96-160. In New Zealand, the United States had expressed concern about the position of American citizens undertaking fishing and commercial activities there, following its acquisition by Britain in 1840, but Britain considered that they will '… find the protection of a settled government more advantageous to them than the anarchy and confusion which has hitherto prevailed': FO to CO, Draft, 26 February 1841, FO 5/371, fols. 85-102. In Monte Video, Britain took action with France (in support of Monte Video) to protect its commercial interests in the ongoing dispute between Monte Video and Buenos Aires, and Aberdeen instructed Pakenham to ask the American government to take action against the perceived interference of Brent, the American chargé d'affaires in Buenos Aires, in making an unauthorised offer of mediation: Aberdeen to Pakenham, 3 October 1845, Draft, FO 5/423, fols. 142-147.

[96] The political significance of rough rice in the United States at the time can be seen from the fact that Tyler made reference to the dispute in his December, 1841 Presidential Message to Congress: Tyler, Presidential Message, 7 December 1841, as contained in Fox to Aberdeen, No 142, 12 December 1841, FO 5/364, fols. 262-285.

Africa', as compared to the duty of 20 shillings per quarter on rough rice admitted into Britain from the United States.[97] The dispute arose when the United States then contended that the West African rate resulted in a breach of the Most Favoured Nation clause in the 1815 Convention.[98] Ultimately, the main point was resolved when Britain confirmed in 1841 that the duties on American rough rice would be charged in the future at the same rate as that for Africa.[99] A further stage also then, however, followed Everett's subsequent call for the duty 'overpaid' in the past to be repaid.[100] This later claim was settled in 1845.[101]

What is important, for present purposes, however, is the way that international law was fundamental to British policy in resolving both stages of this dispute. Most significantly, policy can clearly be seen to have responded to the legal advice received from the law officers of the Crown.[102] On the main issue, Britain appears originally to have maintained a highly technical defence based on the distinction between the states from where items were imported and the states of which such items were the produce. As Stevenson described it, the argument went that, as the British statute applied to 'rough rice imported... from the West Coast of Africa', it applied not just to rice grown in West Africa, but to any rough rice, whether grown in the United States or elsewhere, provided that it was imported from West Africa.[103] The conclusion intended to be drawn from this, presumably, then, was that the low duty for West Africa did not breach the Most Favoured Nation clause in the 1815

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[97] Everett to Aberdeen, 2 April 1842, FO 5/385, fols. 61-74.

[98] See, for example, Stevenson to Palmerston, 1 February 1841, FO 5/369, fols. 21-26, which, in turn, referred to similar points made in February, 1839.

[99] Aberdeen to Stevenson, Draft, 20 October 1841, FO 5/369, fols. 220-221.

[100] Everett to Aberdeen, 30 December 1841, FO 5/369, fols. 254-258.

[101] E. Plischke, *Department of State: A Reference History* (1999*)* refers to a treaty of 1845 which agreed the terms of a respective settlements between Britain and the United States including rough rice, p. 163 (accessed through Google books on 10/5/18).

[102] The process by which this legal advice was acted upon in policy terms in the period up to 1841 is, however, unfortunately obscure, particularly bearing in mind the time delays involved. Furthermore, mysteriously, given that Dodson advised in 1839, Palmerston queried in May, 1841 whether the United States was allowed to import rice at a lower rate under the treaty, and asked whether the Queen's Advocate had been consulted! See: Palmerston Note, 17 May 1841, FO 5/372, fols. 221-222, and Note to the Treasury making Palmerston's point: 24 May 1841, FO 5/372, fols. 199-201. See also, the Board of Trade recommendation in May, 1841 that the duties between rice imported from Africa and the United States should be equalised: Le Marchant to Gordon, 14 May 1841, FO 5/372, fols. 179-181, and cf. Macgregor to Trevelyan, 16 June 1841, Copy, as contained in Pennington to Backhouse, 21 June 1841, FO 5/373, fols. 62-63.

[103] Stevenson to Palmerston, 1 February 1841, FO 5/369, fols. 21-26.

Convention as rough rice grown in the United States could also benefit from it! Unsurprisingly, the United States disagreed with this construction, and argued that treaties needed to be interpreted in line with the 'spirit and intention of the whole instrument'.[104] The crucial point, however, is that the advice of the Queen's Advocate supported the position of the United States, and Britain backed down in 1841.[105]

The role of legal advice in the settlement of the later stage of the dispute is even clearer. Following the change in British policy in 1841, Everett then claimed, as mentioned, that the duty already paid should be refunded - on the basis that it had been 'wrongfully' charged, observing, as well, that the prospective change to the duty had been 'an act of justice' rather than a 'gratuitous favour'.[106] Aberdeen's initial response appears to have been to reject this American contention, arguing that 'it would have a prejudicial effect upon commercial arrangements between friendly states' if back duty needed to be paid following 'concessions' after differences of interpretation, but this argument was, in turn, strongly rejected by the United States.[107] Aberdeen then privately supported the American view when forwarding Everett's letter of October, 1843 to the Treasury, but nevertheless still took legal advice on the point in 1845 following a further letter from Everett.[108] In the event, Dodson, Follett, and Thesiger gave a clear joint opinion that the West African low rate 'was not consistent' with Article 2 of the 1815 Convention.[109] From there, the path to the final agreement that the duty already paid should be refunded was clear, and, indeed, Aberdeen told Peel that he

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[104] Stevenson to Palmerston, 1 February 1841, FO 5/369, fols. 21-26.

[105] Dodson to Palmerston, 15 May 1839, Parry, *Law Officers' Opinions*, Vol. 4, pp. 36-39. Dodson advised that the distinction made by the Treasury was really only applicable to the domestic law charging the duties concerned. More broadly, Dodson then cautioned that the method of fixing duties by reference to the place from where they were imported may have the 'same effect' as if those duties 'were fixed with reference to the place or country of which the article is the growth, manufacture, or produce, and would in that respect be contrary to the spirit' of Article 2 of the 1815 Convention.

[106] Everett to Aberdeen, 30 December 1841, FO 5/369, fols. 254-258.

[107] Aberdeen to Everett, Draft, 1 March 1842, FO 5/385, fols. 25-28; Everett to Aberdeen , 2 April 1842, FO 5/385, fols. 61-74.

[108] FO to Treasury, Draft, 7 December 1843, FO 5/402, fols. 85-88; Everett to Aberdeen, 27 December, 1844, FO 5/417, fols. 227-236.

[109] Dodson, Follett, and Thesiger to Aberdeen, 18 April 1845, Parry, *Law Officers' Opinions*, Vol. 4, pp. 277-279.

'felt quite ashamed to continue the discussion in direct opposition to the provision of the treaty, and the explicit declaration of opinion by the three law officers'.[110]

The other important feature of the rough rice case was in the way that international law can be seen to have influenced policy by providing a clear shield for keeping current politics out of the resolution of the issues involved. In this instance, this worked against Britain, but the principle was important for the long term ability of British-American disputes to be settled through legal argument within a legal framework. The point is evident from the American response to Britain's appeal for an 'equitable interpretation' of the 1815 Convention, in which the British claim was that 'no injury' was intended to the United States by the low duty applied from a 'motive' of 'humanity to the negro race'.[111] Everett, however, rejected this contention, noting that 'no argument can be of a higher character, than that which proceeds on the inviolable obligation of public compacts between nations', and that British motivation 'cannot justify the infraction'.[112] As he grandly put it: 'It is the object of treaties to place the matters secured by them beyond the control of either party'.[113] For Everett, therefore, law not politics was to be the determining factor. As seen, Britain in the end dropped its opposition, and the case was settled without account being taken of British motivation. Whilst it may seem a commonplace, evidence that disputes were settled by reference to the law is, though, important for establishing the reality of a legal framework.

International law, though, was only able to influence British policy through the conduct of disputes in this way because the United States also respected and used international law. In other words, it mattered not only that there was a legal framework for the handling of British-American tensions, but that it was also truly a shared framework. Undoubtedly, the foundation for this positive American approach was an overall wide level of support for international law in the United States. Most importantly, political recognition from American governments in the period at least mirrored, if not exceeded, the position in Britain. Presidents and Secretaries of State alike gave similar public and consistent approval to there being a role for international law. The most prominent of these was Daniel Webster, Secretary of State from 1841 to 1843, for Presidents Harrison and Tyler. Webster believed in

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[110] Aberdeen to Peel, 25 July 45, Peel Papers, Add. MS 40455, fols. 114-115.

[111] Aberdeen to Everett, 11 August 1842, FO 5/385, fols. 157-169.

[112] Everett to Aberdeen, 18 October 1843, FO 5/398, fols. 186-205.

[113] Everett to Aberdeen, 18 October 1843, FO 5/398, fols. 186-205.

international law, a point clearly illustrated by his description of a system of international relations based on 'rules', 'usages', and 'prescriptions' in a letter to Everett in 1842:

> At the present day, no State is so high as that the principles of its intercourse with other Nations are above question or its conduct above scrutiny. On the contrary, the whole civilised world, now vastly better informed on such subjects than in former ages, and alive and sensible to the principles adopted, and the purposes avowed, by the leading States, necessarily constitutes a tribunal, august in character and formidable in its decisions. And it is before this tribunal, and upon the rules of natural justice, moral propriety, the usages of modern times, and the prescriptions of public law, that Governments which respect themselves, and respect their neighbours, must be prepared to discuss with candour and with dignity, any topics which may have caused differences to spring up between them.[114]

This elevated view was shared by others. Van Buren, President from 1837 to 1841, spoke of the 'great principles of international justice, the maintenance of which is alike indispensable to the preservation of social order and the peace of the world'.[115] Similarly, Forsyth, his Secretary of State, valued the importance of observing treaties, and referred to the 'respect for the integrity and character by which the United States have sought to distinguish themselves since the establishment of their right to claim a place in the great family of nations'.[116]

There is also evidence for a broader embrace of international law within the United States in recent work covering the period. The prominence of the American jurist, Henry Wheaton, in matters of international law, was, in fact, observed by his contemporaries in Britain.[117] Within modern research, this has been picked up on, in particular, by Onuf and Onuf, in *Nations, Markets and War.*[118] Here, the authors draw out what they see as the key

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[114] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185; see also Webster to Joshua Austin Spencer, *Webster Papers*, pp. 100-101.

[115] Van Buren, Report of Speech, New York, 2 July 1839, as contained in Fox to Palmerston, No. 34, 10 August 1839, FO 5/332, fols. 200-213 at fol. 208.

[116] Referred to in Van Buren, public letter, in Pakenham to Aberdeen, No. 36, 28 April 1844, FO 5/404, fols. 233-281 at fol. 279. See also Polk, Inaugural Address, as contained in Pakenham to Aberdeen, No. 22, 4 March 1845, FO 5/425, fols. 1-6, where he said that his aim in 'foreign relations' was to 'observe a careful respect for the rights of other nations'.

[117] Wheaton was recognised in the British parliament: Campbell, HL, 14 February 1842, Vol. XV, 324-326.

[118] N. G. Onuf, and P. S. Onuf, *Nations, Markets and War: Modern History and the American Civil War,* (London: University of Virginia Press, 2006).

contribution of Wheaton in establishing international law as a guide for the actions of states in the early to mid-nineteenth century. They comment that:

> Wheaton followed Vattel in arguing that European nations constituted a society, and thus a moral world, within which nations are equally free to pursue their interests within the limits set by international law ... . He took for granted that the rules of international law confer rights and duties on states.[119]

Indeed, for Onuf and Onuf, 'no one writing about international law exceeded [Wheaton] in influence for at least three decades', and he was important because he 'helped make liberal international society a conceptually distinct domain'.[120] In addition, they argue, Wheaton 'gave practical primacy to *positive law*', and (originally) set out in the third edition of *Elements* in 1846 'a specifically juridical basis for a distinctly European international law'.[121]

Others focus instead on what they see as the part played by international law in giving more credibility to the United States as a new nation of the world. Janis picks out the role of Wheaton, alongside Kent, in deploying international law to increase the global standing of the United States. As he puts it, Wheaton and Kent were both 'anxious to use the law of nations to secure the recently-won independence and sovereignty of the United States'.[122] Gould's *Among the Powers of the Earth*, where he refers to 'the drive [of the United States] to be accepted as a treaty-worth nation in Europe', also fits well with Janis' contention as to how Kent and Wheaton saw the law of nations in the context of American independence.[123] The specific use of international law as part of the founding of the United States was also certainly something that was observed in Britain at the time. Roebuck, for example, significantly remarked in the House of Commons in 1841 that: 'It should always be recollected... that on the establishment of the government of the United States, very early in

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[119] Onuf and Onuf, *Nations, Markets and War,* p. 50.

[120] Onuf and Onuf, *Nations, Markets and War,* p. 60.

[121] Onuf and Onuf, *Nations, Markets and War,* p. 63, p. 65.

[122] M. W., Janis, *America and The Law of Nations, 1776-1939*, (Oxford: Oxford University Press, 2010), p. 49.

[123] Gould, *Among the Powers of the Earth,* p. 11. Lev also notes that Kluber commented that 'the United States of North America, have by deed and word expressed their wish to join this community' (which for Kluber was 'the Christian Powers of Europe'): Lev, 'The transformation of international law', p. 130, citing Kluber, Europaisches Volkerrecht, I, II, s35, pp. 73-74, (1821).

the history of those states, that they declared, that they considered themselves amenable to the international laws established among nations'.[124]

Finally, Janis makes a link between religion and international law in the United States. In terms of public politics, he argues that a climate of widespread support for international law in the United States was influenced by religion and an associated desire to resolve disputes peacefully.[125] He also identifies, in particular, the association between Christian peace movements and international law, highlighting both William Ladd's 1840 'Essay on a Congress of Nations' and the work of Elihu Burritt in organising peace conferences in Europe in the 1840s.[126] Janis also, however, emphasises the way American jurists used religion. Kent, he comments, pointed to the Christian 'community of nations', and aimed to use 'religious commonalities to link America to the longer-established European polities'.[127] Both Kent and Wheaton, he observes, considered that 'Christianity was important … as a sanction for international law, a crucial element in affirming the efficacy of the law of nations'.[128]

Whilst this level of presence for international law was an important pre-condition, the crucial point, however, for the practical operation of the shared framework on a day to day basis was that the United States also acknowledged the same broad legal rules as Britain. A basic level of conformity was, of course, ensured by the fact that the United States was on the other side of the seven main treaties which defined the main characteristics of the British-American relationship. It also mattered that, like Britain, the United States placed a high value on observing treaties, as is illustrated, for example, by this extract from a Circular to Collectors and Naval Officers from the Department of Treasury in 1844: 'The most scrupulous good faith is due to the stipulations of treaties. The public faith of the United

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[124] Roebuck, HC, 26 August 1841, Vol. LIX, 263-265.

[125] Janis, 'North America: American Exceptionalism in International Law', p. 533, p. 540. See also Thistlethwaite, *The Anglo-American Connection*, p. 101 for a discussion of the impact in Britain in the early 1840s of the idea for writing arbitration clauses into treaties, which, he comments, originated from William Jay, President of the American Peace Society.

[126] Janis, 'North America: American Exceptionalism in International Law', pp. 533-538.

[127] Janis, *America and the Law of Nations*, p. 53, p. 60.

[128] Janis, *America and the Law of Nations*, p. 64.

States is above money and above price'.[129] More importantly, however, it is clear from the British diplomatic papers of the period that the United States also relied in its relationship with Britain on principles of international law similar to those within the main themes of the Foreign Office practice. This meant that there was, as a result, generally a set of rules within which Britain and the United States were each able to base their respective positions on points of tension. The effect was not, of course, that Britain and the United States agreed on every specific point of law, or on its application. They did not, but it did mean that law could operate as a reference point and guide. In other words, even when they *disagreed*, Britain and the United States nevertheless *agreed* that law was relevant to how they moved forward. The remainder of the section briefly considers the American position on the main aspects of this shared legal framework.

In the British-American relationship, the most prominent principles, in practice, were those related to the independence and sovereignty of the state. For reasons of its own history, the United States would, of course, have been expected to defend the notions of sovereignty and territorial integrity.[130] There was also, however, a strong level of support expressed by its leaders for the associated principle of 'non-interference'. Jackson, for example, regarded 'non-interference' as a basic tenet of American policy, saying simply that the United States 'never interferes with the policy of other Powers, nor can it permit any on the part of others with its internal policy'.[131] Webster similarly noted that 'each nation should be left, without interference or annoyance, direct or indirect, to its undoubted right of exercising its own judgement, in regard to all things belonging to its domestic interests and domestic duties'.[132] Indeed, Webster also considered that adherence to the 'doctrine of non-interference' was vital for the maintenance of peace between Britain and the United States given, in particular, their differing domestic law positions on slavery.[133] Others too, such as Calhoun, Secretary of State from 1844 to1845, also sought to rely on 'non-interference' to keep foreigners out of American affairs. As will be seen in the later chapters, sovereignty and 'non-interference'

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[129] Circular to Collectors and Naval Officers, Dept. Of Treasury, as contained in FO 5/408, fols. 221-222.

[130] Gould observes that the United States also used international law to protect its own effective independence: Gould, *Among the Powers*, p. 218.

[131] Jackson to Santa Anna, 4 September 1836, as referred to in Fox to Palmerston, No. 2, 20 January 1837, FO 5/314, fols. 4-12.

[132] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185.

[133] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185.

were to be important lines of argument used by the United States in relation, in particular, to Canada and Texas.

The United States also shared with Britain the legal principles associated with the ownership of territory on the North American continent. The United States accepted, alongside Britain, that the principles around discovery and occupation were important in establishing title to the ownership of unoccupied land.[134] Indeed, the application of the facts to these principles was to form one of the main bases for the dispute between Britain and the United States over Oregon.[135] What matters, for present purposes, though, is not the detail of that dispute itself, but rather the general point that it was conducted using legal argument around common principles. Equally important, however, was the shared British-American justification for the right of settlers to own territory, which allowed Oregon to be contested in the first place. British practice here, as seen, derived from natural law and Vattel, and a similar basis can also be seen in that of the United States. For example, the reference to the indigenous peoples as 'mere temporary occupants of the soil' in the 1842 decision of the U.S. Supreme Court in Martin v Waddell clearly reflected Vattel's reasoning:

> For, according to the principles of international law, as understood by the then civilised powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.[136]

Given that the United States had emerged from such a 'European nation', there was, as a result, a reliance on the same legal argument for the ownership of land in the British and American states on the North American continent.[137] This gave Britain and the United States an important joint vested interest in the established framework of international law.

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[134] See, for example, the 1826 negotiations over Oregon, as referred to in the Northwestern Memorandum, *British Documents*, Vol. 2, p. 8, referring to the positions of Huskisson and Addington, the British Commissioners for the settlement of the North-West Boundary, 1826, and, of Gallatin, the American Commissioner; and Calhoun's statement on Oregon, as contained in Pakenham to Aberdeen, No. 103, 12 September, 1844, FO 5/408, fols. 23-49.

[135] The Oregon question is discussed in chapter 5.

[136] Martin v Waddell (1842), 16 Peters 370, as referred to in L. H. Laing and N. Mackenzie, (eds.), *Canada and the Law of Nations; a selection of cases in international law, affecting Canada or Canadians* (London: Humphrey Milford, Oxford University Press, 1938), p. 30.

[137] The right to unoccupied land was also fundamental to American expansion. As Howe argues: 'As its most ardent exponent, the Jacksonian Democrats, conceived it, this imperialist program included ... the expropriation of Native Americans and Mexicans': Howe, *What Hath God Wrought*, p. 852.

Further, it was a hugely significant point of political agreement going to the heart of the nature of the state. Put bluntly, the American Revolution, national sovereignty, and the distinctions in the form of government between republican and monarchical, were only possible if there was a right to the territory over which authority was to be exercised.

Importantly, Britain and the United States also had an effectively shared approach in the period to the related question of whether 'nations' of indigenous peoples could own land on the North American continent as sovereign bodies under international law. By the 1830s, at least, it appears clear that neither Britain nor the United States conducted policy on the basis that they could. McHugh has written on the loss of tribal status by the late 1830s in Upper Canada, arguing that it was replaced by a regime of British subject-hood and Crown protection.[138] Conversely, but with a similar effect for their practical ability to be independent sovereign states, 'nations' of indigenous peoples were considered to be 'domestic, dependent nations' in the domestic law of the United States.[139] As will be seen, this unified approach mattered greatly for the territorial dispute over Oregon in that neither Britain nor the United States appeared concerned in their arguments by the position of the indigenous peoples living in the territory. Furthermore, it is also consistent with evidence of British-American cooperation from the time aimed at reducing the risk of an 'independent ' nation of indigenous peoples from being established. Palmerston, for example, wanted Forsyth warned in 1837 of the potentially 'calamitous results' of a possible attempt by a party of men to 'incite the Indian Tribes… to resist the supposed encroachments of the Governments of Great Britain and of the United States, upon their territory; and to induce them … to form themselves into an independent nation'.[140]

The other principles common to Britain and the United States covered the remainder of those discussed earlier as being mainly involved in British practice and more. The republican form of government in the United States matched the British concept of the state as a 'general body'. The United States clearly also accepted the same broad legal framework for international commerce as Britain. This is illustrated by its use of protective duties and its

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[138] McHugh, 'A comporting sovereign', p. 6.

[139] See the legal references in Laing and Mackenzie, *Canada and the Law of Nations*, pp. 180-182 and p. 199. See also Grewe, *The Epochs*, pp. 549-550.

[140] Palmerston to Fox, No. 1, 6 February 1837, FO 5/313, fols. 1-2.

agreement of commercial treaties.[141] Further, whilst it differed from British practice on specific points of law, the United States also clearly accepted the main principles associated with the freedom of the seas and the legal implications of war and peace on the seas. This is evident, for example, from the attempt, mentioned earlier, in the Jay Treaty, 1794 to reach a comprehensive agreement on what constituted contraband and other matters associated with maritime rights in war, and then the later negotiations around the 'right of search' and the slave trade. In these cases, the key point is that, even whilst they were contesting points, Britain and the United States were nevertheless arguing from within the same set of basic rules. Grewe also highlights the 'leadership role' of the United States in furthering the idea of neutrality.[142] Lastly, it is clear that the framework extended, when needed, beyond these key principles. This will be exemplified throughout the remainder of the thesis, and, in particular, by the further issues of international law involved in the McLeod and *Creole* matters.

A final element in the legal framework for handling disputes can be seen in a willingness by Britain and the United States to use and contemplate arbitration as a means of settling international claims. Janis identifies the adoption of arbitration within the Jay Treaty, 1794 as an important precedent for the further use of arbitration.[143] In that instance, claims for compensation arising from three categories of past events were covered, with the cases concerned being decided by commissioners, having regard to their 'merits', 'equity', 'justice', and, in the case of the shipping claims, 'the laws of nations'.[144] In terms of the use of arbitration in direct British-American 'state to state' disputes, however, the key development was the provision for the use of arbitration in the Treaty of Ghent, 1814 as a

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[141] Project Avalon, Yale Law School, (accessed on 10/5/18), lists that the United States entered commercial treaties in the 1830s and 1840s with, for example, the following: Chile (1832), Venezuela (1836), and Belgium (1845).

[142] Grewe, W., *The Epochs,* pp. 538-539.

[143] Janis, 'North America: American Exceptionalism in International Law', p. 536.

[144] The relevant provisions are in Articles 6 and 7 of the Jay Treaty, 1794. The cases covered were: first, American compensation for pre-independence 'debts' of British subjects, which were unable to be recovered in the 'ordinary course of justice'; second, British compensation for losses of American citizens resulting from the 'irregular or illegal captures or condemnations' of their ships or property under British 'authority' or 'commissions' in the then war with France, and which were unable to be received in the 'ordinary course'; and, finally, American compensation for losses of British merchants in the same war resulting from the capture of their 'vessels and merchandise' within the limits of the United States, or by vessels 'originally armed' in the United States.

means of settling the Northeastern boundary dispute.[145] Whilst, as seen, the resulting actual reference to arbitration was unsuccessful in that case, it still proved to be an important precedent, as will be discussed in chapter 4. Arbitration was contemplated, thereafter, by both Britain and the United States at different points as one potential method for settling the Northeastern and Oregon boundary matters. This represented a significant measure of confidence in legal process, as well as being suggestive of a similar approach to the role of international law.

Conclusion

International law made much of its impact on British policy to the United States because it was used, and used regularly, in American relations. Agreement as well as discord was at the heart of British policy to the United States. Treaties and legal principles moulded British objectives so that they conformed to past agreements and the requirements of legal principles. In doing so, they had wide effect, shaping policies as distinct as those that were tolerant of the broad expansion of the United States, and those focused instead on narrow territorial disputes. They also helped and hindered, as can be seen in their influence on the objectives that guided the lofty British ambitions for American trade, as compared to those that restricted what could be done to suppress the slave trade. Ultimately, though, it was a shared legal framework that made international law that much more effective in the British-American relationship. Built on a mutual respect for international law and a set of common principles, this allowed issues within the British-American relationship in the period to be handled within a broad structure of common rules. Perhaps the most striking piece of evidence for its operation comes from a comment of Gallatin in 1840. Gallatin was an American diplomat who had been involved in many negotiations with Britain over the years. Crucially, from that experience, he expressed a belief in 'justice' in British-American relations. For him, Britain was a reliable negotiator on international issues, and he had seen 'nothing at any time that could shake my confidence in the sincerity and good faith of that

[145] Article 5, Treaty of Ghent, 1814.

government'.[146] He was, thus, able to add: 'And I do believe that it would do justice, if it was once satisfied that justice was due'.[147]

[146] A. Gallatin, *The Right of the United States to the North-Eastern Boundary claimed by them*, (New York, 1840), as revised by A. Gallatin, Preface by A. Gallatin, pp. ix-x, as quoted in 'North American Boundary Question', *The Quarterly Review*, Vol. 67, No. CXXXIV, (1840-1841), pp. 501-540 at p. 501.

[147] *Quarterly Review*, 'North American Boundary Question', p. 501, citing Gallatin.

4. **Canada and the Northeastern Border**

In his Report on the Affairs of British North America, Lord Durham urged that it be 'recollected that the natural ties of sympathy between the English population of the Canadas and the inhabitants of the frontier States of the Union are peculiarly strong'.[1] Durham was here concerned specifically with the way 'common wants beget an interest in the politics of each country', and the level of danger he saw presented to Canada by 'sympathisers' in the United States. His point, however, is also a perfect illustration of a wider truth, which is that it was issues concerning the border and border populations that were central to the British-American relationship over Canada and the Northeast in the period. The Canadian rebellions brought the risk of frontier insurgency. The *Caroline* and McLeod affairs both had their origins in an attack driven by individuals from across the border. The Northeastern boundary dispute, and the conflict over fishing rights, were given urgency by locals pushing the limits of territorial rights. This chapter is concerned with how international law influenced the way British policy navigated these problems around border security. Its central contention is that Britain worked with the United States by reference to rules within a shared legal framework. Policy, as a result, was filtered through principles associated with self-preservation and sovereignty, and guided by the sanctity of treaty law. As well as providing an underlying level of agreement to the British-American relationship, this also had the crucial effect of helping to separate the making of policy from the circumstances of the immediate tensions.

The chapter makes three main arguments. It begins by establishing how international law helped Britain to maintain workable relations with the United States and deal with border instability during the Canadian rebellions. The key factor was the emphasis on the duty of protection in Britain's explanations of its actions, which ensured that British policy related to the United States within the ambit of international law. Foreign intervention from the United States was, as a result, less likely. Britain was then able to use principles of international law associated with sovereignty and self-preservation to call for greater security co-operation along the border. Whilst the United States did not respond by adopting exactly the same legal reasoning as Britain, it, nevertheless, did take some serious action aimed at reducing tensions. Importantly, it also used principles of international law, albeit different ones to Britain, to justify the basis for its actions. The second section then shows how

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[1] This quotation and the others in this paragraph are by Lord Durham in Durham, Earl of, *Report on the Affairs of British North America* (London, 1839), p. 96

international law was central to the way British policy handled the acute tensions with the United States which nevertheless arose from Britain's Canadian policy. Whilst the *Caroline* and McLeod affairs resulted from alleged breaches of legal principles, international law, however, also guided their ultimate resolution. Furthermore, international law was used successfully by the United States to resist British policy aimed at entering American territory for security reasons in extreme circumstances. Finally, the third section contends that international law was at the heart of the outstanding British-American territorial issues in relation to Canada. The agreements in previous treaties meant that the main focus of British policy, outside of the Canadian rebellions, was on the disputes over the Northeastern boundary and fishing rights. These were technical, legal disputes aimed at working out the meaning of what had already been agreed, rather than fighting fresh strategic contests. Law was, thus, critical in setting the policy expectations, process, and arguments.

Protecting Canada and co-operation over ongoing border disturbances

The most important stages of the Canadian rebellions, and the nature of the related concern over Britain's relations with the United States, can be summarised briefly for present purposes. From the perspective of the government in London, the main British involvement in the period undoubtedly began with the impasse in the province of Lower Canada over the refusal of the local Assembly to agree to the necessary 'supply' votes to pay for the salaries of judges and other officials. In response, Parliament passed ten resolutions in the spring of 1837 aimed at providing the required funds, albeit that such a direct intervention into Canadian affairs was controversial.[2] This was then followed by the rebellions proper, which began in Lower Canada, in late 1837, before spreading to Upper Canada shortly thereafter. The British government reacted to this by suspending the constitution in Lower Canada, and

[2] The House of Commons ordered that the resolutions be communicated to the House of Lords in a conference on 28 April 1837: HC, 28 April 1837, Vol. XXXVIII, 359. The House of Lords supported the resolutions following a debate on 9 May 1837: HL, 9 May 1837, Vol. XXXVIII, 707-750. Crucially, however, the British government, in turn, also rejected at this time any idea of making the government in Lower Canada more accountable, either by means of an Executive Council 'responsible' to the Assembly or a Legislative Council elected by the people. The structure of the then 'government' in Lower Canada was, broadly, that there was a Governor, an Executive Council (with the Executive Council being viewed in the British parliamentary debates, as an appointed 'cabinet'), a Legislative Council (which was also appointed, and had been originally introduced in an attempt to provide a 'Canadian House of Lords' to balance the Assembly), and, finally, an Assembly, which was elected.

appointing Lord Durham as Governor-General, with both extensive personal powers and a mandate to report with proposals for the future government of the Canadas.[3] In the event, these, and some additional revolts in late 1838, were quashed by the provincial authorities relatively quickly. It was in these better overall circumstances that the British government then accepted Durham's proposals for a legislative union of Upper and Lower Canada in 1839, whilst also rejecting his other main idea for 'responsible' government.[4] Nevertheless, importantly, despite an improving general position, Britain was also faced throughout by the problem of a significant residual level of border disturbances, involving both Americans and Canadians living in the United States.

The main concern for British policy towards the United States from these events was that Americans would, in some way, become involved in Canadian affairs and that this could cause a rupture with Britain. On the face of it, there should not have been any particular problem from American intervention. Britain was, of course, in friendly relations with the United States following the Treaty of Ghent, 1814, and, as seen, the United States shared a framework of international law which valued the principle of 'non-interference'. In reality, however, there was a potential danger arising from the sympathy many Americans felt for the Canadians involved in a fight with imperial Britain. There was, in the words of Lord Durham, a natural level of support for the Canadian rebels among many Americans because the 'contest bore some resemblance to that great struggle of their own forefathers, which they regard with the highest pride'.[5] Radical MPs, too, had similarly warned British ministers regularly about the risk to Canada posed by American citizens. Roebuck, for example, cautioned, at the time of the ten resolutions, that 'thousands of Americans will re-cross the frontier, and the history of Texas, will tell the tale of Canadian revolt'.[6] Others, such as Leader and Molesworth, predicted, during the rebellions, the intervention of the American people in support of the Canadians, irrespective of the wishes of the United States federal government.[7] There was even a lingering suspicion in the British government that

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[3] Russell, HC, 16 and 17 January 1838, Vol. XL, 8 et seq., and 96 et seq. .

[4] Message from the Crown, 3 May 1839, HL, Vol. LXVII, 756; Russell, HC, 3 June 1839, Vol. LXVII, 1260-1274. A bill for the legislative union was introduced in 1840, following a year for consultation in the Canadas: Russell, HC, 23 March 1840, Vol. LII, 1323-1342.

[5] Durham, *Report on the Affairs of North America*, pp. 96.

[6] Roebuck, HC, 6 March 1837, Vol. XXXVI, 1353-1354.

[7] Leader, HC, 22 December 1837, Vol. XXXIX, 1436-1445, Molesworth, HC, 22 December 1837, Vol. XXXIX, 1465-1467.

many in the United States wanted to see 'the British name and power expelled for ever from this continent'.[8]

Furthermore, the risk of a conflict with the United States was made more of a concern by the seriousness with which Britain was determined to keep Canada. It was, as seen in chapter 3, a main objective of British policy to maintain Britain's remaining possessions on the North American continent.[9] British ministers certainly strongly reflected this in their public statements during the period of the Canadian rebellions. The continuation of the link between Canada and the Empire was an underlying theme of the government's ten resolutions aimed at dealing with failures in Canadian governance in early 1837. The objective, however, became much more explicit during the revolts themselves. Russell offered government 'support' for 'legal efforts to secure the allegiance' of Lower Canada, and 'to retain it in obedience to Her Majesty', almost immediately on first hearing of the rebellions.[10] Furthermore, Parliament itself then swiftly backed 'the efforts ... for the suppression of revolt', and expressed 'deep concern' at a 'rebellion' aimed at ending 'allegiance to the Crown'.[11] Crucially, too, the government also received the backing of Peel, the then leader of the main opposition in the House of Commons, who commented that 'it would be the greatest folly on the part of England to allow the connection [with Canada] to be lightly broken'.[12]

International law made on impact on British policy to the United States in these circumstances because legal principles were influential in how Britain publicly justified its objectives in Canada. As seen in chapters 2 and 3, Britain's aim of maintaining its possessions on the North American continent was shaped by the general legal duties to preserve and protect the state and its subjects, which were in turn, accepted parts of British

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[8] Fox to Aberdeen, FO/5/364, No. 137, 5 December 1841, fols. 208-210. Palmerston even referred to this as a motive for why the United States pursued the disputed territory in the Northeast: Palmerston to Monteagle, 28 October 1842, Palmerston Papers, MO/131.

[9] The five main British provinces were Upper Canada, Lower Canada, New Brunswick, Nova Scotia, and Prince Edward's Island. For background on their history within the British Empire, see generally, 'Notes' upon the Northeast Boundary, *The Westminster Review*, Vol. 34, (1840), Article VII, pp. 202-237, and 'North American Boundary Question', *Quarterly Review*, (1841), No. CXXXIV, pp. 501-540.

[10] Russell, HC, 22 December 1837, Vol. XXXIX, 1430.

[11] Russell proposing the Address: HC, 16 January 1838, Vol. XL, 42, and Address agreed to, 93.

[12] Peel, HC, 16 January 1838, Vol. XL, 73.

practice. British policy in Canada was, as a result, explained at the time by government in language which was consistent with the international law principle of *protection*, as well as direct British power interests. Several instances from the associated parliamentary debates illustrate how this was done. Russell, taking the lead for the government in the House of Commons, rhetorically asked whether Britain would leave 'the subjects of the Crown unprotected' when introducing the ten resolutions.[13] Again, after the revolts began, Russell emphasised 'protection to British subjects.'[14] Similarly, Peel, leading for the Tories, saw the protection of Canada as central to any British response, observing that Britain 'might at any moment be called upon to defend that colony from all comers ... from a point of honour involving our character as its protector'.[15] Wellington, too, considered deep into 1839 that further defence strengthening was needed in order to provide the necessary 'protection' to British subjects.[16]

This explanation in the terms of protection mattered for policy towards the United States because it brought British policy towards Canada within the principles of international law, and, thereby, reduced the risk that circumstances would arise which would justify foreign interference. Three factors combined to produce this effect. Most importantly, the principle of protection permitted a strong defence of Canada within international law, which would itself deter intervention. Russell put this clearly when he said:

> But if this country took a timid and pusillanimous tone - if we sacrificed those who looked to us for protection, deserted British subjects who had always been steady and loyal to their allegiance, and withdrew our troops, that they may be overpowered - if we follow so weak and cowardly a course, then we should invite the aggression of foreign Powers.[17]

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[13] Russell, HC, 6 March 1837, Vol. XXXVI, 1292-93.

[14] Russell, HC, 22 December 1837, Vol. XXXIX, 1497. Sydenham, the Governor-General, told Russell in 1841 that Canadians felt 'that they may rely with confidence upon the entire support and protection of the British Crown': Sydenham to Russell, Confidential, 10 April 1841, FO 5/372, fols. 165-166.

[15] Peel, HC 14 April 1837, Vol. XXXVII, 1283-1284.

[16] Wellington, HL 26 July 1839, Vol. LIX, 872.

[17] Russell, HC, 22 December 1837, Vol. XXXIX, 1501.

It was also significant, however, that 'protection' explained British policy in a way that could counter potential accusations of tyranny or arbitrary rule from London.[18] Such attacks mattered because international law, as conceived, for example, by Vattel, gave a right of foreign intervention to help an 'oppressed people' against 'tyranny'.[19] Whilst British policy countered this accusation mainly through its declared intention to search for a new 'free' constitution, protection helped to reduce the risk by, crucially, allowing the British state to act in Canada wearing a cloak of supervisory disinterest within the terms of international law.[20] Apart from the general notions of 'protection' from danger as used by Russell and others, British rule was, accordingly, also described as being necessary for the protection of the 'British' and 'French' inhabitants in the Canadas. As, Stanley observed, if Canada was given up, 'they cast off in Lower Canada alone 150,000 of their British fellow-subjects, who clung to them for protection against a tyrannical majority'.[21] Conversely, he added, the 'only security [for the French Canadians] for the absolute laws and feudal customs to which they clung was in the protecting power of this empire'.[22] Consistently with this, Durham saw his duty in Canada as being 'to extend protection to *all*.' [emphasis added].[23] This use of 'protection', therefore, also appears partly to qualify Benton and Ford's view that, within 'the British discourse of protection', 'protection came to mean both the protection *of* the Crown ... and protection *from* the exercise of arbitrary power - even by those authorised to

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[18] Hume, for example, sought to characterise the Canadian rebellion as a just response within international law to an 'arbitrary' British state, commenting that: 'Vattel was an author very much quoted now-a-days, and Vattel had said that the people had a right to be well-governed, and at as cheap a rate as possible; and that if the people were deprived of these their inalienable rights by force or fraud, they would be justified in using every means in their power to recover them': Hume HC, 29 January 1838, Vol. XL, 627. Others made similar attacks; Leader, for example appealed for support from 'every man who prefers free institutions to arbitrary rule', and O' Connell declared that 'necessity was the constant plea of tyrants': Leader, HC, 6 March 1837, Vol. XXXVI, 1314; O' Connell, HC, 6 March 1837, Vol. XXXVI, 1325.

[19] Vattel, *Law of Nations*, Book II, S56.

[20] The 'despotic' power enjoyed by Durham and his successors was considered to have only a temporary place: Russell, HC, 16 January 1838, Vol. XL, 8; Peel, HC 25 January 1838, Vol. XL, 504. The 'free' constitution envisaged in the 1830s was, however, distinct from the notion of 'responsible' government put forward in the Durham Report of 1839, as British parliamentarians generally struggled in this period with 'responsible' government within an imperial context. See, for example, Russell, HC, 6 March 1837, Vol. XXXVI, 1295; Russell, HC, 3 June 1839, Vol. LXVII, 1260-1274; Melbourne, HL, 2 February 1838, Vol. XL, 687; and Stanley, HC, 8 March 1837, Vol. XXXVII, 118.

[21] Stanley, HC, 8 March 1837, Vol. XXXVII, 125. See also Peel, HC, 14 April 1837, Vol. XXXVII, 1283-1284.

[22] Stanley, HC, 8 March 1837, Vol. XXXVII, 125-126.

[23] Durham, HL, 18 January 1838, Vol. XL, 241.

act for the Crown' - in that it was the actions of the British government in London giving the 'protection' *of* the Crown in Canada that were themselves attacked in Parliament for being 'arbitrary'.[24]

Lastly, protection was often combined with the related notion of allegiance, which then allowed British rule to be presented as, effectively, being the fulfilment of an obligation owed for the loyalty of the Canadians. Chitty certainly made an explicit connection between the protection due from a state under international law, and the allegiance owed by a subject as a matter of British domestic law, in his note on Vattel's section on the duty of self-preservation in his 1834 edition of the *Law of Nations:*

> This principle is in every respect recognised and acted upon by our municipal law. It is in respect of, and as a due return for, the protection every natural born subject is entitled to, and actually does, by law, receive from the instant of his birth, that all the obligations of allegiance attach upon him, and from which he cannot by any act of his own emancipate himself.[25]

The link between protection and allegiance was also consistent with the way that British politicians tended to indicate that Canada was to remain a British possession because that is what its people wanted. Russell, for example, made clear that he 'did not look forward to the maintenance of British authority and British dominion contrary to the express wish of the Canadian people'.[26] Similarly, Peel later considered that Canada had 'to be protected at all risks and against all parties', in part because 'the people of the two Canadas had ... declared their intention to stand by that union'.[27]

Explanations of British action in Canada in terms of protection and allegiance mattered for policy to the United States because they placed the future of Canada into a context in which the separation of a colony could, at least, be contemplated within international law. Many ministers and other parliamentarians gave credence to this by alluding to the possibility of a peaceful separation of Britain from the Canadas, albeit often in the future. These included,

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[24] Benton and Ford, *Rage for Order*, pp. 87-90.

[25] Chitty, Note 15, Vattel, *Law of Nations*, Book I, S17.

[26] Russell, HC, 22 December 1837, Vol. XXXIX, 1500. See also Melbourne, HL, 8 February 1838, Vol. XL, 882-883, who stated that Britain 'should be able to maintain' its possessions ' not merely by force of arms, but by the good will, the friendly feelings of the inhabitants of those countries'.

[27] Peel, HC, 12 June 1840, Vol. LIV, 1121.

for example, Russell, Labouchere, Gladstone, Lansdowne, and Aberdeen.[28] This was important as it implicitly, at least, took account of the American 'contest' and the foundation, more recently, of the South American republics, albeit that, as observed by Fisch, in the latter case there had been a contention for 'an *unconditional* right to independence for all colonies' [emphasis added].[29] It was also significant that others, following Russell's lead, even made an express link between British rule, and the Canadian *wish* for allegiance. Peel, for example, wanted to be 'assured that there is a disposition existing in it [Canada] to cultivate our connection' before being 'expected' to 'undertake a charge of defending the colony in time of war'.[30] Similarly, Ashburton thought it 'well' that Canada stayed in the Empire if that is what it wanted, but, if 'they demanded to be separated', then it was 'most consistent with sound policy to shake hands with them, and let them join with the North Americans, if they so thought fit.'[31] Within the framework contemplated by the British explanation of protection, therefore, the future of Canada *could* be seen as being in the hands of the Canadians, and the United States did not need to step in.

International law also made an important contribution to the way Britain was able to handle the issue of border security with the United States during and after the Canadian rebellions. Although, as will be seen, some serious incidents still occurred, legal principles nevertheless justified a significant level of British-American cooperation. International law's main impact was in providing the basis for Britain to be able to call for the American government to perform its *duty* and, thereby, take steps to prevent citizens of the United States from attacking a power with which it was at peace. This ability to demand action to restrain American citizens was hugely significant given the widespread British concern about the

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[28] Russell, HC, 16 January 1838, Vol. XL, 41; Labouchere, HC, 23 January 1838, Vol. XL, 417; Lansdowne, HL, 8 February 1838, Vol. XL, 865-868; Aberdeen, HL, 2 February 1838, Vol. XL, 662-663; Gladstone, HC, 8 March 1837, Vol. XXXVII, 99, HC, 22 December 1837, Vol. XXXIX, 1454, and HC 29 May 1840, Vol. LIV, 724-731.

[29] J. Fisch, 'People's and Nations' in Fassbender, B., and Peters, A., (eds.), *The Oxford Handbook of the History of International Law*, (Oxford: Oxford University Press, 2012), pp. 27-48, at pp. 35-37. The idea of such an 'unconditional right' was not prevalent in these Canadian debates, with the concept of Canadian separation mainly being dealt with on its own facts and circumstances.

[30] Peel, HC, 26 January 1838, Vol. XL, 552. Peel was, however, also cautious earlier about the wider implications of a principle of allowing peoples to be 'released from their allegiance' if they were 'disaffected' in a parliamentary comment responding to Grote; Peel, HC, 16 January 1838, Vol. XL, 69. Nevertheless, he returned to the connection between Canadian allegiance and protection in 1842, commenting that 'if they are not with us, ... - let us have a friendly separation while there is yet time': Peel to Aberdeen, 16 May 1842, Aberdeen Papers, Add. MS 43062, fols. 48-54.

[31] Ashburton, HL, 8 February 1838, Vol. XL, 848-853.

possible consequences of serious intervention from them. As Sir Francis Head told Fox, it was 'unfair and unjust' that the rebellion 'should be renewed and rendered formidable by the direct and active encouragement of the American people'.[32] Indeed, the importance of the 'duty' to Britain can be seen by the way Fox emphasised it in his reports to Palmerston. Fox wrote, initially, of the willingness of the United States government 'to do their duty towards Great Britain, and to restrain the shameful excesses of their citizens'[33] Similarly, although worried by the practical ability of the armed forces of the United States to make an impact on the ground, he nevertheless reported later that 'they are doing their duty, to the utmost extent of their means; under circumstances of the most extraordinary difficulty and embarrassment.'[34] The other main effect was that Britain was not prevented by any principle of international law from treating any American citizens captured in Canada as ordinary criminals. As will be seen, this was also to have material consequences.

Britain and the United States were able to co-operate around border security in this way because both perceived that they had the same broad rights and obligations within a shared framework of law. Sovereignty was the key common principle for the way both states considered that there was an American duty to prevent damaging interference from citizens, albeit that the exact basis for that obligation was expressed differently. Britain appears to have relied on principles of international law applicable to the relations between independent sovereign states. British policy, thus, assumed that there was an obligation - Fox's 'duty' in the above quotations - on one sovereign state to try to prevent its citizens from damaging the interests of another state with whom it was in friendly relations. Britain did not express this as a duty of neutrality, so the implication is that it was conceived, rather, as a general duty owed by the United States in the circumstances. Whilst the derivation of Britain's 'duty' was not specified in the diplomatic exchanges, such a general 'duty' was, however, consistent with the principle stated by Vattel that 'the nation or sovereign ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend that state itself'.[35] By demanding *general* action, British policy also conformed to Vattel's notion that the duty

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[32] Head to Fox, 23 December 1837, in Fox to Stevenson, 4 January 1838, *Diplomatic Correspondence*, Vol. III, 1421.

[33] Fox to Palmerston, No. 3, 13 January 1838, FO 5/322, fols. 5-6.

[34] Fox to Palmerston, No. 12, 26 February 1838, FO 5/322, fols. 63-65.

[35] Vattel, *Law of Nations*, Book II, S72.

of a state was merely to mitigate the overall risk of such actions, and that it was not generally to be held liable for the specific activities of unauthorised individuals.[36]

In contrast, the United States acknowledged a duty to Britain, but it did so, rather, in the terms of the principles of neutrality and 'non-interference' owed between friendly sovereign states.[37] This particular language was consistent with the domestic law of the United States, which contained legislation to reinforce its policy of neutrality in the conflicts of states with which it was at peace.[38] It also accorded with the principles within the shared framework, as seen in chapter 3. Stevenson, accordingly, referred to the 'obligations of neutrality' when telling Palmerston in 1838 that 'everything' had been done which Britain 'had a right to expect'.[39] Indeed, he even claimed that the 'cessation of hostilities' in Canada was 'in a great measure' to be 'attributed' to the 'prompt and vigorous measures adopted by the United States'.[40] Similarly, Webster expressed the basis of any obligations of the United States in the duties of neutrality under international law. For Webster, 'the just interpretation of the modern law of Nations' was 'that neutral States are bound to be strictly neutral', which, in turn, meant that it was 'a manifest and gross impropriety for individuals to engage in the civil conflicts of other States, and thus to be at war, while their Government is at peace'.[41] More generally, Webster, also linked the duty to take action against citizens to the principle of 'non-interference', on the basis that that 'salutary doctrine...is liable to be essentially impaired if, while Government refrains from interference, interference is still allowed to its subjects, individually or in masses.'[42] The United States also appears to have accepted that international law did not prevent Britain from having the right to prosecute Americans involved in the Canadian disturbances under its domestic criminal law, provided they were caught within British jurisdiction. This will be discussed further below, but the principle,

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[36] Vattel, *Law of Nations*, Book II, S73.

[37] The approach of the United States as set out in this paragraph also appears to have removed any practical effect for British-American relations of the question of whether the Canadian rebellion was at any time technically a 'civil war'.

[38] See, for example, the American Neutrality Act of 1818.

[39] Stevenson to Palmerston, 22 May 1838, *Diplomatic Correspondence*, Vol. III, 1445.

[40] Stevenson to Palmerston, 22 May 1838, *Diplomatic Correspondence*, Vol. III, 1445.

[41] Webster to Fox, 24 April 1841, *Diplomatic Correspondence*, Vol. III, 1269.

[42] Webster to Fox, 24 April 1841, *Diplomatic Correspondence*, Vol. III, 1269.

was certainly, broadly, consistent with Vattel, who considered that the affected state in such circumstances 'may without scruple bring [the offender] to justice and punish him.'[43]

From a British perspective, however, not much turned, in practice, on whether or not there were fine distinctions between Britain and the United States in their respective legal justifications for the American 'duty'. The critical point is that Britain got the cooperation sought by its policy. Indeed, in the circumstance, the overall level of support from the United States was remarkable. The federal government was, clearly, not in support of its citizens getting involved in Canada, with Forsyth, for example, going so far as to comment to Stevenson, in November, 1838, that the 'disturbances' in Canada were now 'happily suppressed'.[44] Britain also benefited from the continued attempts made by the United States to prevent attacks by American citizens throughout, and after, the period of the Canadian rebellions, as will be seen. It is, therefore, unsurprising that there is no suggestion from diplomatic papers and parliamentary exchanges that Britain considered the United States to be in breach of its obligations to aid security under international law. Within parliament, Russell, for example, assured the House of Commons that 'the conduct of the United States Government since the commencement of the disturbances in Canada strongly tends to convince us, that from the United States the Canadian rebels will meet with neither sympathy nor assistance'.[45] Others similarly supportive of the position adopted by the United States at that time included Melbourne, Palmerston, Glenelg, Labouchere, Ellice, and Evans.[46]

Three examples of action taken by the United States in the period serve to illustrate the importance of this security assistance. The United States took its first serious action to restrict the ability of its citizens to attack Canada following the outbreak of revolts in 1837. Most importantly at this time, Van Buren introduced a further Neutrality bill early in 1838

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[43] Vattel, *Law of Nations*, Book II, S75.

[44] Forsyth to Stevenson, 28 November 1838, *Diplomatic Correspondence*, Vol. III, 1222. This is also consistent with Durham's analysis in his Report that the United States was against intervention: Durham, *Report into the affairs of North America*, p. 95.

[45] Russell, HC, 16 January 1838, Vol. XL, 36.

[46] Melbourne, HL, 2 February 1838, Vol. XL, 691-692, Palmerston, HC, 2 February 1838, Vol. XL, 716-717; Glenelg, HL, 2 February 1838, Vol. XL, 711-712, Labouchere, HC, 23 January 1838, Vol. XL, 417-418, Ellice, HC, 26 January 1838, Vol. XL, 562; and Evans, HC, 25 January 1838, Vol. XL, 532. See also Palmerston to Fox, Draft, No. 3, 13 January 1838, FO 5/321, fols. 8-9.

with the aim of enhancing border security.[47] This made a significant contribution, with Fox describing 'the most important provisions' of the bill as being those which 'empower the Federal Government to prevent the collecting of arms and ammunition, within the United States, for the purposes of hostile aggression against conterminous countries'.[48] The United States also took steps to place troops in the border region. Again, this move made an impact, with Fox thus, able to report in March, 1838 of three instances where forces under Wool, Worth, Scott and Brady had 'disarmed' and 'dispersed' 'rebels and pirates', an 'armament', and 'piratical bands' in areas near Lake Champlain, Lake Erie, and Detroit respectively.[49] Similar vigilance also continued until, at least, June, 1838, when Forsyth informed Fox of the 'measures' that were at that point 'in progress, under the President's directions, to maintain the peace of the frontier'.[50] These included the use of 'unarmed steamers' on Lakes Erie and Ontario, the placing of a 'force' in Sackett's Harbour[51], and the sending of General Macomb, the Commander-In-Chief of the U.S. Army, to the 'northern frontier to conduct operations there'.[52]

The second instance occurred late in 1838 when the United States provided perhaps its most critical intelligence during the period of the renewed disturbances in Canada. In this instance, Forsyth passed on to Fox the concern of American officials at Rochester and Oswego that there was a 'secret combination' of up to 40,000 men along the border 'for the purpose of again invading Her Majesty's Provinces'.[53] Significantly, Fox later confirmed to Palmerston the veracity of this information from investigations on the Canadian side of the

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[47] Palmerston referred to Van Buren's approach: HC, 2 February 1838, Vol. XL, 716-717.

[48] Fox to Palmerston, No. 13, 5 March 1838, FO 5/322, fols. 77-87.

[49] Fox to Palmerston, No. 16, 13 March 1838, FO 5/322, fols. 90-96.

[50] Forsyth to Fox, 12 June 1838, *Diplomatic Correspondence*, Vol. III, 1218. This is also consistent with the report of Grey, Durham's emissary to Washington, after a meeting with Van Buren in June 1838, that Van Buren wanted 'to preserve the peace of the frontier,': Grey to Fox, 18 June 1838, FO 5/323, fols. 164-165.

[51] Sackett's Harbour is in Lake Ontario, near the entrance to the St Lawrence.

[52] Poinsett to Forsyth, 11 June 1838, contained in Forsyth to Fox, 12 June 1838, *Diplomatic Correspondence*, Vol. III, 1218

[53] Fox to Palmerston, 2 October 1838, No. 30, FO 5/323, fols. 172-174. Palmerston also expressly instructed Fox to thank the government of the United States for supplying the intelligence of plots in late 1838: Palmerston to Fox, Draft, No. 19, 22 November 1838, FO 5/321, fols. 53-54.

border.[54] In line with the British policy approach of demanding the American government fulfil its duty, Britain confirmed that it expected appropriate action from the United States. Writing to Vail, the Acting Secretary of State, Fox, thus, said that he relied 'confidently upon the friendship and honour of the United States themselves, to exert the necessary powers', on the grounds that British subjects were 'exposed' to 'the hazard and suffering of a state of war while they are precluded from retaliating or making just reprisal upon their enemy'.[55] Crucially, Forsyth accepted, in response, that it was 'the *duty* of the United States' [emphasis added] to 'suppress' any 'organised combination' against Britain within the United States.[56]

Britain and the United States also further cooperated around the time of these renewed disturbances on the issue of the treatment of American citizens caught participating in hostile actions against the Canadian provinces. Fox's despatches to Palmerston from late 1838 refer to disturbances or plotting in Montreal, Prescott (in Upper Canada), Detroit, Lockport and Buffalo.[57] The actions of the United States make it clear that it accepted that American citizens captured in Canada taking part in such rebellious operations could be tried and punished by the Canadian authorities as private citizens without any protection from the American government. Van Buren's important proclamation of the 21st November, 1838 dealt expressly with the position of those taking part in such 'criminal enterprises' in Canada, and said that they 'must not expect the interference of this Government, in any form, on their behalf'.[58] The link to international law was also evident as the proclamation explicitly encouraged American citizens to assist with the 'arrest' of American citizens breaching laws 'providing for the performance of our obligations to the other Powers of the world'.[59] They

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[54] Fox to Palmerston, 19 November 1838, No. 34, FO 5/323, fol. 194.

[55] Fox to Vail, Acting Secretary of State, 3 November 1838, contained in Fox to Palmerston, 19 November 1838, No. 34, FO 5/323, fols. 217-232.

[56] Forsyth to Fox, 15 November 1838, contained in Fox to Palmerston, 19 November 1838, No. 34, FO 5/323, fols. 233-242.

[57] Fox to Palmerston, No. 34, 19 November 1838, FO 5/323, fols. 193-261; Fox to Palmerston, No. 42, 16 December 1838, FO 5/323, fols. 313-328.

[58] Proclamation of Van Buren, 21 November 1838, FO 5/323, fol. 268. Palmerston praised the terms of Van Buren's November, 1838 proclamation: Palmerston to Fox, Draft, No. 3, 19 January 1839, FO 5/330, fol. 6. The significance of this approach by the United States is indicated by Fox's later positive comment on the impact of the conviction and execution in Upper Canada of American citizens who had taken part in an invasion to Prescott, Upper Canada: Fox to Palmerston, No. 6, 21 February 1839, FO 5/331, fols. 46-47.

[59] Proclamation of Van Buren, 21 November 1838, FO 5/323, fol. 268.

should do this, it declared, not also for the sake of the United States, but also from a 'love of order and respect for that sacred code of laws by which national intercourse is regulated'.[60]

Lastly, the United States also continued to take action during the period of renewed border tension following the arrest of McLeod in late 1840.[61] Webster was clearly concerned at this time by the risk of American citizens provoking or joining disturbances in Canada.[62] Accordingly, he warned Tyler, in April, 1841, of around 10,000 individuals in Hunters Lodges and Patriotic Societies from Maine to Wisconsin, who 'desire [war between Britain and the United States] above all things', and who intended 'to unite themselves to the disaffected in Canada, declare the provinces free, and set up another government'.[63] As the date of McLeod's trial approached, Tyler then issued a proclamation, on the 25th September, 1841, threatening punishment for 'illegal acts' aimed at the 'Territories of a Power with which the United States are at peace'.[64] The proclamation also made it clear, again, that the British authorities would be allowed by the United States to prosecute any individuals concerned as a matter of local criminal law.[65] Significantly, Webster also passed to the British copies of the reports of United States agents concerning the Patriot groups along the Canadian border, and reported that Tyler was to renew the Neutrality Law.[66]

In addition to this important contribution from the general principles of international law, it should, also, be acknowledged that treaty law was relevant to the issue of border security. The Exchange of Notes, 1817 limited the number of American and British naval ships that

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[60] Proclamation of Van Buren, 21 November 1838, FO 5/323, fol. 268.

[61] The McLeod incident itself is discussed separately in the next section.

[62] Webster to Tyler, cApril 1841, *Webster Papers*, pp. 56-57.

[63] Webster to Tyler, cApril 1841, *Webster Papers*, pp. 56-57.

[64] Fox to Aberdeen, FO 5/363, 25 September 1841, fols. 65-85. See also Webster to Scott, 23 September 1841, and Webster to Spencer, U.S. Attorney for the Northern District of New York, 24 September 1841, *Diplomatic Correspondence*, Vol. III, p. 154, in relation to Webster's actions to try to prevent such incidents and prosecute the individuals concerned.

[65] Fox to Aberdeen, FO 5/363, 25 September 1841, fols. 65-85.

[66] Fox to Aberdeen, 28 November 1841, No. 133, FO 5/364, fols. 156-161. Copies of documents were sent in December, 1841: Fox to Aberdeen, 5 December 1841, No. 137, FO 5/364, fols. 206-249. Fox also informed Aberdeen in December that Webster had also reported further planned atrocities on Lake Erie planned for 8 January 1842: Fox to Aberdeen, 28 December 1841, FO 5/364, fols. 290-295.

could be positioned on the Great Lakes.[67] This was, however, a problem for Britain in the context of the border disturbances, where the focus was on stopping incursions from American citizens, as opposed to preventing the build up of a force of the U. S. Navy. Britain, as a result, undoubtedly breached the limits of the Exchange of Notes following the the Canadian rebellions, which raises the question of whether or not there was, in this instance, a breakdown in international law. This would, not, however, be a fair characterisation, as the situation did not, in substance, involve a failure of international law. On the contrary, the British breach needs to be seen in light of the fact that Britain had an unconditional right to terminate the Exchange of Notes, and yet still sought to maintain the overall principle of maintaining a regulatory agreement. Fox, thus, informed the United States in 1838 that British increases in naval vessels on the Great Lakes were for the purposes of defence and intended to be temporary.[68] This position then remained unchallenged by the United States until Webster raised it in the autumn of 1841.[69] Aberdeen then again expressed the self-defensive nature of the British forces, but asserted a wish to retain the Exchange of Notes as 'one of the most valuable existing securities for the preservation of that peace and harmony between Great Britain and the United States'.[70] Britain, thus, clearly considered that the treaty law in the Exchange of Notes was important

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[67]Exchange of Notes, 1817, accessed through Project Avalon, Yale Law School, on 23/05/16; all references to the Exchange of Notes are to this version. Under the agreement's terms, both Britain and the United States were restricted to one vessel each on Lake Ontario and Lake Champlain, respectively, and to two vessels each on the Upper Lakes. The Notes also, crucially, provided that 'no other vessels of war shall be there built or armed' by either Britain or the United States. The Notes were also subject to six months notice by either state.

[68] Fox to Forsyth, Copy, 25 November 1838, as contained in Fox to Aberdeen, 5 December 1841, No. 136, FO 5/364, fols. 174-205 at fols. 188-189.

[69] Fox to Aberdeen, 5 December 1841, No. 136, FO 5/364, fols. 174-205.

[70] Aberdeen to Fox, No. 6, 31 March 1842, FO 5/376, fols. 19-26, fols. 25 Dunning also notes the broader role of the Exchange of Notes 'in setting the standard of peaceful methods for the determination of the vexatious problems' of the borders: Dunning, *The British Empire and the United States,* p. 17.

to long-term British security, albeit that it was to be interpreted flexibly according to circumstance.[71]

McLeod, the Caroline, and the Question of Territorial Incursions

International law was also fundamental to the way in which British policy dealt with the tensions arising from border security during the period. Britain and the United States worked, as seen, under the influence of legal principles to prevent American citizens from getting involved in Canadian affairs. Whilst this produced some definite results, it was also, unsurprisingly, unable to restrain all the activities of all the inhabitants along the frontier all of the time. Two particular problems remained. The main risk was of a relatively minor incident escalating unintentionally into a wider conflict between Britain and the United States.[72] This occurred in the important associated cases of the *Caroline* and McLeod, as to be considered immediately below. The other concerned the British desire, after the *Caroline*, to be able to enter American territory to pursue rebels considered to be significant for the position in Canada. International law was central to both issues because each involved perceived British or American rights and obligations. The *Caroline*, McLeod, and the question of territorial intrusions were, at heart, legal disputes, albeit ones that derived their significance from the surrounding circumstances. Law, legal argument, and the shared framework, as a result, played a leading role in the process of their resolution. This did not in itself, of course, mean that there would always be a solution. In particular, in the case of McLeod, this was only achieved after his acquittal by a New York jury in October, 1841. It did, however, serve to reduce the tensions between the two governments, and, thereby,

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[71] There was a further exchange of despatches concerning the 1817 Exchange of Notes in 1844. Britain noted that the United States was breaching the limits: Aberdeen to Pakenham, Draft, No. 23, 3 June 1844, FO 5/403, fols. 57-62. Pakenham noted the problems with the agreement given the advent of steam vessels, but proposed modification not abandonment, again indicating continued British support for the principle of a regulatory legal framework for security on the Great Lakes: Pakenham to Aberdeen, No. 86, 29 July 1844, FO 5/407, fols. 66-77. Pakenham later indicated that Calhoun accepted that the agreement may need modifying: Pakenham to Aberdeen, No. 102, 12 September 1844, FO 5/408, fols. 7-18.

[72] This was a point made by Wheaton, the American jurist, to Webster, when informing him of a meeting he had had with Louis Philippe of France: 'I remarked to [Louis Philippe] that the principal peril was not in the great questions, known or to be anticipated, but in those incidental questions such as the Caroline, the Creole, etc., which were constantly arising and with which diplomacy could not deal so successfully, because they came upon us suddenly, and might occasion collisions before we were aware of the danger': Webster to Wheaton, 15 February 1842, Aberdeen Papers, Add. MS 43123, fols. 86-95.

paved the way for many of the underlying concerns to be addressed in the negotiations around the Webster-Ashburton Treaty of 1842.

The *Caroline* and McLeod incidents were both, then, matters that were defined and shaped by principles of international law. To reiterate, briefly, the *Caroline,* broadly, consisted of the capture in December, 1837 by British forces of a privately owned steamboat *in* the territory of the United States, involving the boat's ultimate destruction, one death, and some injuries.[73] Britain alleged that the *Caroline* was being used to transport people, ammunition, and supplies from the United States to Navy Island (itself a British possession in the Niagara River), from where attacks on British territory were being planned.[74] Nevertheless, the presence of British forces on American soil made an immediate impact in the United States, with Fox reporting that the first news of the *Caroline* was received in Washington on the 5th January, 1838, and that it was 'occasioning a very great uproar throughout the whole country'.[75] At its core, the *Caroline* affair was a legal dispute because it concerned the legal question of whether or not the principle of territorial inviolability could be defeated, in such circumstances, by the further principle of self-preservation. The United States, accordingly, made a prompt official complaint to Britain on the 6th January, 1838, in response to which Fox justified the British action 'in destroying that vessel' mainly on grounds of the 'necessity of self defence and self preservation'.[76] Fox nevertheless also told Palmerston that he expected a 'formal demand for redress' would be made by Stevenson in London.[77]

The influence of international law in guiding British policy in relation to the *Caroline* is also underlined by the important role of legal advice. Britain acted, as seen, on the premise that the attack on the *Caroline* was lawful under international law. Crucially, this line was also supported by legal advice from the three main law officers of the Crown in February, 1838. In a joint opinion, the officers advised that the destruction of the *Caroline* was 'under the circumstances, perfectly justifiable by the law of nations', and 'that the British forces, with a

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[73] The summary in this paragraph is only an outline of the facts. For further details from the British perspective, see Arthur to Sydenham, 1 February 1841, FO 5/371, fols. 166-192.

[74] Arthur to Sydenham, 1 February 1841, FO 5/371, fols. 166-192.

[75] Fox to Palmerston, No. 3, 13 January 1838, FO 5/322, fols. 3-12.

[76] Fox to Palmerston, No. 3, 13 January 1838, FO 5/322, fols. 3-12; Fox to Forsyth, 6 February 1838, FO 5/322, fol. 51.

[77] Fox to Palmerston, No. 11, 25 February 1838, FO 5/322, fols. 41-61.

view of self-preservation, were fully justified in attacking the "Caroline" and treating her as a belligerent vessel'.[78] Campbell, the Attorney-General at the time, later confirmed his perception of the significance of this report for the making of British policy, commenting that he 'wrote a long justification of our Government, and this supplied the arguments used by our Foreign Secretary till the Ashburton Treaty hushed up the dispute'.[79] Of course, the fact that the law officers of the Crown considered the British action lawful did not mean that this analysis was agreed by the United States. Indeed, Stevenson duly made a formal complaint on behalf of the United States which argued that it was 'forbidden' to 'commence or continue any act of violence against enemies' ships, within the limits and jurisdiction of a Neutral Nation'.[80] The advice of the law officers does, however, mean that law influenced the way Britain handled the *Caroline*. In the event, Palmerston made no immediate reply to the substance of Stevenson's letter, and instead simply acknowledged it, leaving it unanswered through the remainder of the period of the Canadian rebellions.[81]

The *Caroline* incident then subsequently came back into the immediate limelight after the associated arrest of McLeod, which itself raised further questions of international law. The State of New York arrested Alexander McLeod in November, 1840, and charged him with murder on the grounds that he had been one of the party attacking the *Caroline*.[82] Again, to reiterate, briefly, Britain's issue with McLeod's arrest was based entirely on its analysis of how international law applied to the situation, which was considered to preclude such action being taken against an individual. Fox, therefore, promptly demanded that McLeod be freed on the basis of the principle of international law that there was no individual responsibility for 'public' acts.[83] The *Caroline* incident, he argued, was a subject only for state to state

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[78] Dodson, Campbell and Rolfe, Law Officers of the Crown, to Palmerston, 21 February 1838, FO 83/2207, fols. 4-7.

[79] *Hardcastle, The Life of Lord Campbell*, Vol. II, p. 118.

[80] Stevenson to Palmerston, 22 May 1838, *Diplomatic Correspondence*, Vol. III, 1445. The American position is supported by Stevens, who comments that the British view was 'tendentiously decided' by the Law Officers of the Crown in early 1838: Stevens, *Border Diplomacy:* p. 25, p. 35.

[81] Palmerston to Stevenson, 6 June 1838, *Diplomatic Correspondence*, Vol. III, 1449.

[82] Fox to Palmerston, No. 30, 27 December 1840, FO 5/349, fols. 223-256; Arthur to Sydenham, 1 February 1841, FO 5/371, fols. 166-192

[83] The British authorities in Canada also considered McLeod was a matter to be decided by international law: Draper to McLeod's Counsel, 12 January 1841, FO 5/359, fols. 56-67. See also Draper to Harrison, 16 December 1840, *British Documents*, Vol. 1, 46, and Arthur to Russell, 25 January 1841, FO 5/370, fols. 151-238.

discussion 'according to the usages of nations' as it was 'a publick act of persons in Her Majesty's service, obeying the order of their superior authorities'.[84] This also represented the considered British response, with Palmerston subsequently approving Fox's initial analysis.[85] Importantly, legal advice was indirectly involved in the British approach to McLeod. Fox relied, in being able to act so quickly, on the same words he had received from Palmerston in 1838 in the context of a similar case, involving an individual called Christie from Upper Canada, who, too, had been alleged to have been involved in the *Caroline*.[86] Crucially, the text in Palmerston's despatch to Fox from 1838 about Christie was, it appears, approved by the Queen's Advocate.[87]

International law came to be at the heart of the resulting McLeod dispute because the United States did not, however, initially accept this British position. British policy on McLeod was following a principle of international law consistent with the British practice of considering the state to be a 'general body', separate from territory, ruler, or people, as discussed in chapter 2. Whilst the further principle that individuals, such as McLeod, could not be held responsible for actions properly attributable to the state, was not itself described earlier as one of the key principles within British practice, it was nevertheless clearly present in Vattel, who, for example, stated that:

> if a nation ... approves and ratifies the act of the individual, it then becomes a public concern; and the injured party is to consider the nation as the real author of the injury, of which the citizen was perhaps only the instrument.[88]

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[84] Fox to Forsyth, 13 December 1840, as contained in Fox to Palmerston, No. 30, 27 December 1840, FO 5/349, fols. 223-256. Similarly, see also Fox to Forsyth, 29 December 1840, as contained in Fox to Palmerston, No. 34, 30 December 1840, FO 5/349, fols. 316-323.

[85] Palmerston told Fox in early 1841 to reiterate to Forsyth that the 'attack upon the "Caroline" was a public act of persons in Her Majesty's Service', that 'established usages of civilised nations' were that no action was to be taken against the individuals involved in such incidents, and that he could not 'believe' that the United States 'can really intend to set an example so pregnant with evil to the community of nations': Palmerston to Fox, 19 January 1841, and 9 February 1841, *British Documents*, Vol. 1, 65 and 66.

[86] Fox to Palmerston, 27 December 1840, *British Documents*, Vol. 1, 48.

[87] Palmerston to Fox, Draft, No. 18, 6 November 1838, FO 5/321, fols. 50-54. Palmerston's words in this letter were: 'the attack upon the 'Caroline' was a publick act of persons in Her Majesty's Service, obeying the order of their superior authorities, and, according to the usages of nations, that proceeding can only be the subject of discussion between the two governments'. The correspondence with the Queen's Advocate is: Backhouse to the Queen's Advocate, 30 October 1838, FO 83/2207, fols. 20-21; Dodson to Palmerston, 31 October 1838, FO 83/2207, fols. 22-23.

[88] Vattel, *Law of Nations*, Book II, S74.

Crucially, however, the United States rejected this legal analysis in the immediate aftermath of McLeod's arrest in their diplomatic exchanges with Britain. Instead, Forsyth stated that the President (van Buren) was 'not aware of any principle of international Law' which gave an offender 'impunity before the legal tribunals when coming voluntarily within their independent and undoubted jurisdiction', on the grounds that he 'acted in obedience to their superior authorities', or because his 'acts have become the subject of diplomatic discussion between the two governments'.[89] Forsyth also added that the public nature of the *Caroline* incident had not in any event been 'communicated to the government of the United States by a person authorised to make such admission'.[90] Finally, Britain and the United States also disagreed about whether the federal government had, in any event, the right to interfere in such state matters, with Palmerston rejecting any notion that it was not responsible under international law.[91]

British policy was also forced by the case of McLeod to return to the issue of the *Caroline.* This was because the status of the attack on the *Caroline,* as a 'public act' of the British state, was central to McLeod's position under international law. A further consequence, however, was the inevitable renewed attention on the question of whether, even if the *Caroline* was such a public act, it was a lawful one. International law, though, remained central to the British case on the *Caroline*, with the main points from the earlier legal analysis simply being reiterated. Fox, thus, told Forsyth that 'the act [involved in the *Caroline*] was one in the strictest sense of self defence, rendered absolutely necessary, by the circumstances of the occasion, for the safety and protection of Her Majesty's subjects'.[92] Interestingly, Bradley and Gardner, the American lawyers now acting for McLeod, took the slightly different line that the taking of Navy Island by the rebels was itself war, and, therefore, was also a cause of

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[89] Forsyth to Fox, 26 December 1840, as contained in Fox to Palmerston, No. 30, 27 December 1840, FO 5/349, fols. 223-256.

[90] Forsyth to Fox, 26 December 1840, as contained in Fox to Palmerston, No. 30, 27 December 1840, FO 5/349, fols. 223-256.

[91] Palmerston to Fox, 9 February 1841, *British Documents*, Vol. 1, 66.

[92] Fox to Forsyth, Copy, 29 December 1840, FO 5/349, fols. 318-323. Fox noted, however, that he was not giving the decision of the British government on the remonstrance by the United States about the *Caroline.*

war.[93] They quoted Vattel as authority, referring to his sections on the right to security, which produces the right of resistance and of reparation (II, SS 49-51), the just causes of war (III, Chapter 3), and the obligations of neutrality, including one that a neutral country was 'not to afford a retreat to troops, that they may again attack their enemies' (III, SS 103, 104, and 133).[94] Whilst there may not, as a result, have been absolute legal unanimity on the British side, the contending legal analyses do, however, again underline the centrality of international law to the *Caroline*.

The huge impact of international law on British policy, however, is demonstrated not only by its role in the specifics of the issues themselves, but also by the fact that Britain seriously contemplated war over McLeod. McLeod, and the connected *Caroline* matter, were, after all, diplomatic issues that gained their prominence from the respect paid to the relevant rules of international law, as opposed to the intrinsic serious nature of the incidents themselves. The arrest, trial, and possible conviction of one man only mattered to Britain because international law gave his actions a public character. The destruction, death and injuries in the *Caroline*, were mainly important to the United States because they took place *just* in American territory, which international law considered inviolable. Yet, despite their importance being derived from international law, Britain prepared for war over them. Furthermore, the British threat of war appears to have been genuine from the outset. Palmerston gave Fox notice early in 1841 to leave Washington in the event of McLeod being 'tried, convicted and executed', and told him that, if he did so depart, to inform the naval officers in the Atlantic.[95] Fox made several references to war in his correspondence.[96] Palmerston also requested information from British consuls in the United States concerning

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[93] Gardner and Bradley to A-G of Upper Canada, 13 February 1841, as contained in Stephen, CO, to FO, 17 March 1841, FO 5/371, fols. 238-245. See also Arthur to Russell, 17 March 1841, as contained in Stephen to Backhouse, 21 April 1841, FO 5/372, fols. 70-75, where Arthur summarises the argument of Gardner.

[94] Gardner and Bradley to A-G of Upper Canada, 13 February 1841, as contained in Stephen, CO, to FO, 17 March 1841, FO 5/371, fols. 238-245. Bradley and Gardner also referred to Chitty's notes on Vattel 95/105.

[95] Palmerston to Fox, No. 5, 9 February 1841, *British Documents*, Vol. 1, 67

[96] See, for example, Fox to Arthur, 3 January 1841, FO 5/359, fols. 24-31; Fox to Palmerston, 12 September 1841, *British Documents*, Vol. 1, 148; Fox to Aberdeen, 12/10/41, Confidential, *British Documents*, 156.

any American naval preparations.[97] The feeling that war was a risk is reflected, too, in comments from the American side. Stevenson told Webster in March, 1841 that, whilst he had 'no reason to believe' this was the view of the British government, there 'seems to be a general impression that War is inevitable'.[98] More directly, Webster wrote to Tyler in April, 1841 that war was 'inevitable, in ten days' if a mob attack resulted in the death of McLeod (who was at this point in custody in the State of New York).[99]

Importantly, British policy also continued to anticipate the possibility of war following the change of government in Britain in September, 1841, which suggests that the point of law involved was given a consistently high relative weighting by both the Whigs and the Tories. On taking over as Foreign Secretary, Aberdeen, thus, repeated Palmerston's earlier instruction for Fox to leave Washington if McLeod was convicted and executed.[100] British ministers, too, as noted by Chamberlain, met to discuss war preparations on the 18th October, 1841.[101] Stanley, the new Colonial Secretary, shared the concern over war at the time, telling Russell that 'my fears predominate over my hopes as to a peaceable termination of our differences with the United States'.[102] As again was the case in the spring, the United States, too, was aware of British intentions. Fox reported that he told Tyler, at a meeting in September, 1841, that Britain could not permit 'sacrificing the life of a British subject, or submitting to a shameful national outrage', and that 'the object of the war would be to strike so terrible an example as should prevent any nation in the world from again committing so monstrous a public crime'.[103] The British threat was also known more widely in Washington. As Clay, perhaps the pre-eminent American Whig politician, put it, he was happy, after McLeod's acquittal, 'at the disappearance of all cause at least of immediate

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[97] Palmerston Note, 18 February 1841, and Bidwell circular to British consuls at New York, Baltimore, Boston, Savannah, Philadelphia, Norfolk, Charleston and Portland, 23 February 1841, FO 5/368, fols. 120-122.

[98] Stevenson to Webster, 9 March 1841, *Diplomatic Correspondence*, Vol. III, 1542. See also, Stevenson to Webster, 18 March 1841, *Diplomatic Correspondence*, Vol. III, 1544.

[99] Webster to Tyler, c. April, 1841, *Webster Papers*, pp56-57.

[100] Aberdeen to Fox, 18 September 1841, *British Documents*, Vol. 1, 147.

[101] Chamberlain, *Pax Britannica?*, p. 85. See also Bourne, *The Balance of Power*, pp. 87-95 for details of British military preparations at this time.

[102] Stanley to Russell, 17 October 1841, PRO 30/22/4B, fols. 196-197.

[103] Fox to Aberdeen, 12 October 1841, *British Documents*, Vol. 1, 156.

hostilities with G. Britain' because he had understood that, otherwise, the 'event of a War, if not desired was expected by the Executive'.[104]

The most important impact of international law on British policy, however, came from the way that it provided a structure of rules to guide Britain's handling of the *Caroline* and McLeod disputes. Consistent with the legal nature of the issues, Britain and the United States worked within a shared framework of international law to reach a diplomatic resolution of both the McLeod and *Caroline* matters. The key development was the appointment of Webster as Secretary of State in the administrations of Presidents Harrison and Tyler from March, 1841. This mattered because Webster's crucial contribution was to align the American view of the international law concerning the McLeod case with that of the British government. Whilst this did not mean that McLeod was released from custody in New York, or that the risk of war was removed, British-American relations were undoubtedly assisted by this change of emphasis by the federal government.[105] It also meant that Britain and the United States were in a better position to work together to resolve the McLeod and *Caroline* matters, both before, and after, the acquittal of McLeod in October, 1841. As will be seen, whilst they did not always agree on the legal analysis to be applied to the circumstances, Britain and the United States were now, at least, starting from a basis of the same broad principles of international law in both problems. In the *Caroline*, the principles of territorial inviolability and self-preservation had, of course, always been part of the shared framework, but Webster's input extended the joint acceptance of the same basic rules to McLeod.

British policy quickly accommodated the change of approach and emphasis brought by Webster to both McLeod and the *Caroline*. In the case of McLeod, Fox immediately recognised the significance of the development, telling Palmerston in March, 1841 that the new government was 'prepared to take an entirely different view of the question from that taken by the last Government'.[106] To this end, Webster's first step in implementing the new American position was to seek the 'formal recognition' by the British government of the

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[104] Clay to Tallmadge, 30 October 1841, *The Papers of Henry Clay,* R. Seager, and M. Hay, (eds.), (Kentucky University, 1988), Vol. 9, pp. 618-619.

[105] Palmerston, HC, 26 August 1841, Vol. LIX, 265-270.

[106] Fox to Palmerston, 7 March 1841, *British Documents*, Vol. 1, 85.

Caroline incident 'as an act of public force, done under its authority'.[107] Fox formally made such a statement in his despatch responding to Webster of the 12th March, 1841.[108] Webster then made it clear that the United States and Britain shared the same view of the relevant international law. Crucially, Crittenden, the American Attorney-General, was told that McLeod's defence at his next hearing should be on the basis that McLeod himself was 'not to be held answerable' as an individual, and that this was 'a principle of public law, sanctioned by the usages of all civilised Nations, and which the Government of the United States has no inclination to dispute'.[109] This new, effectively joint, approach was reflected in Clay's comment from April, 1841 that: 'GB has made herself responsible for the Capture of the Caroline; and justice and national dignity both prompt us to look to her for national reparation, and not to consider the individual amenable to our Courts'.[110]

Britain was also, however, simultaneously, faced with a renewed demand for an answer on the *Caroline* as a result of Webster's attention on McLeod. The main American contention remained that the *Caroline* incident involved a breach of international law because the territory of the United States was not open to British forces. As Webster asserted, the United States was 'jealous of its rights, and among others, and most especially, of the right of the absolute immunity of its territory, against aggression from abroad'.[111] Webster, though, also picked up the British justification of self-defence, and, whilst accepting it as a principle, questioned whether it actually helped Britain on the facts of the *Caroline*. For him, the application of the principle would require 'that Government [the British] to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[112] Applying this test, Webster told Fox that the government of the United

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[107] Webster to Spencer 11 March 1841, *Webster Papers*, p. 41.

[108] Fox to Webster, 12 March 1841, *Diplomatic Correspondence*, Vol. III, 1543. Palmerston, though, later contended that the Americans knew the British position from before Stevenson's note to Palmerston of 22 May 1838 - which Stevenson disputed. See: Stevenson to Palmerston, 31 August 1841 (in response to Palmerston to Stevenson, 27 August 1841), Palmerston to Stevenson, 2 September 1841, and Stevenson to Palmerston, 2 September 1841, *British Documents*, Vol. 1, 137, 138, and 139.

[109] Webster to Crittenden, 15 March 1841, attachment to Webster to Stevenson, 12 April 1841, *Diplomatic Correspondence*, Vol. III, 1268.

[110] Clay to Porter, 24 April 1841, *The Papers of Henry Clay*, pp. 522-523.

[111] Webster to Fox, 24 April 1841, *Diplomatic Correspondence*, Vol. III, 1269.

[112] Webster to Fox, 24 April 1841, *Diplomatic Correspondence*, Vol. III, 1269.

States did 'not think that that transaction [the *Caroline*] can be justified by any reasonable application or construction of the right of self-defence under the laws of Nations'.[113] Webster was, thus, in this way using the principles of international law both to establish common ground (within the shared framework) and to make the case for the United States. Britain did not, however, respond immediately.

This new approach brought by Webster failed in the short term to resolve either of the McLeod or *Caroline* disputes. McLeod was not instantly freed on the grounds that international law precluded his being individually charged for the alleged offence. A hearing was held in May 1841, where his release on the basis of the public law defence was demanded.[114] The decision of the New York court, however, was given in July, 1841 against McLeod, who was then ordered to be tried later in the year.[115] Tension with Britain, as a result, remained high. Whilst, therefore, the immediate problem in McLeod remained, there is nevertheless some evidence that Webster may, at least, have been influencing, or reflecting, wider opinion in the United States with his stance. Seward, the Governor of New York, commented before the July verdict that 'if the assumption of the responsibility by the British government is a legal defence for him, I shall cheerfully submit to the decision of the Court'.[116] Furthermore, the decision itself received some criticism in the United States from a legal perspective.[117] Such a wider acknowledgement of the international law principle behind the British position can only have been helpful for the ultimate settlement of the issue. The delay in the McLeod case did also inevitably mean, however, that there was no progress in the associated *Caroline* dispute. As put by Palmerston, writing to Stevenson in

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[113] Webster to Fox, 24 April 1841, *Diplomatic Correspondence*, Vol. III, 1269.

[114] Fox to Palmerston, 28 April 1841 and 12 May 1841, *British Documents*, Vol. 1, 100 and 102. Webster said this about the hearing to his son: 'it will be for the Court of New York, upon its own responsibility, without any asking from us, to apply to the case the general principle of the law of nations', Webster to Daniel Fletcher Webster, 10 May 1841, *Webster Papers*, pp. 72-73.

[115] Fox to Palmerston, 28 July 1841, *British Documents*, Vol. 1, 121

[116] Seward to Tyler 10 May 1841, *Webster Papers*, pp. 70-72. See also, Seward to Sydenham, 18 May 1841, FO 5/373, fol. 196. Seward, however, expressed ongoing personal support for the right of New York to try McLeod: Seward to Tyler, 1 June 1841, *Webster Papers*, pp. 85-94.

[117] For example, the decision was criticised in Wendell's Reports 26, 663-703, by Tallmadge, a judge of the Superior Court of New York: *Webster Papers*, p. 99, note 3.

August, 1841, Britains's 'opinion' remained that 'the capture and destruction of the *Caroline* was a justifiable act of self defence'.[118]

The shared framework, and Webster's use of it, were, however, fundamental to the final settling of both McLeod and the *Caroline* disputes. The key event which allowed this process to occur, and which removed the immediate threat of war, was the acquittal of McLeod after a trial in October, 1841.[119] The acquittal itself was not the result of arguments based on international law, but rather a lack of evidence linking McLeod to the Caroline incident.[120] Principles of international law were, however, the basis of the subsequent British and American positions on how the original perceived respective breaches of international law needed to be remedied. In the case of McLeod, British policy was to request that the United States changed its constitution to ensure that future similar instances involving public acts, such as McLeod, could not be prosecuted at an individual state level. Aberdeen, thus, requested Fox to point out that Britain expected a solution for the constitutional issue at the centre of the McLeod matter.[121] Britain asked for this because, as put by Peel, that, 'the acquittal is no reparation for the public wrong'.[122] Unsurprisingly, given that Webster's views on the issue were consistent with Britain's, a bill was subsequently introduced into Congress in April, 1842 allowing for cases, such as that of McLeod, to be removed from state to federal courts. The new law finally passed Congress in August 1842, with Fox commenting that he viewed 'the passage of this law as a very important point gained, with a view to the future maintenance of peace between the Two Countries'.[123]

The *Caroline* was also settled on the basis of shared principles of international law. Ashburton and Webster reached an agreement in July, 1842 in which the relevant legal principles were reaffirmed - mainly with an eye to the future - whilst the question as to

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[118] Palmerston to Stevenson, 27 August 1841, *Diplomatic Correspondence*, Vol. III, 1557.

[119] The acquittal was reported to Aberdeen in Moore to Aberdeen, 15 October, 1841, *British Documents*, 158.

[120] Fox to Aberdeen, 11 October 1841, *British Documents* 154, Fox to Aberdeen, 13 October 1841, *British Documents*, 157.

[121] Aberdeen to Fox, 18 November 1841, *British Documents*, Vol. 1, 161.

[122] Peel to Aberdeen, Private, 17 November 1841, Aberdeen Papers, Add. MS 43061, fols. 343-344.

[123] Fox to Aberdeen, 28 August 1842, FO 55/364, fols. 80-82.

whether or not the British action in the *Caroline* was actually justified on the facts was left open. Ashburton's formal response for the British government, thus, confirmed that 'we are perfectly agreed as to the general principles of international law applicable to this unfortunate case'.[124] Britain was under a 'duty', he accepted, to respect the principle of territorial sovereignty, commenting that 'respect for the inviolable character of the territory of independent nations is the most essential foundation of civilisation'.[125] Nevertheless, Ashburton emphasised that there was also the right of self-defence ('the first law of our nature') under international law which could supersede territorial rights.[126] The reply of the United States placed the agreement of these applicable principles of international law at its centre. Webster reported that President Tyler was satisfied that Britain 'fully admits those great principles of public law', and stated that Britain and the United States understood 'these principles alike'.[127] What, thus, remained outstanding, of course, was the issue of how these principles applied, in practice, to the *Caroline*. Ashburton maintained that the test of self-defence was satisfied, albeit that Britain should have handled the matter more sensitively at the time.[128] Webster, on the contrary, contended that 'the difference between the two Governments' was 'only, whether the facts ... make out a case of such necessity for the purpose of self-defence'.[129] In light of the overall respectful tone of the British letter, this disagreement was evidently not enough, however, to prevent the United States from confirming that it was prepared to move on.[130] The resolution of the *Caroline* was, thus, based on the agreement of the shared framework of law and not the facts of the case itself.

International law also influenced the handling of the other main outstanding problem for Britain related to border security, namely the question of what to do about the ongoing problem of rebels sheltering in the United States. The United States accepted, as seen, the British treatment of any of its citizens involved in the Canadian revolts as criminals if they

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[124] Ashburton to Webster, 28 July 1842, in *Diplomatic Correspondence*, Vol. III, 1593 (and *British Documents*, Vol. 1, 206).

[125] Ashburton to Webster, 28 July 1842, in *Diplomatic Correspondence*, Vol. III, 1593.

[126] Ashburton to Webster, 28 July 1842, in *Diplomatic Correspondence*, Vol. III, 1593.

[127] Webster to Ashburton, 6 August 1842, *Diplomatic Correspondence*, Vol. III, 1298.

[128] Ashburton to Webster, 28 July 1842, in *Diplomatic Correspondence*, Vol. III, 1593.

[129] Webster to Ashburton, 6 August 1842, *Diplomatic Correspondence*, Vol. III, 1298.

[130] Webster to Ashburton, 6 August 1842, *Diplomatic Correspondence*, Vol. III, 1298.

were arrested in Canada. Britain was, however, also concerned (following the *Caroline*) about the risk of its forces undertaking further temporary incursions into the territory of the United States for the purposes of dealing with insurgents. International law was naturally considered as a possible means by which such future British action could be justified. Britain's primary position was that the principle of self-preservation could, in certain circumstances, take priority over territorial sovereignty in the unstable circumstances which the border was now in. This, therefore, followed the British line in the *Caroline* itself. Fox and Palmerston also, however, made an attempt to justify British action against such individuals in the territory of the United States, including in the *Caroline,* on the additional basis that the border was, in a loose sense, a 'piratical' area. The United States, however, resisted both arguments, championing its right to territorial sovereignty. Britain appears, from its actions, to have yielded to the position of the United States. Its approach to the remaining problems of border security was, thus, dealt with within the shared legal framework.

Britain's main justification for any potential entry of British forces into American territory in pursuit of rebels remained self defence. The practical question of what would happen in any future incidents, after the *Caroline,* seems to have arisen when Sir George Arthur asked Fox whether he thought some sort of advance permission for entry into American territory could be obtained.[131] Fox considered this 'wholly impractical', but did raise with Forsyth the possibility of arguing in the future the 'right of self defence' when questioning whether, in the state of the border, British forces would 'always have the forbearance to respect the American boundary'.[132] Forsyth, however, insisted that the United States expected that 'under no pretext whatever' would British forces 'permit a violation of the territory of the United States', and dismissed the question of self-defence as being 'in reference to circumstances that have not happened, and which it is hoped will never occur'.[133] Britain's response was pragmatic, with the question of international law involved seemingly being left to the facts and circumstances of any relevant future case. As Fox told Palmerston, 'such acts [of incursion] must I think be left to be justified afterwards, by the paramount and overruling necessity of self defence, and the force of irresistible and excessive

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[131] Fox to Palmerston, 19 November 1838, No. 34, FO 5/323, fols. 193-261.

[132] Fox to Aaron Veil, Acting Secretary of State, 3 November 1838, *Diplomatic Correspondence*, 1452.

[133] Forsyth to Fox, 15 November 1838, *Diplomatic Correspondence*, 1538.

provocation'.[134] Palmerston was more cautious, requesting still that the United States be warned that 'some little overstepping of the boundary' may be undertaken in response to 'acts of positive war against Great Britain committed by individual citizens of the Union'.[135] He did, however, also observe that he was 'persuaded' that the American government 'will see in the circumstances of the moment a sufficient excuse for the irregularity'.[136]

Whatever the theoretical opening left by Fox and Palmerston, British policy, in practice, however, appears to have been to respect American territorial rights under international law following these exchanges. This can be seen in two subsequent important examples. In the first, in 1839, the Foreign Office requested legal advice on the circumstances surrounding the entry of British forces into American territory in pursuit of a man called Kelly. The law officers of the Crown rejected any argument that this could be justified under the 'general law of nations' or on the same legal basis as that used by the United States to explain its attacks into Florida (then part of the Spanish Empire) in 1818.[137] The second is the case of James Grogan, who was arrested by British forces in Vermont on the 19th September, 1841. President Tyler protested to Britain against 'this most extraordinary transaction'.[138] Despite the fact that Grogan was a sought after individual for 'atrocities' in Lower Canada in 1838, the British authorities released him as having been 'wrongfully arrested'.[139] Stanley, the then Colonial Secretary, considered the matter as 'wholly indefensible', and 'an unjustifiable aggression upon the territory of a friendly power'.[140] Aberdeen, too, was concerned, telling Fox to make it clear that Britain was prepared to pay 'any reasonable indemnity' for the 'unauthorised capture and detention of this individual'.[141]

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[134] Fox to Palmerston, No. 34, 19 November 1838, FO 5/323, fols. 193-216 at 210-211.

[135] Palmerston to Fox, Draft, No. 20, 15 December 1838, FO 5/321 at fols. 55-62, fols. 57-58.

[136] Palmerston to Fox, Draft, No. 20, 15 December 1838, FO 5/321 at fols. 55-62, fols. 57-58.

[137] Dodson to Palmerston, 31 May 1841, FO 83/2207, fols. 172-176. The legal advice had been originally sought in 1839! The United States had also rejected the argument that the 1818 American defence could be applicable to the Canadian border situation: Forsyth to Fox, 31 October 1839, *Diplomatic Correspondence*, 1244.

[138] Fox to Aberdeen, 28 September 1841, FO 5/363, fols. 115-122.

[139] Fox to Aberdeen, 12 October 1841, FO 5/363, fols. 177-180; Fox to Aberdeen, 26 October 1841, FO 5/364, fols. 3-30.

[140] Stanley to Bagot, 20 October 1841, FO 5/375, fols. 27-32.

[141] Aberdeen to Fox, 3 November 1841, FO 5/358, fols. 125-128.

Britain also made an attempt to characterise the border area as a refuge for 'pirates' when considering British action more generally against insurgents. This was not developed into a formal line of policy, but was a recurrent theme of British diplomatic exchanges with the United States from the time of the *Caroline*. Fox, in particular, used the terms 'piratical' and 'pirates' when he was seeking to bolster British claims for self-preservation or self-defence against insurgents. Although unexplained by him, the deployment of these descriptions was presumably designed to convey the notion that any British response to the actions of such individuals would be justified because they were outside the law or control of any one state.[142] International law was necessarily involved as an influence because 'piracy' and 'pirates' were terms with legal meaning. Indeed, it was the main consequence of 'piracy' under international law - that 'pirates' could be apprehended by any state - that made the use of the terms especially sensitive to the United States. Britain was, it seems, tentatively, then, trying to introduce a notion that a British response, even on American territory, would be justified because it was dealing with a special class of international outlaw against whom any state could lawfully take action. Similar British attempts to widen the context for the use of 'piracy' were also not uncommon, as noted in chapter 2.

British references to 'pirates' developed after the *Caroline,* with Fox and Palmerston both drawing on ideas of 'piracy' when commenting on the problem of border security. Fox, for example, linked the loss of the right to the inviolability of American territory in the *Caroline* to the actions of 'pirates' in stealing arms. As he told Palmerston: 'if they cannot even prevent the national artillery of the United States from being carried away publickly at mid-day by pirates, ... they have no right to expect that the soil of the United States will be respected'.[143] Importantly, though, he then also pursued the same reasoning with Forsyth directly, referring on separate occasions to the 'piratical character of the steam boat "Caroline" ', and more widely the 'unlawful and piratical acts of hostility' faced by the British provinces.[144] Furthermore, Fox returned to these themes after the arrest of McLeod

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[142] 'Piracy' appears, therefore, to have been a development of the idea of a lawless border area, which Fox had referred to earlier in 1837 in a letter concerning an attack in Lower Canada on a British magistrate in 1835: see Fox to Palmerston, No. 3, 25 January 1837, FO 5/314, fols. 13-115.

[143] Fox to Palmerston, No. 3, 13 January 1838, FO 5/322, fols. 3-12. Fox made further references to 'piracy' in: Fox to Palmerston, No. 4, 21 January 1838, FO 5/322, fols. 13-22; and Fox to Palmerston, No. 13, 5 March 1838, FO 5/322, fols. 77-87.

[144] Fox to Forsyth, 6 February 1838, FO 5/322, fols. 51-52; Fox to Forsyth, 25 November 1838, FO 5/323, fols. 273-274.

in 1840, telling Forsyth that '[the] steam boat "Caroline" was a hostile vessel, engaged in piratical war against Her Majesty's people' and the 'place where the vessel was destroyed ... had been deprived through overbearing piratical violence, of the use of its proper authority over that portion of territory'.[145] Palmerston, too, instructed Fox to remonstrate with the United States, after the *Caroline*, about the 'direct encouragement' being given to 'Pirates' to take arms through the 'insecure and unguarded state' of American military stores.[146] He also approved of Fox's later dealings with Forsyth about McLeod, and referred to 'American pirates' as being involved in the *Caroline*.[147] Whilst many of these comments were in the context of the *Caroline*, the principles involved would certainly have been applicable to other similar circumstances.

Legal advice, however, resulted in Britain dropping the question of 'piracy' and the Canadian border in 1841. The United States certainly firmly rejected from the outset any contention that its citizens were involved in 'piracy'. As put by Stevenson to Palmerston in 1838, 'aid and succour ... from Foreigners, to persons conspiring to subvert or change their Government' was not 'regarded as Piracy', and the *Caroline* 'was not piratical, nor could those on board of her be punished as Pirates or Outlaws'.[148] Similarly, Webster objected in 1841 to the description of 'American Pirates' for those citizens of the United States who were involved in the *Caroline,* stating simply that 'their offence whatever it was had no analogy to cases of Piracy'.[149] Britain ultimately abandoned the point after Dodson, the Queens' Advocate, confirmed that the position of the United States was correct:

> Pirates are defined to be 'Common Sea Rovers who acknowledge no Sovereign, and no Law, and support themselves by pillage and depredations at sea'. The term, therefore, is not strictly applicable to the citizens of the United States, who took part with the Canadian insurgents.[150]

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[145] Fox to Forsyth, 29 December 1840, FO 5/349, fols. 318-323.

[146] Palmerston to Fox, Draft, No. 20, 15 December 1838, FO 5/321, fols. 55-62.

[147] Palmerston to Fox, 9 February 1841, *British Documents*, Vol. 1, 66.

[148] Stevenson to Palmerston, 22 May 1838, *Diplomatic Correspondence*, Vol. III, 1445.

[149] Extract of a note from Webster to Fox, 24 April 1841, FO 5/372, fols. 185-190. Sydenham agreed with Webster: Sydenham to Russell, 25 May 1841, PRO 30/22/4A.

[150] Dodson to Palmerston, 18 May 1841, FO 83/2207, fol. 167.

Whilst, therefore, relatively short-lived, the episode is nevertheless helpful in understanding the role of international law in the British-American relationship. As with any legal code, practical situations tested the rules. In this instance, the view of the United States on the meaning of 'pirates' prevailed. The fact, however, that the United States argued over the use of piracy-related terms in this context, irrespective of how tangentially the point had been made by Britain, indicates that the deployment of words with meaning in international law was perceived to matter. Law was, therefore, viewed as being able to shape the direction of policy. Furthermore, the acceptance by Britain of the legal advice received is additional evidence of its respect for international law and the operation of the shared framework.[151]

The Disputes over the Northeastern Boundary and Fishing Rights

International law was at the centre of the Northeastern boundary dispute. The central issue was that, whilst Article 2 of the 1783 Treaty set out the border from the the river St. Croix to the Lake of the Woods, Britain and the United States could not, in practice, agree where the frontier was actually positioned on the ground from the definition. British policy to the problem at the beginning of the period was, as a result, shaped by both the ambiguity and realistic meanings of the words in the 1783 Treaty, as argued in chapter 3. Ultimately, however, the border was eventually agreed in 1842 on a completely new basis, a so-called 'conventional' line, in the Webster-Ashburton Treaty.[152] Such a fresh redrawing of the border definition could, at first glance, suggest that previous agreements and law were unimportant to British policy. This section, however, argues that international law was, nevertheless, still fundamental to the conduct of the dispute and its ultimate resolution. It makes three main points. Primarily, it argues that British policy operated within a legal framework more than is often appreciated. This gave rise to significant effects on how the dispute developed. It then aims to establish how Britain used legal argument as a means of pursing its policy aims. This not only shows the centrality of law to the dispute, but also

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[151] This is especially the case given that there is some suggestion that Palmerston was unhappy with the advice from Dodson. In a note headed 'ON Qu A's Report of May 18, 1841', he asks 'Was this term "Pirate" used by the Law officers in their opinions': FO 83/2207, fol. 168.

[152] The agreement of the boundary on such a new basis is often referred to as a 'conventional' agreement or line in both the original documents and the historiography, presumably on the basis that it required a new 'convention' (i.e. agreement) to achieve it, as opposed to being a determination of what the boundary actually was, as already defined in Article 2 of the 1783 Treaty.

reveals a meaningful level of continuity in British policy. Lastly, it contends that policy was specifically influenced by the principles of international law relating to sovereignty and the ownership of unoccupied land, both of which were within British practice as summarised in chapter 2 above.

Before turning to the substance of these arguments, however, four brief general points need to be made in order to provide the necessary background for the role of international law to be fully explained.

First, the key factual development that the section is concerned with is the new boundary agreement made in 1842. To summarise the relevant part of chapter 3, the issues in the dispute were over the meaning of the words in the 1783 Treaty definition within four main areas: the territory from the river St. Croix to the river Connecticut, the land from the river Connecticut to Lake Ontario, the lakes Ontario, Erie, and Huron, and the border from Lake Superior to the Lake of the Woods . The most heavily contested area, however, was the first, and this is shown in more detail on the map in the Appendix (the 'Map'), with the American and British claims shown in blue and pink, respectively. The new 'conventional' line defined in the Webster-Ashburton Treaty of 1842 managed to resolve the problems in all four of the areas concerned. The central agreement was that in the first. From a British perspective, the new border here ensured that possession was retained of the military road from Halifax to Quebec (broadly along the north and east side of the valley of the river St John via Madawaska), but conceded the part of Madawaska south of the river St John, and an area of the highlands between the river St. John and Quebec.[153] The position of Madawaska is shown on the Map. The agreements relating to the other areas were, broadly, in favour of the United States[154] Most importantly, the wrongly-positioned '45th parallel' was confirmed as part of the new border between the river Connecticut and Lake Ontario, and the new boundary from north of Ile Royale in Lake Superior was defined so that a disputed triangular area of territory was given up to the United States.[155]

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[153] The relevant agreement is in Article 1, Webster-Ashburton Treaty 1842.

[154] The relevant agreements are in Articles 1 and 2, Webster-Ashburton Treaty 1842. The position of the 45th parallel is discussed in the next paragraph.

[155] The disputed area is discussed in chapter 3. The alleged mineral resources in the area were referred to by Palmerston in parliament: HC, 21 March 1843, Vol. LXVII, 1162-1218. The level of the actual knowledge of the mineral resources as known at the time is, however, questioned in T. Le Duc, 'The Webster-Ashburton Treaty and the Minnesota Iron Ranges', *Journal of American History*, 51 (1964), 476-481.

Second, the section is not arguing, however, that international law was the sole influence on British policy in making this settlement, but, rather, that it had an important impact on policy and how that agreement was reached. Wider British and American interests, of course, affected the relative weighting given by Britain and the United States, respectively, to the points in the dispute. This does not diminish law's role, but rather simply reflects the way that facts and circumstances always impact on legal issues. Indeed, it is important to acknowledge the significance of these other interests as they, too, help to explain the construction of the terms of the 1842 treaty.[156] From Britain's perspective, therefore, the key concern was clearly the military one of ensuring that its forces were able to continue to use the existing overland route connecting Halifax with Quebec.[157] Indeed, as put by Ashburton, without that requirement, Britain may well not have persevered with its claim, however just it may have been.[158] A secondary British concern was the possession of the highlands immediately south-east of Quebec.[159] The 1842 border, in fact, met both these points, as Britain kept its use of the military route and not all of the the highlands were conceded. For the United States, the main problem was the placing of part of the border in the 1783 Treaty on the 45th parallel. The parallel had been wrongly-positioned on the ground, however, with the practical result that, if it was now changed to its correct position, many individuals and the military base of Rouse's Point (near Lake Champlain) would have

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[156] As well as these wider interests, Campbell also noted that the discovery of a map from the time of the 1783 Treaty may have affected the outcome of the negotiations. There is, however, no clear answer as to whether or not the map referred to by Campbell, or other maps, affected the dispute's resolution. Peel suggested in parliament that such maps were not particularly useful, but other contemporary notes indicate the British may have thought different privately: see generally, Campbell, HL, 7 April 1843, Vol. LXVIII, 661; Peel, HC, 21 March 1843, Vol. LXVII, 1218-1252; Aberdeen to Peel, 17 January 1843, Peel Papers, Add. MS 40453, fols. 337-338; and a note by Harriet de Burgh, wife of Clanricarde, Ashburton Negotiations Memorandum, February, 1843, Palmerston Papers, GC/CL/91-97.

[157] The American claim threatened this route.

[158] Ashburton to Webster, 13 June 1842, *British Documents*, Vol. 1, 194. For the background to the British concern, see Aberdeen to Ashburton, 8 February 1842, *British Documents*, Vol. 1, 164; Aberdeen to Ashburton, 31 March 1842, *British Documents*, Vol. 1, 165; Aberdeen to Ashburton, 1 April 1842, *British Documents*, Vol. 1, 166; Ashburton to Aberdeen, 25 April 1842, *British Documents*, Vol. 1, 175; Aberdeen to Ashburton, 26 May 1842, *British Documents*, Vol. 1,183; and Bourne, *The Foreign Policy of Victorian England*, p. 49.

[159] See, in particular, Aberdeen to Ashburton, 26 May 1842, *British Documents*, Vol. 1, 183.

been put into British North America.[160] Again, this point, as seen, was secured to the American advantage in 1842.

Furthermore, international law also partly overlapped, in any event, with British interests, reducing the scope of the apparent dichotomy. Apart from the above military considerations, the other main interest for Britain in the dispute was the overarching one of maintaining 'honour'. Peel, for example, put the question of 'honour' at the forefront of the Canadian question as a whole when commenting on Aberdeen's instructions to Ashburton in 1842. 'Why', he asked, should Britain 'contract the tremendous obligation of having to defend, on a point of honour, this territory against American aggression?'[161] As seen in chapter 2, however, 'honour' was to some extent linked to the upholding of British rights under international law. The matter of 'honour', as associated with legal rights, was, thus, inevitably going to be involved in the Northeastern boundary, given that the dispute concerned both Britain's rights under the 1783 Treaty and the principle of the 'preservation' of its possessions. Palmerston, for one, felt there was a link between between 'honour', 'law' and the boundary. As he put it in the parliamentary debate on the 1842 settlement: 'we threw away concessions which ought to have been employed to procure for us better terms', and 'the interests, rights, and dignity of the country have been unnecessarily sacrificed'.[162] Recognising the significance of 'honour', thus, not only helps for the understanding of the dispute, but also provides some further tangential evidence of the wider influence of international law.

Third, in appreciating the role of international law in the dispute, it is important to understand that there was a material strand of continuity in British policy. Too much emphasis has traditionally been placed on the negotiations for the 1842 Treaty as being the decisive element in resolving the issues concerned. The current historiography rightly draws attention to the level of regional stability gained from the settlement of the dispute in 1842.[163] It also, however, tends to focus on the 1842 agreement itself, playing on the

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[160] On the perceived importance of Rouse's Point to the United States, see Bourne, *Britain and the Balance of Power*, pp. 106-109.

[161] Peel to Aberdeen, 16 May 1842, Aberdeen Papers, Add. MS 43062, fols. 48-54.

[162] Palmerston, HC, 21 March 1843, Vol. LXVII, 1162-1218.

[163] See, for example, Lambert, *Winning without Fighting*, p.177. See also, Bourne, *Britain and the Balance of Power*, p. 119.

apparent contrast between Peel and Aberdeen's quick deal, and Palmerston's previous constant haggling over the 1783 Treaty. What is lost, therefore, is the theme of British policy throughout the period that, ultimately, a new agreement or arbitration would be needed. Palmerston certainly aimed, from 1837, to reach agreement for a new commission 'of exploration and survey' to try again to 'trace out a boundary according to the letter of the Treaty'.[164] Privately, however, he believed that any such commission would fail, leaving a 'conventional' boundary as the then realistic option.[165] Furthermore, the proposal for a new commission then itself developed into one which also included provision for a new arbitration.[166] The 1842 negotiations for a 'conventional' line were, thus, within the scope of long term British policy: nobody seriously thought the 1783 Treaty line would be upheld. Recognition of this 'continuity' matters because it then, in turn, allows the role and significance of international law to be better identified. As will be seen, law guided the process, arguments and aims adopted throughout this protracted period, and, as a consequence, also affected what settlement could, in practice, be achieved. British policy, thus, needs to be seen more as a long-term operation within the constraints of a legal dispute than a free contest over the boundary in which 1842 was decisive in setting the terms.

Lastly, fourth, the course of the dispute also needs need to be appreciated as being affected by the so-called 'Aroostook War' of 1838-39. There had been border skirmishes in the disputed area affecting Maine before, but this was a more serious event as it involved sustained and widespread activities. It began when the Maine land agent and an armed group entered the Aroostook valley in late 1838 to remove individuals, who from their perspective, were trespassers cutting timber.[167] The authorities in New Brunswick saw

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[164] Fox to Forsyth, 10 January 1838, *Diplomatic Correspondence*, 1423.

[165] As Palmerston wrote to Fox when proposing a new commission in 1837, his view at that time was that: 'it is geographically impossible to draw a line that shall be consistent with the words of the Treaty ... . The probability is that the dispute never will be settled in any other way than by an equal division of the disputed territory between the two parties', Palmerston to Fox, Private, 19 November 1837, FO 5/313, fols. 73-80. Britain was also sceptical of the outcome of any new commission to the United States: Fox to Forsyth, 10 January 1838, *Diplomatic Correspondence*, 1423.

[166] No agreement for a new commission had, however, been reached by the time Palmerston left office in 1841. See generally, on the negotiations for a new commission: Forsyth to Fox, 29 July 1839, Diplomatic Correspondence, 1240; Fox to Forsyth, 28 July 1840, *Diplomatic Correspondence*, 1522; Forsyth to Fox, 13 August 1840, *Diplomatic Correspondence*, 1258; and Palmerston to Fox, 24 August 1841, No. 23, FO 5/358, fols. 78-98.

[167] Forsyth to Fox, 25 February 1839, as contained in Fox to Palmerston, No. 8, 7 March 1839, FO 5/331, fols. 103-186. The Aroostook valley was in the part of the disputed territory south of the river St. John.

instead, however, simply an 'armed body of men from the State of Maine' in the disputed territory and responded by sending in troops.[168] The 'war' was, thus, the consequence of the respective actions of locals, all of whom were seeking to protect the competing territorial claims of their respective states. The immediate result was that the land agents of Maine and New Brunswick were seized and held in each other's territory respectively, albeit that both were later released.[169] Understandably, however, the situation remained tense, as it potentially involved armed 'forces' from both Britain and the United States. The situation was also made more worrying, from the British perspective, by the fact that it coincided with continuing unrest in Canada, with the consequence that any military conflict in the disputed territory could have had wider consequences. Whilst, as will be seen, a joint British-American response brought the situation under immediate control, the 'war', therefore, reinforced the need for a permanent agreement.

Against this background, the first of the ways, then, in which international law influenced the conduct of the dispute was through the effects resulting from the operation of the legal framework established in the relevant treaties. Britain and the United States worked within a prescribed legal process to a greater extent than is often appreciated, and the consequences of this made a significant impact on the course of the dispute. Chapter 3 set out the structures established by the Jay Treaty, 1794 and the Treaty of Ghent, 1814 for dealing with the outstanding issues concerning the Northeastern boundary. Crucially, the commission provided for by the Jay Treaty, 1794 determined that the source of the river St. Croix (as referred to in the 1783 Treaty) was more easterly than Britain contended.[170] This mattered hugely as it governed the starting point under the 1783 Treaty for the northern line to the 'highlands' of the treaty, with consequential implications for the future identification of those 'highlands'. The British claim would undoubtedly have been better supported by a more westerly source of the river St. Croix. Britain nevertheless accepted the decision of the Commissioners about the source of the St. Croix in 1798, despite later believing it to be incorrect. As Palmerston noted in 1843:

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[168] Proclamation of New Brunswick, 13 February 1839, as contained in Fox to Palmerston, No. 7, 23 February 1839, FO 5/331, fols. 79-100.

[169] Fairfield to the Senate and House of Reps of Maine, 18 February 1839, and to House of Reps, 21 February 1839, as contained in Fox to Palmerston, No. 8, 7/3/39, FO 5/331, fols. 103-186.

[170] The decision of the Commissioners was on 25 October 1798, *British Documents*, Vol. 1, Northeastern Memorandum, p. 36.

> This decision was clearly wrong, and has been the cause of much inconvenience since; but the British government of the day formally acquiesced in it; and the faith of the country having been pledged, there was no possibility of retracting the acquiescence thus given.[171]

The process of international law in this case, thus, changed the future of the dispute, and Palmerston's approach shows the respect given by the British government to decisions emanating from it.

The process provided by the Treaty of Ghent, 1814 resulted in a more complex factual position. The Commissioners, appointed under the treaty to determine the boundary, stopped in 1822, having failed to reach an agreement.[172] Britain and the United States, as a result, then used the further provision in the treaty allowing for an arbitration, and agreed the King of the Netherlands as arbitrator in 1827.[173] The King's 1831 decision - a proposed compromise - was, however, in turn, rejected by the United States.[174] Following this, the main alternative possibility of then moving straight to agree a new 'conventional' line was also not adopted, with British and American suggestions for such a boundary being rejected.[175] The dispute itself, thus, ultimately fell back, by the late 1830s, into a discussion of what the terms may be for a new commission to try and determine the 1783 Treaty boundary.[176] A further arbitration was also regarded as a possibility in the negotiations for such a commission, as noted above.[177] This is, broadly, where the matter stood, in point of process, when the McLeod matter superseded it in importance in the winter of 1840-41. The

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[171] Palmerston, HC, 21 March 1843, Vol. LXVII, 1162-1218.

[172] Northeastern Memorandum, *British Documents*, Vol. 1, p. 37.

[173] The terms of the arbitration were agreed in a Convention made in London on 29 September 1827: Northeastern Memorandum, *British Documents*, Vol. 1, p. 45.

[174] Northeastern Memorandum, *British Documents*, Vol. 1, p. 58. The United States considered that the King of the Netherlands had to decide between the claims put to him by the United States and Britain respectively, and not suggest a compromise.

[175] Forsyth, for example, suggested the river St John as the boundary from source to mouth, which was rejected by Britain, and the United States rejected Britain's proposal for the disputed territory to be 'equally divided': Palmerston to Fox, Draft, No.14, 19 November 1837, FO 5/313, fols. 38-55.

[176] Palmerston suggested in November, 1837 that the 'only plan left now' was to agree a new Commission to find the treaty line: Palmerston to Fox, Draft, No. 14, 19 November 1837, FO 5/313, fols. 38-55.

[177] See footnote 166 and the associated main text.

Peel government, though, as seen, did favour trying to agree a 'conventional' line, and this is what was agreed in the Webster-Ashburton Treaty, 1842.

Although the eventual agreement of a 'conventional' line may suggest otherwise, the legal framework from the Treaty of Ghent nevertheless made two significant contributions to the way Britain was able to conduct the dispute up to its settlement in 1842. Its main effect was to reduce tension through an expectation of ongoing process, in that failure to settle the matter was seen only as a precursor of further steps, such as new negotiations or arbitration. Palmerston's tactics in the 1830s, as seen, relied on this. The sense of process even seems to have worked during the 1842 negotiations for a separate 'conventional' agreement outside the defined treaty structure. Webster was, surely, reflecting this when expressing his concern to Everett that, if Ashburton did not have appropriate instructions, then this 'tedious matter must go again to arbitration'.[178] The other was in the creation of an informal precedent in the form of the failed arbitration of the King of the Netherlands, which had a lingering effect through the 1842 negotiations.[179] The King's 1831 compromise line was certainly viewed by Britain as a base position from which any new 'conventional' agreement was to be assessed. Indeed, Aberdeen's initial instructions had the King's award, broadly, as its last option, stating that 'beyond this, Her Majesty's Government would not be prepared under any circumstances to concede'.[180] Furthermore, Ashburton relied on the award of the King of the Netherlands as a justification, telling Webster on one occasion that he 'need not observe to you that this would give to Great Britain less than the award of the Arbiter, while at the same time she would be called upon to give up what the Arbiter awarded to her'.[181] Conversely, however, from the perspective of the United States, the extent of the failed arbitration award served as a limiting factor on the British claim. As Ashburton succinctly commented, the 'prevailing idea is, that the Netherlands' Boundary was the utmost possible pretension on our part'.[182] In the end, though, the 1831 'precedent' also acted as an

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[178] Webster to Everett, 31 May 1842, *Diplomatic Correspondence,*1288.

[179] An article in the *Quarterly Review*, for example, commented that: 'it appears to us to possess a certain degree of moral force which ought not to be without its effect on the minds of both parties': *Quarterly Review,* 'North American Boundary Question', p. 507.

[180] Aberdeen to Ashburton, 8 February 1842, *British Documents*, Vol. 1,164.

[181] Ashburton to Webster, 11 July 1842, *British Documents*, Vol. 1, 203.

[182] Ashburton to Aberdeen, 28 July 1842, *British Documents*, Vol. 1, 207.

encouragement for the states of Maine and Massachusetts to accept a 'conventional' line, on the basis that they were, at least, thereby in control.[183]

International law also influenced the conduct of the dispute through the use of legal argument to support British policy aims. The main way this can be observed is in the approach of Palmerston, who relied on points of treaty interpretation to continue rebutting the claim of the United States. Palmerston's overall expectation, as seen, was that it would be established that the 1783 Treaty definition was unworkable, and that a new division of the disputed territory (which would better suit British interests) would then be made in an arbitration or by a 'conventional' agreement. Legal argument on the so-called 'river question' and the meaning of 'highlands' were the mainstay of his rejection of the American claim. Palmerston also placed great emphasis on the related point of ensuring that the British view on these points could be maintained in the proceedings of any new commission. Importantly, though, legal argument was, in addition, also deployed by Aberdeen and Ashburton in the 1842 negotiations for a new 'conventional' line, with a view to emphasising British negotiating strength in the original dispute and defining the parameters of the proposed settlement. Whilst, thus, Palmerston's approach had been changed by Aberdeen in the move to a 'conventional' line, international law provided an important strand of continuity to British policy.

The main legal argument used in British policy under Palmerston against the claim of the United States concerned the ' river question'. This was entirely a point of treaty interpretation around the matter of how the words in the relevant provision applied to the river St John. The relevant part of the definition in Article 2 of the 1783 Treaty, as mentioned earlier in Chapter 3, provided that the boundary was to go [emphasis added]:

> from the northwest angle of Nova Scotia, viz., that angle which is formed by a line drawn due north from the source of the St. Croix River to the highlands; **along the said highlands which divide those rivers that empty themselves into the river St.**

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[183] See Lawrence, Mills and Allen, Commissioners for Massachusetts, to Webster, 20 July 1842, *Diplomatic Correspondence*, 1591; Kavanagh, Kent, Otis, and Preble, Commissioners for Maine, to Webster, 22 July 1842, *Diplomatic Correspondence,* 1592. Maine and Massachusetts were involved in the 1842 negotiations because it was a negotiation for a 'conventional' line and, therefore, any agreement required their consent if it involved the ceding of territory: see, for example, the Report of a joint committee of the Senate and House of Reps of Maine, on 2 February 1837, as contained in, Fox to Palmerston, No. 21, 24 November 1837, FO 5/314, fols. 340-345. Conversely, if agreement had ever been reached on the line of the 1783 Treaty, this would not have required the consent of the states affected as it would merely have been confirming what had already been agreed.

> **Lawrence, from those which fall into the Atlantic Ocean**, to the northwestern most head of Connecticut River.[184]

The 'river question' was, then, whether or not, in applying this definition, the river St. John was one of the rivers 'which fall into the Atlantic Ocean'. The Map can be used to show why this mattered. Britain's position was that the St. John was not an 'Atlantic' river because it fell, instead, into the Bay of Fundy, which, it maintained, was not the same as the Atlantic Ocean. In the British view, therefore, to find 'highlands' conforming to the description in the treaty (as dividing 'St. Lawrence' and 'Atlantic' rivers), the St. John had to be excluded from consideration. The critical effect of this was that, for Britain, 'highlands' matching the description could only be found west of the source of the river St. John. Conversely, the United States treated the St. John as an 'Atlantic' river, which meant that the 'highlands' of the treaty could be found to the east of its source, and also north of the river itself. On the British legal analysis, the American claim - as shown on the Map - was, thus, clearly invalid as it involved a boundary north of the river St. John. Palmerston, accordingly, maintained that Britain was 'decidedly right' on the 'river question', and even argued that this had also been the view of the King of the Netherlands in his arbitration.[185]

The key point, for present purposes, however, is not whether or not Palmerston's legal argument on the 1783 Treaty was actually correct, but, rather, the fact that, for him, it was the argument on which the dispute revolved. The sheer centrality of this question to Palmerston is shown by a comment he made to Fox in 1837:

> For the truth is that this point is the key of the whole question; and the whole dispute turns upon it. If the Bay of Fundy is, for the purposes of the Treaty, to be considered as the Atlantic Ocean, then the line claimed by the United States is the line of the Treaty. If the Bay of Fundy is <u>not</u> the Atlantic Ocean for the purposes of the Treaty, then the dividing highlands must be westward of the sources of the St. John, because it is not till you get clear of the St. John that you can find a ridge from whence the waters will flow to the St. Lawrence one way and to the Atlantic the other way.[186]

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[184] Article 2, 1783 Treaty.

[185] Palmerston to Fox, Private, 19 November 1837, FO 5/313, fols. 73-80. The United States, however, contested the British view of the decision of the King of the Netherlands on this point. See, for example, Forsyth to Fox, 6 February 1838, as contained in Fox to Palmerston, No. 18, 5 April 1838, FO 5/323, fols. 1-41, on the question of whether the decision of the King implied that the river St John was an Atlantic River, as a separate species of 'indirectly' falling rivers (cf. the other species of 'directly' falling rivers), within a broader 'genus' of Atlantic rivers.

[186] Palmerston to Fox, Private, 19 November 1837, FO 5/313, fols. 73-80.

In this period, the practical manifestation of the British view can be best observed in the careful attention Palmerston paid to the terms of the draft proposed convention for setting up a new commission of 'exploration and survey' aimed at determining the boundary as set out in the 1783 Treaty. Palmerston's aim was to ensure that the commission could only 'look for highlands, upon the character of which both parties should be agreed', which, then, effectively gave Britain a veto on the 'river question'.[187] Wording to such effect was, accordingly, included in the first draft sent to the United States in 1839, with Palmerston commenting, for example, that the provision covering the line north from the St.Croix 'has been worded with much care' to make sure that it could only join such agreed 'highlands'.[188] Whilst the proposal for a commission was, as seen earlier, later expanded into one that also included arbitration, the principle that the *commissioners* needed to be agreed on the nature of the highlands was maintained.[189]

Palmerston's other main legal argument was that the claim of the United States was invalid in any event, irrespective of the 'river question', because the 'highlands' it identified as the 'highlands' of the treaty could not be such 'highlands' on a proper construction of that term. This contention developed in earnest following receipt of a report from the British ground survey, as conducted by Featherstonhaugh and Mudge in the summer of 1839.[190] Importantly, Palmerston understood their work to indicate that the 'highlands' in the American claim could not be the 'highlands' specified in the 1783 Treaty because they did not run to the source of the river Connecticut, and were also 'non-existent' at the point where the due north line from the St Croix would have intersected them.[191] As Palmerston was, however, at the time negotiating the terms for a new commission to determine the 1783 boundary, these points were not made to the United States in formal diplomatic exchanges. Instead, Palmerston's approach was to make sure that they, and the other findings in the

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[187] Palmerston to Fox, Private, 19 November 1837, FO 5/313, fols. 73-80. See also, Fox to Palmerston, Confidential, 4 May 38, FO 5/323, fols. 101-109.

[188] Palmerston to Fox, Draft, No. 9, 6 April 1839, FO 5/330, fols. 20-83.

[189] See: Forsyth to Fox, 29 July 1839, *Diplomatic Correspondence*, 1240; Fox to Forsyth, 28 July 1840, *Diplomatic Correspondence*, 1522; Forsyth to Fox, 13 August 1840, *Diplomatic Correspondence*, 1258; and Palmerston to Fox, 24 August 1841, No. 23, FO 5/358, fols. 78-98.

[190] Featherstonhaugh and Mudge had been appointed to conduct a survey in 1839. Palmerston received their full report in spring 1840: *British Documents*, Vol. 1, pp. 207-210, and Palmerston to Fox, Draft, No. 15, 30 April 1840, FO 5/347, fols. 53-56.

[191] Palmerston, HC, 2 May 1843, Vol. LXVIII, 1225-1238. See also Sydenham to Palmerston, 22 October 1839, TH/18, Palmerston Papers.

report, were known in the United States by having the report distributed in America.[192] It probably also helped Palmerston's purpose, in seeking to spread such knowledge, that the *Edinburgh Review* announced confidently in 1840 that Featherstonhaugh and Mudge 'will negative most conclusively the American line' as consisting of the 'highlands' of the treaty![193] The invigoration of this argument was, however, important for British policy. Later comments of Palmerston allow the inference that the newly perceived strength of this argument may have played an instrumental part in his decision in 1840 to accept arbitration in the event the new commission failed to reach agreement.[194]

Aberdeen and Peel, too, also used legal argument on the 1783 Treaty as part of their approach, albeit that they decided to negotiate straight away for a 'conventional' line. Most significantly, Britain referred to the merits of the British claim under the 1783 Treaty during the 1842 negotiations. Ashburton, for example, told Webster that, whilst past claims were not to be dealt with, it was nevertheless his 'settled conviction' from the papers that the parties to the 1783 Treaty meant 'to leave to Great Britain, by their description of boundaries, the whole of the waters of the river St. John'.[195] This was also consistent with the tone of Aberdeen's instructions, in which he had commented that the respective claims were 'so confidently maintained on either side'.[196] Furthermore, Aberdeen also mentioned that that recent scientific material and 'important documents connected with the negotiations for the peace of 1783' were such as should assist with British arguments for the new

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[192] The Report was received in April, 1840 and a total of 25 copies were sent to the United States: Palmerston to Fox, Drafts, Nos. 15, 18, and 19, 30 April 1840, 3 June 1840, and 3 June 1840, FO 5/347, fols. 53-56, 61-74 and 75-80.

[193] *Edinburgh Review*, 'Foreign Policy of the Government', p. 591.

[194] Palmerston indicated in parliament that the position had changed following the report of Mudge and Featherstonaugh, and he specifically mentioned the alleged invalidity of the American highlands as an important point: Palmerston, HC, 2 May 1843, Vol. LXVIII, 1225-1238. The link to his approach to arbitration is suggested by his note to Melbourne in May, 1840, which explained that he been waiting for the report of Mudge and Featherstonaugh before replying to the American response to his draft of a convention for a new commission (and which response had proposed arbitration as a fallback): MM/US/5/2, Palmerston Papers. Britain accepted arbitration as a fallback, in principle, in July, 1840: Fox to Forsyth, 28 July 1840, *Diplomatic Correspondence*, 1522.

[195] Ashburton to Webster, *British Documents*, Vol. 1, 21 June 1842, 196.

[196] Aberdeen to Ashburton, *British Documents*, Vol. 1, 8 February 1842, 164. For the perceived strength of feeling in the United States, see Ashburton to Aberdeen, 25 April 1842, *British Documents*, Vol. 1, 175.

conventional line.[197] This use of arguments on the 1783 Treaty certainly provided some continuity in policy with Palmerston's work. A further effect of legal argument in the 1842 negotiations was that Aberdeen and Ashburton worked within the limits of the respective claims from the 1783 Treaty, even though they were negotiating a new 'conventional' line. In other words, for them, the new border to be agreed was to be within the parameters set by the terms of the dispute on the 1783 Treaty. Aberdeen's response to a suggestion of Webster during the 1842 negotiations shows this clearly. Webster had suggested, as a way forward, that Britain should give up a small slice of its territory around the river St. John (which was outside the previous American claim on the 1783 Treaty) on the basis that there 'must be mutual cessions', commenting that the 'importance' to Britain of such land was 'nothing.'[198] Aberdeen, however, nevertheless flatly refused to countenance such a proposition on the grounds that he was not prepared to 'concede' something for which the United States had no 'right or title to expect'.[199]

The final effect of international law on British policy in the dispute was through the influence of the principles associated with sovereignty and the 'actual occupation' of 'unoccupied' territory, both of which were within British practice as seen in chapter 2. Britain maintained strongly that it was entitled to the jurisdiction and possession of the disputed territory until a final agreement was reached. This followed from the British view that the 1783 Treaty was a treaty of cession and that Britain, therefore, retained the sovereignty of, (and, thereby, the jurisdiction over), the disputed territory until a final agreement was reached, as set out above in chapter 3. Britain was, however, also concerned by acts of 'occupation' by American citizens within the disputed territory. Whilst the land was not strictly 'unoccupied' under international law, the principle of 'actual occupation' was nevertheless referred to in this context. The British fear was that the United States could use any evidence of jurisdiction and occupation to support its claim in a future negotiation or arbitration.[200] Palmerston, accordingly, ensured that British policy was to resist all acts within the disputed territory which were felt to assert jurisdiction or extend American

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[197] Aberdeen to Ashburton, *British Documents*, Vol. 1, 31 March 1842, 165.

[198] Webster to Everett, 14 June 1842, *Diplomatic Correspondence*, 1289.

[199] Aberdeen to Ashburton, 26 May 1842, *British Documents*, Vol. 1, 183.

[200] See, for example, the concern over the reported encroachments in the valley of the river Aroostook as early as 1822: Northeastern Memorandum, *British Documents*, Vol. 1, p. 39. Sir Howard Douglas, a former Lieutenant-Governor of New Brunswick, made the wider point in parliament in 1843: Sir H. Douglas, HC, 21 March 1843, Vol. LXVII, 1267-1285.

occupation. He was not always successful in this, however, particularly following the 'Aroostook War' of 1838. Peel, conversely, appears to have been more cautious, and his fear that the growing American 'occupation' posed an active threat to British possession certainly appears to have influenced his decision to seek to agree a 'conventional' line quickly.

Four examples can be given of policy under Palmerston being influenced by concerns on jurisdiction and occupation. The first three, from before 1838, reflect the pure argument that Britain retained the sovereignty and possession of the disputed territory pending a final agreement. In the first, a spat started by British arrests in Indian Stream village - which was in a disputed area of land between Lower Canada and New Hampshire - Gosford argued that the territory in question, 'until it shall be formally adjudged to be part of the U.S. under the Treaty of 1783, must be considered as still undetached from the original possession of Great Britain - and its inhabitants consequently within the protection of her Govt.'.[201] Similarly, when Greely, an American citizen, was arrested for taking a census in Madawaska in 1837, Fox referred Forsyth to Aberdeen's letter to Lawrence of August, 1828 'upon the question of jurisdiction over the disputed territory' pending a final settlement.[202] Lastly, when Forsyth complained about a proposed railroad from Quebec to St. Andrews in 1837, Palmerston again defended Britain's continuing right of possession on the grounds that 'as the British Crown was the original possessor of the whole country, all the territory which cannot be proved to have been ceded by the Treaty of 1783 must prima facie be considered as still belonging to Great Britain'.[203]

The fourth example concerns the so-called 'Aroostook War' of 1838-39, and illustrates the way in which British policy was influenced by both the principles of 'sovereignty' and 'occupation'. The 'war' resulted, as noted, in armed 'forces' from Maine and New Brunswick becoming active within the disputed territory around the river Aroostook. To prevent further escalation, therefore, Britain and the United States entered a 'holding' agreement in March, 1839, under which, broadly, Maine was to retain the temporary

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[201] Gosford to Bankhead, 6 February 1836, *Diplomatic Correspondence*, Note 4 to 1397.

[202] Fox to Palmerston, No. 21, 24 November 1837, FO 5/314, fols. 301-353 at fols. 317-318. This followed an instruction from Palmerston: Palmerston to Fox, Draft, No. 13, 31 August 1837, FO 5/313, fols. 30-33.

[203] Palmerston to Fox, Draft, No. 10, 5 July 1837, FO 5/313, fols. 21-24.

possession of the valley of the river Aroostook, and Britain, that of the St. John.[204] In theory, therefore, British sovereignty was protected by the fact that the agreement was only temporary, with the existing respective British and American claims being preserved.[205] In practice, however, Britain was faced with the concern that British sovereignty would be eroded by the ongoing American occupation of a part of the disputed territory and any associated specific acts of jurisdiction.[206] Palmerston certainly feared the wider implications of any evidence of jurisdiction being exercised, commenting, for example, in a case concerning 'assessments' near Madawaska, that the 'acquiescence of the British authorities in such proceedings on the part of the Americans would materially weaken the case of Gr Bn in any future reference to Arbitration'.[207]

British policy, as a result, was to resist against the United States both any occupation beyond that permitted by the 1839 'holding' agreement, and any acts which could be construed as the exercise of jurisdiction. Palmerston, for example, therefore, advised against the payment of a timber duty demanded by Maine in the Aroostook valley as it would be an 'acknowledgment of jurisdiction and sovereignty'.[208] Importantly, however, whilst the British intention to oppose the United States was clear, some proposed interventions were difficult to implement on the ground due to the American presence. The main battleground for this problem was over the establishment of a block house by the Americans in the disputed territory at the point where the Fish River joined the St John, just above Madawaska

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[204] Fox to Palmerston, No. 13, 31 March 1839, FO 5/331, fols. 237-241. This followed a previous informal agreement between Fox and Forsyth in February, 1839: Fox to Palmerston, No. 8, 7 March 1839, FO 5/331, fols. 103-186. The holding agreement was summarised by Fox in Fox to Forsyth, 17 August 1840, as contained in Fox to Palmerston, 8 August 1841, No. 73, FO 5/362, fols. 14-44.

[205] Fox to Palmerston, No. 13, 31 March 1839, FO 5/331, fols. 237-241. The preservation of existing rights was referred to the Webster informal memorandum to Fox, 5 June 1841, as contained in Fox to Palmerston, 8 August 1841, No. 73, FO 5/362, fols. 14-44.

[206] Wellington, for example, commented in parliament that the area around the Aroostook valley had been 'seized by the state of Maine, and he was not sure that it was not now in its possession': Wellington, HL, 18 July 1839, Vol. LIX, 871-874.

[207] Palmerston note 23 July 1841, FO 5/373, fols. 210-211.

[208] Palmerston note, 23 July 1841, FO 5/373, fol. 242.

- as shown on the Map.[209] As this block house was in the St. John valley, Britain considered that the United States was in breach of the 1839 agreement.[210] Nevertheless, the block house remained in American hands, and Palmerston's general concerns over the potential effects of American occupation were then borne out. British jurisdiction was resisted in 1841 in the area around the block house when local authorities tried to impose assessments.[211] Furthermore, the law officers of New Brunswick cautioned over whether successful prosecutions could be made against people attending a meeting at the block house called by the state of Maine. In language which struck at the heart of the issue, they asserted that the problem was that the individuals would have a 'plausible defence' that the alleged offences were committed in a 'place' that was 'in the possession and actual occupation of a Foreign Power, ... which claims and exercises Jurisdiction thereon by the tacit assent of the British Government, to the exclusion of Jurisdiction by the Provincial Authorities'.[212]

The fear of American 'occupation' gradually eroding British sovereignty certainly appears to have been one of the main influences acting upon Peel and Aberdeen when, in contrast to Palmerston, they decided to move for a quick settlement to the dispute through a 'conventional' line.[213] Peel made reasoning along such lines clear in an important passage of as his later defence of the Webster-Ashburton Treaty, where he referred to 'a contest for actual possession' [emphasis added]:

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[209] The initial establishment of the Fish River block house is referred to in Fox to Palmerston, No. 29, 10 August 1839, FO 5/332, fols. 109-170. At first, it was occupied by a civil 'posse' from Maine, but this was replaced by regular American troops in 1841 (which Britain opposed as a proposal, but effectively acquiesced in when implemented unilaterally by Webster): Fox to Palmerston, 8 August 1841, No. 73, FO 5/362, fols. 14-44; and Fox to Palmerston, 12 September 1841, No. 83, FO 5/362, fols. 213-264.

[210] See, for example: Fox to Palmerston, No. 5, 17 March 1840, FO 5/348, fols. 90-367; Palmerston to Fox, Drafts, Nos. 7, 8, 10, all of 19 February 1840, FO 5/347, fols. 13-18, fols. 19-22, and fols. 25-26; and Fox to Palmerston, No. 10, 7 May 1840, FO 5/349, fols. 10-37. The British position was, though, complicated by the fact that the United States similarly viewed the presence of British troops in Madawaska as being in breach of relevant agreements: Fairfield to Harvey, Copy, 15 October 1840, FO 5/373, fols. 234-237.

[211] MacLachlan to Colebrooke, 19 June 1841, FO 5/373, fol. 229. Colebrooke had earlier warned Sydenham that the United States, or the state of Maine, would try to assert a right of jurisdiction on the south bank of the St. John around this Fish River block house: Colebrooke to Sydenham, 10 May 1841, FO 5/373, fols. 104-111.

[212] Opinion of the Law Officers of New Brunswick, 6 September 1841, FO 5/374, fols. 284-289.

[213] Peel was also concerned about the risk of renewed disturbances in Canada and wanted a settlement of the boundary matter on a basis 'as far as we safely can go': Peel to Aberdeen, 16 May 1842, Aberdeen Papers, Add. MS 43062, fols. 48-54.

> Every month that passed was undermining our dominion over that continent ... the vast tide of population - that rapid and restless tide which knows no ebb - presses on from day to day, and each month that passed saw our territory further encroached on - **the dominion we had in 1838 we retained not in 1840; and had we postponed the settlement for another five years, the question would have settled itself by a contest for actual possession**.[214]

It is difficult to assess the extent to which Peel was adopting a legal or 'physical power' analysis. Most probably, it was a combination of the two, reflecting concern over both the difficulty of actually removing Americans from land they occupied, as well as the potential effect their presence would have on any further legal process. Palmerston, too, had seen these dangers, commenting of the Americans that 'they mean practically to determine the matter their own way, if we are supine enough to allow them to did so, by forcibly occupying ... the territory in dispute' .[215] Peel, it seems, was just not as prepared as Palmerston to take the practical risk of trying to resist for anything more than the short term.

International law was also central to the way in which Britain dealt with the issue of American fishing rights. Law's role will be illustrated, for present purposes, by using the example of American fishing off the coast of Nova Scotia, as this was the most prominent problem area in the period. In this case, the dispute involved questions of interpretation on the terms of the 1818 Convention, which, amongst other matters, had implemented an important new three mile coastal exclusion for American fishermen, as set out in chapter 3. The resulting tensions were mainly related to the impact of this limit, but they were not derived from any fundamental objection to its principle, which merely accorded with the general principles of international law. Instead, they resulted, rather, from the general contrast between the 1818 Convention, as a whole, and the earlier 1783 provision. Under the 1783 Treaty, American fisherman had previously enjoyed a 'liberty' to 'take fish' on the 'coasts, bays and creeks' of Nova Scotia.[216] This 'liberty' was, however, then renounced 'for ever' in the 1818 Convention for a distance of up to 'three marine miles of any of the coasts, bays, creeks or harbours', subject to some significant exceptions for shelter and

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[214] Peel, HC, 21 March 1843, Vol. LXVII, 1218-1252.

[215] Palmerston to Russell, 19 January 1841, PRO 30/22/4A, fols. 63-66. Palmerston made similar comments in Palmerston to Fox, Draft, No. 22, 17 September 1839, FO 5/321, fols. 119-120. See also Palmerston to Fox, Drafts, Nos. 24 and 26, 14 October 1839 and 2 November 1839, FO 5/321, fols. 123-124 and fols. 127-128.

[216] Article 3, 1783 Treaty.

supplies.[217] As a result, the United States, therefore, sought a wide interpretation of the 1818 Convention, which took into account the earlier position under the 1783 Treaty. Legal argument was, therefore, at the core of the dispute. The key point, for present purposes, however, is that British policy responded to the American arguments by taking and respecting legal advice. The dispute provides, therefore, a further example of a potentially troublesome problem in British-American relations that was handled within a legal framework, albeit that the wider contest on fishing rights continued until well after the period.

The role of international law in guiding the course of the dispute in this way is illustrated by two issues related to the 1818 limit, with the first being decided in favour of Britain, and, the other, the United States. The former concerned the question of whether or not the three mile territorial limit for fishing applied within the 'bays' off the coast of Nova Scotia. The claim of the United States was that it did, so that American fisherman could, for example, fish within large bays (such as the Bay of Fundy) provided they were at least three miles from the shore. Conversely, Britain argued that the whole of the 'bays' were excluded as the three mile limit was to be measured from a line taken from headland to headland at the entrance to the bay.[218] The question materialised when Palmerston raised the issue with Fox in October, 1838 as part of a request for an overall agreement to be reached with the United States on the question of American fishing rights.[219] Nothing was, however, evidently agreed at that time, and the question came up again in 1841 in the form of a case stated from Nova Scotia.[220] Falkland, the Governor of Nova Scotia, though, notably placed international law at the heart of the matter, commenting that he 'cannot but conceive that that construction must be ascertained, not by negotiation, but in the Courts of Law', and that whatever the outcome 'Her Majesty's subjects in this province will willingly abide by it'.[221] He did, however, add that the law officer of Nova Scotia considered that 'bays' were the 'exclusive' British

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[217] Article 1, 1818 Convention.

[218] See, for example, Palmerston to Fox, Draft, No. 16, 6 October 1838, FO 5/321, fols. 38-43.

[219] Palmerston to Fox, Draft, No. 16, 6 October 1838, FO 5/321, fols. 38-43. Palmerston attached two reports from the Queen's Advocate dated 31 October 1837 and 10 March 1838.

[220] The case stated from Nova Scotia asked seven questions relating to the interpretation of the 1818 Convention: Falkland to Russell, 28 April 1841, as contained in Stephen to Backhouse, 25 May 1841, FO 5/372, fols. 202-220.

[221] Falkland to Russell, 8 May 1841, as contained in Stephen to Backhouse, 18 June 1841, FO 5/373, fols. 14-61.

territory, and that the three mile limit was taken from a line drawn across headland to headland![222]

British policy was to follow the legal advice subsequently received on the point. Dodson and Wilde supported the stated British view, and advised later in 1841 that American citizens were 'excluded from any right of fishing within three miles of the coast of British America, and that the prescribed distance of three miles, is to be measured from the headlands'.[223] Nevertheless, it appears that this advice was not initially, at least, passed on to the United States, with the result that Everett wrote a further letter on the matter requesting a response to previous American notes from 1840 and 1841.[224] This time, Everett contended that the British construction of the three mile limit was not in accordance with the 'words' or the 'spirit' of the 1818 Convention.[225] Aberdeen, however, replied in a form consistent with the 1841 legal advice, saying simply that the words of the treaty were that the limit was 'within three marine miles of, any of the Coasts, bays, creeks, or Harbours'.[226] This legal construction, he continued, was confirmed both by the express use of the word 'bay' as well as 'coast', and the fact that the subsequent exception allowed admission to the 'Bays or Harbours for the purposes of Shelter'.[227] Britain, therefore, maintained its legal interpretation of the 1818 Convention.

Two additional points are, however, worthy of note from the way the issue was handled. Most importantly, the matter provides a good further example of the operation of the shared legal framework. Britain and the United States clearly treated the matter as a legal dispute

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[222] Falkland to Russell, 8 May 1841, as contained in Stephen to Backhouse, 18 June 1841, FO 5/373, fols. 14-61.

[223] Dodson and Wilde to Palmerston, 30 August 1841, FO 83/2207, fols. 181-186. The advice was sent by the Foreign Office to the Colonial Office in September, 1841: Foreign Office to Colonial Office, Draft, 7 September 1841, FO 5/374, fols. 170-171. It is worth observing that, whilst the advice was clear, rather discouragingly, however, the advice refers in part of its reasoning to the term 'headland' as being used in the Treaty when, in fact, it was not so used. As this is noted as a query on the original, it is, though, reasonable to infer that it was presumably not felt to affect the overall opinion.

[224] Webster was, though, it appears informally sent a copy of the the questions from Nova Scotia and the response of the law officers of the Crown in March, 1843: Livingston, American Consul, Halifax, to Webster, 17 March 1843, *Diplomatic Correspondence*, 1613.

[225] Everett to Aberdeen, 10 August 1843, *Diplomatic Correspondence*, 1632.

[226] Aberdeen to Everett, 15 April 1844, *Diplomatic Correspondence*, 1664.

[227] Aberdeen to Everett, 15 April 1844, *Diplomatic Correspondence*, 1664.

over the meaning of a rule, in this case treaty law, which was applicable to them both. Legal argument was, thus, a key influence on both British and American policy. Britain relied, as seen, on legal advice to maintain its position. The legal approach adopted by the United States can, alternatively, be illustrated by the way it adapted its argument to cope with what it privately recognised was a strong British case. Everett, for example, told Calhoun that 'the letter of the convention favours the British view', and that the American argument was on the basis of the 'spirit and intent' of the 1818 Convention.[228] Crucially, he also observed, however, that the United States should not make its claims based on the general principles of international law - as these principles provided that 'bays' *were* the territory of the relevant coastal power.[229] Instead, for Everett, the American case was based around a contention that the 1818 Convention was a 'specific' treaty arrangement designed to deal with the local difficulties.[230] Everett, thus, put forward a legal argument for a favourable construction using the fact that the 1818 Convention involved a tightening of the rules from the 1783 Treaty. British policy, of course, followed legal advice in rejecting this, but, for present purposes, what matters is the wider point that both Britain and the United States based their policies around what was legally arguable.

The other is to acknowledge that Britain did nevertheless later 'relax' its interpretation of the strict legal position as regards the Bay of Fundy being a 'bay' under the 1818 Convention, in response to further American arguments.[231] This was an important policy change, as it meant that Americans could fish *within* the Bay, subject to the three mile limit. Everett had previously specifically argued against Britain's construction of the 'Bay of Fundy' being a 'bay' within the meaning of the 1818 Convention on the various grounds that it was a 'broad arm of the sea' which did not 'in reality' have 'all the characters usually implied by the term "bay" ', the 1783 Treaty had been more lenient, and American fisherman 'would be shut out

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[228] Everett to Calhoun, 26 April 1844, *Diplomatic Correspondence*, 1673.

[229] Everett noted that the United States relied on this, for example, in the case of Long Island Sound, Delaware and Chesapeake Bays: Everett to Calhoun, 26 April 1844, *Diplomatic Correspondence*, 1673.

[230] Everett to Calhoun, 26 April 1844, *Diplomatic Correspondence*, 1673.

[231] Aberdeen to Everett, 10 March 1845, *Diplomatic Correspondence*, 1711.

from waters distant not three but thirty miles' from the coast.[232] Britain's case had, however, been supported by clear legal advice from the law officers to the effect that the Bay of Fundy was a 'bay' within the meaning of the 1818 Convention.[233] Aberdeen's concession of the point must, therefore, be seen simply as a political move to remove 'a fertile source of disagreement'.[234] Importantly, however, Aberdeen's action was also expressly limited in scope, with it being made clear that the point was not being conceded in respect of the other 'great bays'.[235] International law, thus, remained at the heart of the dispute despite this compromise.

The second issue, decided in favour of the United States, concerned, broadly, the question of the right of American fisherman to get shelter and supplies from the bays and harbours on the coast of Nova Scotia as set out the 1818 Convention. This, too, was resolved after Britain received the advice of the law officers of the Crown, although this time their report was in favour of the American position. The relevant part of Article I of the 1818 Convention provided that the three mile limit was subject to the proviso:

> that the American Fishermen shall be admitted to enter such bays or harbours for the purposes of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.[236]

The issue arose from the query of Nova Scotia, as to whether or not the right in the proviso for American fishermen to enter the bays or harbours of Nova Scotia to buy wood and get water etc., was limited to cases of distress or when their 'usual' supply was 'exhausted and destroyed', as opposed to it also being applicable in circumstances where these supplies had

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[232] Everett to Aberdeen, 25 May 1844, *Diplomatic Correspondence*, 1672. Everett added that the proviso in the treaty concerning the right to 'shelter', also supported the American interpretation, as the 'shelter' was not in the Bay of Fundy itself, but rather in the bays ('properly so called') within it which 'indent the coast'.

[233] The legal advice on the Bay of Fundy was contained in Dodson, Pollock, and Follett to Aberdeen, 9 April 1844, Parry, Law Officers' Opinions, Vol. 4, pp. 222-225.

[234] Aberdeen to Everett, 10 March 1845, *Diplomatic Correspondence*, 1711.

[235] Aberdeen to Everett, 21 April 1845, *Diplomatic Correspondence*, 1725; Everett to Aberdeen, 23 April 1845, *Diplomatic Correspondence*, 1726.

[236] Article I, 1818 Convention.

not been originally taken from the United States.[237] Nova Scotia, it seems, was clearly attempting to limit the visits of American fishermen to its coast by drawing on the full context of the provision. This point was, however, simply resolved in favour of the United States. Dodson and Wilde jointly advised that the relevant 'liberty' was 'unrestricted by any condition expressed or implied', and 'that no such condition can be attached to the enjoyment of the liberty.'[238] Legal principles again determined the advice, albeit that this time it was to the disadvantage of Britain.

Conclusion

International law, therefore, helped to guide British foreign policy towards the United States through the major challenges presented by Canada and the Northeast in the period. Border populations getting involved with insurgent activity in Canada, and pushing territorial rights in Maine and Nova Scotia, created serious tensions in the British-American relationship. A shared framework of legal principles and treaty law provided a structure through which the issues between Britain and the United States could generally be successfully handled. Events and circumstances were approached from a common British-American standpoint, and solutions understood against a joint structure of rules. Principles associated with sovereignty and self-preservation, thus, helped Britain and the United States work together during the Canadian revolts by providing justifications for both the British defence of Canada and the American security cooperation. The shared framework of *law* was the foundation upon which Britain and the United States were able to move on in McLeod and the *Caroline* affairs, leaving the *facts* behind them. Legal process and argument were a significant part of the means by which Britain dealt with the legal disputes over the Northeastern boundary and fishing rights. Agreement on the law, if not always on its application, was, thus, fundamental to the way the British-American relationship operated in relation to the pressures arising from the northeastern frontier.

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[237] Falkland to Russell, Copy, 28 April 1841, as contained in Stephen to Backhouse, 25 May 1841, FO 5/372, fols. 202-220.

[238] Dodson, Wilde to Palmerston, 30 August 1841, FO 83/2207, fols. 181-186.

5. **American Expansion and the tensions over Oregon, California, and Texas**

On the face of it, it is curious that Britain cared more about the fate of Oregon than that of Texas or California. All three were fundamental to 'manifest destiny', a narrative of the story of the United States that saw as natural its growth from the Atlantic to the Pacific. Indeed, title to the land of both Texas and Oregon was presented in America by many expansionists as part of a wider conflict between Britain and the United States for strategic control of the continent. Furthermore, Texas and California were both handsomely regarded in Britain, with widely-acknowledged potential. Oregon, by comparison, was viewed as being of no real value, a wilderness suitable only for a mediocre fur trade bringing moderate profits. Yet, it was Oregon that was to become the subject of a sustained dispute between Britain and the United States, even threatening war at its peak in 1845 and 1846. Conversely, in Texas and California, whilst there were some serious diplomatic tensions, peace was never at risk as they joined the United States. This chapter aims to set British policy to American expansion within the extremes of being prepared to fight over Oregon, and accepting of the loss of Texas and California. It seeks to explains how international law can aid the understanding of why Oregon, but not Texas or California, caused Britain the most concern, albeit that here, too, much territory was gained by the United States. The chapter also examines how international law can help to provide a better appreciation of British policy in the serious disputes that nevertheless developed in the British-American relationship concerning Oregon and Texas.

The chapter argues that international law made an impact on British policy in two main ways. Primarily, treaty law and legal principles shaped policy objectives so that they were permissive of American expansion and favoured peace. This can clearly be seen in the overall British approach to Oregon, California and Texas, which was always accepting of the principle of American growth. Furthermore, even within that overriding policy stance, international law also guided the specific British policy objectives. Oregon was more of a British priority than Texas or California because Britain possessed legal rights there, which it wanted to be seen to uphold as a matter of honour and power. By contrast, in Texas, Britain respected the principle of sovereignty and the right of Texas to determine its own future despite aiming for continued Texan independence. The second section then considers the tensions that nevertheless arose with the United States over Oregon and Texas, and argues

that Britain handled these within a framework of international law that was, in large degree, shared by the United States. Most importantly, application of a series of joint principles influenced both the time and nature of the settlement of the Oregon question. The legal principles of 'non-interference' and neutrality also guided British policy away from confrontation in Texas over slavery and the alleged sale of armed ships to Mexico.

The chapter also qualifies specific historiographical interpretations. Historians have explained British policy to Oregon, California and Texas as being primarily motivated by a desire to preserve peace and maintain honour.[1] Bourne and Roeckell have also pointed to the influence of British concerns over Mexico in Texas.[2] Traditional themes within the historiography, however, also include arguments that British policy towards American expansion promoted containment of the United States, was weak in its opposition to the United States, or was pacific due to the personal role of Aberdeen.[3] Examples of these contentions can be found in work relating to Texas and Oregon in this period. Silbey contends that Texas 'was one more chance' for Britain to pursue its 'intention to contain the United States'.[4] Galbraith and Merk both consider Aberdeen as having been instrumental in a British policy to Oregon that resulted in a settlement that was, for them, respectively, a

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[1] This is consistent with the main historiographical approaches to British policy to the United States in the period as discussed in the Introduction. Historians noting the objective of peace, honour, and the role of Aberdeen in Oregon include: J . S. Reeves, *American Diplomacy under Tyler and Polk* (Baltimore: The John Hopkins Press, 1907), p. 263; J. S. Galbraith, *The Hudson's Bay Company as an Imperial Factor, 1821-1869* (Berkeley: California University Press, 1957), pp. 248-249, F. Merk, *The Oregon Question*, Essays 7, 8, and 9; Chamberlain, *Pax Britannica*, p. 87; and D. A. Rakestraw, *For honour or destiny: the Anglo-American crisis over the Oregon Territory* (New York: P. Lang, 1995), p. 2. Peace and a lack of interest in new colonies are recognised as the main British priorities in California. See, for example E. D. Adams, 'English Interest in the Annexation of California', Addendum to E. D. Adams, *British Interests and Activities in Texas, 1838-1846 (Baltimore: The John Hopkins Press, 1910),* p. 264; Dunning, *The British Empire and the United States*, p. 136; Jones, *Lord Aberdeen and the Americas*, p. 70; and Bourne, *The Foreign Policy of Victorian England*, pp. 52-53. Similarly, in Texas, historians point to peace, Aberdeen, and Aberdeen's 'entente' with France as explanations for policy. See, for example: Adams, *British Interests and Activities in Texas*, p. 194; Chamberlain, *Pax Britannica*, p. 86, and *Lord Aberdeen*, p. 334; Jones, *Lord Aberdeen and the Americas*, p. 31.

[2] Bourne considers that Britain's chief concerns were the position of Mexico and slavery, and that it did not pursue Texan independence strongly overall: Bourne, *The Foreign Policy of Victorian England*, p. 53, and *The Balance of Power*, pp.76-78. Roeckell argues that British policy to Texas has been analysed too much in the context of the United States as opposed to Mexico: Roeckell, 'Bonds over Bondage: British Opposition to the Annexation of Texas', *Journal of the Early Republic*, Vol. 19, (1999), pp. 257-278.

[3] These are discussed in the Introduction.

[4] J. H. Silbey, *Storm over Texas: The Annexation Controversy and the Road to Civil War* (New York: Oxford University Press, 2005), p. 37-38.

'surrender' and a 'capitulation'.[5] This chapter aims to show that these notions have been overstated by providing a deeper appreciation of the role of international law. Crucially, as noted, it argues that treaty law and legal principles were important in guiding Britain to accept the growth of the United States, and that they influenced the nuances which can be seen in British policy towards Oregon, California and Texas respectively. It then also demonstrates how it was the shared framework of legal principles that set the criterion for the handling of the tensions in relation to Oregon and Texas. In doing so, the chapter, thereby, suggests that British policy was not 'weak', or, as alleged in some instances, a 'surrender' or a 'capitulation', or even solely the result of Aberdeen's character, but, rather, was part of a consistent, long term trajectory guided by international law. Indeed, Britain was simply reacting to American expansion in a way that was consistent with the prevailing structure of international law.

International Law and the shaping of British policy to American Expansion

International law shaped the direction of British foreign policy towards the expansion of the United States in the period. Most importantly, treaty law and legal principles pushed Britain towards a policy that was tolerant of American growth westwards on the North American continent. The nature of Britain's treaty agreements with the United States meant that British policy aims were unlikely to have been to firmly oppose American enlargement, as argued in chapter 3. To reiterate briefly, Britain had conceded the 'territorial rights' of the thirteen states, accepted a boundary for the 'United States' that was larger than that of the existing thirteen states, and agreed a joint occupation for Oregon pending a final settlement. The principle of the United States spreading westwards was, thus, built into the treaties. Moreover, legal principles were also influential in making peace a key British objective, again as seen in chapter 3. A policy aimed at the maintenance of peace naturally further softened Britain's approach, given that it meant that the threat of military intervention to resist the United States was effectively lowered.

British policy in relation to Oregon, California and Texas, accordingly, consistently worked on the basis that the United States might well expand into these territories, as can be shown

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[5] Galbraith, *Hudson's Bay*, pp. 248-249; Merk implies that the settlement of 1846 was a 'capitulation' for Britain: Merk, *The Oregon Question*, p. 281.

by brief review of the main events concerning them in the period. The Oregon question concerned the fate of the land west of the Rocky Mountains between latitude 54° 40' to the north, and that of 42° to the south.[6] Britain and the United States both considered that they had valid claims to the territory, and participated in negotiations to agree a compromise in 1818, 1824, 1826, 1842, 1844, and 1845. The basic disagreement was that the British wanted a boundary based on the river Columbia, whereas the United States sought one instead on the 49th parallel of latitude. In the absence of a settlement, however, a ten year joint occupation of the whole area was agreed in 1818, and then renewed indefinitely in 1827, as set out in chapter 3. Ultimately, the Oregon question was only resolved in 1846, with the agreed boundary then following the 49th parallel to the sea, before veering south, so that the whole of Vancouver Island was left to Britain.[7] Any notion, however, that Britain saw Oregon as part of a strategy to contain the expansion of the United States has limited validity. There is no evidence of such an aim in the diplomatic despatches from the period. Furthermore, Britain was clearly prepared to - and did - compromise Oregon on a basis that gave much territory, and access to the Pacific, to the United States.[8] Importantly, there is, additionally, little evidence that Britain was interested in promoting an independent Oregon state, despite that idea having some traction in the United States.[9]

Britain also appeared indifferent to the receipt of information indicating that the United States was interested in California. California formally became a part of the United States after the Treaty of Guadalupe Hidalgo, 1848, which was the peace treaty ending the U.S./ Mexican War of 1846 to 1848.[10] Britain, however, was aware of possible American interest in California from at least the early 1840s. Webster, for example, made known to Britain the American interest in obtaining the port of San Francisco during the negotiations for the

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[6] For present purposes, these can simply be regarded as the agreed limits of the then Russian and Mexican interests respectively.

[7] Treaty of 1846, 'in Regard to Limits Westwards of the Rocky Mountains', accessed through Project Avalon, Yale Law School, 8/2/17 at c.7.24pm.

[8] See, for example, the British offers in the negotiations of the 1820s as discussed below. Galbraith comments that, from 1821, the Hudson Bay Company believed that, at the least, the area south of the river Columbia would be given to the United States in any settlement: Galbraith, *Hudson's Bay*, p. 82.

[9] See, for example, Pakenham to Aberdeen, No. 112, 29 October 1845, FO 5/429, fols. 38-49, where Pakenham notes his rejection of an approach by the Oregon Emigration Society in Massachusetts.

[10] Article V, Treaty of Guadalupe Hidalgo, 1848, accessed through Project Avalon, Yale Law School, on 5/12/17 at c4.45pm. California and other previous Mexican territory, such as New Mexico, passed to the United States from Mexico under this treaty through the definition of a new boundary.

Webster-Ashburton Treaty of 1842. Britain's immediate response, however, raised no objection, in principle, to an American presence in California, with Ashburton merely commenting to Aberdeen that 'we should make no objection to any arrangement of the kind, provided the cession by Mexico were voluntary'.[11] The most sustained period of warning about the future of California, though, came when the annexation of Texas was being pushed forward in the United States in 1844 and 1845. Pakenham, for example, voiced his concern that California would separate from Mexico, highlighting especially the role of American settlers in 'the scheme of encroachment next to be put in practice by the democracy of this country - the appropriation of the Californias.'[12] Similarly, Elliot, too, told Aberdeen that 'the true point to be watched, and placed on a safe footing at once ... is Upper California'.[13] Ultimately, though, despite appearing very briefly to have considered some joint action with France in 1845, Britain appeared unwilling to get involved with the future of California.[14] Moreover, as Adams identifies, and as will be discussed below, it also refused several opportunities to acquire a legal interest in it.[15] Unsurprisingly then, in the light of this approach, Britain also did not get involved in the U.S./Mexican War when it began in 1846. Consistently too, there was also no diplomatic friction between Britain and the United States over California.

Lastly, British policy similarly worked routinely on the premise that the United States may one day expand into Texas. Texas had emerged as an important international question when it declared independence from Mexico in March, 1836.[16] Mexico had, however, refused to accept the breakaway, and a struggle between Texas and Mexico over the former's 'independence' ensued throughout the period. The process by which Texas then came to be

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[11] Ashburton to Aberdeen, 25 April 1842, *British Documents*, Vol. 1, 174.

[12] Pakenham to Aberdeen, No. 67, 12 June 1845, FO 5/426, fols. 89-103.

[13] Elliot to Aberdeen, No. 19, 3 July 1845, FO 75/13, fols. 155-167.

[14] Aberdeen to Peel, 23 September 1845, Aberdeen Papers, Add. MS 43064, fols. 353-356; Aberdeen to Peel, 25 September 1845, Add. MS 43064, fols. 362-363; and Aberdeen to Peel, 3 October 1845, Add. MS 43065, fols. 7-8.

[15] See generally, Adams, 'English Interest in the Annexation of California '.

[16] The 'Delegates of The People of Texas' proclaimed to the world that: 'our political connection with the Mexican nation has forever ended, and that the people of Texas do now constitute a free, sovereign, and independent republic, and are fully invested with all the rights and attributes which properly belong to independent nations', as referred to in D. R. Armitage, *The Declaration of Independence: A Global History,* (Cambridge MA: Harvard University Press, 2007), p. 216.

annexed by the United States is outside the scope of this thesis, but, from the British perspective, there were two key periods.[17] Initially, the United States recognised Texas as an independent state, but refused to accept it into the Union when offered the chance in 1837.[18] From 1843, however, the United States then, conversely, worked to annex Texas, with Congress finally approving this in February, 1845 and the formal admission of Texas as a state taking place on the 29th December, 1845.[19] Crucially, however, the main orientation of British policy remained the same throughout both stages, namely Britain was prepared to accept Texas as part of the United States. Palmerston certainly quickly acknowledged the notion of annexation in 1836, commenting, of Texas, that 'having freed itself from Mexico, it might choose to attach itself to the United States'.[20] He also wrote to Spring Rice in 1837 with an air of indifference over the fate of Texas.[21] Similarly, Aberdeen told Bankhead, the British minister in Mexico, in 1844 that, for Britain, it 'was of a comparatively minor consequence in the abstract ... whether Texas be independent or whether she be annexed to the United States'.[22] Again, in 1845, Aberdeen commented that he did 'not conceive that any material or direct British interest is involved in the independence of Texas'.[23] Both the

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[17] For a recent account of the annexation of Texas in American politics, see Silbey, *Storm over Texas.*

[18] On the American recognition of Texas, see Reeves, *American Diplomacy*, p. 79. Britain did not object to the recognition of Texas by the United States in March, 1837: Fox to Palmerston, No. 8, 12 March 1837, FO 5/314, fols. 165-180. Britain also approved of the formal rejection given by the United States later in 1837 to the chance offered to it then to annex Texas: see, for example, Fox to Palmerston, No. 23, 24 November 1837, FO 5/314, fols. 363-376 at 364-365.

[19] A treaty for Texan annexation was signed in spring, 1844, albeit that it was rejected by the U.S. Senate in June, 1844. A different process for Texan annexation by resolution of Congress, and subsequent Presidential approval, was then adopted. On the ultimate approval of the United States to Texan annexation in 1845, see the Protest of Almonte, of Mexico, to Calhoun 6 March 1845, *British Documents*, Vol. 2, pp. 455-457.

[20] Palmerston, HC, 5 August 1836, Vol. XXXV, 934-941.

[21] Palmerston wrote: 'We cannot pretend to exert much influence on the destiny of Texas; and have little to do, but to watch the course of events': Palmerston to Spring Rice, 9 October 1837, Palmerston Papers, MO/129.

[22] Aberdeen to Bankhead, No. 49, 31 December 1844, *British Documents*, Vol. 2, p373-376 at 374.

[23] Aberdeen to Elliot, Draft, No. 10, 3 July 1845, FO 75/12, fols. 45-50.

Melbourne and Peel governments also showed no inclination to get involved in Texas militarily.[24]

Importantly, however, international law also helps to explain the different respective directions British policy nevertheless took in relation to Oregon, California, and Texas. Most significantly, Britain took a much greater interest in Oregon than it did in California or Texas, with the key determining factor being the question of whether or not Britain perceived itself as having a legal interest in the territory concerned. This point mattered because the upholding of British rights and obligations under international law was itself an important influence on foreign policy, being linked to British 'honour', as argued in chapter 2. Crucially, Britain considered that it possessed legal rights to the ownership of the territory of Oregon. By contrast, however, Britain had no such claims over California or Texas. The other distinct approach within British policy was the secondary aim of trying to keep Texas as an independent state. This was a 'secondary' objective because it was subservient to the overriding British position of accepting that Texas might become part of the United States. Britain nevertheless saw some advantages in continued Texan independence, as will be seen. Again, however, international law affected Britain, as the legal principles associated with sovereignty guided British policy and ensured that the right of Texas to determine its own future was respected.

Before turning to consider these points in the context of Britain's actions concerning Oregon, California and Texas more closely, however, it is helpful, first, to rule out the other main possible alternative explanation for the specific directions of British policy, namely that it was based on the perceived high value or otherwise of the relevant territory. This can be done easily because, in fact, the opposite was actually the case, and there was an inverse relationship between the overall value or worth each territory was perceived as having in Britain and the level of the British policy interest. Britain, thus, was most involved with Oregon, and yet there was a generally consistent negative view taken by British ministers and politicians in this period as to its intrinsic value. Aberdeen, for example, described

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[24] Palmerston, for example, refused to countenance any British military intervention in parliament in March, 1837: Palmerston, HC, 9 March 1837, Vol. XXXVII, 194-197. Peel intimated a reluctance to 'intervene' in Texas (at the height of the tensions in 1845) in the event even of a forcible American annexation: Peel to Aberdeen, Secret, 23 January 1845, Aberdeen Papers, Add. MS 43064, fols. 178-181.

Oregon as 'an object of no immediate or pressing national interest or importance'.[25] Similarly, Clarendon, leading for the Whigs in a debate on Oregon in the House of Lords, called it 'an unoccupied territory, the whole fee-simple of which is well known to be of such insignificant value as not to compensate the losses and miseries that one single month of war must produce'.[26] Conversely, British politicians were certainly aware of the potential importance of Texas in terms of agriculture, mining, and trade, and raised concerns about the risk of it being acquired by the United States.[27] Peel noted too the valuable strategic geographical position of Texas.[28] Brougham even declared that: 'The importance of Texas could not be underrated'.[29] As to California, Pakenham, as noted by Adams, wrote of the 'magnificent territory of Upper California'.[30]

Even if Britain considered Oregon to be of little value overall as a territory, however, it is nevertheless still possible that factors other than legal rights and honour were the main drivers of British policy towards it in the period. The starting point in assessing the central British motivation to Oregon, therefore, has to be an analysis of why Britain was there in the first place, and here the work, in particular, of Galbraith, Merk, and Rakestraw is especially

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[25] Aberdeen to Pakenham, Draft, No. 8, 3 March 1845, FO 5/423, fols. 21-24. See also Ashburton, who referred to Oregon dispute as a 'question worthless in itself': Ashburton, HL, 17 March 1846, Vol. LXXXIV, 1119-1120.

[26] Clarendon, HL, 17 March 1846, Vol. LXXXIV, 1114-1115. This broad perception was also reflected in the article on Oregon in the *Edinburgh Review* in 1845, which sardonically commented that 'the great error of all the parties has been the importance attached to Oregon': 'Oregon', *Edinburgh Review*, Vol. LXXXII, Article VIII, (1845), pp. 238-265 at p. 261. This view was not, however, a universal Whig view. Russell mentioned, in a speech in 1845 arguing for the maintenance of British rights, that he also thought Oregon was of value, referring to the fur trade, the river Columbia, and the possibility of trade with China: Russell, HC, 4 April 1845, Vol. LXXIX, 190.

[27] See, for example, Barlow Hoy, HC, 5 August 1836, Vol. XXXV, 928-931, and Ward, HC, 5 August 1836, Vol. XXXV, 931-934.

[28] Peel referred Aberdeen in 1845 to a speech of Huskisson from 1830 on the aim of the United States to control the Gulf of Mexico: Peel to Aberdeen, Sunday, [(March/April?), 1845], Aberdeen Papers, Add. MS 43064, fols. 203-204.

[29] Brougham, HL, 18 August 1843, Vol. LXXI, 915-918.

[30] Pakenham to Palmerston, 30 August 1841, as referred to in Adams, E., 'English Interest in the Annexation of California', p. 237. Similarly, Pelly referred Russell to the 'many very fine harbours' in the Bay of San Francisco, and Simpson referred to the fact that it needed 'no illusive descriptions, but plain naked truth to recommend its [California's] value and importance': Pelly to Russell, 6 February 1841, FO 5/370, fols. 142-145 at 143, and A. Simpson, 'The Oregon Territory: Claims Thereto of England and America; Its Condition and Prospects' (London: R. Bentley, 1846), p. 57.

helpful.[31] None of the reasons identified in these and other works seem realistically capable, however, of being the key concern of British policy towards Oregon in the period. Out of these, it is important to take account, initially, of the fur trade, which was, undoubtedly, the original British enterprise in Oregon, with both the North West Company, and, then, the Hudson's Bay Company, operating in the region.[32] Indeed, as Galbraith has observed, fur was the reason why Britain was involved in Oregon at all.[33] Furthermore, as Galbraith also highlights, this trade, in turn, then led to the Hudson's Bay Company and Canning seeing the area between the river Columbia and the 49th parallel as 'essential to the protection of the fur trade', which does partly explain the British negotiating objectives until the settlement of 1846.[34] Nevertheless, in the context of the British empire, the size and importance of this trade was very small. By itself, it is surely not reasonable to suppose that its future was the main influence affecting British policy on Oregon. Indeed, Galbraith himself effectively underlines this point when he argues that the interests of the Hudson's Bay Company were 'sacrificed' by Aberdeen in the 1846 settlement.[35]

Other factors have also been considered as being responsible for British policy in Oregon. Merk, for example, sets out several 'forces shaping Oregon policy' in the period around the 1826 negotiations, which included, trade, imperial 'pride', policy continuity, and fears over American progress.[36] The perceived potential importance of the river Columbia and Oregon for British trade, in particular, has also been picked out by other historians. Galbraith, for example, notes that the Hudson's Bay Company told the British government that the river Columbia was a vital link between the 'northern posts and the coast'.[37] Similarly, Bourne

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[31] Galbraith, *Hudson's Bay;* Merk, *The Oregon Question*; Rakestraw, *For Honor or Destiny.*

[32] The Hudson's Bay Company and the North-West Company merged in 1821: Northwestern Memorandum, *British Documents*, Vol. 2, p. 39.

[33] Galbraith, *Hudson's Bay*, p. 110.

[34] Galbraith, *Hudson's Bay*, p. 180. Galbraith further identifies that the Hudson's Bay Company was behind the formation of the Puget Sound Agricultural Company in 1838, with the aim of strengthening the British claim to the area north of the river Columbia, albeit that he considers that this project failed: Galbraith, *Hudson's Bay*, p. 199, p. 217.

[35] Galbraith, *Hudson's Bay*, pp. 248-249.

[36] Merk*, The Oregon Question,* pp. 139-153.

[37] Galbraith, *Hudson's Bay*, p. 180. Pakenham seems to have been stressing such use of the river Columbia when he argued that the British claim for a boundary based on its course was maintained from 'considerations of utility, not to say necessity': Pakenham reply to Calhoun, as contained in Pakenham to Aberdeen, No. 103, 12 September 1844, FO 5/408, fols. 19-64 at fols. 61-63.

observes the 'implications' of Oregon 'for the trade of the Pacific'.[38] As Schafer highlights, Canning, too, certainly saw a possibility of Oregon providing a trading link for the British empire to China.[39] Nevertheless, as with the fur trade, it is not realistic, however, to suppose that this was Britain's central motivation in this period. Crucially, British opinion did not, on the whole, consider Oregon a valuable territory, as argued above. As for trade specifically, the reality was that the river Columbia was increasingly known to be a difficult river, with a sand bar at its mouth, and navigation of it had been in any event been offered as part of the American offer in 1826.[40] Further, Britain had not taken up possession of the Sandwich Islands - modern day Hawaii - when it had the chance in 1843, there was a potential alternative trading route to China through Central America (albeit not yet wholly on water), and, in terms of any trade coming from Oregon itself, that was entirely for the future.[41]

What it seems Britain did care about, though, was how it was seen to deal with its perceived legal rights in Oregon, both domestically, in the United States, and the wider world. Crucially, British governments in the period considered that Britain had a strong claim in Oregon, and certainly one that matched the United States. Furthermore, that belief was publicly shared by others outside government. The British claim was built on the grounds that Britain possessed a right (jointly with other nations) to occupy vacant areas of Oregon, and that Britain's discoveries and settlements in the region were the equivalent, on the facts, to those of the United States. Britain also contended that its right of occupancy in Oregon was confirmed by the Nootka Sound Convention, agreed between Britain and Spain in

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[38] Bourne, *The Foreign Policy of Victorian England*, p. 51.

[39] See J. Schafer, 'The British Attitude toward the Oregon Question, 1815-1846', *AHR,* (1911), pp. 273-299 at p. 291, note 53, referring to Canning to Liverpool, 7 July 1826 in E. Stapleton, (ed.) *Correspondence of Canning*, II, 71-75.

[40] Galbraith, for example, refers to the three week delay caused to Simpson by the bar of the river Columbia in 1842: Galbraith, *Hudson's Bay*, p. 222. The American offer in 1826 was on the basis that the river Columbia crossed the 49th parallel 'at a navigable point'. For the 1826 negotiations generally, see Northwestern Memorandum, *British Documents*, Vol. 2, pp. 73-76.

[41] For the decision on the Sandwich Islands, see Aberdeen to Fox, No. 23, Draft, 3 June 1843, FO 5/390, fols. 61-64. Britain became more formally involved with United States for a rail or canal link across Central America in 1849: see, for example: Palmerston to Abbott, 13 November 1849, *British Documents*, Vol. 4, pp. 6-7.

1790.[42] As against the United States, specifically then, Britain claimed discovery based on the voyages of Sir Francis Drake, Captain Cook, Captain Meares, and Captain Vancouver between 1578 and 1795, and, most crucially, occupation and settlement from the trading posts of the North West Company and the Hudson's Bay Company.[43] Whilst there was no absolute clarity, Britain certainly considered that these claims were strong enough to resist the corresponding demands by the United States for the 'whole valley of the Columbia'.[44] Under those American claims, the United States, conversely, asserted discovery based, instead, on the voyages in the river Columbia of Gray in 1792, and Lewis and Clarke in 1805.[45] It then, alternatively, claimed settlement through Astoria, a trading post which had been officially retaken by the United States following the War of 1812.[46]

Importantly, Britain also dismissed entirely the other two main American grounds of claim, presumably further affirming its belief in its own interest. In the first of these, the United States argued that it was entitled to Oregon as a result of the Louisiana Purchase of 1803.

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[42] Article III, Nootka Sound Convention, as contained in T. Twiss, *The Oregon Question Examined in respect to Facts and the Law of Nations* (London: Longman, Brown, Green, and Longmans, 1846), p. 115; Pakenham to Aberdeen, No. 106, 28 September 1844, *British Documents*, Vol. 2, pp. 145-147; Pakenham to Aberdeen, No. 95, 13 September 1845, FO 5/428, fols. 18-131 at fols. 22-27. For the significance of Nootka in resisting the Spanish claim to have the sole right to occupy Oregon as against Britain, and confirming that 'occupation, or actual possession, was ... the only test between the two crowns ... of territorial title', see Twiss, Ibid., pp. 118-119.

[43] For discovery, see Northwestern Memorandum, *British Documents*, Vol. 2, pp. 10-37; and Reply of Pakenham, 29 July 1845, *British Documents*, Vol. 2, pp. 173-184 at pp. 180-181. For settlement, see Northwestern Memorandum, *British Documents*, Vol. 2, pp. 38-39, and pp. 41-42, where reference is made to R. Greenhow, *The History of Oregon and California and the other territories of the Northwest coast of North America* (first published 1844) as stating that, in 1844, the Hudson's Bay Company had 22 'forts or establishments west of the Rocky Mountains'; and Reply of Pakenham, 29 July 1845, *British Documents*, Vol. 2, pp. 173-184, at pp. 180-181.

[44] Pakenham to Buchanan, 29 July 1845, *British Documents*, Vol. 2, pp. 173-184 at p. 184.

[45] Northwestern Memorandum, *British Documents*, Vol. 2, pp. 53-55; Calhoun Statement, as contained in Pakenham to Aberdeen, No. 103, 12 September 1844, FO 5/408, fols. 19-64; Reply of Pakenham, 29 July 1845, *British Documents*, Vol. 2, pp. 173-184, at pp. 181-183.

[46] Northwestern Memorandum, *British Documents*, Vol. 2, pp. 56-61; Calhoun Statement, as contained in Pakenham to Aberdeen, No. 103, 12 September 1844, FO 5/408, fols. 19-64; and Pakenham to Aberdeen, No. 106, 28 September 1844, *British Documents*, Vol. 2, pp. 145-147. Astoria had been established by the Pacific Fur Company in 1811 on the south bank of the river Columbia, sold to the North West Company in 1813 during the War of 1812, and then retaken by the United States in 1818, ostensibly as the return of property taken in war pursuant to Article 1 of the Treaty of Ghent, 1814. Britain accepted the retaking of Astoria, but 'without, however, admitting the right of that Government [the United States] to the possession in question', although Merk contends that British 'errors of procedure' added to the strength of the American claim: Northwestern Memorandum, *British Documents*, Ibid., and Merk, *The Oregon Question,* pp. 25-26, p. 29.

There appears to have been two elements to this contention, at least as it was put by Calhoun in 1844. These were the claim to Oregon from the possession of Louisiana itself, and, then, the case for Oregon under the alleged principle of 'continuity'.[47] Pakenham, was, however, scathing, calling the argument, from the Louisiana Purchase, a position 'so very far-fetched, not to say absurd, as scarcely to require serious notice'.[48] The other American claim was derived from the American-Spanish treaty of 1819, by which the United States inherited Spanish rights in relation to Oregon.[49] The American case, in this instance, was that it was entitled to the title of the whole of Oregon, as a result of the combination of the original Spanish right of discovery over the whole north-west coast with subsequent American acts of discovery and settlement.[50] This claim, however, also depended on the further argument that the Nootka Convention was now either invalid or ineffective.[51] Britain naturally rejected this contention, arguing that Nootka was in force and confirmed a British right of occupancy.[52]

Britain was also operating in circumstances where the merits of its rights over Oregon were widely acknowledged in public. It was, in particular, significant that some of those who had been prominently involved with the previous Oregon negotiations in the United States at the very least recognised British claims. For example, John Quincy Adams explained in 1845 his willingness to compromise, as U.S. Secretary of State back in 1818, on that basis that: 'we did think there was some substance in the claim of the British government, and that it

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[47] For the American claim on 'continuity', see Calhoun Statement, in Pakenham to Aberdeen, No. 103, 12 September 1844, FO 5/408, fols. 19-64, and Calhoun to Pakenham, 20 September 1844, as contained in Pakenham to Aberdeen, No. 106, 28 September 1844, FO 5/408, fols. 74-99. Calhoun argued that the rights of the original colonies to westward extension had been restored by the Louisiana Purchase, 1803, as that removed the effect of the Treaty of Paris, 1763, which had, in turn, given up those rights west of the river Mississippi.

[48] Pakenham to Aberdeen, No. 106, 28/9/44, *British Documents*, Vol. 2, pp. 145-147.

[49] Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, 1819, accessed through Project Avalon, on 23/5/16 c. 11.38am.

[50] Buchanan to Pakenham, 30 August 1845, *British Documents*, Vol. 2, pp. 184-210.

[51] Buchanan argued that the Nootka Convention was much more limited in its effect than contended by Britain, being, broadly, concerned with 'merely trading with the Indians whilst the country should remain unsettled', together with the making of settlements for that trading purpose only, rather than the purpose of 'ultimate sovereignty'. Buchanan also argued that Nootka had, in any event, been invalidated by war between Britain and Spain: Buchanan Statement, 12 July 1845, *British Documents*, Vol. 2, pp. 162-173 at pp. 163-164.

[52] Reply of Pakenham, 29 July 1845, *British Documents*, Vol. 2, p173-184.

was a fair and honourable proposition to them to compromise'.[53] Similarly, Pakenham highlighted to Aberdeen that Albert Gallatin, an American negotiator over Oregon in London in 1826, had contended, in a four part series of letters published in the United States in early 1846, that 'neither party has an absolute and indisputable title to the whole of the contested territory'.[54] This seemed to reflect Gallatin's thinking back in 1826, when he had observed that the British had been told that the offering of a boundary 'was a sufficient proof that we admitted that she also had claims which deserved, and to which we paid due consideration'.[55] More recently, Webster had also respected British rights in Oregon, commenting in 1846 in the Senate that: 'it is not to be doubted that the United States Government has admitted, through a long series of years, that England has rights in the northwestern parts of this continent which are entitled to be respected'.[56]

Furthermore, British rights were also supported by a flurry of publications in Britain commenting on the position of the dispute under international law. Most notable was Travers Twiss's 1846 book on the Oregon question.[57] Twiss was an expert in international law, and a future Queen's Advocate.[58] Through 18 chapters and nearly 400 pages, he meticulously examined the basis of the American case and the previous negotiations between Britain and the United States. His motivation was clearly stated in the preface to his book: 'He could not resist the conviction, on reading several able treatises on the subject, that the case of the United States had been overstated by her writers and negotiators'.[59] Other publications supportive to Britain from 1845 and 1846 included, for example, G.F. Ruxton's 'A Glance at the Claims of Great Britain and the United States to the Territory in Dispute',

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[53] Adams, Congress, 1845, Congressional Globe, as contained in Pakenham to Aberdeen, No. 11, 4 February 1845, FO 5/424, fols. 70-106.

[54] Pakenham to Aberdeen, No. 10, 29 January 1846, FO 5/446, fols. 59-70 at fols. 59-60.

[55] Gallatin to the U.S. Secretary of State, during the negotiations of 1826, as referred to in the Northwestern Memorandum, *British Documents*, Vol. 2, p. 90.

[56] Webster, Senate, 30 March 1846, as contained in Pakenham to Aberdeen, No. 36, 30 March 1846, FO 5/447, fols. 181-184.

[57] Twiss, *The Oregon Question.*

[58] Twiss was admitted to the College of Advocates in 1841, and became Queen's Advocate in 1867: *DNB* (Oxford, 2004), pp. 736-739.

[59] Twiss, *The Oregon Question*, p. 2. Twiss's work was sent by the Foreign Office to the British Minister in Washington in March, 1846, and 1,000 copies were republished in the United States following an intervention by the the British consul in New York: Addington to Pakenham, 3 March 1846, FO 5/445, fol. 20; Barclay to Addington, 28 April 1846, FO 5/452, fol. 237.

Edward Wallace's 'The Oregon Question Determined by the Rules of International Law', and TF's 'The Oregon Question' in *The Westminster Review*.[60] *The Edinburgh Review* and *The Quarterly Review* also published articles broadly favourable to the British government's position in 1845 and 1846 respectively, albeit that Merk has argued that these resulted from involvement by Aberdeen and Everett.[61] There were, of course, contrary publications in the United States, but the presence of these British commentaries provides further evidence for the view that the British government was not alone, either in its analysis of the merits of its Oregon claims, or its perception of the importance of being seen to uphold them.[62]

International law was able to make an impact on British policy in relation to Oregon from this position because ministers and politicians cared about the link made between these, widely perceived as strong, legal rights and British honour. Many historians have, of course, already noted the role played by 'honour' in British policy to Oregon. Indeed, Donald Rakestraw called his book on Oregon: 'For Honor or Destiny'.[63] Similarly, Bourne comments that Aberdeen wanted to 'to secure for public opinion ... what could be presented ... as an honourable compromise'.[64] The additional point being argued here, however, is that it was a notion of 'justice' for British rights in Oregon that was an express rationale for both the sustained British interest, and the wider issue as to why power or honour were at stake. Three examples from the parliamentary debate following Polk's claim in 1845 that the American title to the whole of Oregon was 'clear and unquestionable' illustrate this point. (emphases added).[65] Lord John Russell, leading for the Whigs in the Commons called for the two governments to 'settle every question of difference between

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[60] G. F. A. Ruxton, 'The Oregon Question: A Glance at the Claims of Great Britain and the United States to the Territory in Dispute', (London: John Oliver, 1846); E. J. Wallace, 'The Oregon Question Determined by the Rules of International Law', (London: Maxwell & Son, 1846); 'The Oregon Question', *The Westminster Review*, Vol. 45, No 2 (1846), Article VI, pp. 418-454.

[61] *The Edinburgh Review* favoured arbitration and suggested the arbitrator should decide on a boundary of the 49th parallel to the sea, with Vancouver Island left to Britain: *Edinburgh Review*, 'Oregon'. See also: 'The Oregon Question', *Quarterly Review*, Vol. 77, (1846), No. CLIV, pp. 563-610, and, on the involvement of Aberdeen and Everett, *Merk, The Oregon Question,* Essay 10.

[62] An example of one such American work, referred to frequently by Twiss, was Greenhow, *The History of Oregon and California.*

[63] Rakestraw, *For Honor or Destiny*.

[64] Bourne, *The Foreign Policy of Victorian England*, p. 52.

[65] Polk's statement was a significant moment in the dispute, as will be discussed further in the second section.

them, on the one hand with regard to **national honour and dignity**, and with regard, on the other, to the preservation of the **rights** of the subjects under their rule'.[66] For him, thus:

> It cannot be a matter of indifference, that a large territory **to which we have a better and juster title**, should be yielded to what I must call a blustering announcement on the part of the President of the United States.[67]

Similarly, the Earl of Clarendon, leading for the Whigs in the House of Lords, also linked British rights in Oregon to honour, in saying that he was 'sure that the people of this country will be determined not to yield their own **undeniable rights** to encroachment, clamour, or menace', and adding that he hoped the government would 'not shrink from adapting that course which may become necessary for **vindicating the national honour** and protecting the national interests'.[68] Lastly, Aberdeen himself, responding as Foreign Secretary, also made the same connection between honour and rights when arguing that British '**honour** is a substantial property that we can certainly never neglect', and that Britain was 'fully prepared to maintain' its 'clear and unquestionable' 'rights' if a settlement was not achieved.[69]

It was also this perceived need to achieve justice for rights, for the sake of British power and honour, that pushed Britain into repeatedly suggesting arbitration as a means of settling the dispute, especially in the period from 1844 to 1846.[70] What was important about arbitration for Britain in the case of Oregon was not the result, but that it was a process in which 'justice' could be seen to be done by the world. For Aberdeen, the offer of arbitration was, accordingly, evidence of 'a spirit of moderation and fairness, of which the world will judge', 'proof of our confidence in the justice of our own claims', and 'proof also of our readiness to

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[66] Russell, HC, 4 April 1845, Vol. LXXIX, 179-193.

[67] Russell, HC, 4 April 1845, Vol. LXXIX, 192-193.

[68] Clarendon, HL, 4 April 1845, Vol. LXXIX, 120. See also Clarendon, HL, 17 March 1846, Vol. LXXXIV, 1112-1113, in which he wanted action to prevent 'the suspicion, on the part of any other country, that we would submit to a peace purchased by concessions which are incompatible with national honour'.

[69] Aberdeen, HL, 4 April 1845, Vol. LXXIX, 123. See also Peel on the resolve to 'maintain' British rights: HC, 4 April 1845, Vol. LXXIX, 198-199.

[70] See, for example: Aberdeen to Pakenham, Draft, No. 45, 1 November 1844, FO 5/403, fols. 111-114; Pakenham to Aberdeen, No. 10, 29 January 1845, *British Documents*, Vol. 2, p. 155; Aberdeen to Pakenham, Draft, No. 8, 3 March 1845, FO 5/423, fols. 21-24; Pakenham to Aberdeen, No. 40, 29 March 1845, FO 5/425, fols. 102-106; Aberdeen to Pakenham, Draft, No. 72, 28 November 1845, FO 5/423, fols. 168-175; and Pakenham to Buchanan, 16 January 1846, as contained in Pakenham to Aberdeen, No. 11, 29 January 1846, FO 5/446, fols. 71-82.

incur the risk of a great sacrifice'.[71] Furthermore, Aberdeen made clear that it was the concept of British honour that was at stake when he asserted later that Oregon was 'a case peculiarly fitted and calling for that mode of settlement' because its 'possession' was 'an object of no immediate or pressing national interest or importance'.[72] Pakenham, too, made clear that arbitration was desired because 'honour' would be preserved 'whatever might be the result'.[73] The suggestion of arbitration also obtained cross-party support from the Whigs, with Clarendon calling it the 'best proof to the world' that Britain believed in the justice of its claim.[74] From the British perspective, thus, arbitration was a legal solution to what was, at heart, a policy shaped by a legal problem. This can be contrasted with the position of the United States, where the Polk administration refused arbitration because it wanted 'control' in relation to the 'invaluable' Oregon.[75]

The importance of legal rights for the shaping of British policy can also be seen in the way that the possibility of Britain acquiring a legal interest in California was approached. Britain, as seen, appeared willing to accept American expansion into California, and this is consistent with what Adams describes as Britain's 'lack of interest' in it.[76] What is significant then about British policy is not that Britain refused to take some type of interest in California, but rather that it appears to have been perceived that such a legal interest would be necessary or helpful to any change in British policy. In other words, those wanting a more active British position on California were, therefore, striving to put Britain into a position whereby it could possibly intervene there within the ambit of international law - and possibly have an obligation to do so. Conversely, in line with its overall position on California, the British government was careful not to take on any interest which may have given it a legal obligation to protect the territory, or, as in Oregon, a perceived duty to uphold a claim. Three examples from the period up to to 1844 illustrate these points. In the first instance, Pelly, of the Hudson's Bay Company, wrote to Russell in 1841 suggesting that Fort

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[71] Aberdeen to Pakenham, Draft, 28 November 1845, No. 72, FO 5/423, fols. 168-175 at 174.

[72] Aberdeen to Pakenham, Draft, 3 March 1845, No. 8, FO 5/423, fols. 21-24.

[73] Pakenham to Aberdeen, 28 March 1844, Aberdeen Papers, Add. MS 43123, fols. 235-238.

[74] Clarendon, HL, 17 March 1846, Vol. LXXXIV, 1114. See also Russell to Everett, February, 1846, S. Walpole, *The Life of Lord John Russell*, (London: Longmans, Green & Co., 1889), Vol. 1, p. 421.

[75] Buchanan to Pakenham, 4 February 1846, as contained in Pakenham to Aberdeen, No. 12, 5 February 1846, FO 5/446, fols. 85-93.

[76] Adams, 'English Interest in the Annexation of California', p. 264.

Ross be purchased from Russia 'with the view that on the purchase and possession of that establishment some territorial claim may hereafter be founded'.[77] Russell, however, Bourne notes, was not interested.[78] In a similar vein, Adams refers to the fact that Pakenham 'gave details in 1841 to show that it would be easy to form a company in England "for the establishment of an English colony in California" '.[79] Again, as Adams shows, Britain did not pursue the idea, with the rejection this time coming from Stanley, who commented that he was 'not anxious for the formation of new and distant Colonies, all of which involve heavy direct and still heavier indirect expenditure'.[80] Finally, again as Adams identifies, Barron and Forbes made a 'definite proposal' in 1844 for a form of 'protection' for California, and this, too, was rejected by Aberdeen as being 'entirely out of the question' in the light of Britain's relationship with Mexico.[81]

Similarly, Britain also rejected two later proposals for acquiring an interest in California, which on these occasions came from Mexico itself. Again, the proposals aimed to give Britain legal justification for potential interference in California. The most important of these was when the Mexican minister in London approached Aberdeen in 1845 with a view to making 'some arrangement by which it should be our interest to protect California from the invasion of the U. States'.[82] As Aberdeen commented to Peel, what was being considered was 'such an English interest to be constituted in California, as would give us a right to protect the province', or, as he also referred to it, 'our Protectorate'.[83] As with the earlier British sourced proposals, however, nothing resulted from this offer, with Peel taking

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[77] Pelly to Russell, 6 February 1841, FO 5/370, fols. 142-145. Fort Ross is near San Francisco.

[78] Bourne, *The Balance of Power*, pp. 121-122.

[79] Pakenham to Palmerston, 30 August 1841, as referred to in Adams, E., 'English Interest in the Annexation of California', p. 238.

[80]Adams, E., 'English Interest in the Annexation of California', pp. 239-240 as referring to F.O. Mexico, 143, No. 13, Aberdeen to Pakenham, 15 December 1841, and F.O. Mexico 151, Dom Var., Hope to Canning, 23 November 1841. Bourne notes, however, that Stanley also said that he and Aberdeen might have considered a cession of territory to the Crown: Bourne, *The Balance of Power*, pp. 121-122, and Note 1, p. 122. Whilst it is difficult to assess how serious a comment this was by Stanley, some guide that it was not an indication of real British intent may be taken from the fact that, as will be seen, more adventurous schemes were later rejected.

[81] Adams, E., 'English Interest in the Annexation of California', p. 242, and pp. 247-248, referring to Aberdeen to Barron, 31 December 1844, FO Mexico, 179.

[82] Aberdeen to Peel, 23 September 1845, Aberdeen Papers, Add. MS 43064, fols. 353-356.

[83] Aberdeen to Peel, 23 September 1845, Aberdeen Papers, Add. MS 43064, fols. 353-356.

the view that it was 'too late' to establish such an interest, and that any attempt to do so 'would give a selfish character to our interference'.[84] Mexico's second proposal came at around the time that the U.S.-Mexican war broke out in 1846, with the future of California known to be at stake. Adams notes that Mexico then proposed 'to transfer California to England as security for a loan', but that, again, nothing came of it.[85] Indeed, Aberdeen had, in June, 1846, merely informed Pakenham that he had offered 'mediation' after being told that a state of war existed.[86]

In contrast to the positions in Oregon and California, the main problem for British-American relations presented by Texas was the question of Britain's support for Texan independence. Britain, as argued above, was not opposed, in principle, to the annexation of Texas to the United States, and, unlike in Oregon, it possessed no legal interest over the territory of Texas itself. This ensured that British policy aims were, therefore, limited by the constraints resulting from that position, such as, for example, the lack of any desire for military intervention. Subject to that, however, Britain nevertheless still favoured the maintenance of an independent Texas if it could be achieved peacefully. Such a policy, Aberdeen explained, was consistent with the treaties entered into with Texas, helped protect Mexico from the United States, and assisted Britain by reducing the chances of a challenge to the 'internal peace' of the United States from expansion into Texas.[87] International law made two main contributions as to how British policy related to the United States concerning this objective. Initially, the legal consequences from Britain's recognition of the independence of Texas, and the taking on of the rights and obligations of three treaties, brought the Texan issue squarely into the scope of British-American relations. The key impact, however, was from the principle of sovereignty, which Britain accepted gave Texas the right to determine its own future. Crucially, this not only aligned Britain with the United States on the

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[84] Peel to Aberdeen, 24 September 1845, Aberdeen Papers, Add. MS 43064, fols. 357-360.

[85] Adams, E., 'English Interest in the Annexation of California', pp. 262-263, as referring to Bankhead to Aberdeen, 30 May 1846, FO Mexico 197, No. 73, and Palmerston, 15 August 1846, FO Mexico 197, No. 4.

[86] Aberdeen to Pakenham, Draft, No. 28, 18 June 1846, FO 5/445, fols. 65-68. Palmerston showed no inclination to change Aberdeen's policy of offering mediation on taking over in 1846: Palmerston, HC, 24 August 1846, Vol. LXXXVIII, 984-987.

[87] Aberdeen to Elliot, Draft, No. 10, 3 July 1845, FO 75/12, fols. 45-50. The point by Aberdeen on American expansion was not that he was concerned by American expansion in itself, but, rather, that expansion could 'eventually excite discord' in the United States itself, which could 'scarcely fail to act injuriously upon British interests', which he identified with capital and commerce.

principle of Texas's right to choose, but also meant that British policy focused on diplomacy with Texas itself rather than the United States. In the end, respect for the 'will' of the Texan people resulted in British policy giving up on an independent Texas, but the fact that the issue had, in the process, been largely kept away from the diplomatic exchanges with United States allowed the British-American relationship to emerge relatively unscathed.

The initial impact from international law on the direction of British policy came, then, from Britain's decision to recognise Texas as an independent state in October, 1840.[88] Britain entered into three treaties with Texas as part of this process, concerning Texan debt, the slave trade, and commerce.[89] Whilst no immediate issue arose from any of the treaties, each one nevertheless had the potential to bring Texas into British-American relations. The most immediately significant treaty was that concerning Texan debt. Under this, broadly, Texas was to assume £1 million of the pre-1835 Mexican debt if British mediation led to an unlimited Truce, and, thereafter, a Treaty of Peace was agreed between Texas and Mexico.[90] Britain, as a result, became procedurally involved with the future of Texas, and from then on adopted Mexican recognition as its main method of assisting Texan independence. For obvious reasons, this was to become more of a problem in British-American relations when the United States came to favour Texan annexation. The other two treaties also had important ramifications for the United States. The slave trade treaty introduced a mutual 'right of search' and commenced a British-Texan relationship over the issue of slavery, which, as will be seen in the next section, was to become a cause of much distrust in the

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[88] See Hamilton to Palmerston, 14 October 1840, FO 75/1, fols. 8-11, and Palmerston to Hamilton,, Draft, 18 October 1840, FO 75/1, fols. 12-18. Hamilton was the Texan representative in London. McNair makes the point that the decision whether to grant 'recognition' was 'mainly' a 'policy' matter, with the legal questions being concerned with 'what constitutes recognition' and the consequent 'effects': McNair, *International Law Opinions*, Vol. 1, p. 131.

[89] The dates the three treaties were signed were as follows: Commerce, 13 November 1840, Debt, 14 November 1840, Slave Trade, 15 November 1840, FO 75/2, fol. 9. For the background to the treaties, see Palmerston to Hamilton, Draft, 18 October 1840, FO 75/1, fols. 12-18. The treaties were ratified in August, 1842.

[90] Convention between Texas and Britain, 14 November, 1840, relating to Debt and British mediation: H. Gammel, *The Laws of Texas, 1822-1897*, Volume 2, (book, 1898, Austin, Texas), p. 887, (texashistory.unt.edu/ark:/67531/metapth6727/m1/891/:accessed September 21, 2018), University of North Texas Libraries, The Portal to Texas History, Texas history.unt.edu; .

United States.[91] The abolition of slavery in Texas was not, however, made a condition of British recognition in this or the other treaties.[92] Finally, Britain's commercial treaty with Texas was similarly of potential interest to the United States, given the extent of British-American trade and the perceived potential of Texas. Indeed, it is noteworthy that, as highlighted by Adams, Britain turned down a Texan offer for an improved commercial agreement in 1841 in return for a British guarantee of debt, at least partly, it appears, because of fears of the American reaction.[93]

The most significant impact of international law on the direction of British policy in relation to Texas, however, was in the respect given to the principle that independent states possessed the right to decide their own future. British policy objectives throughout the period certainly respected Texan sovereignty. Sovereignty, as seen in chapter 2, was a fundamental principle within British practice. Britain's recognition of the independence of Texas, thereby, meant that, under British practice, Texas possessed the normal rights associated with sovereignty. The significance of this was increased by the fact that Britain can be reasonably presumed to have accepted that 'settlers' were able to participate in the exercise of that sovereignty within Texas.[94] There is certainly no evidence to suggest that Britain considered that international law provided any means to exclude 'settlers' from any decision making process in newly-independent states. The point mattered because, overall, it probably favoured the aims of the United States in Texas, given that most settlers were

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[91] Palmerston's sensitivity towards the influence of the United States can be seen in his letter to Hamilton explaining the draft slave trade treaty, where he expressly sought to distinguish the 'right of search which the people of the United States have objected to' from the right in slave trade treaties: Palmerston to Hamilton, Draft, 18 October 1840, FO 75/1, fols. 12-18 at 14-15.

[92] Indeed, *The Westminster Review* criticised Palmerston for not making the abolition of slavery a condition of Texan recognition in 1840: 'Review of W. Kennedy, Texas; It's Rise, Progress and Prospects', *The Westminster Review*, Vol. 36, (1841), pp. 270-272; cf. an article in The Edinburgh Review, which, however, took a contrary position: 'The Republic of Texas and its Recognition', *Edinburgh Review*, Vol. LXXIII, (1841), Article X, pp. 241-271 at p. 270.

[93] Aberdeen to Hamilton, 4 October 1841, FO 75/2, fols. 73-74; Goulburn to Aberdeen, 1 October 1841, quoted by Adams, *British Interests and Activities in Texas*, pp. 69-72.

[94] There is no evidence of Britain questioning the right of settlers to participate in the process of government in Texas, and this was the case in circumstances where Aberdeen believed that 'the loss of Texas was in fact ascribable to her contiguity to the United States, which alone gave rise to the gradual encroachment of lawless United States' citizens' [i.e. 'settlers']: Aberdeen to Bankhead, No. 30, 30 September 1844, *British Documents*, Vol. 2, pp. 332-334.

American.[95] The centrality of sovereignty to British policy was also further confirmed by advice from the Queen's Advocate. The Foreign Office had questioned both the right of Texas to give up its newly-acquired independence and the potential effect this would have on the British-Texan treaties. Dodson's key report in May, 1844, however, was to the effect that Texas possessed a right to join the United States:

> I am of opinion that a State which has been acknowledged by other States as independent has a right to divest itself by treaty of its independence, and annex itself to a foreign power notwithstanding it may heretofore have entered into treaties with other states, provided that the treaties into which it has so entered contain no stipulation to the contrary.[96]

Importantly, Britain would also have been aware of the fact that a similar view was held by the United States. As Tyler stated simply of Texas's ability to join the Union, in his Message to the Senate in April, 1844: 'As an independent sovereignty, her right to do this is unquestionable'.[97]

The main impact from this acknowledgment of Texan sovereignty on British policy was that Britain focused the direction of its policy objectives on Texas and Mexico, and kept the issue away from its relations with the United States. Britain, after all, had no grounds, under international law, to protest to the United States if Texas was merely exercising its sovereignty. Britain's key objective, thus, became a reinvigorated attempt to secure the recognition of Texan independence by Mexico. This followed from the fact that Aberdeen had been told that there was support for independence in Texas, but annexation to the United States was preferred to reconquest by Mexico or ongoing war.[98] Whilst the details of the resulting British policy in Texas are outside the scope if this thesis, two aspects are, however,

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[95] Indeed, Calhoun, in the context of Texas, implicitly linked settlers to expansion, and then annexation: 'It is our policy to increase by growing and spreading out into unoccupied regions assimilating all we incorporate. In a word, to increase by accretion, and not through, conquest... . No system can be more unsuited to the latter process, or better adapted to the former than our admirable Federal system': Calhoun to King, (U. S. Minister, Paris), 12 August 1844, enclosed in Pakenham to Aberdeen, No. 130, 12 December 1844, *British Documents*, Vol. 2, pp. 360-366.

[96] Report of Dodson on Texan Independence, 15 May 1844, FO 83/2382, fols. 64-67.

[97] Message of Tyler to the Senate, 22 April 1844, as contained in Pakenham to Aberdeen, No. 56, 9 June 1844, FO 5/406, fols. 3-73 at fols. 7-9.

[98] Fox to Aberdeen, No. 33, 8 March 1843, FO 5/391, fols. 185-190; Fox to Aberdeen, No. 130, 27 November 1843, FO 5/393, fols. 270-277 at 274-276. See also: Elliot to Aberdeen, Secret, 31 October 1843, FO 75/6 fols. 272-281 at f278.

important to understanding the role of international law in Britain's relations with the United States. Crucially, Britain maintained throughout its respect for the sovereign right of Texas to decide its own future, which manifested itself, in practice, in Aberdeen's concern for the perceived levels of popular support in Texas for independence.[99] This mattered because, in the event, respect for the Texan will served to restrain British ambitions, which, in turn, reduced the risk of an unintended clash with the United States. The other aspect was that Britain did not protest directly to the United States about its policy of seeking to annex Texas. This was crucial because it meant that the Texan issue did not have the effect of souring British-American relations more widely.

There are two main instances from the course of British policy in Texas which illustrate the respect Aberdeen gave to Texan sovereignty whilst trying to get Mexico to recognise Texas. The most important was in June, 1844, and concerned the idea of 'a formal guarantee' to be 'given to Mexico by Great Britain and France for the permanency of that [Texan] independence'.[100] Aberdeen considered that such a guarantee was important because it would mean that 'the United States would scarcely venture to seek thenceforward to appropriate Texas to themselves at the almost certain hazard of a rupture with Great Britain, France, and Mexico'.[101] In the end, however, the proposal did not proceed. Pakenham had been initially cautious as to the response of the United States, and suggested a deferral in taking the idea forward to avoid any impression being given of foreign interference in the 1844 American Presidential election.[102] The proposal had then been withdrawn, in any

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[99] Whilst there was clearly no express principle of international law requiring such reference to public opinion, it nevertheless amounted to a self-imposed requirement that respected the concept of national sovereignty. It was also consistent with the concept of sovereignty that impliedly lay behind the formation of Texas by the 'people of Texas', as cited in footnote 16 above. Elliot also made the related point that Britain had to be sure there was a feeling for true independence, as opposed to an independence merely as a prelude to annexation to the United States, if it was to encourage Mexico to recognise Texas: Elliot to Aberdeen, Secret, 28 December 1844, FO 75/9, fols. 166-170 at 168-169.

[100] Aberdeen to Cowley, No. 162, 31 May 1844, *British Documents*, Vol. 2, pp. 282-283, and Aberdeen to Pakenham, No. 24, 3 June 1844, Confidential, FO 5/403, fol. 63.

[101] Aberdeen to Cowley, No. 162, 31 May 1844, *British Documents*, Vol. 2, pp. 282-283.

[102] Pakenham's main aim was to assist Clay against Polk: Pakenham to Aberdeen, No. 76, 27 June 1844, *British Documents*, Vol. 2, pp. 311-313.

event, in October, 1844, after Mexico failed to respond positively.[103] The key feature of the idea, for present purposes, however, was Aberdeen's requirement that the 'public feeling' of the people of Texas needed to be ascertained before any formal proposition was put to Mexico. Aberdeen's words on this point in his despatch to Bankhead setting out the initiative are important because they place respect for popular support, and thereby Texan sovereignty, at the centre of the British idea:

> Should France assent to that proposal, Her Majesty's Government proposed to send out forthwith a fit person to Texas, ... who would be instructed to ascertain, as accurately as he might be able, the state of public opinion and feeling with respect to the projected annexation of Texas to the United States, under the security of the joint guarantee above described. If, as Her Majesty's Government were led to believe, the public feeling, under such a security for the future peace of the country, should be in favour of independence, they would then take measures forthwith for operating directly and officially upon the Mexican Government, which they should hope to find amenable to their views, as eminently advantageous to that Republic.[104]

The proposal was, thus, conditional in some loose sense on 'the state of public opinion', and that 'public feeling' being 'in favour of independence'. Huge questions can naturally be raised as to what was meant by 'public feeling', and how it was to be assessed, but this nevertheless illustrates that British policy was responsive to the notion that Texas itself was in charge of its future. In the end, however, public opinion was not assessed because, as seen, the idea was dropped for other reasons.

British policy then contained no new significant proposals in the immediate aftermath of the failure of this initiative, with Britain appearing to perceive itself as being constrained by the state of Texan public feeling.[105] Aberdeen instructed Elliot not to commit himself to any 'line of active policy' in December, 1844, citing 'public feeling' in Texas (as well as the

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[103] Aberdeen to Bankhead, No. 34, 23 October 1844, *British Documents*, Vol. 2, pp. 338-339. The despatch noted Santa Anna's intention of 'persevering in his attempt to reconquer Texas'. Adams also refers to Pakenham's despatch of 27 June 1844 (see footnote 102) as being important to Aberdeen's decision in that it revealed the scale of 'American feeling': Adams, *British Interests and Activities in Texas*, pp. 180-181.

[104] Aberdeen to Bankhead, No. 16, Confidential, 3 June 1844, *British Documents*, Vol. 2, pp. 283-286.

[105] On the British understanding of the state of Texan public feeling at this time, see, for example, Elliot to Aberdeen, Secret, 28 December 1844, FO 75/9, fols. 166-170, in which Elliot reported that the view of Jones (President of Texas) was 'that it ought to be no matter of surprise that there should be a very general feeling in favour of annexation' given the failure to secure Mexican recognition.

'obstinacy' of Mexico).[106] Similarly, Elliot told Jones that it 'seemed very unlikely' Britain would act 'decisively ... till they should be effectively certified that they were really acting in behalf of the Government and people of a durable and bona fide nation of Texas'.[107] Furthermore, no substantive new British policy came from Aberdeen's receiving news, in January, 1845, of a belated conditional proposal from Santa Anna to recognise Mexico, but Santa Anna had fallen from power by the time that Aberdeen wrote to Elliot in any event.[108] Significantly, Aberdeen would also have been aware at this time that the Texan Congress was likely to favour annexation.[109] The unanimous report of the Committee on Foreign Relations of the Texan Senate of 22nd January, 1845 was certainly consistent with the view that annexation commanded popular support in Texas, as illustrated in the following extract emphasising the role of a 'free, sovereign and independent people':

> The annexation of Texas to the United States, already emphatically willed by the people of both countries, will, when consummated, be among the most interesting events recorded in the annals of history ... this will be the first instance where a free, sovereign and independent people will have merged their government in another by their own free will and consent![110]

The ongoing British respect for that Texan sovereignty can also be seen in Aberdeen's observation to Wellington in March, 1845 that should Texas 'freely determine to join the American Union', it would 'be difficult for any other state to prevent it, or to make it a cause of quarrel'.[111]

The second example of Britain respecting Texan sovereignty is in the way that it then pursued a further plan for Mexican recognition only after it received information concerning

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[106] Aberdeen to Elliot, No. 13, 31 December 1844, FO 75/9, fols. 32-33.

[107] Elliot to Aberdeen, Secret, 28 December 1844, FO 75/9, fols. 166-170 at 168-169.

[108] Aberdeen discovered in January, 1845 that, Santa Anna facing rebellion, had finally proposed recognition of Texas, subject to certain conditions: Bankhead to Aberdeen, No. 102, 29 November 1844, *British Documents*, Vol. 2, pp. 379-382. Aberdeen merely told Elliot to offer Texas British and French mediation to 'improve' the terms of the proposal, but (unbeknown to him) Santa Anna was, by then, out of power: Aberdeen to Elliot, Draft, No. 1, 23 January 1845, FO 75/12, fols, 1-10.

[109] Aberdeen reported to Peel that the new Texan chargé d'affaires considered that, whilst the government of Texas was against annexation, 'he fears that their Congress may be of a different opinion': Aberdeen to Peel, 21 January 1845, Peel Papers, Add. MS 40454, fols. 394-395.

[110] As contained in Elliot to Aberdeen, No. 6, 8 February 1845, FO 75/13, fols. 45-56.

[111] Aberdeen to Wellington, 2 March 1845, Peel Papers, Add. MS 40455, fols. 3-6.

a possible move in 'public feeling' in Texas in the spring of 1845. This followed on from Congress in the United States approving the annexation of Texas through a joint resolution in the spring of 1845, with the aim, thereby, of circumventing the defeat of the treaty of annexation in the American Senate back in June 1844.[112] The terms of annexation were, however, now different from 1844, and Pakenham reported that they 'were viewed with disfavour by the Texian people'.[113] Further, Elliot had also commented earlier, after meeting Smith, that 'the temper of this people is changing, and that if terms of independence are speedily offered by Mexico, they will be very generally acceptable, and steadfastly maintained'.[114] In these circumstances, Britain then moved to make a renewed offer of mediation to Mexico and Texas in early May, 1845, supported this time by the 'moral influence' of Britain and France rather than any guarantee or other right.[115] In the event, the renewed British proposal was too late, however, to have any effect. Contrary to his and Pakenham's hopes, Elliot told Aberdeen in late May, 1845 that:

> the friends of annexation have succeeded in exciting a hot, and apparently general feeling in favour of that project, and it is no doubt to be feared that the concessions of the Mexican government will have come too late to act successfully upon the people of the country.[116]

In this, Elliot was right: Texas's decision to approve annexation was confirmed at a Special Convention in Texas on the 4th July, 1845.[117]

The respect for Texan sovereignty in the direction of British policy did, however, mean that annexation of Texas did not become a source of direct diplomatic confrontation between Britain and the United States. Whilst the United States, of course, knew that Britain was

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[112] Aberdeen was kept informed of the expected approval by Congress: Pakenham to Aberdeen, No. 21, 28 February 1845, FO 5/424, fols. 144-147.

[113] As reported by Aberdeen in Aberdeen to Cowley, No. 46, 15 April 1845, *British Documents*, Vol. 2, p457-460.

[114] Elliot to Aberdeen, No. 10, 6 March 1845, FO 75/13, fols. 77-83.

[115] Aberdeen to Cowley, No. 46, 15 April 1845, *British Documents*, Vol. 2, pp. 457-460; Aberdeen to Bankhead, No. 15, 1 May 1845, *British Documents*, Vol. 2, pp. 464-467; and Aberdeen to Elliot, No. 6, 3 May 1845, Draft, FO 75/12, fols. 25-30. Aberdeen's initiative was distinct from Elliot's secret mission to Mexico in April, 1845, which he only received news of in May, 1845: Elliot to Aberdeen, Secret, 2 April 1845 (received 9 May 1845), FO 75/13, fols. 112-127.

[116] Elliot to Aberdeen, No 16, 30 May 1845, FO 75/13, fols. 135-136.

[117] Adams, E., *British Interests and Activities in Texas,,* p. 222.

working to try to keep Texas independent, Britain did not *formally* protest to the United States against annexation. Texas was the focus for British diplomacy on this matter, and, given its view on Texan sovereignty, Britain had no grounds under international law to complain to the United States in any event. Aberdeen did, initially, give an informal expression of 'dissatisfaction' to the United States on reports of the proposed treaty of annexation in 1844, and this was followed by a 'holding' statement on its actual announcement.[118] Thereafter, however, it appears that Britain tried to keep its Texan policy largely separate from the United States. Aberdeen's important despatch of 3rd June, 1844 to Pakenham, containing copies of his despatches to Bankhead and Cowley with his major new Texan 'guarantee' policy, as discussed above, was marked 'confidential', and Pakenham confirmed later that he would not make the details known in the United States before the Presidential election.[119] Similarly, Aberdeen wanted his main 1845 proposal concerning Mexico and Texas, again as discussed above, to be kept from the United States.[120] Respect for Texan sovereignty, thereby, effectively separated British policy in Texas from relations with the United States.

British Policy and the Shared Framework in the Disputes over Oregon and Texas

International law affected the way Britain handled its actual disputes with the United States in relation to Oregon and Texas because the issues concerned were defined, argued, and resolved using legal principles within the shared framework discussed in chapter 3.[121] Britain was, thereby, able, in practice, to manage the disputes over Oregon and Texas, using a common structure of rules. The most important dispute involved Oregon, where policy, as seen, aimed to uphold Britain's legal rights. In this case, Britain conducted and, ultimately, settled its claim on a compromise basis within the terms of the shared framework. The use

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[118]Aberdeen to Pakenham, Draft, No. 7, 4 March 1844, FO 5/403, fols. 14-15; Pakenham to Aberdeen, 14/4/44, No. 22, FO 5/404, fols. 157-176.

[119] Aberdeen to Pakenham, Confidential, No. 24, 3 June 1844, FO 5/403, fol. 63; Pakenham to Aberdeen, No. 76, 27 June 1844, *British Documents*, Vol. 2, pp. 311-313. This was the official poistion; Pakenham reported in July, 1844 that the proposed scheme seemed to be known about in the United States in any event: Pakenham to Aberdeen, No. 81, 13 July 1844, *British Documents*, Vol. 2, pp. 317-320.

[120] Aberdeen to Pakenham, Confidential, No. 28, 3 May 1845, FO 5/423, fol. 71.

[121] California is not included here as there was no significant dispute between Britain and the United States concerning it in the period.

of the shared principles, though, importantly, also explains why the final stages of the dispute in the 1840s became so tense before then being resolved. Changing facts on the ground meant that there were strengthening arguments for an agreement on the ownership of Oregon from a legal perspective. The problem then came when the United States seemed temporarily to move away from the framework on the accession of Polk to the U.S. Presidency. By contrast, in Texas, the situation was less acute. Britain, as seen, possessed no claim to the territory, and accepted that Texas may in the end join the United States. Legal principles concerning 'non-interference' and neutrality nevertheless still influenced the way British policy handled the two main problems that did arise involving the United States directly, over slavery and Texan arms.

British policy towards Oregon worked, then, within a legal framework that was respected in both Britain and the United States, as the competing claims for title based on discovery and settlement, for example, make clear. The most important principles within this structure were that Britain and the United States agreed that land could be taken from indigenous peoples, and that the ownership of unoccupied land was, ultimately, based on 'actual occupation', as was noted in chapter 3.[122] A joint reverence for treaties also ensured that the ownership of territories and rights passed by treaty law was respected.[123] In practice, however, two further specific legal principles were also involved in the tensions over Oregon in the period. The most significant was that disputes between states over unoccupied land should be settled by compromise and 'equitable partition'.[124] The other was that a state could only validly grant land to settlers if it owned the title to the land concerned under international law.[125] As will be seen, this was to become particularly salient in Oregon in the

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[122] The importance of this principle concerning indigenous peoples can be seen by the fact that in Oregon, by the mid-1840s, there were estimated to be 30,000 such inhabitants in approximately twenty tribes: *Quarterly Review*, 'The Oregon Question', p. 599. Rakestraw estimates the number of American settlers by the end of 1845 as 5,000: Rakestraw, *For Honor or Destiny*, p. 114.

[123] Twiss, for example, refers to ownership from cessions of territory as *derivative* title: Twiss, *The Oregon Question,* chapter X. The United States had acquired vast territories, and rights relating to territories, in this way under, for example, the Louisiana Purchase of 1803 and the 1819 Treaty with Spain.

[124] This is reflected in Vattel, *Law of Nations*, Book II, S95. As set out by Vattel: 'If at the same time two or more nations discover and take possession of an island or any other desert land without an owner, they ought to agree between themselves, and make an equitable partition'.

[125] This was because the ability to grant rights over land was perceived as connected to the right of command, or sovereignty, of a state over land. See, for example, Vattel, *Law of Nations*, Book I, S204, S205, S244.

1840s, when it was considered that the granting of land to a new settler, without the confirmed title to do so, constituted an unwarranted act of sovereignty.

The primary effect of the shared framework was to provide a structure and mechanism by which the dispute over Oregon could be handled and resolved. The principles within it not only defined the basis of the claims, but also provided the arguments used in the negotiations, as well as the obligation to seek a compromise. Indeed, as Buchanan put it, his argument for American title in Oregon relied on the 'force' of 'the principles consecrated by the practice of civilised nations ever since the discovery of the New World', and which, he continued, 'were necessary to preserve the peace of the world'.[126] The 1846 settlement was, accordingly, reached, as will be seen, by applying its principles. This 'structural' facilitating role is also underlined by the fact that, in the absence of any deciding authority, there was, of course, no one 'right' answer to the Oregon question from international law, but rather a series of possible solutions. The various offers of compromise in 1818, 1824, 1826, 1842, 1844, 1845, and the final settlement in 1846, could all undoubtedly be explained as being within a range of expected outcomes.[127] This flexibility does not make the role of international law meaningless, however, for, as will be seen, law also played a role in the timing, as well as the form, of the settlement. This flexibility, too, was also important in allowing Britain to defend the 1846 settlement as *being* an 'equitable compromise'. The use of the shared framework in the dispute also influenced the nature of British policy to Oregon. Britain was certainly defending its claim, but it was doing so within a structure that, effectively, ensured that some American expansion would be built into the final settlement. This was, of course, consistent with the overall direction of the British policy objective in

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[126] Buchanan Statement, 12 July 1845, *British Documents*, Vol. 2, pp. 162-173, at p. 170.

[127] The negotiations from 1844 onwards will be considered further below, but an outline of the earlier ones demonstrates the point. For 1818, 1824 and 1826, the details are from the Northwestern Memorandum, *British Documents*, Vol. 2, pp. 61-62, and pp. 71-76. In 1818, the United States proposed the 49th parallel west from the Rocky Mountains. In 1824, the United States initially proposed the 51st parallel west from the Rocky Mountains, before reverting again to the 49th parallel, whilst Britain, conversely, offered the 49th parallel from the Rocky Mountains to where it met the river Columbia, and then down the river Columbia. In 1826, the United States proposed the 49th parallel west from the Rocky Mountains plus free navigation of the Columbia, whilst Britain ultimately offered the same as in 1824 together, broadly, with a pocket of land around the south of De Fuca's Inlet, and free navigation of the river Columbia. Aberdeen's final offer in 1842 was for the 49th parallel until it met the river Columbia, and then the river Columbia until the coast: Aberdeen to Ashburton, 8 February 1842, *British Documents*, Vol. 1, 164. Merk also notes an informal American suggestion from 1818 to leave the watershed of the Gulf of Georgia to Britain, after the 49th parallel had crossed the river Columbia, albeit this was rejected by Britain: Merk, *The Oregon Question,* chapters 2 and 3.

Oregon described in the first section, but it also provides a further reason as to why Oregon was not, from the British perspective, about American expansion.

An appreciation of the principles within the shared framework also allow a better understanding of why it was the case that there was a 'dispute' took so long to resolve by compromise, and yet the matter became so acute in the 1840s. As mentioned earlier, the central practical issue in Oregon was the battle between the claim of the United States for a boundary based around the 49th parallel of latitude, and that of Britain, for one centred on the river Columbia. Both of these claims were defensible as matters of law, though naturally the respective states tended to talk up their own legal cases. The crucial point, however, is that, until the late 1830s to early 1840s, there was no urgent reason for either party, in the absence of any specific agreement on this matter, to move further to a final partition. The main British activity was centred around the fur trade, which, as Galbraith has noted, preferred a 'wilderness' environment, whilst American pursuits until then were merely sporadic.[128] The two states were satisfied, therefore, to reach an interim legal compromise in the 1818 and 1827 Conventions, which was, as seen, a holding position of a 'joint occupation' with no prejudice to their underlying claims - in other words, a kind of stay of proceedings. Indeed, as the British plenipotentiaries said in 1818, they 'hoped' that they had 'substantially secured to Great Britain every present advantage which could have flowed from its actual possession'.[129]

This situation changed, however, in the late 1830s because of the increasing numbers of American settlers coming to Oregon. Both the United States and Britain now had more reason to need the Oregon question decided because of the way in which the numbers of new emigrants interplayed with the applicable legal principles. The presence of more emigrants in Oregon resulted in political pressure in the United States for 'land' and 'government' for the new arrivals.[130] The United States needed 'ownership' in Oregon to meet either of these demands, because, as referred to earlier, the right to grant land was tied to ownership and

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[128] See, for example, Galbraith, *Hudson's Bay*, pp. 215-216.

[129] British Plenipotentiaries to the Secretary of State, 20 October 1818, as referred to in the Memorandum, *British Documents*, Vol. 2, p. 63.

[130] For example, Fox reported to Aberdeen on a Convention on the Oregon question, with delegates from six Mississippi valley states, held between the 3rd and 5th July, 1843 'for the purpose of taking into consideration the best means of securing the possession of the Oregon Territory to the United States': Fox to Aberdeen, No. 97, 28 July 1843, FO 5/392, fols. 329-332.

sovereignty. It is significant, therefore, that this was the main context for how the Oregon question came before Congress in the 1840s. For example, Linn's bill in the Senate in 1843 was described by Fox as 'authorising more complete acts of sovereignty on the part of the United States, by formal and authentic grants of land to American settlers within the Territory claimed by Great Britain'.[131] The significance of the change this represented in the tempo of the dispute can be seen by Aberdeen's description of the bill as an 'emergency', albeit that it was not ultimately passed into law.[132] Similarly, Atchison's bills in the Senate in 1843 and 1844 concerned territorial organisation for Oregon.[133] A bill for territorial government in Oregon also passed the House of Representatives in early February, 1845, despite concerns being expressed over international law.[134] None of these bills became effective, but they expressed a growing demand for change.[135]

Britain was also aware that growing numbers of American settlers could, at some point, change the balance of the legal analysis on who had the 'actual occupation' of Oregon in a manner detrimental to its interests. Indeed, this risk was all the more important because, as Galbraith has argued, the pace of British arrivals had been held back because of the Hudson Bay Company's 'conviction' that settlement was the antithesis of the fur trade.[136] Peel, in particular, had been concerned in August, 1842 by the failure to agree terms on Oregon as part of the Webster-Ashburton Treaty, for, as reported by Everett, he had said that 'now was the time to adjust it, before the settlement of the country increased the difficulty of an

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[131] Fox to Aberdeen, No. 9, 29 January 1843, FO 5/391, fols. 50-55.

[132] Aberdeen to Fox, Draft, No. 5, 3 February 1843, FO 5/390, fols. 13-16. The bill passed the Senate on 3 February 1843, but was not passed into law: Fox to Aberdeen, 11 February 1843, FO, 5/391, No. 15, fols. 85-89, and Fox to Aberdeen, 4 March 1843, No. 26, FO 5/391, fols. 143-144.

[133] Fox to Aberdeen, 28 December 1843, No. 136, FO 5/393, fols. 314-325; Pakenham to Aberdeen, No. 140, 29 December 1844, *British Documents*, Vol. 2, pp. 152-154.

[134] Pakenham to Aberdeen, No. 11, 4 February 1845, FO 5/424, fols. 70-106. Pakenham's despatch contained a copy of *The Congressional Globe* with details of the debate, from which it is clear that Congressmen were debating the issue as one to be argued within applicable international law. For example, Thompson asked whether 'possession' could be taken of Oregon 'consistently with our treaty obligations', Hunt feared that forming a government would be 'equivalent to an act of war, on the principles of international law', and Douglass cautioned for the United States to 'violate no treaty stipulations, nor any principle of the law of nations' in pushing for its 'rights'.

[135] Pakenham reported that the session of Congress closed before any bill was passed concerning Oregon: Pakenham to Aberdeen, No. 23, 4 March 1845, FO 5/425, fol. 7.

[136] Galbraith, *Hudson's Bay*, pp. 215-216.

arrangement'.[137] Significantly, and consistently, Peel had also justified the agreement over the Northeastern boundary dispute in language referring to the pressures from 'occupation', as seen in Chapter 4.[138] In contrast, Aberdeen seems, on occasion, to have been more relaxed on this point, as he still considered that a 'delay' in reaching a settlement may not have been 'unfavourable' to Britain in late 1844 when suggesting the possibility of a further ten year treaty extension.[139] Pakenham, however, warned against such a view from mid-1844, noting both the numbers of settlers alleged to be moving to Oregon, and the approach, taken by Calhoun and others, that the passage of time would favour the United States.[140] In practice, a treaty extension was not discussed, and Aberdeen formally cancelled the instruction to consider it in April, 1845 following Polk's accession.[141]

By 1844, the principles of the shared framework were, therefore, influencing British policy towards settlement, as would have been expected in the new, more urgent, situation. With their respective motivations pointing towards the need for a resolution, Britain and the United States, accordingly, came together during 1844 on a nascent compromise, albeit that this was done behind their respective official, traditional positions.[142] Aberdeen, thus, importantly, stated, in March, 1844, that he was prepared for a settlement based on a partition, broadly, in a form as it was finally agreed in 1846. His private instructions to Pakenham as to what to do in the event of the United States refusing the British first formal offer makes this clear. He said:

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[137] Everett to Webster, 1 August 1842, *Diplomatic Correspondence*, 1595.

[138] See chapter 4, footnote 214.

[139] Aberdeen to Pakenham, Draft, No. 47, 18 November 1844, FO 5/403, fols. 117-118.

[140] Pakenham to Aberdeen, No. 72, 27 June 1844, *British Documents*, pp. 140-141. Pakenham had also sent Aberdeen earlier a memorandum prepared by McTavish, the British Consul at Baltimore, which included references to acquiring Oregon over time through emigration in the 1843/1844 session of Congress: Pakenham to Aberdeen, No. 6, 27 February 1844, FO 5/404 at fols. 16-37.

[141] Aberdeen to Pakenham, Draft, No. 21, 6 April 1845, FO 5/423, fols. 47-50.

[142]Aberdeen instructed Pakenham to restart the Oregon negotiations in December, 1843: Aberdeen to Pakenham, No. 10, 28 December 1843, FO 5/390, fols. 147-148. Traditional official positions were, however, maintained in the negotiations between Pakenham and Calhoun. The final of the staged British offers was, broadly, for the river Columbia to be the key boundary, with free navigation of it for both Britain and the United States, together with a pocket of land to the south of De Fuca's Inlet and free ports in De Fuca's Inlet and south of the 49th latitude for the United States. This was rejected by Calhoun. For further details of the negotiations: see Pakenham to Aberdeen, No. 103, 12 September 1844, FO 5/408, fols. 19-64, Pakenham to Aberdeen, No. 106, 28 September 1844, FO 5/408, fols. 74-99, and Aberdeen to Pakenham, Draft, No. 22, 18 April 1845, FO 5/423, fols. 55-60.

> you will endeavour, without committing yourself or your Govt, to draw from the American negotiator a proposal to make the 49th degree of latitude the boundary, with the proviso that all ports to the south of that parallel to the Columbia inclusive, shall be free Ports to Gt Britain.
>
> The navigation of the River Columbia should be common to both; and care should be taken that the 49th degree of latitude, as a boundary, is to extend only to the sea, and not to apply to Vancouver's Island.
>
> I confess that I do not think the arrangement I have now suggested, would be an unreasonable compromise. It is essential, however, that the Cabinet should be enabled to deliberate fully upon it, if proposed.[143]

Aberdeen's private correspondence with Pakenham also reveals that by the summer of 1844, Calhoun was coming towards such a basis of agreement.[144] Even Buchanan, the new Secretary of State under Polk, was reported by Pakenham in March, 1845 as having referred to 'the principle of giving and taking', leading him to speculate that 'his intention may be to propose the parallel of 49 to the sea, as a boundary, leaving to Great Britain the entire possession of Van Couver's Island, with an agreement for the free navigation of the Columbia River.'[145] Peel remained cautious on such a basis of settlement at this point, but, overall, these developments are evidence of the shared framework operating.[146]

The importance of the shared framework to British policy was then shown by the response of British politicians to Polk's inaugural Presidential address in March, 1845, which was the crucial circumstance that interrupted the process of compromise and gave the Oregon question its image as a matter that might have led to war. Polk claimed that the American title to the whole of Oregon was 'clear and unquestionable', and this was now more than a

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[143] Aberdeen to Pakenham, 4 March 1844, Aberdeen Papers, Add. MS 43123, fols. 233-234. Merk dates Aberdeen's adoption of this view as December, 1843: Merk, *The Oregon Question*, Essay 8, p. 250.

[144] Pakenham to Aberdeen, 29 August 1844, Aberdeen Papers, Add. MS 43123, fols. 243-246: See also, Pakenham to Aberdeen, Separate and Confidential, 28 September 1844, FO 5/408, fols. 100-107.

[145] Pakenham to Aberdeen, No. 40, 29 March 1845, FO 5/425, fols. 102-106.

[146] Peel said he favoured arbitration at that time more than 'any important concession' from a former proposal: Aberdeen to Peel, 25 September 1844, Aberdeen Papers, Add. MS 43064, fols. 32-33; and Peel to Aberdeen, 28 September 1844, Aberdeen Papers, Add. MS 43064, fols. 34-37. Peel also emphasised 'the point of honour' in January, 1845, and suggested sending a frigate to the river Columbia: Peel to Aberdeen, Secret, 23 January 1845, Aberdeen Papers, Add. MS 43064, fols. 178-181.

mere election slogan from 1844.[147] By doing so, Polk appeared in Britain to be undermining all prior British and American negotiation offers, and the tentative new compromise, all of which had implicitly recognised each state's respective rights.[148] The content of the address and its timing - during a still ongoing negotiation - seemed to challenge directly the principles of the shared framework. Peel, Aberdeen, and Russell criticised Polk's approach, respectively, for being 'contrary to all usage', 'so different' and 'entirely new'.[149] British power and honour, thus, became directly, publicly involved, because, from a British perspective, they were, as argued earlier, linked to the perceived strength of British claims and a process of obtaining justice. A policy by the United States which, on its face, appeared entirely to disregard British rights was, thus, unacceptable to Britain. As Aberdeen put it, 'from the language of Mr Polk', Britain 'must expect that the American Govt will renounce the Treaty without delay', which carried the risk of 'a local collision' or 'war itself' without a quick settlement.[150] The importance of being seen to defend legal rights was also emphasised by Aberdeen, who, whilst being 'still ready to adhere to the principle of an equitable compromise', was notwithstanding 'perfectly determined to concede nothing to force or menace', and 'fully prepared to maintain' British 'rights'.[151]

The final settlement was nevertheless achieved out of this period of hostility through a gradual return to the principle of compromise within the shared framework. Aberdeen's crucial move in mindset had come, as seen, before Polk's election, and he already had in mind an ultimate form of settlement. Officially, in the immediate aftermath of Polk's

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[147] Polk stated that: 'Our title to the country of Oregon is "clear and unquestionable", and already our people are preparing to perfect that title, by occupying it with their wives and children': Polk, Inaugural Speech, as contained in Pakenham to Aberdeen, No. 22, 4 March 1845, FO 5/425, fols. 1-6. Whilst, this did not claim a 'perfect' title over Oregon, it still disregarded the competing British claims by implication.

[148] In particular, Tyler had commented positively on Oregon in a Presidential message as recently as February, 1845, saying that 'considerable progress has been made in the discussion, which has been carried on in a very amicable spirit between the two governments; and that there is reason to hope that it may be terminated, and the negotiation brought to a close within a short period': Tyler, Presidential Message, 19 February 1845, as contained in Pakenham to Aberdeen, No. 20, 26 February 1845, FO 5/424, fols. 136-141.

[149] Peel, HC, 4 April 1845, Vol. LXXIX, 198-199; Aberdeen to Pakenham, 2 April 1845, Aberdeen Papers, Add. MS 43123, fols. 247-248; Russell, HC, 4 April 1845, Vol. LXXIX, 179.

[150] Aberdeen to Pakenham, Draft, No. 21, 6 April 1845, FO 5/423, fols. 47-50.

[151] Aberdeen to Pakenham, Draft, No. 21, 6 April 1845, FO 5/423, fols. 47-50.

address, no progress was made in the negotiations, with Aberdeen suggesting waiting for a further offer from the United States.[152] Furthermore, Buchanan's proposal, when it came in July, 1845, did not signal any meaningful move, being, broadly, for a boundary along the 49th parallel from the Rocky Mountains to the Pacific Ocean (i.e. not the sea).[153] The key point, however, is that Aberdeen continued separately to push his tentative settlement. Thus, Aberdeen also told Pakenham, in April, 1845, that an offer from Buchanan for 'an extension of the 49th parallel to the sea as the line of boundary, leaving us in the possession of the whole of Van Couver's Island, and the free entrance into the straits of Juan de Fuca' would not be 'perfectly inadmissible', albeit that its acceptance currently, even with 'some modification', was possible but unlikely.[154] There were also signs that Buchanan was edging closer to the compromise ultimately agreed in 1846, for, as Rakestraw notes, he privately authorised McLane, 'if necessary', to make clear to Aberdeen that the United States would also concede the 'southern tip' of Vancouver Island.[155] Against this background, it was probably a tactical mistake, then, for Pakenham to reject Buchanan's formal July offer outright without referring back to London, which led, in turn, to its withdrawal by the United States.[156] This undoubtedly delayed matters, but, seen in the light of Aberdeen and Peel's view that Pakenham had made an error, the episode is not, however, evidence of a British retreat from seeking to work within the shared framework.[157] Moreover, even Pakenham's refusal arguably worked towards the final settlement by referring expressly to Vancouver

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[152] Aberdeen to Pakenham, Draft, No. 22, 18 April 1845, FO5/423, fols. 55-60. In the event of an offer from Buchanan, Pakenham was also authorised formally to counter-offer, 'in addition' to the previous British offer, 'all the ports within the disputed territory south' of the 49th latitude as 'perpetually free ports'.

[153] It also offered a free port on Vancouver Island, south of this parallel: Buchanan Statement, 12 July 1845, *British Documents*, Vol. 2, pp. 162-173.

[154] Aberdeen to Pakenham, 10 April 1845, Aberdeen Papers, Add. MS 43123, fols. 249-250.

[155] Rakestraw, *For Honor or Destiny*, p. 105, referring in note 57 to Buchanan to McLane, No 2, 12 July1845, Despatches to U.S. Ministers, RG 59, NA.

[156] Reply of Pakenham, 29 July 1845, *British Documents*, pp. 173-184; Buchanan. Reply to Pakenham, 30 August 1845, *British Documents*, pp.184-210.

[157] Pakenham defended himself by arguing that the offer was inferior to previous American offers, but Aberdeen and Peel both considered him to have made an error: Aberdeen to Pakenham, Draft, No. 64, 3 October 1845, FO 5/423, fols. 135-138; Peel to Aberdeen, 22 November 1845, Aberdeen Papers, Add. MS 43065, fols. 110-111; Pakenham to Aberdeen, No. 114, 29 October 1845, FO 5/429, fols. 55-68.

having ‘circumnavigated’ Vancouver Island in 1792, and commenting that Britain had ‘the strongest possible claim to exclusive possession of that island’.[158]

Despite the setback following on from Pakenham’s refusal of the July offer, British policy thereafter remained consistent and firm in its pursuit of a compromise. Aberdeen again informed Peel of his broad outline settlement in October, 1845, adding also that it should include free navigation of the river Columbia, and that ‘all the ports between the Columbia and the 49th parallel ... should be declared free ports’.[159] Such an agreement, Aberdeen told Peel, ‘would give us everything really worth contending for’ in Oregon.[160] At the same time, he also observed that it ‘would seem to coincide with the notions of the Hudson’s Bay Company’, who had ‘lately’ moved their main settlement from Fort Vancouver on the river Columbia to Vancouver Island.[161] Merk views news of this move of the Hudson’s Bay Company (which he notes was received in London in 1845) as an important development in persuading the British government as a whole to accept Aberdeen’s proposal.[162] Whilst this cannot be ruled out, the more important point, though, is surely the consistency in Aberdeen’s approach from 1844. He remained confident that the United States, even under Polk, would ultimately be obliged to reach a compromise.[163] Crucially, his reasoning was grounded in the force of an assumed American desire to be seen as acting within the principles of international law. Britain had, as noted earlier, also continued to offer arbitration as an alternative during the period. Thus, he told Peel in August, 1845 that the American people would not ‘approve’ of the negotiations ending with a British offer of arbitration, and the ‘rest of the world could not hesitate to think us right’ in that event.[164] Similarly, in December, 1845, he commented to Pakenham that, if the United States refused

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[158] Reply of Pakenham, 29 July 1845, *British Documents*, pp. 173-184, at pp. 180-181.

[159] Aberdeen to Peel, 17 October 1845, Aberdeen Papers, Add. MS 43065, fols. 53-54.

[160] Aberdeen to Peel, 17 October 1845, Aberdeen Papers, Add. MS 43065, fols. 53-54.

[161] Aberdeen to Peel, 17 October 1845, Aberdeen Papers, Add. MS 43065, fols. 53-54.

[162] Merk, *The Oregon Question,* pp. 250-254. Galbraith notes the decision of the company was made in 1843 as ‘Vancouver Island was more convenient to the coastal trade than Fort Vancouver’: Galbraith, *Hudson’s Bay*, p. 224.

[163] See, for example, Aberdeen’s confidence in a settlement after Polk’s December Message to Congress: Aberdeen to Peel, 28 December 1845, Aberdeen Papers, Add. MS 43065, fols. 127-128

[164] Aberdeen to Peel, 29 August 1845, Aberdeen Papers, Add. MS 43064, fols. 279-283.

arbitration and negotiation, 'they will be so manifestly in the wrong, that I greatly doubt their receiving the necessary support'.[165]

In the United States, the Senate became the key due to the requirement for its approval on treaty matters by a two-thirds majority. Although there was a fierce debate, the majority view there came squarely behind a policy of compromise, and away from one for 'the whole of Oregon'. Polk himself maintained the pressure, with his Presidential message to Congress in December, 1845 calling for a termination of the 1827 Convention. Nevertheless, importantly, he also did this in a manner which indicated respect for international law. Polk emphasised the importance of keeping to the terms of the 1827 Convention during the twelve month notice period, commenting that the 'faith of treaties, in their letter and spirit, has ever been, and I trust, will ever be, scrupulously observed by the United States'.[166] Further, he was evidently also concerned with wider opinion, asserting that the 'civilised world will see in these proceedings a spirit of liberal concession on the part of the United States'.[167] The key point, however, is that the Senate were moving away from the extremes associated with Polk's policy.[168] Pakenham was able to tell London in December, 1845 that he had received 'overtures' for a partition, on the basis suggested by Aberdeen in March, 1844, from a significant group, including Senators Archer and Benton.[169] Then, crucially, by February, 1846, he reported that 'upon the very best authority... there is a certain majority in the Senate in favour of an accommodation of the Oregon question on the principle of equitable partition and compromise'.[170]

The final agreement came, as noted by Rakestraw, after Buchanan let it be known to Britain that Polk would allow the Senate to decide whether to accept an offer similar to that in the

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[165] Aberdeen to Pakenham, 3 December 1845, Aberdeen Papers, Add. MS 43123, fols. 272-273.

[166] Polk, Presidential Message to Congress, December, 1845, as sent with Pakenham to Aberdeen, No. 128, 28 November 1845, FO 5/429, fols. 169-179. (The letter was written before the address anticipating that the first copy in New York would be added to it).

[167] Polk, Presidential Message to Congress, December, 1845, as in footnote 166

[168] See the later comments of Pakenham on the views of the Senate in Pakenham to Palmerston, No. 106, 13 August 1846, *British Documents,* Vol. 2*,* p. 222.

[169] Pakenham to Aberdeen, No. 138, 29 December 1845, FO 5/430, fols. 174-186, and Pakenham to Aberdeen, Private and Confidential, 29 December 1845; FO 5/430, fols. 188-191.

[170] Pakenham to Aberdeen, Private and Confidential, 26 February 1846, FO 5/446, fols. 177-182.

previous nascent compromise from 1844.[171] Significantly, Bourne does not consider that McLane's report of potential British military 'preparations' was 'particularly important' in this American policy decision.[172] Rather, for him, it was 'likely' that Polk was 'bluffing' on the threat of war over Oregon, with 'no real sign that the news of the supposed British preparations called that bluff'.[173] This is consistent with the argument that the ultimate force defining the problem and guiding the solution were the principles within the shared framework. Gallatin's four letters on the Oregon question, when published in January, 1846, again highlighted for Americans that the claims of the United States to Oregon were not unchallengeable.[174] They also accorded with the view of those in the Senate in favour of reaching a compromise. When, therefore, Congress finally voted to end the 'joint occupancy' of the 1827 Convention in April, 1846, it was done with a view to reaching a settlement, and was understood this way in Britain.[175] Aberdeen finally, then, made a formal offer in May, 1846, which was based on his private suggestion for a compromise from 1844. In this, Britain offered the 49th parallel as the boundary to the sea, together with British possession of Vancouver Island and free navigation of the river Columbia for the Hudson's Bay Company.[176] Aberdeen expected that these terms would be accepted by the required two-thirds majority in the Senate, and they were by 38 votes to 12.[177]

Legal principles within the shared framework also guided the way in which British policy responded to the two main areas of direct tension with the United States over Texas. The most important of these was the question of what was perceived by the United States to be Britain's alleged attempt to achieve the abolition of slavery in Texas. This arose within the

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[171] Rakestraw, *For Honor or Destiny*, p. 150, referring to Buchanan to McLane, No. 23, 26 February 1846, Moore (ed.), Works of James Buchanan, Vol. I, 377-383.

[172] McLane's note to Buchanan was of 3 February 1846: Bourne, *The Balance of Power*, p.158.

[173] Bourne, *The Balance of Power*, p. 164.

[174] Gallatin's letters were copied to Aberdeen in January, 1846: Pakenham to Aberdeen, No. 10, 29 January 1846, FO 5/446, fols. 59-70.

[175] Pakenham to Aberdeen, No. 49, 28 April 1846, FO 5/448, fols. 225-228; Peel, HC, 29 May 1846, Vol. LXXXVI, 1424.

[176] Aberdeen to Pakenham, 18 May 1846, *British Documents*, Vol. 2, pp. 210-216. One particular distinction from the 'nascent' compromise of 1844, though, was the removal of the requirement for all ports down to the river Columbia on the Pacific Coast to be free ports.

[177] On 12 June 1846: *British Documents*, Vol. 2, p. 219. The signed Convention was then approved in the Senate 41-14, on 18 June 1846: *British Documents*, Vol. 2, p. 219.

context of the British policy aimed at the maintenance of Texan independence, as described in the first section, but it mattered to the United States as well because of a perception there that abolition in Texas would also damage it. The principle of 'non-interference' became involved in the issue from 1843, when the United States considered that Britain was 'interfering' in the domestic affairs of Texas with its then policy of encouraging Mexico to make the abolition of Texan slavery a condition of any peace deal. Britain responded within the terms of the principle of non-interference, arguing, effectively, that only 'improper' interference was prohibited and that its actions in Texas did not amount to this. Unsurprisingly, this position was rejected by the United States, with the American government also maintaining that Britain was interfering in its domestic affairs as well through its policy in Texas. In the end, the differing British and American contentions on what constituted 'interference' remained formally unresolved, but, importantly, Britain modified its policy towards Texas away from one seeking abolition.

The role of definitions of 'non-interference' in these tensions over the abolition of slavery developed from a Mexican proposal to give elements of self-government to Texas in the spring of 1843. Britain was interested because of its wider objective of keeping Texas independent, but was cautious about the plan because formally Texas would still be 'required to acknowledge the sovereignty of Mexico'.[178] Aberdeen, as Adams notes, then put forward the suggestion that Mexico insist on the 'abolition of slavery instead of sovereignty over Texas as a condition' for Texan independence.[179] Crucially, however, this was then followed by a public exchange on the subject of slavery and Texas in parliament in August, 1843.[180] Brougham, in the context of asking about Texas and Mexico, said that he was 'irresistibly anxious for the abolition of slavery in Texas' because that 'must ultimately end in the abolition of slavery in America', to which Aberdeen replied by commenting that 'no one was more anxious than himself to see the abolition of slavery in Texas'.[181] This gave credibility

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[178] Aberdeen to Elliot, FO 75/6, 3 June 1843, fols. 13-18.

[179] Adams, *British Interests and Activities in Texas,* pp.137-138, which refers in Note 19 to Aberdeen to Doyle, FO Mexico 160, 31 July 1843.

[180] Upshur had already warned that 'few calamities could befall this country more to be deplored than the establishment of a predominant British influence and the abolition of domestic slavery in Texas': Upshur to Murphy, 8 August 1843, as contained in Pakenham to Aberdeen, No. 56, 9 June 1844, FO 5/406, fols. 13-15.

[181] Brougham, HL, 18 August 1843, Vol. LXXI, 915-917; Aberdeen, HL, 18 August 1843, Vol. LXXI, 917-918.

to American concerns over the scope of British aims.[182] Indeed, Upshur wrote in September, 1843 to Everett in London asking him to investigate Britain's position with Aberdeen, referring to the August exchange.[183] What was crucial, however, for present purposes, was that the principle of 'non-interference' was used to justify the concern over British policy. Tyler, for example, was perceived to have been referring to Britain in his December, 1843 message to Congress complaining of 'interference on the part of stronger and more powerful nations' in Texas.[184] There was also domestic criticism from Russell, who as Reeves points out, was alleged to have said said that the Whigs would go for 'non-interference in the domestic policy of other nations', and that 'the attempt to emancipate the slaves of ... the States and Texas' was 'illegal and unwise interference'.[185]

Britain was certainly sensitive to the issue of whether its policy in Texas amounted to interference in the affairs of another sovereign state, but, in practice, failed to assuage the fears of the United States. The initial American concerns, as seen, were not expressed in a particularly strong form, and indeed the United States soon became bound up in Upshur's subsequent proposal for a new treaty of annexation with Texas in October, 1843.[186] It is, therefore, especially significant that Aberdeen nevertheless took the time to write a detailed

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[182] For example, see the letter from General Duff Green, Galveston Reporter, 8 November 1843, expressing the concern that Britain wanted 'to have converted [Texas] into a refuge for robbers and runaway slaves', FO 75/6, fol. 310.

[183] Upshur to Everett, FO 5/406, 28 September 1843, fols. 18-23.

[184] President Tyler to Congress 5 December 1843, *British Documents*, Vol. 2, pp. 223-224. Aberdeen was in no doubt that Tyler was referring to Britain as an interfering power: Aberdeen to Pakenham, No. 1, 9 January 1844, *British Documents*, Vol. 2, pp. 229-230.

[185] Reeves refers to this as derived from a report by Duff Green following a visit to England in the summer of 1843: Reeves, *American Diplomacy*, p. 125, note 17, referring to Green to Calhoun, 2 August 1842 [sic 43?], Report of American Historical Association, 1890, II, 846. In a similar vein, Hume also later asked for the production of papers on Texas as he was concerned they would show British 'interference in the internal affairs of other countries': Hume, HC, Vol. LXXIV, 20 May 1844, 1330.

[186] Upshur's proposal was referred to in Upshur to van Zandt, 16 October 1843, FO 5/406, fol. 23. From Aberdeen's perspective at the time, there was no clear reason why the United States proposed annexation at this point. Fox reported that it was the fear of the effects of the abolition of slavery in Texas that had revived the annexation plan, but Houston seems also to have warned Elliot of trade being a reason for a growing interest in annexation in the United States: Fox to Aberdeen, No. 130, 27 November 1843, FO 5/393 fols. 270-277 at 274-276, and Elliot to Aberdeen, Secret, 5 February 1843, FO 75/6, fols. 75-79. In any event, Upshur appears to have proposed annexation in October, 1843 before receiving Everett's reply (November 1843) to his earlier September letter. querying British policy on the abolition of slavery in Texas (Everett's reply, Everett to Upshur, 3 November 1843, FO 5/406, fols. 23-24.

defence of British policy for the benefit of the United States in December, 1843. As put by Aberdeen, whilst he wanted to see 'slavery abolished in Texas', as well as 'elsewhere', Britain 'shall not interfere unduly, or with an improper assumption of authority ... in order to ensure the adoption of such a course'.[187] Indeed, on the contrary, Aberdeen continued, Texas would be free to make its own decision, provided that 'other states act with equal forbearance'.[188] Britain also refuted the notion that it was trying to 'act' on the United States 'in a political sense' 'through Texas'.[189] The United States was, however, unpersuaded. Instead, Calhoun gave Aberdeen a powerful defence of the principles of national sovereignty and the right to govern free from foreign interference within international law, even making an appeal to the 'decision of the civilised world':

> Whether Great Britain has the right, according to the principles of international law, to interfere with the domestic institutions of either Country, be her motives or means what they may; or whether the avowal of such a policy and the exertions she has made to consummate it in Texas do not justify both countries in adopting the most effective measures to prevent it, are questions, which the United States willingly leave to the decision of the civilised world. They confidently rest the appeal on the solid foundation, that every Country is the rightful and exclusive judge, as to what should be the relations, social, civil, and political, between those who compose its population; and that no other Country, under the plea of humanity or other motive, has any right whatever to interfere with its decision. On this foundation rest the peace and the harmony of the world.[190]

The issue over British interference in Texas was, thereafter, to remain formally unresolved, but it is hard nonetheless to avoid the conclusion that the American pressure did not have some effect on British policy. Aberdeen certainly took the time to reiterate his earlier distinction between 'interference' and 'improper interference', telling Pakenham in June, 1844, that Britain would 'not improperly interfere with the internal concerns of other nations whose views and positions in respect of domestic slavery may differ from their own'.[191] Britain, Aberdeen argued, was, though, still entitled to offer 'friendly counsel' to foreign

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[187] Aberdeen to Pakenham, No. 9, 26 December 1843, FO 5/390, fols. 139-146, at 141-142.

[188] Aberdeen to Pakenham, No. 9, 26 December 1843, FO 5/390, fols. 139-146, at 142.

[189] Aberdeen to Pakenham, No. 9, 26 December 1843, FO 5/390, fols. 139-146, at 143.

[190] Calhoun to Pakenham, 27 April 1844, enclosed in Pakenham to Aberdeen, FO 5/404, No. 36, 28 April 1844, fols. 267-280, at fols. 273-274.

[191] Aberdeen to Pakenham, No. 25, 3 June 1844, FO 5/403 fols. 65-70.

states on slavery or other matters, whilst nevertheless 'religiously' respecting their rights.[192] Notwithstanding this, Britain does, though, also appear to have modified its policy in Texas in line with the concerns raised. The question of abolition in Texas seemingly dropped down the agenda of the British government, and Aberdeen sought to place future British policy within the context of Britain's treaty obligations to Texas. Britain, Aberdeen told Pakenham in June, 1844, had 'no intention to press at this time the abolition of domestic slavery' on Texas, given that Britain's treaties with Texas were 'concluded in 1840 without any stipulation for that object'.[193] Whilst the principles of sovereignty and 'non-interference' were absent as explanations for this change, it is, however, still reasonable to infer that they were influential. Law, crucially, had formed the main basis of the challenge from the United States and others, and, thus, constituted the main justification for the concerns. Furthermore, it is clear from Aberdeen's responses that Britain took the complaints seriously. Britain ostensibly appears to have felt the need to be seen to be working in a manner consistent with international law.

There was, lastly, one further issue in the period up to 1843, which touched upon the role of international law in British-American relations in the context of Texas. This concerned the minor dispute between Texas and Britain in 1842 over two ships bound for Mexico, the *Guadalupe* and the *Montezuma*. Although, as will be seen, Britain and the United States were on opposite sides, the matter's main significance is instead in the further evidence it provides of the successful working of the shared framework in the period, in this case around the principles of neutrality. The problem originated in Texan complaints that the provision by Britain of the *Guadalupe* was 'inconsistent' with British-Texan friendly relations, and, that of the *Montezuma,* a breach of both the Foreign Enlistment Act 1819 and 'impartiality'.[194] Smith, the Texan representative in London, accordingly, protested to Aberdeen about the *Guadalupe* in June, 1842, commenting that it was due to sail armed from a British port, manned by 'Europeans', 'commanded by a British officer', and 'with the known purpose of proceeding to Mexico to be employed against Texas'.[195] He then made further attacks, first in July, 1842, about both the *Guadalupe* and the *Montezuma*, describing

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[192] Aberdeen to Pakenham, No. 25, 3 June 1844, FO 5/403 fols. 65-70.

[193] Aberdeen to Pakenham, No. 25, 3 June 1844, FO 5/403 fols. 65-70.

[194] Smith to Aberdeen, 14 June 1842, FO 75/5, fols. 5-10; Smith to Aberdeen, 1 July 1842, FO 75/5, fols. 17-18; Smith to Aberdeen, 14 September 1842, FO 75/5, fols. 39-41.

[195] Smith to Aberdeen, 14 June 1842, FO 75/5, fols. 5-10.

each as a 'war steamer', and then again in September, 1842 over the *Montezuma*.[196] Aberdeen, however, rejected the Texan challenges, stressing British neutrality and arguing that the Foreign Enlistment Act had not been breached.[197] Indeed, for Britain, on the advice of the Queen's Advocate in the context of the *Montezuma*, the Foreign Enlistment Act simply gave the British government 'the power of controlling, if it sees fit, the acts of its own subjects in regard to Foreign Powers'.[198]

The ongoing tensions over the *Guadalupe* and *Montezuma* nevertheless show how both Britain and the United States placed importance on the principles of neutrality. In his subsequent letter of the 10th October, 1842, Smith had widened the Texan attack on Britain to one alleging breaches of neutrality, asserting that the *Guadalupe* case involved an 'infringement of its [Britain's] neutrality agreeably to the Law of Nations', and that of the *Montezuma* a 'violation' of 'an accurate interpretation of the obligations of neutrality'.[199] Importantly, however, there is also evidence that Texas received assistance from the United States in building its case. Most significantly, Adams argues that a 'perusal of ... [Smith's letter of 10/10/42] ... reveals a familiarity with documents in the American embassy'.[200] In that letter, Smith had appealed, in particular, to the precedent of the American acceptance of the British complaints against the United States in 1793 for 'arming and equipping' French ships, and referred to the the fact the government of the United States considered this inconsistent with a ' "faithful neutrality" '.[201] In a further link to the 1790s, he had also expressly reserved the right to make claims for damages arising from the alleged breaches of international law, following the precedent adopted by Britain and the United States in the Jay Treaty, 1794.[202] The other assistance from the United States consisted of the material

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[196] Smith to Aberdeen, 1 July 1842, FO 75/5, fols. 17-18; Smith to Aberdeen, 14 September 1842, FO 75/5, fols. 39-41.

[197] Aberdeen to Smith, Draft, 16 July 1842, FO 75/5, fols. 30-32, and Aberdeen to Smith, Draft, 27 September 1842, FO 75/5, fols. 50-57. See also Peel, HC, 2 August 1842, Vol. LXV, 964-965, for a defence of the British position.

[198] Aberdeen to Smith, Draft, 27 September 1842, FO 75/5, fols. 50-57. The letter seeking the advice of Dodson on the *Montezuma* is of 23 September 1842, and the reply of Dodson 24 September 1842, FO 83/2382, fols. 32-33, and fols. 34-35.

[199] Smith to Aberdeen, 10 October 1842, FO 75/5, fols. 58-65.

[200] Adams, *British Interests and Activities in Texas*, p. 91.

[201] Smith to Aberdeen, 10 October 1842, FO 75/5, fols. 58-65.

[202] Smith to Aberdeen, 10 October 1842, FO 75/5, fols. 58-65.

evidence supporting Texans claims which was provided by the American consul in Bristol (Francis Ogden). As reported by Ogden, in an affidavit copied by Smith to Aberdeen, the builder of the *Guadalupe*, John Laird, had informed him that the vessel was 'armed to the teeth' on its departure from Liverpool.[203]

Britain's response brings out the importance it, too, attached to the principles of neutrality, particularly with relevance to its relationship with the United States. Whilst Aberdeen began his reply by refusing 'to enter into a lengthened and intricate argument on the rights of neutrality as established by the laws of nations', he nevertheless highlighted the 'Facts' as he saw them which demonstrated the British position of neutrality and 'the most friendly and liberal spirit towards Texas'.[204] More importantly, however, Aberdeen also took the time to argue that the views of the United States now on neutrality were not the same as in the 1790s, and quoted two comments of Webster in relation to American conduct in the Mexico-Texas conflict which he perceived as being similar to, and, thereby, supportive of, the British position in the *Guadalupe* and *Montezuma*:

> If it be true that citizens of the United States have been engaged in a commerce by which Texas an enemy of Mexico has been supplied with arms and munitions of war, the Government of the United States nevertheless was <u>not bound to prevent it</u> - could not have prevented it, without a manifest departure from the principles of neutrality.
>
> [Re a complaint by Texas against two ships alleged to be acquired from the United States for Mexican use in the war with Texas]: It appeared to be a case of great doubt; but Mexico was allowed the benefit of that doubt; and the Vessels left the United States with a whole or part of their armament actually on board.[205]

The implicit message to the United States in this letter to Texas was clear: the rules of neutrality mattered to Britain and she was, in turn, observing the actions of the United States.

Beyond reaffirming the way in which the British-American relationship worked within the shared framework, it is unlikely, however, that there was any wider impact on policy towards

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[203] Copy of affidavit as enclosed in Smith to Aberdeen, 19 September 1842, FO 75/5, fols. 42-47.

[204] Aberdeen to Smith, 8 November 1842, Draft, FO 75/5 fols. 66-81. Aberdeen drew attention, amongst other matters, to the facts that the cases of the *Guadalupe* and the *Montezuma* had first arisen before the ratification of the treaties with Texas, and that, since ratification, Britain had pressed Mexico to recognise the independence of Texas in a manner that fully met the spirit of the treaties with Texas.

[205] Webster to Bocanegra, 8 July 1842, and Webster, as quoted in Aberdeen to Smith, Draft, 8 November 1842, FO 75/5, fols. 66-81.

the United States in relation to Texas from this dispute over neutrality. Adams indicates that Aberdeen may initially have hesitated over adopting a policy of neutrality when he took office in 1841, and then suggests that Smith's protests and calls for treaty ratification in 1842 may have played some part in pushing Aberdeen towards 'the policy of neutrality'.[206] As the subsequent increased British involvement with Texas over Mexican recognition and the abolition of slavery came, as seen, to affect British-American relations from 1843, this is a potentially significant point. Whilst, however, the tensions over the *Guadalupe* and the *Montezuma* cannot be ruled out as a factor in affecting wider British policy aims, there are reasons to suggest that their importance in this respect was secondary in nature. Crucially, Peel indicated in parliament in April and June, 1842 that ratification of the Texan treaties was intended.[207] This was before the main period of the dispute over the *Guadalupe* and the *Montezuma*. Furthermore, Adams also contends that Aberdeen's policy towards Texas was influenced by his knowledge, from the beginning of June, that Ashburton was not going to be able to secure agreement with the United States on all the disputed points in the 1842 negotiations.[208] This, he continues, meant that Aberdeen then came to favour more 'the idea of an independent Texas as a necessary barrier to American expansion' in the absence of 'extreme friendship' with the United States.[209] An issue of international law was, thus, unlikely in this case to have caused a major turn in British policy.

Conclusion

International law made a major impact on the way that Britain approached the growth of the United States on the North American continent in the period. Treaty law and legal principles shaped British policy into a direction under which its objectives were, broadly, accepting of American expansion into Oregon, California and Texas. Moreover the different turns then taken by British policy were also influenced by how Britain perceived its legal position. Most importantly, Britain pursued its perceived good historic legal rights to Oregon in order

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[206] Adams, *British Interests and Activities in Texas,* pp. 92-93

[207] Peel, HC, 26 April 1842, Vol. LXII, 1127-1129, and 13/6/42, Vol. LXIII, 1490-1491. Aberdeen also wrote to Fox on 30 May 1842 informing him that Elliot was to be Her Majesty's Consul General in Texas: FO 5/376, fols. 60-63.

[208] Adams, *British Interests and Activities in Texas,* pp. 95-96.

[209] Adams, *British Interests and Activities in Texas,* pp. 95-96.

to maintain its honour. In contrast, it accepted Texas's sovereign right to decide its own future, and thereby accepted its annexation to the United States. In all cases, however, British aims in relation to Oregon, California, and Texas were not about preventing the United States getting land for its own sake. British policy, in this respect, was, thus, neither a 'surrender' to the United States, nor the equivalent of a weathervane changing direction on the whims of Palmerston or Aberdeen. Furthermore, a shared framework of legal principles guided policy in the issues and tensions that did actually arise directly with the United States in relation to Oregon and Texas. This was especially significant in the case of Oregon, where it was a return to this framework that allowed a compromise, eventually, to be reached in 1846. What this suggests is that the British-American relationship needs to be conceptualised as one based more in the structure of international law, and with a greater degree of strategic and practical cooperation, than has generally been appreciated. The use of common principles in these instances also underlines, again, that the relations of Britain and the United States worked within a high level of underlying political agreement contained in the law.

6 The Slave Trade and the *Creole*

In May, 1841, Palmerston argued that treaties with many nations, allowing a 'right of search', had 'enabled' Britain to 'establish' the 'maritime police' of the West African Squadron, whose 'vigilance and activity' helped to effect the suppression of the slave trade.[1] If further negotiations succeeded, he observed, the United States, would then be the 'single exception' from 'every state in Christendom which has a flag that sails on the ocean' in having such a treaty, albeit that it was not his belief that the 'American people ... will long stand aloof'.[2] Keeping American ships detached from foreign interference was, however, fundamental to the approach of the United States to the slave trade in the period. There was no slave trade treaty between Britain and the United States. Indeed, a treaty 'right of search' had been perceived in the United States as an attack on the 'freedom of the sea', with the act itself viewed as 'analogous to that of searching the dwelling houses of individuals on land'.[3] British action against American ships was, accordingly, resisted by the United States when it was felt to amount to a 'right of search'. A similar defence of American aloofness was also in issue in the *Creole,* an American ship which arrived in the Bahamas in 1841 after a mutiny by the slaves on board. Here, Webster felt it was 'in vain' for Britain to defend the failure to assist the master and crew regain control 'by appealing to general principles of humanity'.[4] For Webster, Britain should simply have accepted that the American law on slavery still prevailed on the *Creole.* What united these problems, though, was not only the demand that the position of American ships as, effectively, part of the independent United States be respected, but also the use of international law to make that claim. British policy was then faced with needing to deal with the United States in a way that conformed to the principles of the 'freedom of the seas' and the 'comity of nations', whilst maintaining its efforts to restrict the slave trade and the efficacy of its abolition of slavery.

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[1] Palmerston, HC, 18 May 1841, Vol. LVIII, 648-649, as referred to from the quotation in Chamberlain, *British Foreign Policy in the age of Palmerston*, p. 117.

[2] Palmerston, HC, 18 May 1841, Vol. LVIII, 649-651, as referred to from the quotation in Chamberlain, *British Foreign Policy in the age of Palmerston*, p. 117.

[3] See H. Wheaton, *Enquiry into the validity of the British claim to a right of visitation and search of American vessels suspected to be engaged in the African slave trade*, (New York: Negro Universities Press, 1969, reprint of the 1842 edition), pp. 91-93.

[4] Webster to Everett, 29 January 1842, *Webster Papers*, p. 177-185.

International law, though, was not just an American stick used to fend off British threats. What this chapter aims to establish is that Britain too worked within what was a shared framework of principles to reach solutions with the United States on the slave trade and the *Creole* in the period that were not incompatible with its wider policies. British governments, accordingly, made no claim for a 'right of search' against suspected American slave ships, because they accepted that Britain possessed no such right in peace except where it was given by treaty. Instead, the question of the 'right of search' only arose because, faced with the fraudulent use of the American flag, Britain pursued what became known as a 'right of visit' to ascertain the nationality of a ship. Action taken under this, as well as a separate short-lived informal agreement between local British and U.S. naval commanders, produced a dispute over what was alleged by the United States to be, effectively, a 'right of search' by another name. The 'right of visit', however, was not an abrogation of international law. On the contrary, it was an attempt by Britain to use the law to solve the practical problem of checking whether suspected slave ships really were American without deploying a 'right of search', and it was supported by consistent legal advice. Indeed, it was this basis in law that ensured it was successful. When British policy was properly explained to the United States from 1841, the differences narrowed, and a largely agreed joint legal position resulted. Furthermore, far from the provisions for joint cruising in the 1842 Webster-Ashburton Treaty being an alternative way of settling the issue of the 'right of search', the shared framework on the 'right of visit' was, in fact, crucial to the making and operation of that agreement. Similarly, in the case of the *Creole,* Britain used legal principles to produce a compromise that defended its abolition of slavery in the Empire, whilst also reassuring the United States. Ashburton and Webster accepted that the 'comity of nations' meant that Britain would not 'interfere' with American ships forced into British ports in the future, but acknowledged that Britain could declare 'slaves' to be free within the Empire under imperial law.

In making these arguments, the chapter, therefore, aims to demonstrate, again, how central international law was to the British-American relationship. In the cases of the slave trade and the *Creole,* this is, of course, self-evident on one level in that both problems were defined by legal concepts. The point, however, goes much deeper than this. In both instances, it was agreement on legal principles that allowed workable solutions to be reached. The shared framework of law meant that British policy was able to handle these problems with the United States in a generic way, separated from the facts of particular events. Agreements for the future were more easily reached in the abstract. International

law could not, of course, resolve the fundamental underlying policy differences that lay beneath much of the tensions on the slave trade and the *Creole*, such as the American approach to the 'right of search' and slavery. It was, however, a framework in which common ground could be found. Again, therefore, the problems over the slave trade and the *Creole*, paradoxically, also bring out that there was much underlying agreement in the British-American relationship. They were, after all, not just disputes, but legal disputes around shared rules.

The slave trade

Britain and the United States were not, on the face of it, in dispute over whether or not action should be taken to suppress the slave trade. In Britain, the Act for the Abolition of the Slave Trade, 1807 declared the African slave trade unlawful and introduced penalties for British subjects, and residents in British territory, that were participating in it.[5] Britain had also then gone further than these imperial restrictions, and attacked the ships of foreign states involved in the slave trade, as evidenced by the actions over many years of the West African squadron. In the United States too, the Act Prohibiting the Importation of Slaves, 1807 made it illegal to import slaves into the United States from a foreign state or place.[6] Furthermore, as Martinez observes, the United States had supplemented this by extra legislation restricting Americans from the activities of the 'fitting out of slave ships in American ports' for use in the foreign slave trade, or having an interest in, or serving on, slave ships involved with that business.[7] In addition, as she continues, the U.S. Navy, was also permitted to stop American slave ships, and slave trading was treated as 'piracy' in American domestic law.[8] Rather, the issue between them in the period was over what the United States perceived as an infringement of the 'freedom of the seas' by British interference with suspected American slave ships. This mattered, for, as Stevenson argued, the preservation of the 'rights of neutrality and the liberty of the seas' were the 'consistent and persevering' policy of the

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[5] Act for the Abolition of the Slave Trade, 1807, accessed through the very helpful website of Peter Davis on William Loney, RN, www.pdavis.nl, 'Background'.

[6] Act Prohibiting the Importation of Slaves, 1807, accessed through §Statutes at Large, 2. Stat. 426. This formulation of 'importation' protected the domestic slave trade.

[7] Martinez, *The Slave Trade and the Origins of International Human Rights Law,* pp. 41-42.

[8] Martinez, *The Slave Trade and the Origins of International Human Rights Law*, pp. 49-50.

United States, and the basis, on which British-American relations 'can alone be expected to continue'.[9]

British policy to the United States, though, worked within international law, and, in particular, did not attempt to use a peacetime 'right of search' against American ships. As set out in chapter 3, the main restriction affecting British policy was that there was no general right, in peace, for ships of one state to search the ships of another, even when they were suspected of being involved in the slave trade. Indeed, it was the very acceptance of the restriction on the 'right of search' in peacetime that encouraged Britain to develop a policy of entering slave trade treaties with other states.[10] These treaties worked by creating conventional mutual 'rights of search' over suspected slave ships to make up for the lack of one under the general principles of international law.[11] British policy was, thus, to enter into such treaties with as many states as possible.[12] No agreement had been reached with the United States, but, by 1840, Britain did have treaties with Spain, Portugal, the Netherlands, Sweden-Norway, France, Argentina, Uruguay, Bolivia, and Ecuador.[13] The so-called Quintuple Treaty between France, Britain, Russia, Prussia, and Austria was also then signed

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[9] Stevenson to Aberdeen, 10 September 1841, PP, 1842, XLIV, No. 272.

[10] The use of treaties to find a practical legal solution to the problem of the 'right of search' was, it seems, therefore, part of what Benton and Ford refer to as 'attempts to order oceans', which were 'centred on an awkward combination of bilateral treaties, municipal law, admiralty law, and diplomatic negotiation': Benton and Ford, *Rage for Order,* p. 119. This practical basis for the use of slave treaties is also consistent with Benton and Ford's wider analysis rejecting the notion that the 'slave trade policing ... invoked or produced clearly articulated international norms', p. 121, Ibid., and see generally, Ibid., chapter 5 'Ordering the Oceans'. For a contrary view, see Martinez, *The Slave Trade and the Origins of International Human Rights Law.*

[11] The treaties also 'established mixed courts to try and condemn captured slave ships': Martinez, *The Slave Trade and the Origins of International Human Rights Law*, p. 35. For ease of reference, states with whom Britain had such a treaty are termed, collectively, 'treaty states' in this chapter.

[12] Whilst a common part of British practice, the efficacy of these treaties was, however, nevertheless certainly questioned at the time. An article in *The Westminster Review,* for example, commented that the anti-slavery campaigner Buxton's 'estimate of the value of treaties for the suppression of the slave trade agrees with our own - they are worse than useless': *Westminster Review*, 'The African Slave Trade', p. 134. Furthermore, more recently, this conclusion has also been echoed by Ryan, who observes that, by 1839, the problem was that the 'limitations' 'negotiated' by most states in the treaties meant that 'their flags still remained almost wholly useable to a wily slave dealer': M. Ryan, 'The Price of Legitimacy in Humanitarian Intervention: Britain, the Right of Search, and the Abolition of the West African Slave Trade, 1807-1867', in B. Simms and D. J. B. Trim, (eds.), *Humanitarian Intervention: A History* (Cambridge: Cambridge University Press, 2011), chapter 10, p. 239

[13] See Grewe, *The Epochs,* pp. 560-562; Palmerston also summarised British treaties in parliament in May, 1841: HC, 18 May 1841, 649-651, as referred to from the quotation in Chamberlain, *British Foreign Policy in the age of Palmerston*, p. 117.

in 1841, although France refused to ratify the treaty in 1842.[14] The lack of a treaty with the United States did not, however, mean that Britain thereby claimed a 'right of search' against it. On the contrary, Britain always worked on the fallback basis that it possessed no 'right of search' in peace against American ships.[15] Palmerston and Aberdeen both expressly accepted this point in correspondence with the United States.[16] Peel argued it publicly, and strongly, in parliament, saying that: 'The right of search, with respect to American vessels, we entirely and utterly disclaim'.[17] In doing so, they were all also following the clear and consistent legal advice given to the Foreign Office by the law officers of the Crown.[18]

Moreover, the failure to get a slave trade treaty with the United States was not connected to any British argument that challenged the broad common understanding around the 'freedom of the seas'. On the contrary, Britain's acceptance that it had no legal rights over suspected American slave ships in peace is consistent with its attempts to get such a treaty. The drive for a treaty originated in the article in the Treaty of Ghent, 1814 providing for both states to 'use their best endeavours' to achieve the 'entire abolition' of the slave trade.[19] Negotiations were, accordingly, undertaken, but they failed to produce a successful result. The United States, as Wheaton observed, objected in 1818 to the system of mixed courts inherent in a slave trade treaty - on the grounds that it had no colonies in which to locate such a tribunal, and because of possible constitutional objections to the involvement of foreigners in

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[14] Grewe, W., *The Epochs,* pp. 561-566.

[15] Gould notes the significant impact of this restriction on British policy: 'the U.S. Navy occasionally captured American slavers, yet this was a minor impediment, and nothing compared to what Britain ... might have achieved had the peacetime law of nations not prevented its cruisers from intervening': Gould, *Among the Powers*, pp. 214-215. See also for a similar comment, H. G. Soulsby, *The Right of Search and the Slave Trade in Anglo-American Relations*, 1814-1862, (Baltimore: The John Hopkins Press, 1933), p. 11.

[16] See, for example, Palmerston to Stevenson, 27 August 1841, PP, 1842 XLIV, No. 268, and Aberdeen to Stevenson, 13 October 1841, PP, 1842 XLIV, No. 273.

[17] Peel, HC, 2 February 1843, Vol. LXVI, 86-91.

[18] The main relevant legal advice in the period was: Dodson to Palmerston, 22 June 1839, Parry, *Law Officers' Opinions*, Vol. 71, pp. 370-372, and Dodson to Aberdeen, 2 October 1841, Parry, *Law Officers' Opinions*, Vol. 72, pp. 152-155.

[19] Article 10, Treaty of Ghent, 1814.

American justice.[20] More fundamentally, Wheaton identified that there was also also a 'universal repugnance' in the United States to the idea of extending the 'right of search' in peace.[21] Soulsby too concludes that the opposition was based, at this time, on a general reluctance to 'increase the naval power of Great Britain and interfere with the freedom of American shipping', and mentions a fear over the use of impressment as an additional factor.[22] Similar concerns then appear to have also prevented a treaty from being agreed in 1823.[23] The situation was, however, somewhat different in 1824. Soulsby highlights that the deeming of the slave trade as 'piracy' was suggested by the United States as a way of overcoming its objection to *extending* the 'right of search', on the basis that there was already a right to capture pirates in peace under international law.[24] Britain and the United States were, thus, able to *sign* a treaty at that time, but, in the end, it too did not proceed as Britain refused to accept an exemption for the American coast that was made on ratification by the Senate.[25] Thereafter, no further attempt at an agreement was made before the period, and, as Soulsby notes, the American position became more hostile after British abolition in 1833.[26]

British acceptance of the principle that it possessed no 'right of search' over American ships was also consistent with Britain's wider public acknowledgement that its policy on the slave trade overall needed to work within international law. British practice, as seen in chapters 2

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[20] Wheaton, *Enquiry*, pp. 38-39. Wheaton's latter point here has also been picked up more recently by Hamilton and Shaikh, who highlight the American concern in 1818 that American 'citizens would be subject to a "court consisting partly of foreign judges, not liable to impeachment under the authority of the United States" ': K. Hamilton and F. Shaikh, 'Introduction', in K. Hamilton and P. Salmon, (eds.), *Slavery, Diplomacy and Empire: Britain and the Suppression of the Slave Trade, 1807-1875* (Brighton: Sussex Academic Press, 2009), p. 8.

[21] Wheaton, *Enquiry*, p.39.

[22] Soulsby, *The Right of Search,* p. 10, p. 17. Soulsby also notes the role of John Quincy Adams in making this connection between impressment and the right of search in a slave trade treaty. The argument, broadly, was that abuse of the 'right of search' in war resulted in the impressment of American sailors. In relation to the American concern over British power, see also Grewe, who refers to the way that the campaign against the slave trade 'was used ... to secure international legal recognition of the British claim for dominion of the seas', see Grewe, *The Epochs*, pp. 568-569.

[23] Wheaton refers to the objection made by John Quincy Adams in 1823 to the possibility of extending the 'right of search' by treaty in 1823: Wheaton, *Enquiry*, pp. 91-93.

[24] Soulsby, *The Right of Search*, p. 9, p. 33.

[25] Soulsby, *The Right of Search.* p. 37; Wheaton, *Enquiry*, pp. 105-107.

[26] Soulsby, *The Right of Search*, p. 10.

and 3, operated in this area on the basis of legal principles, but ministers also spoke about the necessity of following the law for Britain to achieve its aims. Aberdeen explained the constraints on British policy as ones that were necessary for Britain to achieve its ambitions:

> If it were possible to suppose that this country alone could effect the abolition of the slave trade by its single exertions, we might deal with these questions more easily, but it is an undoubted fact that our only chance of effecting the abolition of that traffic is by the assistance of other countries. It is therefore, necessary, that in the execution of this duty we should do nothing to injure the rights of independent nations, or to violate public justice.[27]

Similar comments were also made by Peel, and even Palmerston argued that Britain should not 'violate the law of nations, or do anything which the treaties did not warrant'.[28] Aberdeen's intentions for the unofficial commission appointed in 1842 to review the instructions to naval officers concerning the slave trade also make the role of international law clear.[29] The aim, he specified, was to produce a 'Code of Instructions which shall be compatible with the law of nations, with the specific engagements of treaty, and with the municipal law of England'.[30] Similarly, Britain accepted that its general obligation to act within the law was unaffected by its motivation regarding slavery, and it agreed to pay compensation in specific cases, some of which involved the United States.[31]

Of course, the extent to which Britain always conformed to this stated intention to work within international law, in practice, is open to fair challenge. Certainly, British legality has been widely questioned by historians, although, crucially, this work does not in itself cast specific doubt on the law's impact in the case of the British-American relationship.

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[27] Aberdeen, HL, 7 April 1843, Vol. LXVIII, 654-661.

[28] Peel, HC, 21 March 1843, Vol. LXVII, 1218-1252; Palmerston, HC, 16 May 1845, Vol. LXXX, 490.

[29] This 'commission' consisted of Lushington, Rothery, Bandinel and Captain Denman: Aberdeen to Peel, 21 November 1842, Aberdeen Papers, Add. MS 43062, fols. 200-202.

[30] Aberdeen to Peel, 21 November 1842, Aberdeen Papers, Add. MS 43062, fols. 200-202.

[31] For example, Dodson advised that 'an eminent good should not be obtained otherwise than by lawful means' in the context of action against the slave trade: Dodson to Aberdeen, 8 April 1842, as contained in Palmerston Papers, SLT/18. On compensation generally, Aberdeen told Peel that: 'there are some cases in which compensation is manifestly due, and under the authority of our law officers, I have acknowledged': Aberdeen to Peel, 21 November 1842, Aberdeen Papers, Add. MS 43062, fols. 200-202. For one example involving compensation and the United States, see the case of the *Tigris*, where Aberdeen stated 'the act of the officer ... was not justifiable upon any principle of international law, or by any existing treaty': Aberdeen to Everett, 17 March 1842, PP, 1843 LIX, No. 140.

Drescher, however, must be generally right that 'the six-decade British campaign for the suppression of the slave trade entailed "imperialist" methods by mixtures of coercion and intimidation, stretching and breaching international law'.[32] Others, such as, for example, Semmel, Ryan, Lambert, and Law rightly point to the action taken against Portugal and Brazil in the mid-nineteenth century as evidence that Britain was prepared to act in a way that was, at best, legally debatable.[33] This work, though, whilst revealing in the context of wider slave trade policy, does not, however, mean that British policy did not work within international law in its dealings with the United States. Specifically, as seen in chapters 2 and 3, Britain and the United States accepted that international law was applicable in their relationship. Furthermore, there was a real question over whether the United States would be treated in the same way as some other states. As Huzzey observes, the fact that Britain felt able to act in such a way against Brazil did not mean it could do so with impunity against the United States.[34] Furthermore, despite these instances, Britain was, at least in the period, still ostensibly striving not to 'procure an eminent good, by means that are unlawful'.[35] New slave trade treaties were sought. The early 1840s saw, as Law points out, 'subsequent doubts and disputes over the legality of' attacks on the West African coast.[36] Macaulay's desire, to

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[32] S. Drescher, 'Emperors of the World', in D. R. Peterson, (ed.), *Abolition and Imperialism in Britain, Africa, and the Atlantic* (Athens, Ohio: Ohio University Press, 2010), chapter 5, p. 143.

[33] See, for example: Ryan, 'The Price of Legitimacy', pp. 231-256; Semmel, *Liberalism and Naval Strategy*, p. 39; A. Lambert, 'Slavery, Free Trade and Naval Strategy, 1840-1860', in K. Hamilton and P. Salmon, (eds.), *Slavery, Diplomacy and Empire: Britain and the Suppression of the Slave Trade, 1807-1875* (Brighton: Sussex Academic Press, 2009), chapter 3, p. 71; and R., Law, 'Abolition and Imperialism: International Law and the British Suppression of the Atlantic Slave Trade', in D. R. Peterson, *Abolition and Imperialism in Britain, Africa, and the Atlantic* (Athens, Ohio: Ohio University Press, 2010), chapter 6, pp. 150-151.

[34] Huzzey comments on the treatment of Brazil in 1845 in relation to the United States: 'Britain knew from experience that a similar violation of American sovereignty would have led to a bloody nose': R. Huzzey, *Freedom Burning: Anti-Slavery and Empire in Victorian Britain*, (Ithaca: Cornell University Press, 2012), p. 59. Semmel also refers to a possible distinction in Britain's approach to France and the United States, as compared to Portugal and Brazil: *Liberalism and Naval Strategy*, p. 39

[35] The words referred to were those of Lord Stowell, who said that: 'in short, to procure an eminent good, by means that are unlawful, is as little consonant to private morality as to public justice', Stowell, referred to in *The Westminster Review,* 'The African Slave Trade', pp. 153-154, and quoted in that article from the *British and Foreign Review*, October, (1839), p. 502. These words also appear to have been reflected in Dodson's advice, as referred to in footnote 31.

[36] Law, in fact, suggests that 1851-52 was a more significant point in terms of Britain turning away from international legality: 'Abolition and Imperialism', p. 169.

stop the slave trade by taking the 'law in our own hands, ... to break down, in fact, all barriers to international law', was criticised.[37]

The question then arises as to why there was nevertheless still an issue in British-American relations over the 'right of search' if, as stated, Britain accepted that its policy was restricted by international law. Indeed, the need for an explanation is only increased by the regularity and sharpness of the American complaints. This can be seen in the whole series of protests of the United States from 1839 onwards about British cruisers 'interfering' with American vessels around the West African coast, whether by 'visiting', 'searching', or 'detaining'.[38] Stevenson, for example, complained to Palmerston about British actions concerning the *Douglas,* the *Mary,* the *Iago,* the *Hero,* the *Tigris*, the *Seamew*, the *Jones*, and the *William and Francis* in the period between November, 1840 and April, 1841 alone.[39] British actions in these incidents, he alleged, were contrary to international law, and inflicting unnecessary commercial damage on lawful American trade.[40] In the case of the *Douglas*, by way of illustration, there was, he maintained, 'evidence of another unwarrantable search, detention, and ill-usage of an American vessel and her crew'.[41] Similarly, after dealing with the *Iago* and the *Hero*, Stevenson reiterated that 'there is no shadow of pretence for excusing, much less justifying, the exercise of' the right of search or detention.[42] Overall, a flavour of the strength of feeling on the American side can be gauged from Stevenson's analysis that these 'continued and unprovoked aggressions ..., so contrary to every principle of common justice

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[37] *The Westminster Review*, 'The African Slave Trade', pp. 152-154.

[38] See, for example, Stevenson to Palmerston, 14 August 1840, PP, 1842 XLIV, No. 241, Stevenson to Palmerston, 27 February 1841, PP, 1842 XLIV, No. 246, and Stevenson to Palmerston, 16 April 1841, PP, 1842 XLIV, No. 254.

[39] Stevenson to Palmerston, 13 November 1840, PP, 1841 XXX, No. 114 re the *Douglas* (between October 1839 and February 1840) and the *Mary* (in August 1839); Stevenson to Palmerston, 27 February 1841, PP, 1842 XLIV, No. 246 re the *Iago* and the *Hero*; Stevenson to Palmerston, 16 April 1841, PP, 1842 XLIV, No. 254 re the *Tigris*, the *Seamew*, the *Jones*, and the *William and Francis.*

[40] As a general matter, the United States asserted that it had an expanding lawful trade with West Africa: see, for example, Upshur to Commander Perry, 15 March 1843, PP, 1844 XLVIII, Enclosure in No. 29. The principle that loss *could* arise from stopping a ship does not appear to have been generally challenged in Britain. See, for example, the comment of Wellington (in this context) that: 'There can be no doubt that to detain a ship at sea at all, even to enquire from her her latitude and longitude, and whether she requires the assistance of waters, may be injurious. The detention may affect her arrival at her destination, her insurance, demurrage': Wellington Memorandum, 7 February 1842, Aberdeen Papers, Add. MS 43123, fols. 23-31.

[41] Stevenson to Palmerston, 13 November 1840, PP, 1841 XXX, No. 114.

[42] Stevenson to Palmerston, 27 February 1841, PP, 1842 XLIV, No. 246.

and right, and in violation of all the principles of public law', put at risk 'the amicable relations' of Britain and the United States.[43] In saying this, furthermore, he was only reflecting comment in the United States, such as that, for example, of Pickens, who Fox reported as having stated in Congress that Britain:

> has recently seized our vessels and exercised a power involving the right of search, under the pretext of suppressing the foreign slave trade, which, if persevered in, will sweep our commerce from the coast of Africa, and which is incompatible with our rights as a maritime power.[44]

The answer to this problem lies in the nature of the twofold British response to what was perceived as being the relatively new issue of ships falsely flying the American flag, rather than in any fundamental disregard of the 'freedom of the seas'.[45] Britain asserted that many ships belonging to treaty states were seeking to protect themselves from being searched by the Royal Navy by raising American colours to which they were not entitled.[46] Indeed, the practice appears to have reached such a level that, by mid-1839, Palmerston was sufficiently concerned to instruct Fox formally to tell the American government of the evidence that 'the flag of the United States is now resorted to by slave traders as a protection'.[47] As Palmerston himself put it in the case of the *Lark,* a ship condemned at Sierra Leone: 'The Captain of this vessel attempted to take advantage of the flag of the United States, in order to hide the fact, that the "Lark" was a Spanish vessel, engaged in the Spanish slave trade'.[48]

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[43] Stevenson to Palmerston, 16 April 1841, PP, 1842 XLIV, No. 254.

[44] Pickens, House of Representatives, February, 1841, when discussing the Report of the Committee on Foreign Relations, as reported in the National Intelligencer, in Fox to Palmerston, No. 12, 17 February 1841, FO 5/359, fols. 112-127.

[45] Fox noted to Forsyth in late 1839 that the issue had only become material in the prior 2-3 years: Fox to Forsyth, 29 October 1839, PP, 1840, XLVII, First Enclosure to No. 159.

[46] The aim of these ships was evidently to avoid search by British cruisers as an 'American' ship on the basis that there was no treaty for mutual search between Britain and the United States. Such ships were, of course, liable to being searched by the American Navy, but this was, presumably, perceived as carrying a much lower risk.

[47] Palmerston to Fox, 25 June 1839, PP, 1840, XLVII, No. 135. Fox duly complied and sent Forsyth a letter (running to 13 typed pages, excluding the enclosures) detailing 'the surprising and deplorable extent' to which slave ships were using the American flag to protect themselves: Fox to Forsyth, 29 October 1839, PP, 1840, XLVII, First Enclosure to No. 159.

[48] Palmerston to Fox, 22 August 1840, PP, 1841 XXX, No. 105.

Part of the cause of the dispute, undoubtedly, was that, for a brief period until February, 1841, Britain tried to tackle the problem by pursuing a policy akin to a 'right of search' under an 1840 arrangement made 'on the ground' on the West African coast with the United States.[49] Under this, Commander Tucker of the *Wolverene* and Lieutenant Payne of the *Grampus* reached an agreement for the purposes of 'mutual co-operation and assistance for the suppression of the slave trade'.[50] The key part of this arrangement consisted of a mutual agreement 'to detain all vessels under American colours, found to be fully equipped for, and engaged in, the Slave Trade'.[51] In other words, Britain appeared to have obtained what was, in practice, a peacetime 'right of search' over American ships. Palmerston certainly later used the arrangement as an excuse in some instances, and he also deployed it as an explanation for British actions in a parliamentary debate in 1843.[52] The crucial point, for present purposes, however, is that Stevenson seems to have been unaware of its existence until told about it by Palmerston in August, 1841.[53] This must have clouded the issue to some extent, making it appear to him, at least, that Britain was unilaterally operating a 'right of search'.

The other cause of the dispute, however, was the British practice of what was referred to later as a 'right of visit'. This involved the boarding by the Royal Navy of a suspected slave ship flying an American flag in order to check its nationality status from its papers. Thus, in the context of the false flags problem, Britain was in this way seeking to confirm that suspected slave ships showing American colours were truly 'American', as opposed to ones belonging to other states. The United States was not, however, given any proper explanation of the practice until August, 1841, and, when Britain did then comment, it did so in such a way that the policy was initially perceived by the Americans simply as a disguised

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[49] The arrangement seems to have ended in February, 1841 when the Admiralty were told to issue instructions to the Royal Navy to 'abstain from capturing United States' vessels engaged in the slave trade': Canning to Barrow, 27 November 1841, PP, 1842 XLIV, Enclosure to No. 278.

[50] Palmerston to Fox, 17 June 1840, PP, 1841 XXX, No. 89.

[51] Fifth Enclosure, Palmerston to Fox, 17 June 1840, PP, 1841 XXX, No. 89

[52] Re the *Iago* and the *Hero,* Palmerston argued that the actions were in line with the 1840 arrangement, but that 'such cases... cannot happen again, because positive orders were sent by the Admiralty ... not again to detain or meddle with United States' vessels': Palmerston to Stevenson, 5 August 1841, PP, 1842, XLIV, No. 264. Re the parliamentary debate, see Palmerston, HC, 2 May 1843, Vol. LXVIII, 1225-1238.

[53] Stevenson to Palmerston, 9 August 1841, PP, 1842, XLIV, No. 266.

'right of search'.[54] From this point, therefore, the question of 'visit', thereby, became the main subject of the ongoing British-American tensions over the 'right of search'. Stevenson contended that 'a right is now asserted ... over the vessels and flag of the United States, involving high questions of national honour and interest, of public law, and individual rights'.[55] Indeed, for him, Britain's distinction between the 'power' claimed and 'search' was 'wholly fictitious', for they were 'essentially the same'.[56] The point mattered, he declared, because the United States possessed a duty 'of guarding the rights of neutrality from every species of violation' - and in that duty was 'the best means' of keeping the peace and 'giving security to weaker communities under the shadow of impartial justice'.[57]

Of course, if correct, the American view that 'visit' meant 'search' would certainly have justified this anger, but the reality was more prosaic. Rather than being a blatant venture to introduce such a backdoor 'right of search' in disregard of legal rules, the 'right of visit' was instead a British attempt to deal with the issue of fraudulent flags on 'American' ships by using *existing* international law. Indeed, a hint of this can be seen in the way that, for some time, the term 'right of visit' itself was not used.[58] Crucially, Britain's key contention was for a right to check the nationality status of suspected slave ships that were flying American colours, but which it believed really belonged to states with which it *already* had a treaty 'right of search'. Thus, the 'right' claimed was grounded in *existing* treaty rights. Moreover, the presence throughout of legal advice is also consistent with British intentions to work *within* the law. The real problem with the United States came from the fact that the legal position of a British 'visit' to a ship that turned out to be truly 'American' was initially left obscure. There are indications that some in Britain believed that there was a wider general 'right of visit' to check the nationality of ships under international law, which would have covered 'true' and 'false' American ships. This was not, however, the basis for British policy, nor the legal advice which guided it, which looked to *existing* treaty rights - a point which

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[54] Stevenson to Aberdeen, 10 September 1841, PP, 1842, XLIV, No. 272. Soulsby notes that Palmerston had made an 'intimation' of the British position at a meeting with Stevenson in May, 1841: Soulsby, *The Right of Search*, p. 59.

[55] Stevenson to Aberdeen, 10 September 1841, PP, 1842, XLIV, No. 272.

[56] Stevenson to Aberdeen, 10 September 1841, PP, 1842, XLIV, No. 272.

[57] Stevenson to Aberdeen, 10 September 1841, PP, 1842, XLIV, No. 272.

[58] See, for example: Palmerston to Stevenson, 27 August 1841, PP, 1842, XLIV, No. 268; Stevenson to Aberdeen, 10 September 1841, PP, 1842, XLIV, No. 272; and Aberdeen to Everett, 20 December 1841, PP, 1842 XLIV, No. 281.

was finally clarified by the British acceptance that compensation would be due for any loss in cases where truly 'American' ships were visited in error. Ultimately too, it was the basis of the policy in the *existing* law that ensured its ultimate use and success. As these points gradually came to be set out for the United States, the differences narrowed, and the dispute subsided. An updated broad shared framework then emerged, and this served as the understanding beneath the making and operation of the joint cruising agreement made in the Webster-Ashburton Treaty, 1842.

The British attempt to handle the practical problem of false American flags through the use of existing legal rights is particularly evident from the close relationship between the advice received from the law officers of the Crown and the subsequent implementation of the 'right of visit' policy. Dodson gave relevant legal advice to Palmerston in 1839, and his opinions made three key points.[59] First, Britain had no right of 'visitation and search' in peace over what were 'in appearance and in fact' American ships. Second, if the American flag has been used falsely by a ship 'found engaged in the slave trade', then if that ship was 'in fact the property of the subjects' of a treaty state, it could be 'detained' and sent for adjudication to the relevant mixed commission under the treaty concerned. Furthermore, the 'result would justify the capture' in a case where a British cruiser seized an 'American' ship, sent it for adjudication to a mixed commission, and it was proved there that it belonged to a treaty state and was involved in the slave trade.[60] This was a crucial point, as it gave legal cover for 'detaining' a suspected 'American' ship, but, equally importantly, it did so by relying on the *existing* treaty right of search.[61] Lastly, third, that, as there was no 'right of search' in peace, except by treaty, the 'utmost caution', or 'great caution', should be used in 'visiting or detaining', or in the 'search or detention' of, any ships which were not 'under the flag' of a treaty state. Indeed, cruisers which seized such a ship on 'a suspicion which turned out to be

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[59] All references to Dodson's advice in this paragraph are to the following reports: Dodson to Palmerston, 22 June 1839, Parry, *Law Officers' Opinions*, Vol. 71, pp. 370-372, Dodson to Palmerston, 19 August 1839, Parry, *Law Officers' Opinions*, Vol. 71, pp. 385-388, and Dodson to Palmerston, 19 August 1839, Parry, *Law Officers' Opinions*, Vol. 71, pp. 392-394.

[60] Dodson's advice was given in the context of an example where the suspicion was that both the 'flag and papers' of a ship were fraudulent. This was important as the question leading to the advice was presumably designed to get an opinion which would permit ships to be sent for adjudication when suspicion remained even after its papers ostensibly supported the use of the American flag.

[61] Indeed, Martinez refers to the mixed commission in Sierra Leone condemning 'American-flagged ships on the grounds that they could be treated as Spanish under the law of nations' in the period of the 'late 1830s and early 1840s': Martinez, *The Slave Trade and the Origins of International Human Rights Law*, p. 86; see also her note 119, p. 213.

unfounded would thereby incur a serious responsibility'. Thus Dodson did not appear to be relying on any 'right' to visit what were truly 'American' ships, and, indeed, with his reference to 'serious responsibility' after a seizure, can be seen as suggesting that Britain would then be in the wrong. From the beginning, thus, no general 'right' that would cover true 'American' ships was being asserted in the legal advice. The dispute was really caused by the failure to grasp this point in the early despatches sent to the United States explaining British policy.

Nevertheless, the new instructions issued by Palmerston to the Admiralty in May, 1841 did take on board the main elements of Dodson's advice. Whilst the reason for the delay from 1839 is not apparent, it was probably, largely, to do with the intervening 1840 informal arrangement with the United States. Fresh clarity would have been needed following Palmerston's blanket order in 1841 to 'abstain from capturing American vessels engaged in the slave trade', which ended that 'agreement'.[62] Overall, the perceived legal sensitivity of the new instructions is indicated by the fact that there was a specific reference to the approval of the Queen's Advocate.[63] The instructions then provided that suspicious 'American' ships could be stopped, but, significantly, made no mention that this this was pursuant to a 'right':

> where there is good reason to suspect that a vessel ... may not be American, and may be engaged in Slave Trade, the mere fact that she hoists an American flag ought not to protect such vessel from being boarded for the purpose of examining her papers.[64]

The instructions then, effectively, restated the tenor of the 'result would justify the capture' advice from 1839. If, they went on, the stopped ship was found to have 'irregular and imperfect' American papers, or papers of a treaty state, it could be searched. Then, they continued, if, on that search, the ship was found to be engaged in the slave trade, it could be detained and dealt with, either by relevant treaty powers, or under the Act for the

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[62] Leveson to Sir John Barrow, 18 May 1841, enclosure in Palmerston to Fox, 24 May 1841, PP, 1842, XLIV, No. 259.

[63] Dodson's reports of 26 April 1841 and 8 May 1841 gave the approval that the draft instructions were 'correct and proper': Dodson to Palmerston, 26 April 1841, Parry, *Law Officers' Opinions*, Vol. 72, pp. 54-56; Dodson to Palmerston, 8 May 1841, Parry, *Law Officers' Opinions*, Vol. 72, pp. 61-62.

[64] Leveson to Sir John Barrow, 18 May 1841, enclosure in Palmerston to Fox, 24 May 1841, PP, 1842, XLIV, No. 259.

Suppression of the Slave Trade, 1839 if it did not have papers 'sufficiently regular' to entitle it to the protection of a flag.[65]

The United States understandably, however, failed initially to appreciate the legal reasoning within the British position as it was not fully explained for them. As a result, the diplomatic exchanges give the impression that international law was at the heart of a dispute over the 'right of search'. Palmerston's letter in August, 1841 to Stevenson simply made a distinction between 'searching a vessel' and 'examining her papers to see whether she is legally provided with documents entitling her to the protection of any country'.[66] He then expressed himself strongly in asserting that British cruisers would examine the papers of suspicious vessels to check their flag status. As he put it:'this examination of the papers ... is a proceeding which it is absolutely necessary that British cruisers should continue to practise ...The cruisers ... must ascertain, by inspection of papers, the nationality of vessels'[under suspicion].[67] Whilst Palmerston did then confirm that any ship, whose papers proved she was truly American, would be allowed to 'pass on, free and unexamined', he made no argument as to the legal basis for the initial examination.[68] Nor, did he refer in any way to any responsibility for Britain in such a situation. Unsurprisingly, therefore, Stevenson took the view that Britain was claiming a type of general 'power' of examination against all ships, and categorically denied that any such right existed under international law. For him, this was because, by the 'public law' and the 'usage of nations':

> it is expressly declared, that the vessels of all nations in time of peace, navigating the ocean, shall be exempt from every species and purpose of interruption and detention,

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[65] Leveson to Sir John Barrow, 18 May 1841, enclosure in Palmerston to Fox, 24 May 1841, PP, 1842, XLIV, No. 259. The Act for the Suppression of the Slave Trade, 1839, as relevant here, broadly, permitted slave ships, not 'justly entitled to claim the protection of the flag of any state or nation' to be dealt with by British courts. The Act's main purpose was to deal with the slave ships of Portugal in the dispute referred to earlier. The Act for the Suppression of the Slave Trade, 1839 was accessed through the very helpful website of Peter Davis on William Loney, RN, www.pdavis.nl, 'Background'.

[66] Palmerston to Stevenson, 27 August 1841, PP, 1842, XLIV, No. 268.

[67] Palmerston to Stevenson, 27 August 1841, PP, 1842, XLIV, No. 268.

[68] Palmerston to Stevenson, 27 August 1841, PP, 1842, XLIV, No. 268.

> unless engaged in some traffic contrary to the law of nations, or expressly provided for by treaty.[69]

Despite these sharp exchanges, Britain nevertheless worked within the ambit of international law in seeking to handle the resulting tensions with the United States. Faced with this dispute on coming into office, Aberdeen took the step of confirming the legal position with Dodson. Importantly, though, the key points of Dodson's previous opinions remained the same. Dodson advised that it 'cannot be maintained that Her Majesty's Cruisers would be justified, in boarding and detaining American vessels'.[70] Similarly, he again made clear that the act of 'visitation and search' was linked to an existing 'right' of 'visitation and search', this time referring to ships of treaty states or British vessels:

> It should, therefore, seem to follow, that where there is just ground to believe that the American flag is used for colourable purposes only, and the vessel is in reality the property of subjects of Her Majesty, or of any state that has conceded the right of visitation and search, the act of visitation and search is justifiable.[71]

Lastly, Dodson reiterated the tenor of the previous 'result would justify the capture' advice: 'As, however, the visitation and search can only be fully justified by the result, very great caution should be used, in order that the right may on no occasion be used on light or insufficient grounds'.[72]

Dodson's use of the words 'seem to follow' in the first of the above extracts suggest, on first glance, that he might here also have been saying that a British 'visit', in those circumstances, to what turned out to be a truly 'American' ship, would be 'justifiable'. If that was the case, then this may have represented a significant change in Dodson's thinking as he could have been envisaging a wider right encompassing 'American' ships. Whilst it is difficult to be certain, the better view, however, is that he did not mean this. Dodson refers in these extracts to 'visitation and search', which links the act concerned to a full right of 'visitation and search' over the ships of treaty states or British vessels - i.e. he does not appear to have been

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[69] Stevenson to Aberdeen, 10 September 1841, PP, 1842, XLIV, No. 272. Stevenson's main argument was on principle. He did, however, also contend that the claimed 'power' was not practical, asking, for example, what would be the 'restrictions' and 'limitations', what tribunal would judge the 'degree of suspicion' and 'national character', and what evidential 'security' would there be for Americans.

[70] Dodson to Aberdeen, 2 October 1841, Parry, *Law Officers' Opinions*, Vol. 72, pp. 152-155.

[71] Dodson to Aberdeen, 2 October 1841, Parry, *Law Officers' Opinions*, Vol. 72, pp. 152-155.

[72] Dodson to Aberdeen, 2 October 1841, Parry, *Law Officers' Opinions*, Vol. 72, pp. 152-155.

referring to just a self-standing 'right of visit'. Furthermore, the use of the word 'fully' in the second extract indicates that, if the result, say, went the wrong way, the action would be only partially justified. In other words, under international law, it would be partially unjustified and a wrong would have been committed. As will be seen, Aberdeen's subsequent letters to the United States are consistent with this interpretation.

The legal implications of British policy were also at the heart of Peel's intervention into the dispute around this time in October, 1841. Peel clearly considered that the law was uncertain, describing the 'right of visit' as one which 'might be according to the law of nations', or, one that was 'according to what ought to be in this special case the law of nations'.[73] In this, he was speculating, but crucially, he still considered the issue within the conceptual framework of international law. Thus, he saw some force in the American case, describing Stevenson's latest letter as being 'good ...upon the whole', and commenting that, whilst the 'right' was necessary to British efforts to curtail the slave trade, he also thought it 'liable to abuse, and entailing vexation and possibly injustice'.[74] Crucially, Peel also recognised the consequences of the legal uncertainty as being the ones that would properly follow within a system of law. Whether Britain was right or wrong, the major issue for Peel, accordingly, was the practical one of the complaints which would arise from the United States *irrespective* from the 'very general stoppage of American vessels on the high seas for the purpose of visit'.[75] The risk, he told Aberdeen, was then that the resulting incidents would, 'if not clearly defensible by the recognised law of nations soon involve us in a war', with the ensuing question being as to 'which party has the public law on its side?'[76] Peel's approach, thus, was to acknowledge the legal risk on whether there was a 'right' to visit American ships, and try to deal with the potential consequences of British action within the system of international law. In this, he was, therefore, clearly still seeking to handle the dispute within the established legal framework.

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[73] Peel to Croker, 29 October 1841, Confidential, Aberdeen Papers, Add. MS 43061, fols. 313-316.

[74] Peel to Aberdeen, 25 October 1841, Aberdeen Papers, Add. MS 43061, fols. 297-301. Whilst it is not specified, the timing suggests that Peel was referring to Stevenson's letter of 21 October 1841 (referred to below).

[75] Peel to Croker, 29 October 1841, Confidential, Aberdeen Papers, Add. MS 43061, fols. 313-316.

[76] Peel to Aberdeen, 25 October 1841, Aberdeen Papers, Add. MS 43061, fols. 297-301.

Peel's concern over these practical issues manifested itself in yet further instructions being given to the Admiralty, and, from there, to the British cruisers on the West African coast.[77] The aim of such instructions, Peel told Aberdeen, would be to reduce the risk of any further tensions arising over specific incidents involving American ships by preventing the 'abuse of discretionary power', and showing that Britain 'had voluntarily taken whatever precautions could be taken, against the abuse of rights of which we cannot forgo the exercise'.[78] The weakness in the British position under international law - and the policy itself - was also recognised in his acknowledgment that the United States would have complaints. Thus, a further objective for the guidelines, he continued, was 'to narrow as far as possible the grounds of American complaint, and to do our best, to reconcile the exercise of our own rights - with deference to the rights of friendly nations'.[79] Fundamentally, however, even with this gloss, the new instructions, effectively, just followed the previous instructions from Palmerston and the legal advice of 1839. American ships involved in the slave trade were not be stopped or visited, they maintained, but, if there was 'good reason' to suspect the fraudulent use of the American flag, then the ship concerned could be checked by 'visit or otherwise'.[80] Furthermore, they continued, if the suspicion was confirmed, then that the ship could be dealt with according to the relevant 'law and .... Treaties', but, if it was not (that is, the ship was instead accepted as truly 'American'), a full report was to be made to London 'at the earliest opportunity'.[81]

The contention that British policy was working within international law is also supported, indirectly, by the nature of the most prominent of the publications on the subject around this time. Whilst some were more favourable than others to the notion of the 'right of visit', the

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[77] FO to Admiralty, 27 November 1841, enclosed in Aberdeen to Fox, 30 November 1841, PP, 1842 XLIV, No. 278; Sir John Barrow to the Commanders, 7 December 1841, enclosed in Aberdeen to Fox, 11 December 1841, PP, 1842 XLIV, No. 280.

[78] Peel to Aberdeen, Private, 1 November 1841, Aberdeen Papers, Add. MS 43061, fols. 317-320.

[79] Peel to Aberdeen, Private, 1 November 1841, Aberdeen Papers, Add. MS 43061, fols. 317-320. Again, presumably with the object of assisting with complaints, Peel also wanted a report of every 'visit', both in the ship's log and by 'separate letter', and which gave details such as the 'grounds of suspicion', the 'length of detention', and whether the right was 'exercised' 'by examination of papers or otherwise'.

[80] FO to Admiralty, 27 November 1841, enclosed in Aberdeen to Fox, 30 November 1841, PP, 1842 XLIV, No. 278.

[81] FO to Admiralty, 27 November 1841, enclosed in Aberdeen to Fox, 30 November 1841, PP, 1842 XLIV, No. 278.

key point is that all addressed their arguments to the current legal position. In other words, there appears to have been an understanding that the conceptual framework for the dispute was existing international law, even if there was a debate about what that law was on the point in question. This was not a case, then, of assertions being made to the effect that Britain should trample over international law. By far, the best argued legal case was in Wheaton's 1842 work.[82] In this, Wheaton began by placing the issue firmly within the wider context of the 'free navigation of the seas, and the general balance of maritime power'.[83] He then made three key points. First, there was no distinction in international law between visit and search.[84] Second, there was no right in peacetime for 'visitation and search' under international law.[85] Lastly, Aberdeen's justification for a 'right of visit', namely that it was only to examine ships suspected of being British, belonging to a treaty state, or holding pirates, could be resisted.[86] Of those potentially more supportive of the British position, the most interesting was Robert Phillimore, who covered the issue briefly in a pamphlet published in 1842.[87] In this, Phillimore distinguished the 'right of search' from a right to 'verify' nationality, and argued for the latter on the basis that 'according to every principle of reason, ... a party interested in the observance of a law, should have the means of ascertaining the fact of its violation'.[88] This echoed Peel, but he nevertheless gave no authority in support of the proposition that such a right was an existing part of international law. There was also an angry denunciation of Cass in a pamphlet entitled 'Reply to an

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[82] Wheaton, *Enquiry.*

[83] Wheaton, *Enquiry,* p. 5.

[84] Wheaton, *Enquiry*, p. 122. Wheaton said that 'the 'right of visitation and search' is the appropriate technical term always used by British civilians', and that visit without search was 'an empty mockery'.

[85] Wheaton, *Enquiry,* p. 125. For Wheaton, thus, the American 'merchant and navigator': 'has, as we maintain, a perfect right to be exempt upon the high seas in time of peace, from visitation and search, and seizure and detention for trial, by foreign officers and foreign courts of justice'.

[86] Wheaton, *Enquiry,* pp. 132-144. In substance, Wheaton's third point was about whether or not there was a 'right of visit' against suspected 'American' slave ships that were subsequently found to be truly American. As will be seen, however, Britain effectively conceded this point, in any event, by offering compensation for any losses in such circumstances.

[87] Phillimore, *A Letter to the Right Hon. Lord Ashburton.*

[88] Phillimore, *A Letter to the Right Hon. Lord Ashburton,* pp. 46-47.

American's Examination of the "Right of Search" by an Englishmen'.[89] This work asserted that the right claimed by Britain to 'examine a suspicious vessel' was a 'self-evident necessity' and that the American position was 'inadmissible', but its arguments lacked legal substance.[90] Finally, Moylan's 1843 'The Right of Search' provided a good summary of the dispute, but added little that was new on the central point in issue.[91]

The combination of Britain's legal approach with the fact that the challenge from the United States was, self-evidently, based on law meant, however, that the circumstances were favourable to a solution once the British position was fully explained. The terms of the dispute were gradually narrowed in the diplomatic exchanges, and ultimately a workable compromise was reached, giving rise to an updated broad shared framework on the issue. On taking over from Palmerston in 1841, Aberdeen argued the British position on the basis of the necessity for 'visit' given the 'fraudulent use of the American flag', which, he said, gave the 'reasonable ground of suspicion which the law of nations requires'.[92] Quite which part of the 'law of nations' he was referring to here is unclear, but the point is rendered superfluous by his then further explanations of British policy. Britain, he maintained, renounced any claim 'to visit and search American vessels in time of peace'.[93] Instead, he continued, the suspicious ships were visited, not as 'American' ships, but rather as 'British vessels engaged in unlawful traffic', ships of treaty states, or as the ships of 'piratical outlaws'.[94] This was an application of Dodson's advice, which grounded the 'visit' concerned in an existing 'right' related to the ultimate nature, or nationality, of the ship concerned. Whilst maintaining his previous objections, Stevenson's response, importantly, also revealed common points of legal analysis. The United States, he argued, was objecting solely to interference with ships that were 'bona fide American', and was not 'denying' the

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[89] 'Reply to an American's Examination of the "Right of Search" by an Englishman' (April, 1842); the author was named as W. Ousely in the catalogue of the University Library, Cambridge. Cass had produced his own pamphlet on the issue, to which this was a reply.

[90] 'Reply to an American's Examination of the 'Right of Search' ', p. 12. Furthermore, the work contended that the then government of the United States must be 'regarded as out of the pale of the law of nations', and that only 'force' was 'respected by North Americans', pp. 62-64.

[91] D. C. Moylan, *The Right of Search as between France, America and Great Britain* (London: H. [Butterworth], 1843).

[92] Aberdeen to Stevenson, 13 October 1841, PP, 1842 XLIV, No. 273.

[93] Aberdeen to Stevenson, 13 October 1841, PP, 1842 XLIV, No. 273.

[94] Aberdeen to Stevenson, 13 October 1841, PP, 1842 XLIV, No. 273.

right of Britain to act in the case of ships not 'bona fide American', provided that 'it should be done without violating the principles of public law or the rights of other nations'.[95] In practice, this meant that the dispute, by late October, 1841, clearly only concerned the question of a British 'visit' to the subset of suspected American slave ships that turned out to be truly 'American', as opposed to also covering those that were falsely flying the American flag.

Britain then made the decisive final move in effectively resolving the tensions within the period when it accepted the reality of the legal advice from 1839, for the cases of 'visit' to genuine American ships, in Aberdeen's renowned letter of the 20th December, 1841.[96] In this, Aberdeen followed the substance of both the new Admiralty instructions, and his earlier letters, in setting out when suspected ships would be stopped. Crucially, however, Aberdeen also made clear that Britain would accept responsibility for inadvertently stopping what turned out to be truly American ships. As he put it: 'if, in spite of the utmost caution, an error should be committed, and any American vessel should suffer loss or injury, it would be followed by prompt and ample reparation'.[97] In other words, Britain was accepting liability for a wrong under international law in those circumstances. This, of course, reflected the substance of the advice already given to the British government (for example, Dodson's 'serious responsibility' in 1839), but it had not until now been officially passed on to the United States. The letter, thus, removed the sore at the centre of the dispute with the United States.[98] As will be seen, the technical issue of whether or not a British 'visit', to what turned out to be truly an 'American' ship, could nevertheless properly be said to have been

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[95] Stevenson to Aberdeen, 21 October 1841, PP, 1842 XLIV, No. 274. Aberdeen later used Stevenson's reference to 'bona fide' American vessels to help his case, questioning how this was to be proved: Aberdeen to Everett, 20 December 1841, PP, 1842 XLIV, No. 281.

[96] Aberdeen to Everett, 20 December 1841, PP, 1842 XLIV, No. 281. This letter was often used as a reference point in political discourse on the subject; see, for example, the comment of Lansdowne, who said that it 'contains a sound, clear, and dispassionate exposition of international law on this subject': Lansdowne, HL, 7 April 1843, Vol. LXVIII, 642-654.

[97] Aberdeen to Everett, 20 December 1841, PP, 1842 XLIV, No. 281.

[98] Interestingly, the letter also followed what, according to Cass, Guizot appears to have outlined as the respective positions of Britain and the United States. Cass wrote that Guizot felt that the 'American government does not advance the pretension that the mere hoisting of their flag, protects every vessel from examination, whether such vessel be American or foreign', and that he (Guizot) considered that the safeguards in the British position should be 'precise instructions' that the 'strongest suspicion amounting almost to conviction that [a ship] was not American' was needed before boarding, together with 'satisfaction' if a mistake was made: Cass to Webster, Copy, 12 March 1842, Aberdeen Papers, Add. MS 43123, fols. 97-105.

under some sort of a 'right' did still remain. This, however, was more apparent than real. Liability had been conceded. Some British politicians may have continued to call it a 'right' in some circumstances within the period, probably for presentational reasons, but what they were actually, loosely, referring to in real British practice was a 'right' asserted against British, treaty state, and pirate, ships. That this was the case can also be seen in the broad agreement of the United States to the legal principles in Aberdeen's letter, which can be reasonably inferred from the significant fact that, as Peel later noted, Aberdeen's despatch was formally unanswered.[99]

Thereafter, the legal analysis on the 'right of visit' represented by Aberdeen's December, 1841 letter formed the main understanding between Britain and the United States that lay behind the subsequent agreement for 'joint cruising' in the 1842 Treaty. Both Britain and the United States wanted to reduce the chances of serious American complaints in the future, and the question of further action to suppress the slave trade was one of the matters covered in the 1842 negotiations. Ideally, Britain had again wanted to solve the issue by agreeing a new slave trade treaty with the United States providing for a mutual 'right of search'.[100] Webster, though, soon ruled this out, and instead considered joint cruising as a way of dealing with what he viewed as one of the two issues of the 'most commanding interest and highest importance' in British-American relations.[101] This was undoubtedly a political compromise between the British desire for a treaty providing for a mutual 'right of search', and the American wish for their ships to be left entirely alone by British cruisers. Britain reluctantly agreed after accepting that the United States would not, at such time, 'become a party to any convention conferring a mutual right of search'.[102] Overall, the British approach was probably fairly summed up by Peel, who later described joint cruising as 'a step in

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[99] Peel, HC, 2 February 1843, Vol. LXVI, 86-91. In practice, Britain also noted, and presumably took comfort from, the fact that the United States was felt to be pursuing a similar policy of confirming nationality in the Gulf of Mexico: Aberdeen to Everett, 20 December 1841, PP, 1842 XLIV, No. 281, and Peel to Aberdeen, 31 October 1841, Aberdeen Papers, Add. MS 43061, fols. 308-310,

[100] Aberdeen to Ashburton, No. 2, 8 February 1842, *British Documents*, Vol. 1, 164; Peel also said he wanted to 'try again mutual right of search', and another 'arrangement' if that failed: Peel to Aberdeen, 25 October 1841, Aberdeen Papers, Add. MS 43061, fols. 297-301.

[101] Webster to Everett, 20 November 1841, *Diplomatic Correspondence*, Vol. III, 1278 (the *Caroline* was the other main issue referred to by Webster); Ashburton to Aberdeen, 25 April 1842, PP, 1843 LIX, No.149. Generally, Ashburton feared the influence of Cass and Wheaton on the issues related to the slave trade: Ashburton to Aberdeen, 10 February 1842, Aberdeen Papers, Add. MS 43123, fols. 34-35.

[102] Aberdeen to Ashburton, 26 May 1842, *British Documents*, Vol. 1, 184.

advance', presumably because it did put more obligations onto the United States.[103] The central aim of the joint cruising nevertheless was, simply, the practical one of lowering the risk associated with British policy by reducing the frequency with which 'American' flagged ships would be stopped by the Royal Navy through the presence of an American force. In Webster's words (as reported by Fox), it 'was adopted with the hope of rendering all further discussion of the subject unnecessary'.[104] Ashburton too thought that 'the vexed question of the right of visit will settle itself under this arrangement'.[105]

The December, 1841 framework nevertheless helped the process of agreeing joint cruising because it meant that there was an acknowledgment of the legal principles which Britain and the United States could both accept as being applicable to their operations. This mattered because the 1842 Treaty settlement, although for joint cruising, also envisaged separate activities where British 'visits' to American ships were still possible in some circumstances. Under its terms, Britain and the United States were each to maintain a separate 'naval force' off the African coast 'to enforce, separately and respectively, the laws rights and obligations of each of the two countries, for the suppression of the Slave Trade'.[106] The 'joint' element was, however, then catered for in the further requirement that each was also to ensure that the orders to their forces, whilst being 'independent', allowed some level of cooperation, with copies of the orders to the respective commanding officers to be exchanged.[107] The agreed legal principles were fundamental to these orders. Indeed, it is difficult to see that they could have been mutually acceptable if, for example, it had not been clear that Britain accepted liability for losses caused by wrongfully 'visiting' American ships. From the British side, the relevance of the legal principles was also expressly declared. Peel told Aberdeen that he wanted not the 'slightest compromise of the principles we have maintained

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[103] Peel, HC, 2 February 1843, Vol. LXVI, 86-91.

[104] Fox to Aberdeen, No. 19, 24 February 1843, FO 5/391, fols. 99-106.

[105] Ashburton to Aberdeen, 25 April 1842, PP, 1843 LIX, No. 149.

[106] Article VIII, 1842 Treaty, accessed through Project Avalon, Yale Law School, on 27/10/17, and all references to this treaty are to this version. There was no maximum size for the respective 'forces', but they were required to have a minimum of eighty guns, and to be 'sufficient and adequate'. The agreement on joint cruising was for five years from ratification, after which it could be terminated by notice by either Britain or the United States: Article XI, 1842 Treaty.

[107] Article VIII, 1842 Treaty. Britain was sent a copy of the American orders on 26 April 1843: Everett to Aberdeen, 26 April 1843, PP, 1844 XLVIII, No. 29 and enclosure. Britain sent a copy of the British orders on 29 December 1843: Aberdeen to Pakenham, 29 December 1843, PP, 1844, XLVIII, No. 50.

in respect to the right of visit' in the Instructions.[108] He also argued, later in 1844, that the Instructions 'maintained the principles for which this country had always contended', and were 'in substance the same' as those that had been issued previously.[109]

Three key points in the instructions sent to the respective fleets following the 1842 Treaty make clear just how central, in fact, the agreed legal principles were to the making, and successful operation, of these provisions for joint cruising.[110] First, both sets of instructions reiterated that there was no peacetime 'right of search' over American ships. The British instructions specified to British cruisers that it was 'no part of their duty to capture, or visit, or in any way interfere with' American ships. Similarly, the American ones said that the United States did 'not acknowledge a right in any other nation to visit and detain' American ships. Second, both acknowledged the 'right' of Britain to stop ships falsely flying the American flag. Thus, the British instructions noted that the American government were 'far from claiming that the flag of the Union should give immunity to those who have no right to bear it'. Again, similarly, the American ones stated that the American 'claim' of protection for their ships 'presupposes that that the vessel visited is *really* American'. Finally, and crucially, the instructions restated the workable compromise on 'visit'. The British instructions provided that, in limited circumstances where there was reasonable suspicion of the American flag being used falsely, a British officer 'is' to visit it for the purposes of inquiry.[111] There was not, however, any mention of there being a 'right' to make such a visit. The American ones then dealt with the consequences of such action. They observed that, whilst suspicious ships may be visited by American cruisers, 'this privilege does not

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[108] Peel to Aberdeen, 16 August 1843, Aberdeen Papers, Add. MS 43062, fols. 365-367.

[109] Peel, HC, 5 February 1844, Vol. LXII, 276.

[110] The references to the respective instructions in this paragraph are to: Instructions to British Cruisers, 12 December 1843, PP, 1844 XLVIII, First Enclosure in No. 50; and Instructions to American Navy, 15 March 1843, PP, 1844 XLVIII, Enclosure in No. 29.

[111] The British Instructions are slightly unclear on this, but they do seem to have envisaged separate visits where it was the only option. This seems to be the case from the following words before a description of the procedure of 'visit' to be followed by the Officer in command: 'In carrying this part of his instructions into execution, he will do right to leave the Commander of the United States cruiser to take the first step of visiting the vessel, and ascertaining whether she is entitled to bear the flag of his country, provided that in doing so no such delay is incurred as may enable her to escape altogether unvisited ...; and that most assuredly Great Britain never will allow vessels of other nations to escape visit and examination by merely hoisting an United States flag'. Peel also gave an example of a British visit alone to an American ship after the 1842 Treaty when answering a question in parliament on the visiting of American ships since the 1842 Treaty: Peel, HC, 8 July 1845, Vol. LXXXII, 140-142.

extend to cruisers of any other nation; that is it cannot be conceded to them as a *right*'. The key result from this was the acceptance of liability for any resulting losses. As the instructions continued, thus, 'whenever ... a cruiser of any other nation, shall venture to board a vessel under the flag of the United States, she will do it upon the responsibility for all consequences'. Significantly, they then added that 'these principles are believed to be well understood and settled'.

The continuing importance of the December, 1841 framework was also brought out in the debate in Britain about the effect of the treaty in the wake of Tyler's Presidential Message of December, 1842. British hackles were raised by the combined effect of Tyler's various comments on the nature of the joint cruising agreement. The United States, he asserted, had maintained its opposition to the British claim to 'visit and inquire', adding that by the 1842 Treaty 'all pretence' had been 'removed' for foreign 'interference with our commerce for any purpose whatsoever'.[112] Most importantly, he argued that the joint cruising settlement showed that the slave trade could be reduced 'without the interpolation of any new principle into the maritime code', which implied that the British position on the 'right of visit' was an attempt to make new international law'.[113] Tyler was, thus, appearing to add himself firmly to those in American politics who had sought to justify the joint cruising compromise by hinting that Britain had given up on its legal claims. Rives, for example, when explaining the decision of the Senate's Committee on Foreign Relations to approve the treaty, contended that the 'right to board and detain vessels sailing under the American flag' was a 'pretension of alarming extent, and which we have resisted, and must ever resist, as wholly unsustainable upon any just principle of public law'.[114] Fox later commented that Webster too had 'pretended to have obtained concessions from Great Britain'.[115] The combination of Tyler's message with these wider circumstances clearly increased the concern in Britain.

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[112] John Tyler: 'Second Annual Message', 6 December 1842, Online by Gerard Peters and John T. Woolley, The American Presidency Project: Http.//www.presidency.ucsb.edu/ws/?pid=29484, accessed on 24/2/18 at c10am.

[113] John Tyler: 'Second Annual Message', 6 December 1842, Online by Gerard Peters and John T. Woolley, The American Presidency Project: Http.//www.presidency.ucsb.edu/ws/?pid=29484, accessed on 24/2/18 at c10am.

[114] Rives, Speech in Senate, 17-19 August 1842, FO 5/384, fols. 57-64.

[115] Fox commented that the controversy in the United States was caused by Webster having 'pretended to have obtained concessions from Great Britain which they now find have not been obtained': Fox to Aberdeen, No. 19, 24 February 1843, FO 5/391, fols. 99-106; Fox to Aberdeen, No. 20, 24 February 1843, FO 5/391, fols. 107-113.

Campbell's comment to Palmerston following the President's message illustrates the anxiety. He was, he said, worried by the risk of further restriction on British maritime rights, such as an argument that, 'by our concession', search in war would also be seen as 'an interpolation in the maritime code'.[116]

British policy was, as a result, restated in the immediate diplomatic exchanges and forthcoming parliamentary debates. Aberdeen intended it to be passed on to the United States that he would not 'recede' from the position set out in his his letter of 20th December, 1841.[117] He then gave Fox a summary of his position, which succinctly captured the consistent elements of British policy traced back to Dodson's 1839 advice. Britain was not, Aberdeen reiterated, exercising a right to stop American ships, but, rather, ships suspected of belonging to treaty states, and damages would be paid if a mistake was made. The full text makes clear how strongly this was maintained:

> The President may be assured, that Great Britain will always respect the just claims of the United States. We make no pretension to interfere in any manner whatever, either by detention, visit, or search, with vessels of the United States, known or believed to be such. But we still maintain, and will exercise, when necessary, our right to ascertain the genuineness of any flag which a suspected vessel may bear .... If in the exercise of this right, either from involuntary error, or in spite of every precaution, loss or injury should be sustained, a prompt reparation will be afforded.[118]

Aberdeen made similar pronouncements in parliament. Again, he maintained the key points of British policy, namely the right concerned was a right to check the nationality of ships suspected of belonging to treaty states, not American ships, and, if American ships were stopped, liability was accepted.[119] Indeed, in a key passage, Aberdeen, again, made clear that the British right was based on existing treaty rights, noting that:

> It is not such a right as all nations have in capturing pirates, but it is a right, the exercise of which is accorded by treaty. And it is because we have reason to believe, that a vessel

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[116] Campbell to Palmerston, 27 December 1842, Palmerston Papers, GC/CA/32/1-2. From the rest of the letter, Campbell seemingly was concerned that Britain really had conceded ground on international law (albeit that this was not, he accepted, apparent from the face of the 1842 Treaty), and that the Presidential Message was a way of publishing this.

[117] Aberdeen to Fox, 18 January 1843, PP, 1844 XLVIII, No. 22.

[118] Aberdeen to Fox, 18 January 1843, PP, 1844 XLVIII, No. 22.

[119] Aberdeen, HL, 7 April 1843, Vol. LXVIII, 654-661.

> belongs to a country with which we have a treaty, that we have any ground for visiting her with the view of ascertaining her nationality.[120]

Peel too described the British position overall as not having given a 'concession' on the 'right of visit', and maintained that the claim to the 'right of visitation' made in Aberdeen' letter of 20th December, 1841 had not been 'relinquished'.[121] Peel and Aberdeen's position was then supported by Tyler's supplemental special message of February, 1843, which clarified that the United States had neither 'yielded' in their view, nor 'demanded' Britain give up their 'pretension'.[122] Instead, in Tyler's words, there had been 'a practical settlement of the question'.[123]

The one substantive issue that remained, of course, from Aberdeen's letter of the 20th, December, 1841 was that of whether or not Britain was exercising a 'right' when making a 'visit' to what turned out to be truly American ships. As argued above, this was more a point of presentation than substance, as Britain acknowledged that, in such circumstances, it would meet any losses. It does not affect, therefore, either the argument that Britain was handling the question of the 'right of visit' within international law, or that broadly agreed principles were important to the agreement for joint cruising. Two related points are, however, briefly worthy of note. The first is to acknowledge that one of the reasons for the issue remaining live was, of course, that there was a political discourse in Britain which argued that a 'right of visit' was a 'right' within international law separate from a 'right of search'. Peel, for one, as mentioned above, appears to have been sympathetic to this

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[120] Aberdeen, HL, 7 April 1843, Vol. LXVIII, 654-661. See also as a further example, Aberdeen's statement of his views in the letter to the 'commission' on producing a general Code of Instructions for British cruisers involved in suppressing the slave trade: Aberdeen to Lushington, Bandinel, Denman, Rothery, 14 December 1842, Peel Papers, Add. MS 40453, fols. 277-290.

[121] Peel, HC, 2 February 1843, Vol. LXVI, 86-91.

[122] Fox to Aberdeen, No. 25, 4 March 1843, FO 5/391, fols. 131-142 referring to Tyler's Message of 28 February 1843.

[123] Fox to Aberdeen, No. 25, 4 March 1843, FO 5/391, fols. 131-142 referring to Tyler's Message of 28 February 1843. This was also reflected in *The Westminster Review,* which commented that the question had been 'put aside for the present with no alteration of the position taken by either party in the controversy': 'Lord Ashburton and the American Treaty', *The Westminster Review*, Vol. 39, (1843), Article VIII, p. 198.

argument, but in this he was merely reflecting a wider public debate.[124] This meant that the question was often confounded by a lack of clarity on whether what was being discussed on a particular occasion was a 'right', as claimed by Aberdeen, against treaty states etc., or a wider 'right' of visit to confirm nationality as contemplated by Peel and others. The other point, with that in mind, is that it is nevertheless still clear that British policy in the period proceeded in line with Aberdeen's understanding. Aberdeen made the key statements of policy, and even Peel, as seen, referred to Aberdeen's letter of 20th December, 1841 as the one containing the British claim that had not been 'relinquished'. Furthermore, the instructions to the naval forces were also consistent with Aberdeen's position. Lastly, it is also significant that Aberdeen accepted Webster's reply to his restatement of the British position after Tyler's 1842 message. After an an extensive recounting of the positions held by Britain and the United States respectively, Webster argued that Britain had no 'right' to detain American vessels, that any detention of an American ship was 'therefore, a wrong, a trespass', and that compensation 'implies, at least in its general interpretation, the commission of some wrongful act'.[125] Crucially, as Soulsby observes, Aberdeen apparently believed that letter to be 'excellent', and 'that he did not know that he would wish to alter a word.'[126]

Finally, there is also one related further point that is suggestive of an influential role for international law in policy towards the United States on the slave trade, and which, thereby, indirectly supports the argument of the chapter that British policy worked within a shared

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[124] See, for example, the following three instances. First, Campbell, who considered that the 'right of visit' was a 'perfect right' under the law of nations, and that the 'object of this right of visit was simply to ascertain the genuineness of the flag, and whether the ship was entitled to carry the colours she hoisted'. For Campbell: 'This was an indispensable right, and it existed as much in time of peace as the right to search for arms etc., existed in time of war... . There was not the slightest ground for denying that right, or for asserting that it was not a perfect right': Campbell, HL, 7 April 1843, Vol. LXVIII, 661 et seq. . Second, in 1841-42, *Quarterly Review*, 'Letters of John Adams to his wife, ed. by C. F. Adams', p. 275: 'England says... that under the ancient and necessary common law of the sea, and according to the ordinary rules of common sense, we are entitled to satisfy ourselves that the ship which hoists those colours is really entitled to hoist them'. Third, in 1843, *Edinburgh Review*, 'History of the Progress of the Law of Nations', pp. 370-372: this argued that the right of visit was derived from 'necessity' and 'arose as soon as slave-trading was declared a crime, and the Christian world agreed to suppress it', and said that Wheaton's 'error' was 'occasionally confounding' the right of search for 'detention' with that for 'inquiry', and then assuming that Britain only pursued it by treaty.

[125] Webster to Everett, 28 March 1843, PP, 1844 XLVIII, No. 30.

[126] Everett to Webster, Private, 27 April 1843, noted in Soulsby, *The Right of Search*, p. 103, note 55, referring to G. Curtis, *Life of Daniel Webster*, II, 165.

framework of legal principles. This concerns the relationship between the policies of Palmerston and Aberdeen. Soulsby considers that 'Aberdeen also appeared to believe that the government had considerably modified the policy of its predecessor', referring to speeches of Aberdeen in parliament in 1843.[127] He then argues that, in fact, the claims of Palmerston and Aberdeen 'amounted to the same thing', and that Aberdeen's 'renunciation of the right of visit was, in short, a diplomatic fiction'.[128] Whilst Aberdeen did not, as seen, purport to reject Palmerston's 'right of visit' in the way suggested, Soulsby's wider point is nevertheless interesting and correct: there was a continuity in British policy. Palmerston and Aberdeen were both arguing for a similar policy of 'visit', with the main difference being, as noted, that it was Aberdeen that explained it properly to the United States. This consistency is less surprising, though, when it is put into the context that both Palmerston and Aberdeen were relying on, effectively, the same legal advice. Of course, there were differences in quite how each individual used that advice, as there always is, but Dodson's interpretation of the law on the 'right of visitation and search' ensured that the instructions to British cruisers changed little once the 1840 informal arrangement had been abandoned in February, 1841.

The Creole

The *Creole* incident gave rise to further issues that placed international law at the centre of British-American relations. The case concerned the fate of American 'slaves' on board a ship, the *Creole,* following a mutiny and their subsequent arrival in the Bahamas in November, 1841.[129] The United States argued that, given that the Creole was in British territory, Britain had been under an obligation to assist with the regaining of control over the ship and its 'slaves'. This contention was based on the 'comity of nations', which it asserted meant that American jurisdiction and laws (in particular, those on slavery) should have been respected on the *Creole* in the Bahamas. The *Creole,* thus, touched the wider question of how far international law could operate to protect a state's jurisdiction over a ship when it was in foreign territorial waters. As with the 'right of search', the United States was, thus, seeking to keep its ships as detached as possible from foreign intervention. Britain, however,

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[127] Soulsby, *The Right of Search*, pp. 64-65.

[128] Soulsby, *The Right of Search*, pp. 64-65.

[129] The word 'slaves' will be placed in inverted commas in this section, as the status of the individuals concerned as freemen or not was at the heart of the dispute.

rejected the American claim. The British position, instead, was that the 'slaves' on the *Creole* were free in the Empire, and that the 'comity of nations' did not require assistance to be given. In the end, the main ongoing impact of the *Creole* in British-American relations was not the particular case itself, but the wider question of how similar instances would be dealt with in the future. The United States wanted assurances over the position of slaves on board American ships that were forced into British harbours. The purpose of this section is to show how the 'comity of nations' was central to British policy in relation to the compromise that was reached. It argues that Britain did not contest the principle of 'comity' itself, but, rather, its application where slavery was involved. British policy, as a result, was able to handle the issue within a broad framework of law shared with the United States, and find sufficient flexibility within the principle for a workable settlement to be found.

The main facts concerning the *Creole* can be summarised relatively briefly.[130] The *Creole* itself was an American ship intending to carry passengers, tobacco and 'slaves' from Richmond in Virginia to New Orleans as part of the lawful domestic coastal slave trade of the United States. During the voyage, however, some of the 'slaves' rebelled, took control of the ship, and forced it to go to the British possession of the Bahamas. One passenger was killed and several others were injured during the incident. The British authorities became involved at the request of the local American Consul, following the arrival of the *Creole* in the port of Nassau, and took nineteen 'slaves' believed to have been involved in the 'murder and assault' into custody. In relation to the nineteen, it is also important, as Webster observes, that their 'surrender' to the United States at this time was 'refused' on the basis that instructions were to be requested first from London.[131] In the view of the British government, the remaining hundred or so 'slaves' were, however, free from restraint by the British authorities, and the vast majority of them then left the *Creole* and did not return. The circumstances of these 'slaves' were, however, a key point of contention with the United States. Webster saw British agency in the facts of this crucial stage as being rather more positive, commenting that it was 'through the interference of the colonial authorities' that these 'slaves' were 'liberated, and encouraged to go beyond the power of the master of the

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[130] The summary in this paragraph is, except where indicated by separate footnote, taken from Aberdeen to Everett, 18 April 1842, PP, 1843 LIX, No. 146. Further details are available in A. Downey, *The Creole Affair*, (London: Rowman and Littlefield, 2014), E. Jervey, and H., Huber, 'The Creole Affair', *Journal of Negro History*, 65 (1980), pp. 196-211, and H., Jones, 'The Peculiar Institution and National Honor: The Case of the Creole Slave Revolt', *Civil War History*, XXI, (1975), pp. 28-50.

[131] Webster to Everett, 29 January 1842, *Webster Papers,* pp. 177-185.

vessel, or the American Consul, by proceedings which neither of them could control'.[132] Finally, the nineteen 'slaves' in custody were held then until a subsequent court hearing in April, 1842, following which, for the reasons to be set out below, they were released.[133]

The *Creole* gave rise to a dispute with Britain because it was perceived by many in the United States that the British actions damaged American interests.[134] There was the obvious precedent for slave rebellion.[135] More importantly, however, there was also a practical concern, emphasised by Ashburton, over the risk of American ships being forced in the future into the harbours of the Bahamas, and the question of what then would happen to any slaves that were being carried by such ships.[136] Some Americans argued too that the case damaged the national honour of the United States.[137] The main subject in the dispute was the implication for the future of the actions of the British authorities towards the 'slaves' on the *Creole*. In short, the United States contended that it had been the 'plain and obvious duty' of Britain to 'assist' the American Consul to achieve the return of the 'slaves' to the United States under the 'duties imposed by that part of the code regulating the intercourse of friendly nations, which is generally called the comity of Nations'.[138] This would then have allowed the relevant 'slaves' to be tried for their alleged crimes in the United States. The United States, therefore, wanted some agreement with Britain as to what would be done in future similar cases. There was, in addition, one further aspect to the problem. For a period after they had been taken into British custody, there was the specific issue of whether the nineteen detained 'slaves' would, in fact, be sent to the United States. In the end, Britain

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[132] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185.

[133] Darling, American Consul, Nassau to Webster, 16 April 1842, *British Documents*, Vol. 1, 188.

[134] There is a full discussion of the varying reactions in the United States in Downey, *The Creole Affair*, chapter 5, and Jones, 'The Peculiar Institution', pp. 28-50.

[135] Jones, 'The Peculiar Institution', p. 36.

[136] Ashburton told Aberdeen that the United States wanted clarification on the future position of ships forced into British ports, for example, by bad weather, and that a settlement was needed for the sake of the 'interests of the great southern coasting trade': Ashburton to Aberdeen, No. 2, 25 April 1842, *British Documents*, Vol. 1, 174, and Ashburton to Aberdeen, No. 20, 9 August 1842, *British Documents*, 215.

[137] Jones,'The Peculiar Institution', pp. 33-37.

[138] Webster to Everett, 29 January 1842, *Webster Papers,* pp. 177-185. The American case was stated directly in Everett to Aberdeen, 1 March 1842, PP, 1843 LIX, No. 139. That letter relied for the substance of its arguments on the contents of Webster to Everett, Ibid..

decided that they would not, but this matter was not the central focus of the dispute, which, as noted, was directed towards the future.[139]

The striking nature of the main American argument in the *Creole* can be lost in the detail. The United States was contending that Britain was obliged under the 'comity of nations' to assist it in the maintenance of American laws, even within British territory, and in the context of slavery. The necessity giving rise to the presence of the *Creole* in the Bahamas was also an important factor in Webster's reasoning.[140] The core argument, thus, struck right at the heart of British jurisdiction in one of its own possessions. As it was argued by Webster, the British authorities in Nassau should have helped the American Consul to retake the *Creole* for the master and crew, 'and to take the mutineers and murderers to their country to answer for their crimes before the proper tribunal'.[141] Webster's premise was that the *Creole*, whilst in the Bahamas, was nevertheless still within American jurisdiction for purposes related to the ownership of the 'slaves', and the alleged mutiny.[142] As he put it:

> We know of no ground on which it is just to say that these coloured people had come within, and were within, British territory, in such sense as the laws of England affecting and regulating the conditions of persons could properly act upon them.[143]

Indeed, for him, it would have been 'no more than just' for Britain to have treated the *Creole* as still 'on her voyage, and entitled to the succour due to other cases of distress whether

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[139] In addition, there was also a claim for compensation to be given to the owners of the 'slaves' on the basis that they had been deprived of their 'property' by the actions of the British authorities - a claim which was finally settled in 1855. This is not covered here, however, as the section is considering, instead, the way the issue between the British and American governments was dealt with in the period. For further details of the property claim, see Jones.,'The Peculiar Institution', p. 47, and Downey, *The Creole Affair*, chapter 8; Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185.

[140] As put by Webster, the people on board were, except for the 'mutineers', 'not there voluntarily': Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185. Webster also said later that: 'The presumption [as to the applicability of the comity of nations] is stronger... in regard to vessels driven into foreign ports by necessity, and seeking only a temporary refuge': Webster to Ashburton, 1 August 1842, *British Documents*, Vol. 1, 216.

[141] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185.

[142] Webster also gave an important fuller explanation of his understanding of the impact of the 'comity of nations' in this context later in 1842: 'A merchant vessel enters the port of a friendly State, and enjoys whilst there the protection of her own laws, and is under the jurisdiction of her own Government, not in derogation of the sovereignty of the place, but by the presumed allowance or permission of that sovereignty. This permission or allowance is founded on the comity of nations': Webster to Ashburton, 1 August 1842, *British Documents*, Vol. 1, 216.

[143] Webster to Everett, 29 January 1842, *Webster Papers,* pp. 177-185.

arising from accident or outrage'.[144] The 'persons on board the "Creole" ', he continued, 'could only have been regarded as Americans', and to give an 'English character' or 'English privileges' to them, was not 'justified'.[145] In other words, British policy needed to respect the fact that British laws did not prevail in all circumstances within British jurisdiction. Put bluntly, this meant that the British abolition of slavery should not have been the pretext for the 'slaves' on the *Creole* obtaining their freedom.

The American argument relied, as seen, on the principle of the 'comity of nations'.[146] For Webster, 'comity' involved the duties and obligations involved with the notions of 'hospitality', 'assistance', and certainly 'no unfriendly interference' between friendly nations.[147] It was, he considered, a 'doctrine' derived from the 'laws and usages of nations', and was 'a part, and a most important and valuable part, of the law of nations, to which all nations are presumed to assent, until they make their dissent known'.[148] This presumption of consent was important in that, whilst Webster accepted that nations could refuse to accept the obligations from 'comity', he considered a 'positive' measure was needed to opt out.[149] For him, thus, Britain had the obligation to assist the return of the 'slaves' in the *Creole* because it had not rejected 'comity', and it was not possible to 'conceive how any other course could be justly adopted, or how the duties imposed by that part of the code regulating the intercourse of friendly States, which is generally called the comity of nations, can otherwise be fulfilled'.[150] It was certainly this notion of the 'comity of nations' that made the American case even arguable. Without it, there could have been no issue as to whether Britain should assist in its own territory with the enforcement of American law. In this

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[144] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185.

[145] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185.

[146] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185; Webster to Ashburton, 1 August 1842, *British Documents*, Vol. 1, 216.

[147] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185.

[148] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185, and Webster to Ashburton, 1 August 1842, *British Documents*, Vol. 1, 216. For Webster, it was 'upon' the comity of nations 'as its solid basis, that the intercourse of civilised States is maintained': Webster to Ashburton, 1 August 1842, Ibid..

[149] Webster to Ashburton, 1 August 1842, *British Documents*, Vol. 1, 216. Story also referred to the fact that a nation was 'at liberty to concede or refuse' matters of 'comity': Story to Webster, 26 March 1842, re the *Creole, Webster Papers*, pp. 525-527 (Story was a member of the U.S. Supreme Court).

[150] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185.

direct sense, then, British policy was being forced to respond to an issue that was created by international law.

The dispute with Britain arising from the *Creole* was not, however, about whether the 'comity of nations' existed, but, instead, about what it entailed in such circumstances. 'Comity' as a principle was undoubtedly recognised by Aberdeen in his main letter on the subject to Everett of 18th April, 1842, and by Denman, the then Lord Chief Justice, in a parliamentary debate on the *Creole*.[151] Britain, however, took the view that the 'comity of nations' nevertheless did not require it to assist in circumstances such as the *Creole* in the way demanded by the United States. Aberdeen appeared to restrict the obligation required to that of not taking any positive action.[152] Denman and Phillimore, alternatively, brought in notions of 'justice', 'benefit', and 'injury', with Phillimore noting in his pamphlet on the *Creole* that it was an 'imperfect', not a 'perfect' obligation.[153] Indeed, for Phillimore, rejection of slavery was so entrenched within British policy that 'comity' was simply not pertinent.[154] Interestingly, this view on the 'comity of nations' also received support from an American pamphlet, which gained some prominence in Britain, by William Channing. Channing's 'The Duty of Free States or Remarks Suggested by the Case of the Creole' contended that 'comity' was a 'vague, unsettled law', which 'ought' not to apply to Britain in this case when 'lives and liberties are at stake'.[155]

These differences in the understanding of 'comity' did not, however, matter to the making of British policy on the immediate question for London from the *Creole* concerning the fate of the nineteen 'slaves'. This was because the action of taking the 'slaves' into custody had already taken place, and the remaining issue was whether to deliver them from there to the

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[151] Aberdeen to Everett, 18 April 1842, PP, 1843 LIX, No. 146; Denman, HL, 14 February 1842, Vol. LX, 321-324.

[152] Aberdeen to Everett, 18 April 1842, PP, 1843 LIX, No. 146.

[153] Denman considered that the 'comity of nations' could only be applicable on the 'supposition that the laws of all nations should be reasonable and just': Denman, HL, 14 February 1842, Vol. LX, 321-324. Phillimore commented, of 'comity', that: 'you lie under an imperfect, if not a perfect, obligation to give effect to his laws within your dominions, when, by so doing, you would benefit his subjects, and could not injure your own': R. Phillimore, 'The Case of the Creole Considered in a Second Letter to the Right Hon. Lord Ashburton', (London: J. Hatchard, 1842), pp. 8-9.

[154] Phillimore, R. 'The Case of the Creole', p. 12, pp. 20-21, p. 30, p. 37.

[155] W. E. Channing, *The Duty of Free States or Remarks Suggested by the Case of the Creole*, (London: J. Green, 1842), p. 26.

United States.[156] Dodson, Follett, and Pollock, the then three law officers of the Crown, provided a clear opinion that the nineteen 'slaves' could not be returned to the United States.[157] They advised that there was no principle of international law or treaty which required Britain to 'give up' (i.e. extradite) persons wanted by foreign states in respect of alleged offences.[158] Nor, they continued, would it be lawful for the British government to voluntarily 'deliver up' the nineteen 'slaves' then held in custody.[159] Similar opinions were also expressed in a debate in the House of Lords, and by Phillimore in a pamphlet published in 1842.[160] Aberdeen undoubtedly felt constrained by the unity of legal opinion in parliament in favour of the view that the 'delivery' of the 'accused persons' to the United States would be 'contrary to law', commenting to Ashburton that there was no choice 'as to the course of the government'.[161] He, therefore, accordingly, followed both the advice of the law officers, and the opinions in the House of Lords, when replying formally on the *Creole* to the United States on the 18th April, 1842. The 'slaves' concerned became 'free' on arrival in Nassau, he asserted, and could neither be tried for offences committed outside British jurisdiction nor extradited to the United States.[162]

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[156] Indeed, the key opinion from the law officers of the Crown had been given by the time Everett's letter setting out the American position was received in March, 1842.

[157] Dodson, Follett, and Pollock to Stanley, 29 January 1842, Parry, *Law Officers' Opinions*, Vol. 72, pp. 172-194. The law officers also advised, broadly, that the nineteen could not be tried in the Bahamas on the grounds that no alleged offences had been committed either by British subjects or within British jurisdiction, and that 'piracy' was not involved as the 'intent' and 'object' of the 'slaves' was to gain their 'freedom'. The law officers also expressed the view that the authorities in the Bahamas had acted correctly, on the facts as explained to them, both by reference to international and domestic law. On this point, it should be observed, though, that a key factual assumption made elsewhere in their opinion, which may have been relevant to this advice, was that the 'slaves were not liberated by the British authorities nor does it appear that any control was exercised by them, in this respect, over the crew' - such a factual assumption was, as noted above, contradicted by Webster's description of the incident.

[158] Dodson, Follett, and Pollock to Stanley, 29 January 1842, Parry, *Law Officers' Opinions*, Vol. 72, pp. 172-194 at pp. 184-185.

[159] Dodson, Follett, and Pollock to Stanley, 29 January 1842, Parry, *Law Officers' Opinions*, Vol. 72, pp. 172-194 at pp. 187-194.

[160] Brougham, HL, 3 February 1842, Vol. LX, 27-30, and HL, 14 February 1842, Vol. LX, 317-320, Denman, HL, 14 February 1842, Vol. LX, 321-324, Campbell, HL, 14 February 1842, Vol. LX, 324-326, and Aberdeen, HL, 14 February 1842, Vol. LX, 320-321; Phillimore, R.'The Case of the Creole'.

[161] Aberdeen to Ashburton, 3 March 1842, Aberdeen Papers, Add. MS 43123, fols. 59-62.

[162] Aberdeen to Everett, 18 April 1842, PP, 1843 LIX, No. 146.

Conversely, the various strands of opinion on what 'comity' entailed did provide the key flexibility for an agreement to be reached around the main part of the dispute, namely that concerning future situations similar to the *Creole*. This general subject had been added to Ashburton's brief for the negotiations around the 1842 Treaty because Britain recognised the seriousness with which the United States viewed the issues involved.[163] British policy, thus, was to try to calm the tensions by providing some security to the United States, whilst nevertheless preserving, to the greatest extent possible, the vital principle, from Britain's perspective, that slaves became free when on British territory. The solution ultimately adopted was to deploy the common strand of opinion, in the respective conceptions of 'comity' of Britain and the United States, that emphasised the duty of not acting positively towards, or 'interfering' with, American ships forced into British ports. This benefitted the United States as it reduced the practical risk of slaves on board American ships in British territory gaining their freedom through official action. It also worked for Britain in that it meant that no positive action was required from it to keep individuals in slavery. In this way, British policy was, thus, using a shared legal principle as the basis of the compromise necessary to produce a settlement. Furthermore, the use of an abstract legal principle must surely also have facilitated the process of resolving the tensions by allowing Britain and the United States to move away from the actual facts of the controversy that had caused the problem in the first place.

The principle of 'no interference' was able to form the basis of a solution because it was present in both the British and American conceptions of what was meant by 'comity' in the *Creole.* The opinion of the law officers, Webster's letter of the 29th January, 1842, and Aberdeen's letter of 18th April, 1842 are all key documents for understanding how 'no interference' came to be a shared principle in this case. From Britain's perspective, the basis for the compromise was an opinion of the law officers permitting 'no interference' under British law. The officers were asked whether the relevant British authorities had a duty in the *Creole* to check whether the 'slaves' were 'about so to return to the United States of their

[163] Aberdeen told Ashburton that 'we must do the best we can to put the matter on a right footing and to obviate irritation and resentment': Aberdeen to Ashburton, 3 March 1842, Aberdeen Papers, Add. MS 43123, fols. 59-62. See also, Ashburton to Aberdeen, 28 April 1842, *British Documents*, Vol. 1, 179.

own free and unbiased will', given that they knew that 'slaves' were on board.[164] Crucially, whilst not based on 'comity', the law officers advised that there was no such duty:

> We think that the Officers of the Customs might lawfully grant a clearance to the 'Creole' to return to the United States and that it was no part of the duty of the Officers of the Customs to ascertain whether, the slaves were returning to America, of their own free will or otherwise.[165]

This was important as it meant that a policy of 'no interference' was legally possible as a matter of British law. Webster's letter then makes clear that, whilst the United States had high expectations for positive action, 'no interference' was also embraced within one of the two main parts it saw in 'comity':

> It appears to this Government, that not only is no unfriendly interference by the local authorities to be allowed, but that aid and succour should be extended in these as in other cases which may arise affecting the rights and interests of citizens of friendly states.[166]

This reference to 'no unfriendly interference' provided the key common theme with Aberdeen's letter. For Aberdeen had commented on when an 'appeal' to the 'comity and usages of nations' might have had 'good reason', whilst rejecting it on the facts of the *Creole* itself. It was important in the *Creole*, he argued, that the 'slaves' had received no 'encouragement' or 'invitation' from Britain to 'capture' the ship. Indeed, in rejecting Everett's analysis on the 'slaves' not taken into custody, he also saw it as important that the British authorities had been 'passive', commenting that they had been 'merely left in the exercise of the freedom they had obtained, and were consequently not prevented from going on shore'.[167] In other words, for Aberdeen, 'comity' could be satisfied by 'no interference'.

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[164] The full question asked of the law officers was: 'Whether the officers of Customs at the Port of Nassau could lawfully grant to the 'Creole' a clearance, and the ship's papers necessary to enable her to leave that port on her return to the United States; she having on board slaves, or persons who in the United States would be regarded and dealt with as slaves, and if so, whether it would or would not be the duty of such officers of Customs to ascertain whether such slaves were about so to return to the United States of their own free and unbiased will': Dodson, Follett, and Pollock to Stanley, 29 January 1842, Parry, *Law Officers' Opinions,* Vol. 72, pp. 172-194 at pp. 178-179.

[165] Dodson, Follett, and Pollock to Stanley, 29 January 1842, Parry, *Law Officers' Opinions,* Vol. 72, pp. 172-194 at p.187.

[166] Webster to Everett, 29 January 1842, *Webster Papers*, pp. 177-185 at p. 181. See also Webster to Everett, 1 August 1842, *Webster Papers*, pp. 658-665 at p. 665, where a similar distinction is maintained, although, as will be seen, by this point, 'no interference' appears to have been already decided upon as a solution given the draft texts working on it in June, 1842.

[167] Aberdeen to Everett, 18 April 1842, PP, 1843 LIX, No. 146.

This provided the link with Webster as 'no interference' also necessarily met the 'no unfriendly interference' test.[168]

The practical importance of the common acceptance of 'no interference' within the 'comity of nations' can then be seen in the final arrangement made by Ashburton and Webster in 1842.[169] Ashburton suggested wording in June that Britain would 'abstain from any interference' with American laws (meaning here those concerning slavery) established in the United States, and that governors in British colonies would be 'instructed... to take care that no provocation or excitement, which they may be able legally to prevent shall be suffered with relation to condition of the coloured population'.[170] In response, Webster then made explicit the link to international law (implicit in Ashburton's text) by arguing that Britain should not interfere with American law for its citizens wherever the United States 'has jurisdiction, according to the laws of nations' (meaning here the 'comity of nations').[171] For him, thus, the British authorities should undertake that:

> no interference be made or suffered, which can be legally prevented in relation to the condition of coloured persons within the limits of the two countries respectively, not subjects of Her Majesty, and not found within British jurisdiction as aforesaid [meaning here 'exclusive' British jurisdiction].[172]

The principle of 'no interference', as present here, was then carried through into the final text. Ashburton placed his letter within the context of the joint interest of Britain and the United States in 'maintaining sound and pure principles of international law', given that they

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[168] 'No interference' also dealt for the future with Webster's contention that, on the facts in the *Creole*, Britain *had* assisted the slaves gain their freedom, albeit that this was a key point of factual dispute with Aberdeen in the *Creole* itself (as noted above).

[169] Although, as Downey and Jones point out, Ashburton lacked specific instructions on the Creole settlement, the common principle of 'no interference' did, however, give him sufficient authority to act given that, as shown, it was present in Aberdeen's letter of April, 1842 (which Ashburton had seen - Ashburton to Aberdeen, No. 6, 12 May, 1842, *British Documents*, Vol. 1, 185): Downey, *The Creole Affair*, p. 121, and Jones, 'The Peculiar Institution', pp. 42-44.

[170] Ashburton Draft Text, *British Documents*, Vol. 1, 199; as contained in Ashburton to Aberdeen, No. 12, 29 June 1842, *British Documents*, Vol. 1, 198.

[171] Webster, Draft Text, *British Documents*, Vol. 1, 200; as contained in Ashburton to Aberdeen, No. 12, 29 June 1842, *British Documents*, Vol. 1, 198.

[172] Webster, Draft Text, *British Documents*, Vol. 1, 200; as contained in Ashburton to Aberdeen, No. 12, 29 June 1842, *British Documents*, Vol. 1, 198.

were ‘covering all the seas of the world with their commerce’.[173] Whilst London would need to be involved in any further arrangement given the legal principles involved, there was, in his words, to be ‘no officious interference with American vessels driven by accident or by unlawful violence’ into British ports. Instead, ‘the laws and duties of hospitality shall be executed’, and these did not ‘require’ or ‘justify’ any enquiry by British officials ‘into the state of persons or things on board’ other than ‘may be indispensable to enforce the observance of the municipal law of the Colony, and the proper regulation of its harbours and waters’. As no doubt was expected, Webster then, accordingly, accepted this means of resolving the matter on behalf of the United States.[174]

British policy had then achieved a settlement of the main dispute following the *Creole* on the basis of a compromise on what the ‘comity of nations’ would entail in similar future circumstances. The political reaction in Britain to the arrangement indicates that it was widely perceived that a solution within the law had been reached . *The Quarterly Review* believed that Webster’s doctrine in the *Creole* was right and said that Ashburton ‘seems’ to have agreed.[175] Similarly, *The Westminster Review* also indicated a compromise had been reached, calling the arrangement ‘the reasonable way of leaving the question’.[176] More importantly, it also became apparent that, whilst Britain had successfully rejected the attempt for it to assist the United States directly with the enforcement of slavery, it had also accepted that the strict position that a slave was free in British territory was modified by its obligation under ‘comity’ not to interfere. Palmerston and Campbell both questioned the British approach in the parliamentary debate on the 1842 Treaty, with Palmerston seeking to confirm that slaves on board American ships could still be released on a writ of habeas corpus.[177] In response, Peel maintained that Britain had kept the ‘principle that the slave coming upon

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[173] Ashburton to Webster, 6 August 1842, *Webster Papers*, pp. 666-669. All subsequent quotations in the remainder of this paragraph from Ashburton are from this letter. Ashburton’s letter followed a long note from Webster, dated 1 August 1842, which set out a full statement on the ‘comity of nations’ in the context of the dispute (as noted above), and which formally introduced the idea for Ashburton to ‘engage that instructions shall be given to the local authorities in the islands’: Webster to Everett, 1 August 1842, *Webster Papers*, pp. 658-665.

[174] Webster to Ashburton, 8 August 1842, *British Documents*, Vol. 1, 218. Webster did, however, note that the President wished for ‘further stipulations, by treaty or otherwise’.

[175] ‘The Washington Treaty’, *Quarterly Review*, Vol. 71, (1843), Article VII, pp. 560-595 at pp. 590-591.

[176] *The Westminster Review,* ‘Lord Ashburton’, p. 200.

[177] Palmerston, HC, 21 March 1843, Vol. LXVII, 1162-1218.

British soil is free', and Stanley insisted that no new instructions had been given to British governors.[178] Indeed, Stanley confirmed that those instructions were:

> that in case any complaint was made to the British governor, upon credible testimony, that any persons in a British port were detained against their will, it was the duty of the governor, upon verifying the statement so set forth, to afford such persons relief and protection.[179]

Peel and Stanley were, however, making technical defences. In the light of the terms of the arrangement, Peel seemed to be side-stepping the consequence of the new British approach for the checking for slavery on American ships, and Stanley's requirement for a 'complaint' and 'credible evidence' seemed less likely to occur. Rives, arguing in favour of the 1842 Treaty in the Senate, perceived the situation more accurately, when he commented that the 'declarations' and 'engagements' 'go far towards giving us the practical security we have so long sought'.[180] Working within international law, thus, resulted, effectively, in some restrictions on Britain's freedom to act, albeit that it also allowed the dispute from the *Creole* to be resolved peacefully.

Conclusion

This chapter has aimed to show how British policy worked within the principles of international law in order to reach solutions in two disputes with the United States over the extent to which American ships suspected of carrying slaves were immune from interference. The tensions over the false American flags problem were ultimately resolved through the application of a shared framework of legal principles for the checking of the nationality of American ships suspected of being involved in the slave trade. Indeed, the joint cruising agreed in 1842 relied on this common understanding. Whilst the long term efficacy of joint cruising in tackling the slave trade can be rightly questioned, there is little doubt, however, that it, and the framework upon which it was built, were successful in resolving peacefully the problem in British-American relations over the 'right of search', both in the immediate

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[178] Peel, HC, 21 March 1843, Vol. LXVII, 1218-1252; Stanley, HC, 10 April 1843, Vol. LXVIII, 747-749.

[179] Stanley, HC, 10 April 1843, Vol. LXVIII, 747-749.

[180] Rives, Speech in Senate, 17-19 August 1842, FO 5/384, fols. 57-64.

sense in 1841-42, and for the remainder of the period under consideration.[181] Similarly, in the *Creole*, it was the use of the common legal principle of 'no interference' within the 'comity of nations' that allowed Britain to make an arrangement with the United States that did just enough to defuse the issue of whether it needed to assist directly with the keeping of individuals in slavery. Britain, thus, emerged from both disputes with peace intact and workable settlements that allowed it, respectively, to tackle the slave trade better than before, and maintain the notion that a slave was free on entering the British Empire. Britain's handling of these problems through legal principles again also brings out that the British-American relationship needs to be understood within a context greater than the immediate tensions around the controversies involved. Slavery, of course, was a fundamental political difference that international law could not remove. Beyond that, however, legal principles allowed common ground to be found on the related problems caused by the slave trade and the impact of British abolition on American ships. This level of underlying agreement contained in the law means that British policy to the United States is best appreciated as based on cooperation as well as conflict.

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[181] On the question of the long term success of American efforts to curtail the slave trade, Lambert comments: 'Suitably embarrassed by British seizures of such fraudulent "American ships" an American anti-slavery patrol was set up in 1842, but it was never intended to be effective, to avoid upsetting sectional interest, and only became effective after slavers openly landed slaves in Georgia in 1858': Lambert, 'Slavery, Free Trade and Naval Strategy', p. 66, and referring in note 3 to D. Cannes, *Africa Squadron: the U.S, Navy and the Slave Trade, 1842-61* (2006). Peel, at least, however, felt that joint cruising was operating successfully, at least up to 1845: Peel, HC, 8 July 1845, Vol. LXXXII, 140-142.

7. Epilogue

British policy to the United States in the period was concerned mainly with the tensions caused by the desire to protect Canada, the claim to Oregon, and the action to suppress the slave trade. Why then did international law play such a large part in the debates? This thesis has shown that ministers and the wider political class worked on the basis that Britain had international obligations imposed not just by treaties but by shared legal principles. The Foreign Secretary took expert legal advice from the Queen's Advocate. British practice deferred to treaty law and legal principles. Thus British objectives towards the United States developed in a way that took account of international law. Territorial settlements in treaties, and the principle of self-preservation, justified the ongoing aspiration to retain Canada and the Maritime Provinces. Principles associated with sovereignty bolstered Britain's wish to keep the United States out of Canadian affairs after the rebellion in 1837. Disputed boundary definitions forced British attention to be directed towards the Northeastern border. Britain's aims beyond Canada were affected too. Historic legal rights, and the perceived need to uphold them for the sake of British honour, meant a greater interest in Oregon than Texas. The commercial treaty between Britain and the United States defined trading rights and obligations. Rules restricting what could be lawfully traded in war incentivised the maintenance of peace. Maritime rights influenced how Britain could pursue the Atlantic slave trade.

Moreover, treaty law and legal principles provided a means for regulating the actual disputes in the British-American relationship of the period. Respect from the United States created the engagement that allowed international law to operate as a bilateral system of rules within what was effectively a shared framework. Indeed, for Phillimore, the 'rise of independent states on the other side of the Atlantic' was one of the reasons for the greatly increased status of international law, for 'to no people can the maintenance of International Law ... be of nearer interest or greater importance'.[1] Thus common principles relating to sovereignty and neutrality encouraged security cooperation along the Canadian border. Mutual acknowledgement of legal principles facilitated practical resolutions to the *Caroline* and McLeod incidents. Legal process and arguments guided the way Britain dealt with the Northeastern boundary dispute and the problem of fishing rights off Nova Scotia. The shared framework extended too to issues outside the purview of Britain's existing

[1] Phillimore, *A Letter to the Right Hon. Lord Ashburton,* pp. 5-6

possessions. Jointly held principles based on the concept of unoccupied land facilitated the ultimate partition of the Oregon territory. The rule against interference influenced the nature of the American pressure against perceived attempts to abolish slavery in Texas - and Britain's response. Existing law guided the development of a practical framework for Britain and the United States to respond to the problem of suspected slave ships falsely flying American flags. Frequently too, legal principles assisted with the easing of tensions by providing an escape from the facts of contentious events. In the *Caroline* and the *Creole* affairs, for instance, it was agreements on the principles themselves that formed the settlements.

Thus the thesis also establishes that 'international law' was not just a set of moral aspirations but operated on policy with the real force of law. Britain and the United States clearly agreed that treaties, rules, and principles governed their conduct towards each other, albeit if they disputed some interpretations. Their shared framework was, therefore, as Manning considered the wider 'law of nations', 'law' in the 'sense of Hooker', being ' "any kind of rule or canon whereby actions are framed" '.[2] Nor was the international law which influenced Britain a mere vehicle for protecting existing British state interests. Certainly, Britain used tailored legal arguments to promote its aims, along with other traditional methods such as diplomatic and consular representation, and military threats. International law, though, also shaped and regulated British policy towards the United States in a manner that bore no *necessary* correlation to Britain's ongoing interests over time. Agreements in prior treaties, for example, undoubtedly cast a long shadow by converting past policy into future law. Thus, *political* choices made in earlier treaties guided, *as law*, policy decisions in the 1830s and 1840s, such as on the issue of containment. American legal arguments too regularly defended the national interests of the United States, and ensured that some compromise was inevitable. Britain adapted its policies on problems such as, for example, the Canadian border and the slave trade.

What implications then does this role for international law have for the wider position of Britain in the nineteenth century? Most importantly, the thesis confirms that the influence of international law is a serious factor to be considered across the range of British foreign policy. This is particularly significant in the light of the work covering alleged breaches of

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[2] Manning, *Commentaries on the Law of Nations*, Book I, p. 5, citing Hooker, Eccles. Pol. I. 3 (1676 edn), p. 72.

legal principles by Britain associated with the slave trade, as discussed in chapter 6. Perhaps most relevantly to the thesis, assessments of British relations with European states would be helped by a greater understanding of whether or not international law influenced objectives, or resolved disputes, in these instances as it did with the United States. There is, at first glance, good reason to suppose that international law may have had such a role. The fact that Parry's edited version of the opinions of the law officers' of the Crown classifies the reports largely by country over ninety-five volumes is a simple illustration of the fact that law affected British policy towards many states.[3] There is, of course, also the argument referred to in the Introduction that there was a wider European trend towards the increased use of international law following the Napoleonic Wars. Key issues that could be considered in this context include whether or not the impact from international law was consistent across British policy to all other European states, and the extent to which the nature and intensity of the legal questions thrown up by independence made the relationship between Britain and the United States unique. New light may then be shed on British strategic objectives in both Europe and the Americas in the nineteenth century. A better analysis could also be made of the *actual* role played by international law in Schroeder's 'transformation', or Lev's 'interstate sphere'.[4]

Moreover, the thesis indicates that criticism, as per Schmitt, that international law merely acted as a 'cover' for the pursuit of state interests in foreign policy is too simplistic in Britain's case.[5] Undoubtedly, contemporary British arguments that were based on the prevailing system of international law are, in one sense, always vulnerable to the accusation that they merely represented an efficient means of pursuing Britain's 'interests'.[6] The Introduction refers to works highlighting the increasing role for international law in preserving peace in Europe and in achieving 'order' within the British empire.[7] International law promoted too British property and commercial interests globally through legal principles

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[3] Parry, *Law Officers' Opinions.* Indeed, the research for the thesis itself shows how, for example, Guizot made comments affecting Britain in the context of the slave trade: see chapter 6, footnote 98.

[4] See: Schroeder, *The Transformation*, and Lev, 'The transformation of international law'.

[5] See the reference to Schmitt and associated discussion in the 'International Law' section of the Introduction.

[6] In this sense, adopting Hull's words, in the context of her argument as to the centrality of law to the First World War: 'interests and law are not anti-thetical; they are joined': Hull, *A Scrap of Paper*, p. 49.

[7] The key references are Schroeder, *The Transformation*, and Benton and Ford, *The Rage for Order*.

associated, for example, with territory, the freedom of the seas, and trade.[8] Furthermore, the use of law when possible would usually have been much cheaper than the main alternative of military power. Yet, this does not also mean that there was no role for international law in British policy as a set of properly functioning rules. The thesis clearly demonstrates how international law guided the nature and implementation of British objectives towards the United States - as distinct from being just a means for implementing them. The thesis shows too how international law was able to operate as a regulatory system with real meaning for Britain and the United States, which signals that it could have done so in other circumstances. What was key was the British and American political support for the use of the shared framework - and evident acceptance that *specific* points could be lost in the management of disputes without damage to *overall* state interests.[9] Thus, what the thesis suggests is that international law coexisted as both a protector of Britain's interests in a wider global context, and as a guide-cum-regulator in certain relationships - but not that it is to be simply equated with British interests.[10]

The thesis is also relevant to analysis of the general role of law in early- to mid- nineteenth-century Britain. Most importantly, the thesis brings out just how far international law was embedded within the institutions and practice of British foreign policy. Experts were regularly consulted, and diplomatic despatches deployed legal argument. British practice, at least in the case of the United States, was also shaped around 'cornerstone' legal principles. The historiographical bounds of the concept of legality within British politics need, therefore, to embrace the workings of the Foreign Office and the making of British foreign policy. Moreover, the thesis simultaneously reinforces too the notion that law and legality were central features of British politics. Applying what Craig and Thompson identify as

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[8] Indeed, as one example, Pagden observes the importance of the debates on the 'legitimacy' of the Spanish 'conquest of the Americas' for the future role of international law: A. Pagden, 'Conquest and the Just War: The "School of Salamanca" and the "Affair of the Indies" ', in S. Muthu (ed.), *Empire and Modern Political Thought*, (Cambridge: Cambridge University Press, 2012), pp. 30-60, at p. 34.

[9] Furthermore, the making of opposing legal arguments in the context of the same problems, as illustrated in the thesis by Britain and the United States, does not of itself relegate international law to being just a proxy for state interests either - any more than similar contentions would impair the status of domestic law.

[10] This dual role for international law makes sense too if what might be thought of as a 'realist' framework for international relations is applied - in that international law can be used by states within that system. Indeed, Holsti observes that what he then termed 'modern realists' had 'turned their attention from human behaviour to the structure of the international system to explain state behaviour': O. Holsti, 'Models of International Relations and Foreign Policy', *Diplomatic History*, 13, (1989), pp. 15-43 at p. 19.

Skinner's request ' "to ask what' [a person] 'may be *doing* when he appeals to the language of ... particular traditions" ', legality was, thus, impliedly being invoked when international law was appealed to in political debate, such as on the issue of intervention.[11] Furthermore, the 'public' sphere of international law raises the additional question of whether 'legality' itself may have been a particular concern in foreign policy. British respect for international law may clearly have counted for more in a context where legality was both valued generally *and* a matter of interest for world and public opinion. For, as Parry observes, 'one of the major themes of nineteenth-century *elite* politics was the image of itself that Britain should project' , including 'on the diplomatic stage'.[12]

The thesis builds too on Benton and Ford's main contention that the British 'rage for order' 'shaped the very idea of legal order on a global scale' by showing how the British use of law within the empire also affected issues of policy - and 'order' - concerning a foreign 'civilised' state, such as the United States.[13] Chapter 6, for example, demonstrates how Britain's response to the dispute with the United States on the slave trade was influenced by the nature of what Benton and Ford describe as wider British 'attempts to order oceans' using a variety of available, practical legal methods.[14] Similarly, in the case of the Canadian rebellions, the thesis argues that the use of 'protection' within British politics gave reasons within international law for the United States not to interfere. Whilst, as chapter 4 notes, the way 'protection' was deployed in this case can be partly distinguished from Benton and Ford's analysis, it was nevertheless still an example of what they term the 'adoption of discourses of protection to fit shifting schemes of imperial administration'.[15] Furthermore, the thesis illustrates additional ways in which the imperial and foreign 'orders' came together by showing how 'traditional' international law was fed into the process of British governance from a foreign policy context. The *Creole,* for example*,* provides an instance of how international law arguments from a foreign power - in the form of the comity of nations as

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[11] D. Craig, and J. Thompson, *Languages of Politics in Nineteenth-Century Britain*, (Basingstoke: Palgrave Macmillan, 2013), p. 5, citing Q. Skinner, 'Some Problems in the Analysis of Political Thought and Action' in J. Tully (ed.), *Meaning and Context: Quentin Skinner and his Critics* (Cambridge: Polity Press, 1988), p.107.

[12] Parry, *The Politics*, pp. 1-2.

[13] Benton and Ford, *Rage for Order,* p. 27.

[14] Benton and Ford, *Rage for Order*, p. 119.

[15] Benton and Ford, *Rage for Order*, p. 88.

put forward by the United States - could affect the nature of British rule.[16] The research from the thesis makes clear too that comments on legal matters were occasionally passed between the Foreign Office and the Colonial Office, and among diplomats posted overseas and local imperial officials.[17] There is undoubtedly scope for further exploration of these forms of connection.

Finally, returning to the British-American relationship itself, the thesis indicates that the role of international law needs to be taken into account more seriously as an important factor in the development of the closer connection between Britain and the United States over the remainder of the nineteenth century. The shared framework and the process of arbitration clearly continued to provide mechanisms through which British-American disputes could be resolved peacefully. Whilst the 1850s contained issues over such matters as military recruitment during the Crimean War, fishing rights, and the slave trade, undoubtedly the most significant cases of law's impact occurred during the American Civil War. Here, two major incidents caused by alleged breaches of international law were ultimately settled using legal argument and procedure, with the 'independent' nature of international law being underlined by the fact that the matters went for and against Britain respectively. Thus, in 1861, Britain demanded the release of two Confederate diplomats seized by the North from the *Trent*, a British ship.[18] The men were let go, and as Dunning comments: 'There were a few cool heads in the North that believed [the] action unwise and unjustifiable by the law of nations'.[19] Then, famously, the North contended to Britain that the cruiser, the *Alabama,* should not have been released to the South from Liverpool in 1862.[20] Consequently, the United States claimed damages for the losses it alleged were subsequently caused to the

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[16] See the section on the *Creole* in chapter 6.

[17] See, for example: Stephen (Colonial Office) to Backhouse (Foreign Office) , 17 February 1838, FO 5/328A, fols. 19-23, and Arthur (Canada) to Fox, 12 January 1841, FO 5/370, fols. 174-176 in the context of the *Caroline;* the comments of Palmerston on a draft of a letter from the Colonial Office to Stevenson of the United States concerning New Zealand: Draft letter to Stephen, 26 February 1841, FO 5/371, fols. 85-102; and a letter from the Colonial Office to the Foreign Office relating to an alleged discriminatory tonnage duty on American vessels in Honduras in breach of the commercial treaty with the United States, 21 May 1842, FO 5/387, fols. 240-253.

[18] Dunning, *The British Empire and the United States*, pp. 210-215.

[19] Dunning, *The British Empire and the United States*, p. 211.

[20] Dunning, *The British Empire and the United States,* p.219.

commerce of the North during the war.[21] After a protracted legal dispute, arbitration provisions were ultimately agreed in the Treaty of Washington 1871, and Britain was ordered to pay $15.5 million in compensation.[22]

The alignment anchored in the treaties and shared framework - most importantly, on territory, sovereignty, commerce, and the freedom of the seas - must also certainly have served to enhance political relations between Britain and the United States over the long term. The circumstances of other issues were, of course, significant too in this process. It is no coincidence, for example, that the British-American relationship developed more after the problems from slavery and the Civil War fell away in the latter part of the nineteenth century. But what international law provided to Britain and the United States was a durable, joint conceptual framework through which they could each independently address their respective global interests. Crucially, this, in turn, then made it more likely that Britain and the United States would react in like manne to international affairs as and when those interests converged. Mazower, for example, observes how Britain and the United States responded similarly in the 'diplomatic rift' with Europe over 'interventionism and its limits' in the 1820s - with the implications of the period for British-American relations, for him, spanning far into the future.[23] In a different context, Britain and the United States can also be seen to have adapted correspondingly to some of the ongoing challenges of trading globally from their shared background of international law.[24] Furthermore, beyond the immediacy of such events, it may be questioned too whether the shared legal concepts around 'sovereignty' or the 'civilised' may also have reinforced indirectly the cultural connections considered important for British-American diplomatic rapprochement in the later nineteenth-century, such as the ' "notions" of an "Anglo-Saxon" racial or cultural affinity' pointed to by Otte, or

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[21] Parry, *The Politics*, pp. 294-295.

[22] Parry, *The Politics*, pp. 294-295.

[23] As Mazower comments: 'Canning in particular anticipated the fundamental development of the twentieth century - the rise of Anglo-American hegemony': Mazower, *Governing the World*, pp. 8-9.

[24] Britain and the United States, for example, both entered trade treaties with China in the 1840s, with Cushing, the then American diplomat in China, referring to being 'informed' through Everett of 'the just and liberal views of the British government in regard to the intercourse of other nations with China': Cushing to Everett, Copy, 8/3/44, FO 5/416, fols. 120-121. On the position of the United States generally, and with reference to its future cooperation with the British in relation to Korea and Japan, see: R. Tamar Van, 'Cents and Sensibilities: Fairness and Free Trade in the Early Nineteenth Century', *Diplomatic History*, 42, (2018), pp. 72-89.

the ‘diplomatic sub-structure’ of ‘writers’ and ‘clergy’ of Hall and Goldstein.[25] Thus it seems too narrow to restrict the wider impact of international law in the British-American relationship to the realm of disputes. Grotius observed that ‘it is most true that everything loses its certainty at once, if we give up the belief in rights’.[26] By acting in the law together, Britain and the United States showed that they ‘believed’ in the *same* international law. Perhaps in doing so they sought too the similar ongoing ‘certainty’ of their then respective positions on the North American continent and globally. If it was, then, the legacy of independence that provided Britain and the United States with a common need for international law, it was nevertheless international law that helped to build the new relationship between them in the nineteenth century.

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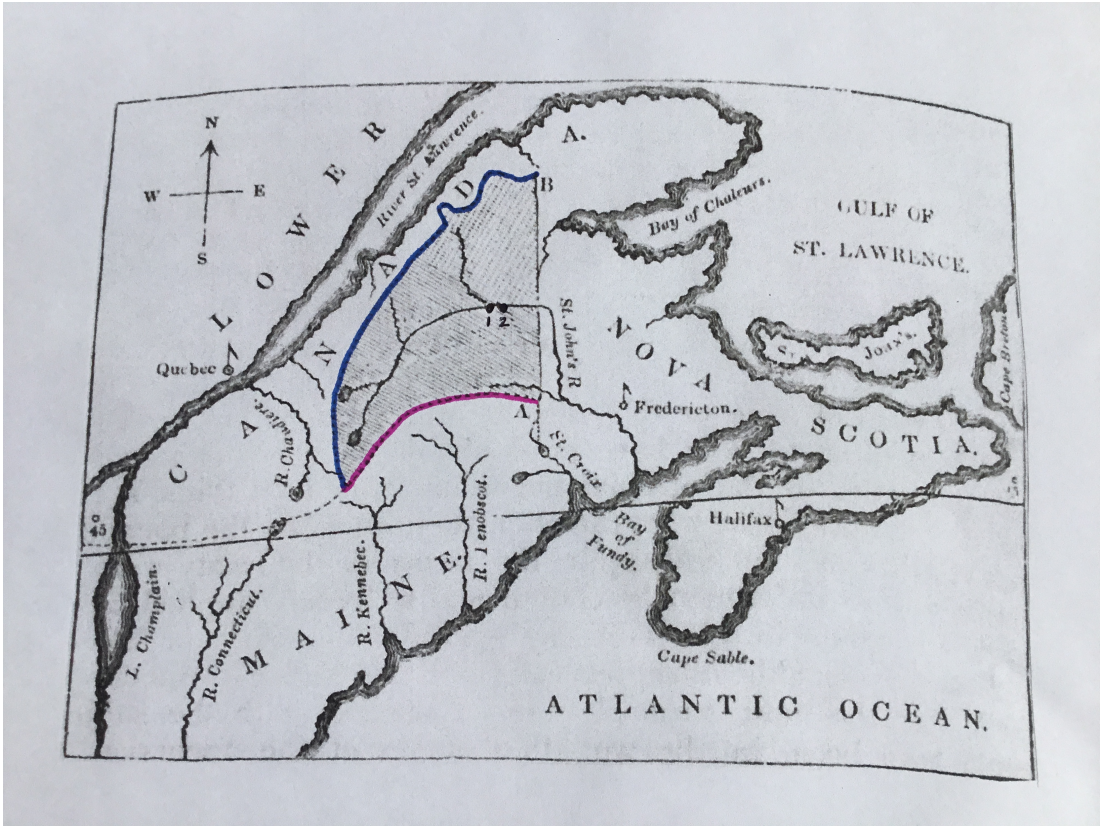
[25] Otte, *The Foreign Office Mind*, p. 404, and M. Hall and E. Goldstein, ‘Writers, the Clergy, and the “Diplomatisation of Culture”: Sub-structures of Anglo-American Diplomacy, 1820-1914’, in Fisher and Best (eds.), *On the Fringes of Diplomacy*, pp. 127-154. ‘Sovereignty’ is considered here for the sense of ‘confidence’ that may have arisen from secure international status.

[26] H. Grotius, *Grotius on the Rights of War and Peace: An Abridged Version*, Whewell, W., (ed), (Cambridge: University Press, 1853), Preliminary Remarks, pp. xxix-xxx.

Appendix: Map

Source: Quarterly Review, 'North American Boundary Question', Vol. 67, March 1841, No. CXXXIV, pp. 501-540 at p. 504.

(The blue and pink colours have been added to lines on the original for the purposes of clarity. Points 1 and 2 have been added to the original. See the key below.)



Key: Blue line - American claim

Pink line - British claim

Point 1 - Fish River block house

Point 2. - Madawaska

The impact of international law on British foreign policy to the United States, 1836-1846

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