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**American Foreign Policy and the Maritime Declaration of Paris (1856)**

**Abstract**

*The Maritime Declaration of Paris which was signed at the end of the Crimean war aimed at solving problems regarding rights of neutrals, privateering and blockades. These problems which were sources of conflicts and even wars for a number of centuries were solved in an innovative manner with regards to the development of the rules of international law. The United States of America, which was the defender of neutral rights almost immediately after its independence did not adhere to the Declaration. This preference stemmed from a number of domestic and foreign policy factors that were closely interconnected. The studies of international law often neglect the historical background of the emergence of these rules. However, it is often impossible to comprehend the logic of those rules without analyzing the power politics between states, that is, the political and economic dynamics within which these rules emerged. What is more neglected is US policy and its contributions to the emergence of these rules. Within this framework this study aims to*



*analyze Maritime Declaration of Paris with a view to American foreign policy priorities. As such, the study aims to contribute to the fields of history of international law and history of American foreign policy.*

**Keywords:** *History of American Foreign Policy, History of International Law, Maritime Declaration of Paris, Neutrality, Privateering*

## **Amerikan Dış Politikası ve Paris Denizcilik Bildirgesi (1856)**

### **Öz**

*Kırım Savaşı'nın sonunda imzalanan Paris Denizcilik Deklarasyonu, tarafsızların hakları, korsanlık ve ablukalarla ilgili sorunları çözmeyi amaçlıyordu. Birkaç yüzyıl boyunca çatışmalara ve hatta savaşlara kaynaklık eden bu sorunlar, uluslararası hukuk kurallarının gelişimi açısından yenilikçi bir şekilde çözülmüştür. Bağımsızlığının hemen ardından tarafsız hakların savunucusu olan Amerika Birleşik Devletleri, Bildirge'ye bağlı kalmamıştır. Bu tercih, birbiriyle yakından bağlantılı bir dizi iç ve dış politika faktöründen kaynaklanıyordu. Uluslararası hukuk çalışmaları genellikle bu kuralların ortaya çıkışının tarihsel arka planını ihmal eder. Oysa devletler arasındaki güç politikalarını, yani bu kuralların ortaya çıktığı siyasi ve ekonomik dinamikleri analiz etmeden bu kuralların mantığını anlamak çoğu zaman mümkün değildir. Daha çok ihmal edilen ise ABD politikası ve bu kuralların ortaya çıkmasındaki katkılarıdır. Bu çerçevede, bu çalışma Paris Denizcilik Deklarasyonu'nu Amerikan dış politika öncelikleri açısından analiz etmeyi amaçlamaktadır. Bu haliyle çalışma, uluslararası hukuk tarihi ve Amerikan dış politikası tarihi alanlarına katkıda bulunmayı amaçlamaktadır.*

**Anahtar Kelimeler:** *Amerikan Dış Politikası Tarihi, Uluslararası Hukuk Tarihi, Paris Denizcilik Bildirgesi, Tarafsızlık, Korsanlık*

### **Introduction**

It is a commonly overlooked fact that the rules of international law have their roots in longstanding conflicts and power struggles between nations. These rules did not simply materialize out of thin air but rather emerged from a complex history that historians and international law scholars often neglect. International law differs from domestic law; the rules are not enacted but rather adopted by states through consistent observance of a practice over long periods or by treaty obligations. Such a perspective also enables us to comprehend the fact that the dominant powers in the international system were influential developing the rules of international law, and in most instances, they were guided by national interest rather than justice to all. Needless to say, smaller states and/or emerging powers, when challenging the position of the dominant power(s) in the international system also challenged the rules that benefited those powers. The nineteenth century presents us numerous examples of this phenomenon.

Even more overlooked is American involvement in matters concerning international law. The fact that it is often labelled ‘isolationist’ obscures many instances that the United States (US) pursued an active policy, especially in European matters in the 19th century. International law holds an important place in US foreign policy. It is the very thing that its founders based their existence upon, saw as a tool for their acceptance on an equal footing, especially into the European family of nations.

The (Maritime) Declaration of Paris (1856), which was adopted at the Paris Peace Congress following the Crimean War, is a remarkable example of the framework outlined above. It endeavored to put an end to long-standing disputes among nations regarding neutral rights, privateering, and blockades. The significance of the Crimean War and the Paris Treaty for European history is its drastic blow to the Vienna system. The Declaration is either ignored or mentioned in passing. As for international law power politics that surrounded the whole issue is often disregarded. The Declaration, however, stands as a milestone not only because it sought to resolve long-standing disputes among nations but also because it signaled the opening of a new era regarding law-making process in the international arena. It was the first multilateral law-making treaty in which powers agreed upon a set of rules and invited other powers to join, and “*thus create almost instantaneous customary law*” (Lemnitzer, 2014, p. 3). Furthermore, US challenge to the Declaration is an interesting episode where the interests of an emerging power clashed with the existing rules of the international order. Therefore, the Declaration deserves more scrutiny both from historical and from legal perspectives.

This study, therefore, aims to focus on US policy regarding the Declaration of Paris. At first glance the Declaration seemed to solve the problem of neutral rights in a manner that had been advocated by the US for a long time. However, rather than adhering to it, the US further challenged the Declaration. The reason for this should be found in other articles of the Declaration, especially the abolition of privateering. The policy of the US towards the Declaration can best be understood if seen from a perspective that takes into consideration domestic and international factors, and the relative position of the US against Britain, the leading maritime power.

The study begins with account of the controversies regarding neutral rights and privateering. The US position in these issues will specifically be emphasized. The study will then explore the conditions under which a compromise was reached between Britain and France regarding neutral rights at the beginning of the Crimean War, and the US reaction to it. The third part of the study will focus on the US initiative to make the compromise of 1854 into permanent rules of

international law but ended up being blindsided by Britain and France which came up with a formula that suited their own interests. Rather than simply rejecting the Declaration the US challenged it by proposing an amendment. Each episode of the matter provides us with the curious dynamics of power politics among nations.

In Turkish literature privateering is only mentioned briefly to emphasize that it is different from piracy, which is an illegal act and not sanctioned by states.<sup>1</sup> Therefore, the Declaration of Paris is only mentioned only as one of the treaties that regulated maritime matters without dwelling on the power politics behind it. Hence, there is no mention of American foreign policy regarding the Declaration of Paris. Most of these studies in Turkish literature tend to focus on either legal aspects of piracy or on more contemporary examples of piracy such as those off the coasts of Somalia.<sup>2</sup> Although Meray's study is published in 1963, it gives a comprehensive analysis of the difference between the two concepts when focusing on Turkish treaties prohibiting piracy and privateering.<sup>3</sup> In this respect, the study aims to contribute to Turkish literature by giving a more detailed account of the history of the abolition of privateering with a view to American foreign policy.

### **1. The Two Controversies of Commercial Warfare: Privateering and Neutral Trade**

As Europe extended its influence overseas in the 16th century so did the colonial rivalries between maritime powers. The Spanish and Portuguese claims to exert sovereignty over the oceans were quickly annulled by the challenges of the Dutch, the British and the French. This rivalry produced frequent wars, and capture of commercial merchandise at sea for the purpose of crippling the commerce of the enemy became an integral element of warfare at sea. At a time when states were not able to obtain wealth sufficient enough to sustain large navies during peacetime, they

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<sup>1</sup> See for example, Topal, A. H. (2010). Uluslararası Hukukta Deniz Haydutluğu ve Mücadele Yöntemleri. *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 59 (1), 99-130; Evin, B. (2016). Uluslararası Hukukta Deniz Haydutluğu Kavramı ve Şiddet Faktörü. *Güvenlik Bilimleri Dergisi*, 1 (1), 119-152. <https://doi.org/10.28956/gbd.239713>; Çalışkan Uyanık, S. (2022). Denizde Yasadışı Eylemlerin Önlenmesine Dair Sözleşme ve Protokolün Deniz Haydutluğu, Seyir Güvenliği ve Deniz Terörü ile İlişkisi. *Denizcilik Araştırmaları Dergisi: Amfora*, 1 (1), 80-88.

<sup>2</sup>A few examples are: Doğru, S. (Eylül 2017). Uluslararası Hukukta Deniz Haydutluğu: Uluslararası Toplumun Mücadelesi ve Türkiye'nin Katkıları. *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 66 (3), 551-80. [https://doi.org/10.1501/Hukfak\\_0000001900](https://doi.org/10.1501/Hukfak_0000001900); Beyoğlu, M. (2013). Somali'de Yaşanan Deniz Haydutluğu ve Deniz Haydutluğuna Karşı Geliştirilen İnisiyatifler. *Çankırı Karatekin Üniversitesi Sosyal Bilimler Enstitüsü Dergisi*, 4 (2), 29-42; Bayıllıoğlu, U. (2011). Somali Sahilleri ve Açıklarında İşlenen Deniz Haydutluğu Fiillerine Karşı Yürütülen Mücadelenin Hukuki Dayanakları ve Türkiye'nin Durumu. *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi*, 15(1), 125-162; Demirtaş, C. (2012). Somali Sahillerindeki Deniz Haydutluğu Eylemleri ve Haydutların Yargılanması. *Journal of Istanbul University Law Faculty*, 70 (1), 39-67; Çalık, T. (2017). Uluslararası Hukukta Deniz Haydutluğu ve Somali Açıklarındaki Deniz Haydutluğu ile Mücadele. *Hacettepe Hukuk Fakültesi Dergisi*, 7 (1), 1-38.

<sup>3</sup> See, Meray, S. L. (1963). Bazı Türk Anlaşmalarına Göre Korsanlık ve Deniz Haydutluğunun Yasaklanması. *Ankara Üniversitesi SBF Dergisi*, 18 (03). [https://doi.org/10.1501/SBFder\\_0000000705](https://doi.org/10.1501/SBFder_0000000705)

frequently resorted to privateering to overcome this restraint during wartime. Through issuance of letters of marque, the belligerent states granted certain rights to commercial vessels, including foreign ones, to capture enemy ships and goods, thereby inflicting a considerable damage to enemy's commerce. This form of warfare was either called as commerce warfare or "guerre de course." In the age of mercantilism this type of warfare was resorted to frequently, so much so that Howard called them as "*wars of the merchants*" (Howard in Peifer, 2013, p. 87).

A set of rules and regulations guided the privateers; the captured ships were to be taken to the nearest prize court of the belligerent state; the final fate of the vessel, its cargo, and the shares of the government and the privateers were decided only after the prize courts condemned them as legitimate prize (Anderson and Gifford Jr., 1991). The stakes were high, so were the prizes, so much so that privateering turned into a lucrative business. Ship owners, merchants and other interested parties established companies which paid dividends to shareholders from profit that was made through privateering. During the Seven Years' War, for instance, "*the Duchess of Nottingham and some ladies of the Court equipped three large ships for privateering, intent on making their own profit*" (Olivier, 2001, p. 22). In theory privateering differed from piracy, where the pirates acted on their own accords for self-enrichment, not at the service of any government, and certainly not on legal grounds. In practice however, the lack of absolute governmental control often led to situations where the line between piracy and privateering blurred. This was particularly the case when neutral vessels or neutral cargo on board enemy vessels were captured because such controversies had the potential of drawing neutrals into the conflicts, if not leading to outcries for compensation. Some scholars go as far as to contend that there was "*no distinction between piracy and privateering and state warfare*" (O'Malley, 1988, p. 254). Nevertheless, privateering provided the state an easy and a shortcut solution for an urgent problem. Added to this was the state commissions that were collected from each prize, which provided additional income for the state almost without any expenses.

Employment of privateers engendered some risks for the state as well. As this was a private enterprise, it operated on the profitability of the venture not on the loyalty of the privateers. There was no actual contract enforcing privateers to continue with the war effort if the profits were not worth the risk and the effort. The captured vessels were not to be sunk but to be sailed to the nearest port with a prize court, which actually increased the risk of recapturing by the enemy thereby rendering the whole enterprise futile. On the other hand, although the risks were high since

privateering promised more income than state service, seamen were more inclined to be privateers hence “*drew on the pool of seamen available for naval vessels*” (O’Malley, 1988, p. 255). There was also the danger of privateers turning into pirates at the end of wars. This was especially true when wars lasted for years and there came into being a group of privateers who made their fortunes not by trade but looting others’ merchandise for extended periods of time. Once wars were over, they could very well find themselves unemployed and it was easier to continue looting than going back to business as usual (Dolin, 2022).

From mid-18th to early 19th century European great powers were almost at constant war with each other. Warfare at sea was an indispensable part of great power rivalries since most wars involved colonial matters. As overseas trade expanded so did the scale of privateering, and to an unprecedented degree. O’Malley (1988) ties the growing disgruntling towards privateering to the development of modern capitalism where the status of private property in time of war began to change. As warfare began to be more a state business than a monarch’s business the property rights of individuals also began to be distinguished from that of the state (Stark, 1897). The natural outcome of this process was the growing tendency to grant immunity to private property during wartime. The debates continued well into the 19th century and while immunity of private property on land became a norm albeit with considerable exceptions, there was no consensus on the status of private property at sea.

By the beginning of the 19th century although privateering was still a lucrative business, the mixed blessing character of privateering began to wane in Britain. The foremost reason for this change was the fact that especially after Trafalgar Britain became the master of the seas. Successful blockades of the French ports during the Napoleonic wars, and the American ports in the War of 1812 proved to be a more effective measure than privateering for Britain’s interests. As British trade increased dramatically, so did the possibility of suffering more from privateering. This rendered privateering meaningless for British merchants (Nadelmann, 1990).

There began to appear a similar tendency in France as well but for different reasons. Although it could be argued that the destruction of the French navy at Trafalgar should have fostered the resort to privateering on the French side the undisciplined character of the French privateers created more problems with the neutrals. With French ports effectively blockaded by the British and the neutrals closing their ports to French privateers, privateering seized to be an effective tool of the French war effort (O’Malley, 1988). After 1814 France was able to rebuild the navy, albeit still far from posing a challenge to the British mastery of the seas.

The advance of the industrial revolution increased the production of states to unprecedented levels during the 19th century. The need for raw materials and markets increased the volume of world trade to unimaginable levels. The direct effect of this development was the increase in state revenues to allow the industrial nations to keep a large navy during peacetime. These two factors meant that privateering had become obsolete, and even harmful, at least for the interests of the major powers. As Europe entered into a period of stability following the Congress of Vienna the issue of privateering subsided and no concrete steps were taken to do anything about it because no wars between the major powers took place until the Crimean War.

The reaction of the smaller powers to the waning of privateering was somewhat mixed. When major powers were at war, they usually remained neutral. Even if their neutrality kept them from getting embroiled in great power conflicts, the same could seldom be said about their trade. As mentioned above, neutral trade often suffered at the hands of the belligerents. The privateers, who were more prone not to follow rules and regulations consisted part of the problem that neutral trade had faced. Even though a state could refrain from issuing letters of marque, public naval vessels still retained the right of search and capture property on board neutral vessels. To make matters worse, Britain and France, the two major maritime powers had completely opposing practices with respect to capturing private property at sea. For Britain, it was the nationality of goods that mattered. In other words, the British captured enemy goods in neutral ships as well, while neutral goods on enemy ships were safe from capture as long as they were not contraband. For the French, it was the nationality of the ship that counted. This practice actually favored neutral shipping because enemy goods on neutral ships were safe from capture. This of course gave enormous advantage to neutral shipping in times of war. Let us not forget, however, since it was the nationality of the ship that mattered for the French, neutral goods on enemy ships were liable to capture (Woolsey, 1879). The issue of contraband, that is, goods that contribute to the warmaking capacity of an enemy state was also a thorny issue for the neutrals. Naturally, any kind of weaponry constituted contraband, and was liable to capture if found on board neutrals destined for the enemy. Other than that, it was mostly up to the belligerent to decide what constituted contraband, as any item that was used in peace time also had the capacity to be used in wartime. These were called conditional contraband if destined for enemy ports (US Naval War College, 1906). Two things complicated the matters for the neutrals: first, there was no consensus among the states as to what constituted conditional contraband, therefore it was up to the whim of the belligerents whether to capture any property or not. To clarify matters, each belligerent published lists of contraband at the

beginning of wars, and they usually kept them extensive, leaving little for the neutrals to trade. Second, even if there was such a list it needed to be revised and updated all the time, since technology advanced so rapidly that new raw materials and new items were introduced for consumption. The London Naval Conference of 1909 was an attempt to reach a consensus in this matter, signed by most states but ratified by none (Hamilton, 1982). Therefore, the issue of contraband remained as a powerful tool at the hands of the belligerents, which limited the rights of neutrals. So much so that, during World War I Britain kept on expanding the contraband list, “*until almost every conceivable commodity, except ostrich feathers, was liable to condemnation as contraband!*” (Cecil and Forster, 1929, p. 94).

Another matter which put the neutrals into a difficult position was coastal and colonial trade. During the mercantilist era, the European powers did not allow foreign ships to trade directly with their colonies or take on coastal trade. During the Seven Years’ War, the naval superiority of Britain forced France to allow the neutral Dutch to trade with the French colonies, albeit with restrictions. Britain retaliated by adopting what later came to be known as the Rule of (the war of) 1756. Simply put, the rule said “*what is prohibited during wartime is also prohibited during wartime*” (Arias, 1915, p. 585). The wider interpretation is that the engagement of neutrals in the coastal or colonial trade of one of the belligerents is actually a violation of their neutrality because such a form of trade is actually prohibited by the states during peace time. The rule was announced in 1758 and its consequences were directly seen. Before the proclamation of the Rule British privateers brought 153 French and 35 neutral vessels to prize courts. In 1758 privateers brought 128 French and 130 neutral vessels (Stark, 1897).

The Rule was invoked during the War of American Independence, but this time the neutrals countered Britain by what is called as the Armed Neutrality (1780). When attacked by British vessels, neutral Russia declared that “*all neutral vessels might, of right, navigate freely from port to port and along the coasts of nations at war; which laid down the principle Free Ships Free Goods, and defined contraband so as to exclude materials of naval construction, besides denouncing as invalid all ‘paper’ or ineffective blockades*” (Stark, 1897, p. 77). Soon, Denmark and Sweden adopted the Russian declaration, which led to the closing of the Baltic to the belligerents. Other neutrals in Europe followed suit. The Americans, however, presented a peculiar case because they declared their intention to join the declaration although they were one of the belligerents, and the current war was in fact the direct consequence of their revolt against the British rule. Faced with fierce determination the British relaxed the application of the Rule. When the



French Revolution led to a series of coalition wars, the British applied the Rule from 1793 to 1794 especially in the Caribbean, which led to the revival the Armed Neutrality in 1800 again led by Russia. However, the league of the Armed Neutrality did not survive the destruction of the Danish fleet by Britain in 1801, and the assassination of the Russian tsar and fell apart (Grewe, 2000). It was therefore Britain that the smaller powers both resented and also feared the most because of its overwhelming naval superiority, and from that superiority came the imposition of rules that served British interests most. As for privateering, this was somewhat a necessity rather than a choice even in the 19th century. The smaller powers in Europe were continental states which necessitated them to retain land forces as well against possible attacks from their neighbors. Given the financial burden of keeping a large navy during peace time it is not surprising that the smaller powers, though they complained about privateering, wanted this practice to be an option for them in case they found themselves in a naval war. Given the fact that even Louis the XIV found it extremely difficult to conduct war both on land and at sea at the same time (Peifer, 2013), the somewhat indecisive attitude of the smaller powers towards privateering is understandable. Nevertheless, when it came down to choosing between giving up their right to privateering and guarantees for neutral trade, they leaned towards neutral rights, as they did in 1856.

## **2. An Entangled Triangle: Neutrality, Privateering and American Naval Strategy**

The US had a different position regarding neutrality and privateering. At the beginning of the 19th century the US could well be categorized as a small power, but by the middle of it there was no doubt that the country was in full swing to fulfill its potential to become a great power. The interests of the US converged with the smaller powers when it came to neutral rights, but diverged when it came to the abolition of privateering. In other words, when it came to the Declaration of Paris, the US would not relinquish its right to privateering as easily as the smaller powers of Europe did. In order to understand the logic behind US attitude towards the Declaration of Paris a short evaluation of its foreign policy principles relevant to the matter would be useful.

Several factors determined the foreign policy of the nascent state. First, the nation was practically born out of a clash of commercial interests. As Moore (1905, p. 2) puts it, “*When our ancestors embarked on the sea of independence, they were hemmed in by a system of monopolies. It was to the effects of this system that the American revolt against British authority was primarily due; and of the monopolies under which they chafed, the most galling was the commercial.*” Thus, the protection of American commerce became the founding principle of US foreign policy. Second, shortly after American independence the French Revolution posed a great challenge to European

politics and systems of government. The series of coalitions formed against the revolution quickly developed into struggles against French domination over Europe. These wars had the potential to drag the US into complex web of European politics, which the nation was militarily too weak and diplomatically too inexperienced to effectively deal with (Renehan Jr., 2007). The situation further exacerbated by the efforts of the British to support Native Americans against further expansion (Moore, 1905). Hence, neutrality became an important agent of US security while it also served as an advantage in commercial affairs; a niche that the nascent state could exploit when Europe was at war. However, as mentioned above, neutral trade had always been at risk as the major maritime powers did not have a consensus on capture of private property on sea. These factors show that, “*commercial and foreign policy were synonymous ... [The Americans] sought trade on an equal basis with all nations in both war and peace, but in time of war that their need for economic growth and prosperity could best be met*” (Lint, 1977, p. 21).

At a time when there were completely opposing practices regarding neutral trade it became a priority for the US to endorse rules that protected the rights of neutrals in a fashion that safeguarded American interests best. Since it was still not powerful enough to dictate its position, the US went along with bilateral treaties with nations. As President Pierce emphasized in his Annual Message, free ships, free goods was “*a doctrine which from the very commencement of our national being has been a cherished idea of the statesmen of this country*” (Cecil and Forster, 1929, p. 92). As early as 1776, the US came up with The Treaty Plan of 1776 (or Model Treaty) that was largely drawn upon the Anglo-Dutch Treaty of 1674 with a view to endorse this principle (Stark, 1897). As Lint (1977) rightly suggests, the Treaty Plan of 1776 reflected long-term American interests. Therefore, implied in the Treaty Plan of 1776 was the notion that the US would remain neutral in future wars, which was becoming the fixed norm of American foreign policy as early as the 1790s. Facing the dangers of being dragged into the intricate politics of Europe George Washington’s farewell address (1796) drew the outline of US foreign policy: “*The great rule of conduct for us, in regard to foreign nations, is in extending our commercial relations to have with them as little political connection as possible.*” (Washington’s Farewell Address, 1796, p. 26). And Hamilton, in 1801, turned it into a slogan: “*Peace, commerce, and honest friendship with all nations, entangling alliances with none*” (LaFeber, 2012, p. 44). Americans were successful in inserting the principle of free ships, free goods to their commercial agreement with France in 1778, and with Prussia in 1785, but failed to do so with Britain. On the contrary, they accepted the British practice when they signed the Jay Treaty (1794) thereby creating an inconsistency in their position.

In the end they concluded that “*the British practice ... must unfortunately be recognized as the existing law of nations, except between such nations as would agree by treaty to the rule, free ships, free goods*” (Cecil and Arnold-Forster, 1929, p. 92).

Neutrality as a stance led to a misunderstanding that American foreign policy was isolationist. As Morgenthau argues in Foreword to Alan Dowty’s monograph (1971, p. viii): “*The tradition of American foreign policy throughout the 19th century followed indeed the pattern established by the founders, but that pattern consisted of an active diplomacy serving a dual purpose: the protection of the United States from involvement in the conflicts of European nations and the promotion of the interests of the US in the Western Hemisphere.*” Unfortunately, the myth still continues and sometimes scholars use the term ‘isolationist’ for mere convenience (Paterson, 2018). The very basic notion of placing commercial interests at the center of foreign policy automatically defeats the isolationist view of American foreign policy. The term “isolationist” came to be pronounced in the 1890s not as the definition of a foreign policy preference but rather to denote those who are against expansionism in domestic politics. Before that, the term simply referred to a geographic reality (Mc Dougall in Mukherjee, 2022). Thus, American foreign policy in the 19th century can at best be defined as neutrality or unilateralism “*to capture the sentiment that the US should selectively engage with foreign partners when national interests are at stake*” (Paterson, 2018, p. 5).

Just as neutrality had a different connotation compared to that of smaller powers in Europe, so did privateering for the US. Under British rule privateering served as a supplement to the navy. Like in Europe privateering was established as a lucrative business in the thirteen colonies. The prosperity of the coastal towns of New England was a direct consequence of privateering as a venture (Swanson, 1985) and during the wars of the 18th century the “*bourgeoisie ... had a very great interest in maintaining privateering as a component of American naval effort*” (O’Malley, 1988, p. 260). During the war of independence, with the Continental Navy unable to match British naval superiority privateering remained the only option to inflict damage on their colonial masters. The privateers and the Continental Navy took prizes estimated around eighteen million dollars and six million dollars respectively. Through privateering the Americans were able to disrupt British trade flows, provided themselves with the much-needed strategic materials to continue with the war effort. Although Mahan (1918, p. 5) says privateering, “*was a most important secondary operation of naval war*” it was but one of the factors that contributed to the successful outcome of the war of independence (Morgan, 1977; Dolin, 2022). Because of the role it played during the war

of independence privateering gained a positive reputation; privateers were praised as patriots rather than just profit-seeking vultures (Dolin, 2022). Whereas privateering was slowly being abandoned in Europe, it remained an indispensable component of American naval strategy. This was largely due to domestic politics revolving around naval debates that prevented the building of a large navy. As Sprout and Sprout (1946, p. 6) put it:

*“The Navy became entangled in domestic politics, victimized by patronage and the pork-barrel. It was then that oceanic, continental, sectional, economic, and partisan influences gave rise to strategic theories and political attitudes which were strikingly to affect the growth of naval power for a century and more to come”*

Therefore, whatever naval power the US developed was mostly the result of improvised responses to outside factors rather than a coherent and carefully planned strategy. Evidently this was the reason why the US was always hesitant about the abolition of privateering although it was condemned by various politicians and public opinion almost immediately after independence. Benjamin Franklin, for instance, was one of the most prominent opponents of privateering. When negotiating a treaty with Prussia he stressed, *“It is high time, for the sake of humanity, to put a stop to this enormity. The United States of America, though better situated than any European nation to make profit by privateering, are, as far as in them lies, endeavoring to abolish the practice”* (The New Maritime Law, 1856, p. 29). The treaty with Prussia that was signed in 1785 banned the issuance of letters of marque against each other, but when the treaty was renewed in 1799, this clause was omitted (Woolsey, 1879). Franklin wanted to insert a clause against privateering in the treaty that he was negotiating with the British, but he was not successful.

We should also take into consideration the connection between American neutrality and naval policies. At first glance it might seem unnecessary for a state that embraced neutrality as its foreign policy stance to have a powerful navy. However, neutrality did not provide a protective shield or rendered it unnecessary to acquire naval power. On the contrary, the growing foreign trade of the US necessitated a navy to protect the commercial interests because neutrality worked as long as other states respected the rights of neutrals. Paradoxically, it was the infringement of neutral rights that often led to clashes and conflicts between the neutrals and the states that violated their rights. As early as 1796 Washington was drawing attention to this fact:

*“An active external Commerce demands a naval power to protect it ... the most equitable and sincere neutrality is not sufficient to exempt a state from the depredations of other nations at war with each other. It is essential to induce them to respect that neutrality that there shall be an*

*organized force ready to vindicate the national flag. This may even prevent the necessity of going into war by discouraging from those insults and infractions of right which sometimes proceed to an extreme that leave no alternative”* (From George Washington to the U.S. Senate and House of Representatives, 1796).

The Americans did not wait too long to see their neutrality being challenged by the developments in Europe. These not only led to heated debates about a navy-building program, but also a war with Britain where the Americans once again resorted to privateering. Although the French Revolutionary wars posed a challenge to American shipping it was the Barbary pirates that the US had to deal with first. The Naval Act of 1794 gave the Executive authority to build six frigates to defeat the Barbary pirates who were giving a hard time to American shipping in the Mediterranean. Consequently, there began the debate that would last almost a century. The debate carried along two broad alleys which reflected the interests of two distinct sections in American society. The first ran along the lines of the Federalist and anti-Federalist debate. The Federalists favored a large navy in the European style to protect American commerce in the high seas and to act as a deterrent against European maritime states (Sprout and Sprout, 1946). The anti-Federalists were of the opinion that geographic remoteness coupled with Europe’s endless struggles with each other made it unlikely that any of the maritime powers would be bring about an overwhelming presence to American lands, hence the futility of a navy. Furthermore, *“America’s true destiny lay not at sea, ... but in a thriving agriculture and a growing population of farmers”* (Hagan, 1991, p. 25). They were more interested in the expenditure side of the matter and on whose shoulders that expenditure would fall in the form of heavy tax burdens. The natural outcome of heavy taxation would be the empowerment of the Federal Government, to which they were against (Hagan, 1991).

The second alley was the conflict of interests between the agrarian West (or the interior), and the Northern commercial towns along the eastern coast and the Southern plantations. The agrarian States argued that the burden of building a large navy would mainly fall upon the small farmers of the country since they were the majority of the population. Moreover, while the inner country would pay the majority of the financial costs, the commercial classes would be the main beneficiaries of the Navy. They also argued that the real wealth of the country came from agriculture and the manning of such a navy would drain the already scarce source of agricultural labor. As far as foreign relations were concerned the inner country was of the opinion that such a powerful navy would lead to an inevitable clash with the major maritime powers. The commercial classes and the shipowners of the North were of course in favor of a standing navy, both for the

protection of their interests abroad and to defend the American coast in case of an attack. These two broad alleys were roughly overlapping, that is, the agrarian West and South were mostly anti-Federalists whereas the commercial classes of the North were more inclined towards a strong Federal government (Sprout and Sprout, 1946).

The clash of these two groups could be observed throughout 19th century foreign policy beginning with the Naval Act of 1794. The act required that the building of frigates should be stopped once the threat was over. If it wasn't for the quasi-war with France (1798-1800) the remaining frigates would not be built at all. This was also when John Adams, a Federalist President with Federalist majorities in both branches of Congress took over the Government (1797). Not only the Administration continued with the naval program, but a separate Navy Department was also created. The navy, however, was still not powerful enough to ward off French threat in the West Indies, the Caribbean and Western Atlantic so privateers and armed merchantmen were employed again (Sprout and Sprout, 1946). Nevertheless, aegis of Stoddert, the first Secretary of the Navy, an outline of Federalists' approach to navy came into being. Stoddert in his report, listed the basic objectives of the navy as, "*protection of our Coast ... safety of our important Commerce; and our future peace when the Maritime Nations of Europe war with each other ... To make the most powerful nations desire our friendship—the most unprincipled respect our neutrality...*" (Sprout and Sprout, 1946, p. 41). Other than fast-going cruisers or frigates that would wage a successful commercial war against the enemy, the building of capital ships would enable the US to deter their enemies. A prominent spokesman of the anti-Federalists Gallatin's argument shows us clearly why the US could not give up privateering: "*Considering the manner in which our trade had principally suffered in the West Indian seas, by row-boats and other small vessels, there could be no doubt but the armed private commercial vessels had been of much greater service in preserving our vessels from plunder, than our navy*" (Hagan, 1991, p. 45). In the face of rising government spending and fears that a strong navy was planned not as a deterrent against the enemy but rather as a tool to enhance the Federalists, Stoddert's proposals were defeated (Sprout and Sprout, 1946).

When Jefferson and his party won the elections in 1801, the political power shifted towards the representation of the interests of the agrarian classes which meant whatever was achieved in the previous administration would be shelved. This was really the intention of Jefferson until the problem of Barbary pirates reemerged and necessitated an intervention in the Mediterranean. The fact that the blockade of ports in the previous struggle against the Barbary pirates was the decisive factor in forcing them to surrender changed the naval policy from building capital ships to frigates

and to smaller ships that could sail on shallow waters, which could be very useful for blockading ports (Sprout and Sprout, 1946). The problem of Barbary pirates was relatively an easy one to solve compared to the problems with Britain that would culminate into a war. British naval blockade of Europe and Napoleon's continental blockade from 1806 onwards which again brought about the harassment of American neutral shipping rapidly deteriorated Anglo-American relations.

The reaction of Jefferson's administration to this harassment was, however, a passive one. Instead of strengthening the navy the administration adopted the Embargo Act of 1807, which prohibited all American trade to foreign ports with the hope that both the French and the British would respect neutral rights. However, the Americans ended up suffering more; and their trade revenue fell by 9 million \$. Subsequent measures such as the Non-Intercourse Act and Macon's Bill led to the declaration of France that it would respect neutral rights, but produced no results with Britain (Bradford, 2016). Respect for neutral rights was only one of the problems with Britain; suspicions that the British are provoking the Native Americans, application of the Rule of 1756, illegal blockades, and especially the impressment of Americans were other reasons that made war with Britain inevitable (Bickham, 2012).

Despite the approaching war Congress took no steps to strengthen the navy. On the contrary, it "*seriously debated a proposal to reduce the Navy*" (Sprout and Sprout, 1946, p. 63). When the war broke out in 1812, lacking capital ships to match the British, the Americans once again fitted out privateers. The privateers definitely contributed to the navy's *guerre de course*; they captured over a thousand British vessels whereas the navy captured about 250 vessels (Dolin, 2022). Privateering activities pushed insurance rates up to 30 percent, and the revenue that the federal government gained from privateering equaled to nearly four times the federal income in the prewar years (Bickham, 2012). The outcries of the British merchants and the fact that American privateers also operated along the coasts of Britain shows that some damage was done to British trade.

The balance sheet at the end of the war, however, was not in favor of the US. The British (both the navy and the privateers) captured a total of 1,407 American vessels. Furthermore, the initial success of American privateers was because Britain's attention was turned towards defeating Napoleon. Bickham (2012) claims that by the end of 1813 Britain had already won the war in the Atlantic. The British blockade of the entire Atlantic coast of the US resulted in a sharp loss of trade (%11 percent of the 1811 level), which meant loss of revenue derived from import duties for the federal government (O'Malley, 1988) and government income derived from privateering was far from covering that loss (Bickham, 2012). Bickham also calculated that three-fifths of the voyages

of American privateers “yielded to nothing,” making it questionable for private gain as well. O’Malley (1988) suggests only 2.5% of British merchant fleet was captured between 1793-1815, and this also includes the numbers in the War of 1812. Overall, privateering activities did not have a great impact on British trade in general. Accordingly, the War of 1812 was a typical example of mixed results of privateering where it was a nuisance for both sides but not the decisive factor in the outcome of the war.

The few successful operations against Britain’s smaller ships falsely contributed to a legend that the Americans once again defeated the British. *“This legend of victory, which went virtually unchallenged for nearly a century ... ignored the strategic insignificance of the American operations, as well as the blockade which annihilated [American] maritime commerce, all but paralyzed the economic life of the country, and laid the seaboard open to invasion”* (Sprout and Sprout, 1946, p. 87). Furthermore, the Americans totally misunderstood the lessons to be drawn from the war of 1812. The partial success of American commerce-raiding strengthened the views of the Federalists that small and fast ships had an utmost importance in commerce-raiding against a superior enemy like Britain, missing the effects of a blockade carried out by capital ships as the key to victory (Sprout and Sprout 1946). Interestingly enough, the War of 1812 was the last time that the Americans resorted to privateering.

In the years following the War of 1812 the most important naval development was the establishment of the Squadron Navy (1815-1843), designed to perform peacetime functions centered around protection of commerce in general. The first permanent squadron was established in the Mediterranean to find a solution to the problem of Barbary pirates. By 1843 the squadrons scattered all around the world numbered seven, including a home squadron, which more or less performed the same functions (Hagan, 1991). These squadrons comprised several ships cruising the seas they were assigned to. The squadron navy seems to have found the answer to the question as to what functions the American navy would perform during peace time, but the bigger question was whether it could be employed efficiently in wars. The dispersion of the navy all over the world coupled with the low incentive to build capital ships demonstrated the fact that the navy still lacked coherency, and that the Squadron Navy was of no capacity to perform larger naval operations especially against powerful maritime states (Sprout and Sprout, 1946). During this period the naval debates continued but if any decisive steps were taken, they were again taken when a foreign crisis appeared. The French scares of 1835 forced even a president like Jackson who was against standing



armies as well as navies to renounce his previous stance. Anglo-American crisis of 1840-41, on the other hand, resulted in the creation of the Home Squadron (Sprout and Sprout, 1946).

From the 1840's onwards biggest challenge to the naval debate was American westward expansion which resulted in reaching the Pacific Ocean. However, even this fact had little impact on the inner country's traditional resistance to a standing navy (Hagan, 1991). During the Oregon crisis (1846) the Naval Department prepared several reports demonstrating the poor condition of the navy compared to that of the British and French. One of the reports again pointed out that given the poor condition of the navy, "*commerce raiding by solitary cruisers was still the only offensive operation open to the US*" (Sprout and Sprout, 1946, p. 131). Typically, once the war scares with the British subsided the recommendations for the navy were shelved. It is possible that the successful naval operations in the Mexican War of 1846, contributed to the impression that the current navy is capable of protecting American interests. The US did not resort to privateering during the war even though Mexico issued letters of marque against the Americans (Mukherjee, 2022). What brought success to the naval operations was the heavy blockade of Mexican ports during the war (Bradford, 2016). Let us not forget, however, Mexico was a smaller power which the US could easily defeat even with its modest naval power and without resorting to privateering. As for the possibility of a war with the greater maritime powers, the navy's current condition still necessitated the option of privateering remain open.

Mid-nineteenth century was a time of expansion for the US. Apart from adding an enormous amount of land, territorial expansion added a two-thousand-mile-long coastline. Expansion was not limited to territory. Within ten years American foreign commerce and tonnage of merchant fleet doubled, bringing the country to an unprecedented position, second to Britain, as far as world trade was concerned (Sprout and Sprout, 1946). Although the election of Pierce from the Democratic Party with majorities of the Democrats in Congress raised hopes for the naval expansion no major developments took place. As Sprout and Sprout (1946, p. 145) put it, "*the naval policy of the Pierce administration was a blend of progressive and narrowly conservative views.*" Administration was progressive in the sense that they introduced steam ships to the navy, conservative because the navy was still composed largely of small ships. Consequently, it was this naval quagmire which shaped American attitude towards the Declaration of Paris and resulted in non-adherence to a document that finally settled the question of neutral rights in the manner that the US defended from its independence onwards.

### 3. The Maritime Declaration of Paris (1856)

#### 3.1. The Crimean War, Neutral Trade and American Policy

As the possibility of British and French participation in the Russo-Ottoman war increased so did the anxiety of the countries that would remain neutral. As early as December 1853 Sweden informed the American government of the intention of a joint declaration with Denmark to be issued to Britain, France and Russia regarding respect for the principle of free ships, free goods (Moore, 1909). Since it was the British that observed a contrary principle, we could say that the declaration targeted Britain. Therefore, had the British declined to observe the principle it was very likely that a third Armed Neutrality would be created. On the other hand, although the Americans were the most enthusiastic defenders of the free ships, free goods they were also aware of the fact that with the Jay Treaty of 1794 they accepted the British practice. Moreover, as American minister to London Buchanan admitted bitterly, "... *the Supreme Court of the US, have ... decided, as a principle of the law of nations, that the goods of an Enemy may be captured on board the vessel of a friend*" (Moore, 1909, p. 141). Therefore, it was thought unlikely that the British would abandon their practice in the current war. Failing to persuade Prussia, the Netherlands and the US to a joint declaration, Sweden and Denmark presented identical dispatches to on 2nd January 1854 clarifying their neutral status.

Surprisingly though, three months later Britain accepted the principle, albeit for the duration of the war (Piggott, 1919). There are a number of reasons for Britain's forfeiting its right albeit for a limited period of time. First, it was a matter of coordination. As mentioned above, Britain and France had opposing practices as to how to treat neutral trade. Therefore, at some point a coordination of these policies would be necessary. This, of course is a partial explanation because it does not explain why the British accepted the free ships, free goods principle and not the other way round. A number of scholars offered different explanations. Piggott, in his comprehensive study of the Declaration of Paris where he heavily criticizes British policy, concludes that Britain got carried away with a liberal ideology (1919). Abbenhuis (2014) also stresses the role of free trade ideology in British policy, but from a more positive stance. Malkin (1927) on the other hand, claims Britain feared that the US might employ privateers in the war, therefore produce much damage to British trade. Given the unprecedented expansion of British trade in mid-19th century and as a champion of free trade this fear seems plausible. Anderson (1960) focuses on the economic aspects of the Crimean War and argues that Britain was much aware of its actions and that the acceptance of the free ships, free goods principle benefited British trade as its international trade

continued without much interference. Spencer (1971) praises Mason's (American Minister in Paris) memorandum as the driving force behind Britain's acceptance of the free ships, free goods principle during the war. A more up to date interpretation that makes use of an extensive range of archival documents than aforementioned studies is Lemnitzer's work (2014). He especially disproves Spencer by showing that the British had already accepted the principle before Mason presented his famous memorandum. Lemnitzer does not dismiss British anxiety over a clash with the US, both over neutral rights and privateering, but he also adds that a possibility of a Third Armed Neutrality, the leader of which was Sweden in 1854 was one of the major factors to Britain's change of policy. The strategic location of the Scandinavian powers in relation to the Baltic Sea made it almost imperative for them to remain neutral if Britain wanted to conduct a successful operation against Russia (Lemnitzer, 2014).

In a last-minute attempt to prevent the Americans from engaging in privateering activities if the Russians issued letters of marque,\* British Foreign Secretary Lord Clarendon presented Buchanan a draft treaty between Britain, France and the US, which stipulated that, "*all captains of privateers and their crews should be considered and punished as pirates*" (Moore, 1909, p. 162). As has been mentioned above, countries resorted less to privateering but its status as a belligerent right was not challenged as widely as neutral rights in the international arena. Even the US inserted a clause that banned privateering in its several bilateral treaties, the majority of them being in Latin America (Woolsey, 1879). Nevertheless, this was a major deviation from a practice which had a solid foundation in the law of nations. At a time when the American merchant fleet had reached the second rank in the world and when the Americans were contemplating to provide subsidies to private vessels that could be converted into warships in case of a war (Sprout and Sprout, 1946) it was obvious that such a proposal would not find any supporters in the US government. Buchanan, in his meeting with Lord Clarendon responded with a counter-proposal: the abolition of war against private property at sea, which in turn would ipso facto abolish privateering (Moore, 1909). Before the subject matter reached a resolution however, a number of neutrals began declaring that they would close their ports to privateers; some by choice some upon the subtle pressure put on by Britain (Lemnitzer, 2014). In any case, the proposal for a treaty was withdrawn before the US presented a formal reply although during the war it came up from time to time in Buchanan's conversations with British diplomats (Moore, 1909).

A day before entering the war against Russia, on the 28th of March both Britain and France issued declarations to neutrals. The declaration was basically a compromise between the conflicting

practices of the British and the French regarding neutral trade. While Britain, waived its right of seizing enemy's property on board neutral vessels except for contraband, France waived its right to confiscate neutral property on board enemy vessels (Piggott, 1919). Both powers also declared that they would refrain from issuing letters of marque. Given prior treatments of both powers in previous wars, this was a huge concession.

The US response to the declarations came to be known as the "First Marcy Note." While Secretary of State Marcy praised the British and the French in accepting a principle that was defended by the US for a long time, he also showed that the US was willing to take further action to, "*unite with other Powers in a declaration that it shall be observed by each, hereafter, as a rule of international law*" (Piggott, 1919, p. 265). Therefore, the US was quick to seize the opportunity to turn this "concession" into a permanent rule of international law. However, the creation of a new rule of international law is a slow and painful one. The constant observance of a practice over a long period of time often led to a consensus among international jurists which in turn came to be accepted as customary law (Lemnitzer, 2014). What the US attempted to do was to speed up the process by signing a series of bilateral treaties with states to get the principle to be recognized as a principle of international law observed by many states (Ahonen, 2005). Lemnitzer (2014) draws a line of similarity between Britain's complex web of bilateral treaties in its attempts to ban slave trade following the Congress of Vienna, but Britain also used coercive power, especially against the smaller powers for inducing them to accept the ban (Kennedy, 1976).

The natural course for such an undertaking for the US would be to target the neutrals in the current war but it was Russia, another belligerent, that the Americans approached first. According to Thomas Seymour, American minister in Russia, despite the blockade on Baltic ports Russia would do everything it can to keep trade going; "*even the tsar set his hopes on the American trade,*" (Ahonen, 2005, p. 102) not to mention the illicit trafficking of American arms and ammunitions to Russia contrary to the principles of neutrality. The Russo-American treaty was quick to go into force, the Senate ratified it almost immediately after it was signed. To the irritation of the British, the treaty had a distinct clause that kept privateering as a right. In an interesting maneuver, rather than signing bilateral treaties with each state, the US called on to the all the states to adhere to the treaty with a simple declaration. The invitation was also extended to Britain and France, however not formally forwarded by Buchanan (Moore, 1909). The scheme did not work; Britain did not adhere to the treaty and it further persuaded other Europeans not to adhere as well (Lemnitzer, 2014). Therefore, it was still Britain which decided on the rules of the game, did not let any other

state take the lead, and gently coerced smaller powers to stay in course. Most governments, upon receiving invitation to adhere to the treaty, turned on to Britain for a second opinion (Lemnitzer, 2014) is also indicative of their acceptance of Britain's lead. Under these conditions the American initiative did not succeed, but the Americans did not give up trying.

In 1855 the Americans once again moved for the neutral rights. This time, a proposal for a new treaty was only issued to France, and Lemnitzer (2014) argues that this time it was not a matter of international law but international politics that the Americans were drawing their incentives from. The Americans and the British were now coming to heads with each other on certain issues, especially Central American questions and British attempts of recruitment in the US (Dowty, 1971). Now that the British and the French were allies, in case of a war with the British the US might have to face the French as well. Therefore, it was imperative for the US to divide this alliance. The scheme, however, did not work. When the war ended in 1856, the US attempts about neutral rights produced no concrete results and the final say about the matter would again be up to the Europeans, and more specifically to Britain.

### **3.2. Caught by Surprise: The Declaration of Paris and the United States**

Apart from signing the Paris Peace Treaty which ended the Crimean War, the parties also signed a declaration regarding maritime rights on the 16th of April, 1856. The Maritime Declaration of Paris consisted of four articles that aimed to bring an end to long-standing disputes about maritime issues. The four articles were: 1. Privateering is and remains abolished. 2. The neutral flag covers enemy's goods with the exception of contraband of war. 3. Neutral goods with the exception of contraband of war are not liable to capture under enemy's flag. 4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy (U.S. Naval War College, 1906). All other powers were invited to adhere to the Declaration, which would only be binding on the adherers. Furthermore, a protocol was also signed indicating that these four principles were indivisible, which actually implied that the two maritime powers, France and Great Britain were the real architects of the Declaration, and Britain would not wave its long-held right without getting something in return. As Earl Clarendon said, "*Now England [is] prepared definitely to abandon her principle provided that privateering is abolished*" (Piggott, 1919, p. 118). The protocol further stipulated that from this point onwards the adherers to the Declaration would not enter into any agreement contrary to those four articles. By the end of 1856, forty-two states had acceded to the Declaration, with an eventual adherence to fifty-five. As The Declaration marked, "*the beginning of modern international law as we know it:*

*multilateral treaties open for accession by all powers with the intention of creating new universal rules”* Lemnitzer (20143, p. 1068).

There are a number of reasons as to why Britain was insisting on the abolition of privateering. The first and foremost is the fact that, with its overwhelming naval power, the British did not need the privateers anymore. But Kennedy (1976, p. 198) draws attention to a fact often missed by other scholars, “*the trade British privateers of the seventeenth and eighteenth centuries had harassed was that between ports which then belonged to her rivals – Ceylon, Mauritius, Cape Colony, Guinea, Dominica, Trinidad, St Vincent, St Lucia, Demarara, Grenada, French Canada. Since those times they had all become British.*” Therefore, even if privateers were employed in future wars Britain would have nothing to gain, nor in material terms nor in crippling the trade of the enemy. The British now saw the US as the foremost threat to its trade in case of a war, or at least a combined forces of other powers such as the French and the Russians. So great was the volume of British trade that the combined forces of these three powers would still inflict damage to Britain in case of a war.

Although the abolition of privateering was discussed between Buchanan and Clarendon as early as 1854 the Declaration caught the US with surprise. Furthermore, the US felt itself cornered with the indivisibility of the four articles; accepting the declaration would finally settle neutral rights question in favor of the US, but at the same time it would also deprive it from resorting to privateering in future wars. Initial response of the US was to send out letters to a number of governments, especially the smaller and neutral powers, urging them not to sign the declaration (Lemnitzer, 2014). Although the smaller powers were not pleased with their right of privateering taken away as a form of defense, as long as neutral rights were guaranteed they were ready to give up that right.

The subsequent attempt of the US was what is known to be the “Second Marcy Note,” or the “Marcy Amendment” which was actually a letter addressed to de Sartiges, French Minister in Washington. It was also forwarded to the participants of the Paris Peace Conference except Britain. In this long response to the Declaration, Marcy elaborated on the Declaration’s implications for the international maritime order. As far as the last three articles were concerned, the US did not have any objections, indeed articles two and three were exactly what the US had been demanding for years. As far as the abolition of privateering was concerned the objections of the US centered around three factors. First and foremost, Marcy’s note reflected the domestic disputes that had been going on for years which led to the establishment of a strong link between privateering and naval

constraints: “*The United States consider powerful navies and large standing armies, as permanent establishments, to be detrimental to national prosperity and dangerous to civil liberty. The expense of keeping them up is burdensome to the people; they are ... in some degree, a menace to peace among nations*” (Piggott, 1919, p. 400).

Marcy made it very clear the US would not bow down to pressure of changing naval policy because a change in the rules of international law dictated to do so. As we have mentioned earlier, the Declaration came during the Pierce administration which contemplated subsidizing the building of merchant vessels that could be employed during war time. Combined with the crisis that erupted between the US and Britain towards the end of the Crimean war, it would be unthinkable for the US to accept the Declaration as it is. As long as the US was not relieved of domestic constraints standing in the way of building a powerful navy, privateering remained as the only alternative for fighting against a powerful maritime nation like Britain.

Another important problem for the US was that the abolition of privateering did not actually rule out commercial warfare completely. In other words, navies still retained the right to confiscate enemy property at sea, which gave an enormous advantage to the most powerful maritime nation, that is, Britain. Therefore, it was difficult for Marcy to understand if public vessels still retained this right, privateers, “*which are in fact but another branch of the public force of the nation commissioning them*” (Mukherjee, 2022, p. 119) were deprived of it. To emphasize this point, Marcy presented a hypothetical war scenario without spelling out Britain where, “*the commerce of each [power] is about equal, and about equally wide-spread over the world ... but as naval Powers there is great disparity between them ... The fatal consequences of this great inequality of naval force between two such belligerents would be in part remedied by the use of privateers*” (Piggott, 1919, p. 400).

The third point that Marcy objected to was that, as opposed to neutral rights, the right to privateering was not consistently challenged by nations in the international arena. In other words, there were always complaints about the damage caused by privateers, but almost no arguments as to the right to employ them. He gave examples of two bilateral treaties where the parties agreed not to resort to privateering in case of a war between them. The first was signed between Sweden and the United Provinces in 1675, and the second between the US and Prussia in 1785. Whereas the first was disregarded as soon as war erupted between the parties, the clause in the second treaty was omitted when renewing it (Savage, 1934).

Marcy's note, however, went one step further and offered an amendment to the Declaration: the exemption of all private property from seizure during war. Consequently, the logic behind the right to privateering would cease to exist, thereby nullifying the resort to it. Mukherjee (2022) argues that the Marcy Amendment was in fact a reaction of the US to the closure of the Great Power club to the US. By tying the acceptance of a long-held US position on neutral rights to the abolition of privateering the great powers put the US in a very difficult position. The Declaration came as a compromise between Britain and France, where France saw a window of opportunity to persuade the British to accept the free ships, free goods principle. Britain, on the other hand, was ready to accept the principle as long as privateering was abolished. When the Declaration was discussed in the British Cabinet, the members mainly focused on US reaction and were almost sure that the US would not sign. They were, however, counting on the pressure that the US would be exposed to if all the powers of Europe acceded to it, leaving the US isolated. Only one member of the Cabinet warned that the consent of the US should be secured before signing the Declaration, which was not taken into consideration (Lemnitzer, 2014). In this respect, the amendment was a maneuver to save the US from that position. Simply rejecting the Declaration would lead to the isolation of the US, whereas with a counter-proposal the US, "*in resisting an attempt change the existing maritime law ... look[ed] beyond its own interest, and embrace[d] in its view the interest of all such nations as are not likely to be dominant naval powers*" (Savage, 1934, p. 79). Negotiations as to how to insert the Marcy Amendment to the Declaration went on for several months, but it was the US administration that suspended the negotiations. The new US President Buchanan, "*unlike his predecessor ... could not imagine abandoning privateering under any circumstances until the US fleet had reached the size of the British Navy*" (Lemnitzer, 2014, p. 91). Once again domestic restraints on naval policies had the final say on American stance towards privateering.

Assessing the archival documents Lemnitzer (2014) arrives at the conclusion that Britain was going to reject the amendment any way, but in such a case it would be Britain's turn to find a convincing justification for failing to accept such a liberal reform. On the other hand, the British assumption that the US would sign the Declaration under overwhelming pressure did not come to be true either. Instead, by offering a counter-proposal the US found a face-saving way to evade both the pressure and risk of isolation. Suspending further negotiations once the administration changed, however, was a major blow to US diplomacy, leaving matters unresolved.

Since not all the states adhered to the Declaration, there was confusion as to how the Declaration would apply under various circumstances. War scenarios for various combinations



were almost endless: if two powers, for instance, one adhered to the Declaration and the other did not, formed an alliance against a state that adhered to the Declaration, how would the Declaration work? What if there were two coalitions of states warring against each other, each containing adherers and non-adherers? All these combinations presented difficulties that remained to be seen as the Declaration was put to practice. The powers did not have to wait long to see the working of the Declaration; in the Franco-Austrian war of 1859 (both adherers to the Declaration) France made it explicitly clear that the Declaration would only apply to those that adhered to it. Others would be treated according to French maritime law, that is, neutral cargo found on board enemy vessels would continue to be confiscated. Remaining loyal to the Declaration the European powers demonstrated their support for it. During the war, the Marcy amendment was once again brought to the agenda by the smaller powers of Europe, but the discussions led to no results (Lemnitzer, 2014).

The major blow to US stance on the question, however, would come from within, in an unexpected turn of events. In 1861, the US civil war broke out where the Confederates immediately fitted out privateers. The Union's response was President Lincoln's Proclamation regarding the blockade of the Southern ports, the last paragraph of which was a threat to the Confederates: "*... if any person, under the pretended authority of said States molested a vessel of the US, or the persons or cargo on board her, such persons would be treated as pirates (Peifer, 2013).*" Furthermore, the Union government instructed its ministers in Europe to the government's desire to join the Declaration of Paris without any reservations" (Savage, 1934, p. 420). Several questions arose with regard to the situation: first and foremost, the recognition of the Confederates as belligerents. Whereas the Union government described them as rebels not a belligerent, therefore not eligible for any international rights the European governments recognized them as belligerents. However, by proclaiming a blockade, which is actually an act of war between two warring parties, the Union government itself had indirectly recognized the Confederates as belligerents (Lemnitzer, 2014).

Treating the Confederates as pirates, however, proved to be more problematic. Only five years after the Declaration of Paris the Union government found itself defending a principle that was the very reason of its non-adherence: abolition of privateering. In an attempt to outlaw Confederate privateering the Union government sent out instructions to its ministers in Europe for accession to the Declaration of Paris, this time without any reservations (Savage, 1934). The response of the governments, especially Britain, was affirmative provided that the Declaration

cannot be applied to the current situation, which basically would not serve the intention of the Union government because its sole purpose to join in such haste was to condemn the Confederate privateers. Since the Union government did not accept the secession of the South, the Declaration of Paris would be binding on the Confederates as well. Gone was this opportunity when the Confederates were recognized as belligerents by the European governments.

The Europeans, all of which adhered to the Declaration of Paris, remained neutral in the war. Although they recognized the Confederates as belligerents, and that they were not obligated to observe the Declaration of Paris, they generally remained loyal to it. So much so that, they closed their ports to Confederate privateers. Lemnitzer (2014) argues that the reason for this was not that the Europeans were taking sides with the Union but that they wanted to see privateering abolished all together. In any case, as the civil war continued the Union was able to tighten the blockade of Southern ports which made privateering less and less profitable, making the Southerners turn to blockade running which proved be a lucrative business (O'Malley, 1988).

Although the attempt to adhere to the Declaration in such haste proved to be an embarrassment for the Union it found a middle way to deal with the situation. Despite pressure from the traditional privateering towns the Union government did not issue any letters of marque during the war. Although they announced that they would treat the privateers as pirates, no privateer was condemned to death penalty for acts of piracy (Lemnitzer, 2014; O'Malley, 1988). Furthermore, the Union government proclaimed that it would respect the rights of neutrals in accordance with the principles established in the Declaration of Paris (Savage, 1934). Following the civil war the US neither adhered to the Declaration nor did it resort to privateering in subsequent wars. Privateering, however, continued to be debated both in political and legal circles in the US. Perhaps American ambivalence towards the issue was best explained by Woolsey: "*We cling to the possible benefits of privateering, while trying to avoid its acknowledged evils*" (Woolsey, 1879, p. 132).

### **Conclusion**

The process which culminated into the Declaration of Paris is a demonstration of how power politics influence the development of rules of international law. On the one hand, there was France which saw a window of opportunity for persuading Britain to accept the rights of neutrals as practiced in the Crimean War. There was of course, Britain on the other hand, ready to relinquish its long-observed practice, but not without getting something in return. Finally, there was the US, powerful enough to apprehend Britain, but still not powerful enough to shape the rules of

international law to best suit its interests. Its economic capacity in mid-19th century reached a level that could finance a large standing navy, but domestic politics hindered such an endeavor. Under these circumstances the leaders of the country saw but no option to regard privateers as indispensable components of the country's naval strategy. Therefore, at a time when this practice became obsolete for the leading maritime powers of Europe, the US still clung to it. The price to be paid for not relinquishing privateering was being deprived of neutral rights that the US had consistently fought for. Therefore, it was still Britain which had a firm grip on the shaping of the rules of the international system even if it was being more and more challenged by the smaller powers. One peculiar aspect of the issue is that as early as 1797 the US did not allow its citizens to take part in privateering activities against states that the government had peaceful relations with (Woolsey, 1898). The bewilderment as to why the US still clung to privateering even though it did not resort to it after the War of 1812, can only be explained by the plain fact that this option remained open because it would only be used against Britain.

The Declaration of Paris was certainly not a Grotian moment because the rules adopted in the Declaration had a complex history of competition, challenge and defiance. The way they were adopted, however, was new, which paved the way for speeding up the process of rules gaining wide recognition. It should be borne in mind that the rules continued to evolve. As far as privateering is concerned the practice continued in somewhat a different form under direct control of the state. The first example of which was seen in the American civil war when the Confederates attempted to establish a volunteer navy. As such, the merchant fleets of states gradually turned into auxiliaries to the navy, under strict state control, which gained formal recognition at the Hague Peace Conference in 1907.

The rights of neutrals, however, proved to be more problematic. The Hague Conventions on neutrality were huge steps on the formal recognition of neutrality as a status in international law. Despite these efforts neutral rights continued to be violated, disregarded and by way of expanding the lists of contraband made it almost impossible for the neutrals to continue trade during wars. Even the US began to fit more into the pattern of a great power which would bend or ignore the rules to its own liking rather than strict observance of them. As such, the US was only a step away from imposing its own version of rules in international law in late 19<sup>th</sup> century.

The study of US policy with respect to the Declaration of Paris presents us a curious case in the development of the rules of international law. Commercial clashes with Britain played an important role in American independence. As such, neutrality played an important role in the

commercial policy of the nascent state. The reason for that was not mere avoidance of getting entangled in complex web of European politics, but creating a niche that would enable the US to trade while the Europeans were at war. That advantage to be drawn from that niche, however, depended heavily on Britain observing the free ships, free goods principle. Privateering on the other hand, was a double-edged sword for the policy of the nation. As far as neutral trade was concerned, privateering was one of the major threats to US commerce. However, unless American navy reached a level that could challenge British supremacy on sea, privateering remained an indispensable part of US naval strategy. The unsuccessful attempt of Marcy in the face of Britain's clever linking of neutral rights and privateering clearly revealed that although Britain relinquished its long-observed right, it still had the power to shape the rules of the game in its favor. The US would have to wait for the 20th century to exert such power.

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