

Gone with the War? Neutral State Responsibility
and the Geneva Arbitration of 1872

Neutral Countries ... may be exploited by the Great Powers both strategically and as a source of additional armies and fleets. Of central importance to the game are those Neutral Countries and provinces which are designated as "Supply Centres". A player's fighting strength is directly related to the number of Supply Centres he or she controls, whilst the game is won when one player controls at least 18 Supply Centres.¹

1. Introduction.

War can be 'kind' to certain sectors of an economy² and the armed forces of a state can be as easily employed arguably to protect domestic trade as to face an external armed threat. With this point in mind, the arbitral award of \$15,500,000³ made to the United States against Great Britain on 14 September 1872 is of crucial and historic importance. The arbitration was held in Geneva pursuant to the Washington Treaty of 8 May 1871, and was intended to settle various differences which had arisen largely during the American Civil War ('ACW'), 1861 – 1865.⁴ Propelling the

¹ Excerpt from the rules of the popular board-game 'Diplomacy' [1989] Gibson Games, in which players re-enact European war-mongering prior to World War 1. Eighteen 'Supply Centres' constitute a majority of the 34 Supply Centres marked on the board.

² See G. Best, War and Society in Revolutionary Europe 1770 – 1870 (Stroud, Sutton Publishing Ltd., 1998), p. 138.

³ Plus interest payable by Britain. The amount originally claimed was \$34.75 million.

J.H.W. Verzijl, International Law in Historical Perspective: The Law of Neutrality, Vol. X Part IX-B (Alphen aan den Rijn, 1979), p. 118.

⁴ Text of Treaty reprinted in J.B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Vol. 1 (Washington: Government Printing Office, 1898), pp. 547 – 553. Articles I – XI of the Treaty regarded the so-called 'Alabama' claims. Other claims involved (1) the navigation of the St. Lawrence river, (2) fisheries disputes, (3) transit of goods through Maine, lumber trade

arbitration were American accusations that Great Britain had assisted the new Confederacy covertly in its rebellion, and in breach of British neutrality. In particular, Great Britain had declared neutrality soon after the outbreak of the ACW, as had many other European states, but British shipbuilding for or on behalf of the Southern Confederacy during the war was a prime complaint.⁵

The laws of armed neutrality⁶ have a long history, as the practice of third states remaining neutral during times of war was derivative of the fact of war. Serious attempts by states to deter or prevent each other from engaging in war only began in the last hundred years or so.⁷ Thus, by the late Nineteenth Century, the rules of neutrality had crystallised into two main principles, those of abstention and impartiality. First, neutral states were entitled to continue with their peaceful trade during a war. Secondly, belligerent states were entitled, for wartime purposes, to monitor certain forms of trade in order to prevent the delivery of prohibited contraband to an enemy.⁸ Therefore, the law of neutrality permitted the continuation of neutral peacetime trade during a military war without the neutral having to ally with a belligerent.⁹ This did nothing to prevent war; it merely helped to confine

down the St. John River and reciprocal trade between the U.S. and the Dominion of Canada, (4) the Manitoba boundary, (5) the San Juan water boundary, (6) British claims arising from the ACW, and (7) Canadian claims for Fenian raids. See, e.g., J.T. Adams, A History of the American People (London: Routledge, 1933), pp. 141 – 144; J.B. Moore, above, this note, pp. 539, 540 - 541.

⁵ The Tribunal would examine a total of 18 such claims.

⁶ By which is meant neutrality made applicable during war, rather than a stance of neutrality pronounced during a time of peace.

⁷ Fuelled in part by the need to harness new military technology. I.P. Trainin, 'Questions of Guerrilla Warfare in the Law of War' [1946] 40 A.J.I.L. 534, 536 n.2. See also G. Best, 'The Restraint of War in Historical and Philosophical Perspective', in Humanitarian Law of Armed Conflict – Challenges Ahead (A.J.M. Delissen and G.J. Tanja, eds.) (Dordrecht: Martinus Nijhoff, 1991), pp. 3, 19; General Treaty for the Renunciation of War 1928, U.K.T.S. 29 (1929), Cmnd. 3410, 94 L.N.T.S. 57.

⁸ F.E. Smith (Earl of Birkenhead), International Law (London: Dent (The Temple Primers), 1900), p. 145. See also Y. Dinstein, 'The Laws of Neutrality' [1984] 14 Isr. Y.B.H.R. 80.

⁹ See, e.g., C.H. Stockton, 'The Declaration of Paris' [1920] 14 A.J.I.L. 357, who refers to the Crimean War (1853 – 1856) as 'in fact, a practical example of that anomaly of "a military war and a commercial peace"'. No lawful trade could be conducted between the citizens of states at war with each other, without special permission. G.G. Wilson (ed.), H. Wheaton's Elements of International Law: the Literal Reproduction of the Edition of 1866 by R.H. Dana, Jr. ['Dana'] (Oxford: Clarendon Press, 1936), p. 358.

war's effects. Moreover, as a breach of neutral duties by one state could place serious diplomatic pressure on its neighbours, it was in the interests of the international community to ensure observance of the rules of neutrality by both belligerents and neutrals.

However, and in step with steady technological progress,¹⁰ neutral states were forced slowly to devote greater efforts to policing their neutrality. Higher levels of neutral state 'due diligence' were demanded as the price for remaining uninvolved. To do otherwise meant risking the appearance of aiding one belligerent to the detriment of the other. However, as higher levels of 'due diligence' came to be expected from neutrals, a contradiction at the heart of Nineteenth Century neutrality, and thus at the heart of the bases for arbitration at Geneva, was exposed. Continued trade between a neutral and a belligerent could secure a corresponding degree of advantage to each.¹¹ At what point, then, would a 'practical example of that anomaly of a military war and a commercial peace'¹² operate in practice to the advantage of one belligerent, and the disadvantage of another? At what point could 'neutral' trade become 'un-neutral' service? At what point could a mere perception of un-neutral activity be serious enough to trigger a declaration of war by an aggrieved belligerent upon that neutral?

In short, while rules of neutrality were indeed a fact of international life, their precise content was not. The observance of any particular set of rules was designed more to secure a stance of neutrality within given circumstances than to express 'disapproval' of a war. As a decision to declare neutrality involved cost-benefit considerations as well, such as whether and to what extent a belligerent state might secure 'natural' advantages from geographic position, or historic trade links,¹³ consideration had also to be given to modes of 'permissible' assistance. The tasks, therefore, of the Geneva arbitrators in 1872 included re-defining the modern content of 'due diligence', assessing for purposes of compensation the many claims for damage allegedly caused

¹⁰ For instance, the use of the telegraph, railways, steamships, and new armaments. See, e.g., A. Haughton, 'Braxton Bragg and Training in the Army of Tennessee 1861 – 1863' [1998] 3(2) War Studies Journal 96; I.P. Trainin, *supra* note 7.

¹¹ Cf. the recent furore surrounding Swiss 'neutrality' during World War 2. See Book Review, de Waal, 'Dangers of Discretion' [1999] 21(2) London Review of Books 27.

¹² C.H. Stockton, *supra*, note 9.

¹³ See F.A. Boyle, 'International Crisis and Neutrality: U.S. Foreign Policy Toward the Iraq-Iran War', in Neutrality: Changing Concepts and Practices (A.T. Leonhard, ed.) (London: University Press of America, 1988), pp. 59, 64; E.C. Phillips, 'American Participation in Belligerent Commercial Controls 1914 – 1917' [1933] 27 A.J.I.L. 675.

by the breach of neutrality by Great Britain,¹⁴ and facilitating an agreement between the parties regarding operative rules for future use.¹⁵

American demands for compensation from Britain after 1865 were essentially ignored for nearly two years after the war,¹⁶ during which time Britain maintained that its neutrality had not been compromised. Nevertheless, the emergence of the United States as a new world force, capable increasingly of inflicting damage on British interests, meant that the compensation claims made by the United States were not merely a challenge to British political and judicial interpretations as to its neutral obligations; the claims involved substantial and practical questions of international law and conduct. As post-war proposals to change American neutrality laws contained various retaliatory elements which would have infringed British freedom of trade, Great Britain was convinced ultimately of the wisdom of adjudicating the financial claims arising from the ACW. Most importantly, Britain agreed to arbitrate on the basis of rules which were not yet accepted as principles of general international law, and which clearly favoured the case of the United States from the outset.¹⁷

The convening of the Geneva Arbitration to determine definitively, as between the two countries, the content of the laws of neutrality was also viewed as more appropriate to the times. There was otherwise a risk of ‘the exercise of force by bodies politic, for the purpose of coercion’.¹⁸ However, when the arbitrators awarded a gross sum in compensation to the United States on grounds that stated categorically which ‘rules’ of neutral duty had been breached by Britain, the inference was sealed that either British domestic laws had not been adequate to the task of ensuring compliance with international obligations, or the actual interpretation and application of the laws by British customs officers, the judiciary, and others, were somehow at fault. Either way, Britain was found liable for its failure to ensure that its interpretation of the content of the laws of neutrality – and the commercial advantage to be secured through it – remained above reproach.

¹⁴ Article VII of the Treaty of Washington, and specifically, ‘the claims of the U.S. against G.B. on account of acts committed by rebel cruisers’. J.B. Moore, *supra* note 4, p. 541.

¹⁵ See statement of Lord Granville, *quoted in id.*, p. 540.

¹⁶ *Id.*, p. 497.

¹⁷ E. Castrén, *The Present Law of War and Neutrality* (Helsinki: Academia Scientiarum Fennica, 1954), p. 505.

¹⁸ Dana, *supra* note 9, p. 378 n. 171, who adds: ‘[m]odern civilisation has recognised certain modes of coercion as justifiable’.

Naturally, the history of the Geneva Arbitration of 1872 has been recounted extensively elsewhere, but it is the specific purpose of this discussion to explore the conventional flexibility which propelled the development of the laws of neutrality for so long, and which was greatly circumscribed by the Geneva Arbitrators in 1872. The structure of this discussion is as follows. First, the historical framework for the rules of neutrality is briefly outlined; the primary emphasis is on the modern (post-1815) period¹⁹ in order to foreground the events that unfolded in 1861. A short review of third state reaction to the outbreak of the ACW is then made. The opposing positions taken by Great Britain and the United States regarding the rights and duties of neutrality, and the course of the arbitration at Geneva, are then discussed. It is concluded that, for reasons largely to do with the specific circumstances of the ACW, the finding of British liability in 1872 would mark the beginning decline of the laws of armed neutrality.

2. The 'Standardisation' of Neutrality.

By the mid-Nineteenth Century, a stance of neutrality was the best, if not the only, mechanism by which third states could avoid involvement in the wars of other states. It was also the case by 1861 that a neutral state could profit hugely from continued trade relations with one or both of the warring parties. However, should geographic position or historic trade links lead in fact to the enjoyment by one belligerent of an advantage greater than that of another, any resulting perception of 'un-neutral' service could quickly endanger a neutral state's more formal stance. When coupled with the risk that an aggrieved belligerent might view 'un-neutral' activity as serious enough to provoke a wider war, the operation of the law of neutrality could only be as good as each state's ability to police and enforce its own position within the rules.

In other words, a certain 'equality of arms' was a pre-requisite to the success of any state's particular neutral policies. As mere expediency is often the key to action taken regarding the outbreak and resolution of any war, it is the purpose of this section to discuss in brief outline the background and framework of those rules of neutrality which were perhaps better 'known' by 1861, in order then to evaluate the level of actual consensus in existence between 'civilised' nations at that time.

2.a. The Pre-Modern Era of Neutrality – An Overview.

¹⁹ The writer is of course aware of the recent debates surrounding the conceptualisation of pre-modern/modern/post-modern, etc., periods. See, e.g., A. Giddens, The Consequences of Modernity (Cambridge: Polity Press, 1990). However, engagement with those debates is beyond the scope of this discussion.

The rules of neutrality, as they existed in 1861, were the direct result of the non-prohibition of war in international relations. In terms of the development of the relevant rules, three stages are of crucial importance: the demise by the Sixteenth Century of the ecclesiastic 'just war' doctrine, the growth throughout the Seventeenth and Eighteenth Centuries of bi-lateral treaties of defensive alliance, and friendship and amity, and the advent during the late Eighteenth and early Nineteenth Centuries of wars of national liberation. While it is controversial to what extent the ancient world systematised warlike arrangements, the law of neutrality in its modern sense was largely unknown generally speaking until the last centuries of the Middle Ages.²⁰ As there could be no 'legal' basis for a stance of neutrality between states in the absence of any ascertainable body of international law and few shared rules for waging war, any attempt at a stance of neutrality, or rather, of non hostes, could only be viewed as a temporary political fact.²¹ Even then, the general practice, particularly where deemed necessary for geographic or economic reasons, was for third states to affiliate with, and/or provide assistance to, one of the belligerents.

In time, the search for limits to the 'right' to use force was facilitated in Europe by the Christianity held increasingly in common, and ever-expanding commercial relations.²² Older debates in the classical bellum justum which required the justification of war by reference to a 'just cause' thus constituted an attempt to assign war a place in the Christian theological and moral universe.²³ However, new controversies incident to the discovery of the New World and the blood-filled exploitation of the Amerindians began to weaken the centuries-old ecclesiastic 'just war' doctrine, and the idea arose

²⁰ See E. Castrén, *supra* note 17, p. 12.

²¹ A.P. Rubin, 'The Concept of Neutrality in International Law', in A.T. Leonhard (ed.), *supra* note 13, pp. 9 – 15.

²² See, e.g., T.E. Holland, Studies in International Law (Oxford: Clarendon Press, 1898), pp. 20, 40 – 58. An example of standardisation is the 'Consolato del Mare', a work dating from the Twelfth Century but first published in 1474 in Barcelona, in Catalán. See Morratel V., 'The Spanish School of the New Law of Nations' [Sept.-Oct. 1992] 290 I.R.R.C. 416, 424 – 425; H. Wheaton, History of the Law of Nations in Europe and America (New York: Gould, Banks and Co., 1845, reprinted 1973), pp. 36 – 42, 106 – 107; H. Lauterpacht (ed.), Oppenheim's International Law, Vol. II (London: Longmans, 7th ed. 1952), p. 628

²³ 'As such, it [the 'just war' doctrine] constituted an attempt to impose restrictions on a practice of recourse to force which was virtually endemic, and could not simply be outlawed given the fragility of the institutions'. P. Haggemacher, 'Just War and Regular War in Sixteenth Century Spanish Doctrine' [Sept.-Oct. 1992] 290 I.R.R.C. 434, 437.

that those who lack a personal 'just cause' also lack the standing to fight, and could have no moral or legal grounds for resorting to arms or otherwise assisting a belligerent.²⁴ This development lent a new rational basis to a formal stance of third-party neutrality during war which simultaneously diminished the importance of ideological justifications for war. Thus, neutrality could become an obligation.²⁵

Arguably more important than the gradual demise of the 'just war' doctrine, however, was the steady conclusion of treaties of 'qualified' neutrality which contributed to the emergence of a formalised stance of impartiality during war.²⁶ In practical terms, waging war was expensive then, as now, and a stance of 'qualified' neutrality permitted a form of alliance, or amity, to be signalled simultaneously with the retention of non-combatant status. 'Qualified' neutrals were thus unlikely to find themselves automatically within the pool of warlike actors, yet retained their freedom to profit from war by agreeing in advance to furnish a belligerent with money, troops, and similar assistance. In this way, a 'qualified' neutral state could benefit more from the wars of others in commercial and economic terms than it would lose.²⁷ Moreover, bi-lateral treaties of defensive alliance, and of commerce and amity, expired in due course, at which point participant countries were free to alter their prior mutual agreements, and to develop new conventional obligations.²⁸ The resulting scope for manoeuvre and advantage meant however there was little evidence of the emergence of a 'body' of generally accepted rules of international law in this context.²⁹

The transition of Europe to industrialisation accompanied a slow but gradual centralisation of power in the hands of ever more powerful states. This in turn

²⁴ See *id.*; H. Lauterpacht (ed.), *supra* note 22, pp. 623 – 626; T.E. Holland, *supra* note 22, p. 52.

²⁵ A.P. Ruben, *supra* note 21, p. 14.

²⁶ Treaties of defensive alliance, and of commerce and amity, were used for this purpose. H. Lauterpacht (ed.), *supra* note 22, p. 663. See also J.H.W. Verzijl, *supra* note 3, pp. 3, 5 – 7, 40 – 42.

²⁷ See H. Wheaton, *supra* note 22, p. 122, who notes a similar Dutch stance following the Peace of Westphalia.

²⁸ *Id.*, p. 202.

²⁹ As in the case of seizure of private property at sea. See, e.g., H. Lauterpacht (ed.), *supra* note 22, p. 460. G.B. usually passed prize acts to meet each new war. Dana, *supra* note 9, p. 392 n. 176. Exceptions existed regarding other aspects of maritime neutrality, as well. See H. Wheaton, *supra* note 22, pp. 106, 115, 206 – 217, 300 – 301, 305; J.H.W. Verzijl, *supra* note 3, p. 46 (the Armed Neutrality of 1780); Dana, *supra* note 9, pp. 507, 508 n. 223.

altered the 'equality of arms' formerly held between smaller 'state' entities,³⁰ and certainly by the Nineteenth Century, higher levels of 'perfect' or 'impartial' neutral obligations were demanded by belligerents.³¹ In turn, a more 'perfect' observance of neutrality required higher levels of 'due diligence' to maintain the demarcation between 'neutral' and 'un-neutral' service. Industrial progress merely complicated inter-state relations during war in this regard, as growing lists of prohibited contraband constituted a warning of the coming erosion of neutral freedoms. Generally speaking, trade in warlike instruments such as munitions could be seized as prohibited contraband. Gradually, as industrialisation began slowly to change the manner of waging war, articles declared contraband, and hence, forbidden to the enemy through belligerent seizure, came to include more everyday commodities such as pitch and tar, rosin, sail cloth, and even food, the acquisition of which could also prolong a war.³² While neutral nationals who continued to profit from trade in contraband articles did so at their own risk, neutral states became increasingly aware that to act in defence of private commercial interests against belligerent attack increased the risk of neutral state involvement in foreign wars.

2.b. The Post-1815 Importance of Neutrality.

The American position at Geneva in 1872, that the applicable laws of impartial neutrality 1861 – 1865 were well-known to 'civilised' states, was to some extent true. The four decades which elapsed between the Congress of Vienna in 1815 and the Crimean War (1853 – 1856) were 'relatively calm from the point of view of war and neutrality'.³³ The peace settlement in 1815 at the end of the Napoleonic wars had

³⁰ Cf. the meaning of the term 'state' which Vitoria, writing in the mid-Sixteenth Century, characterised as '...for example, the kingdom of Castile and Aragon, the Republic of Venice, and the like ...'. Quoted in H. Wheaton, *supra* note 22, p. 37.

³¹ E.g., the 'right' of neutrals to trade freely with each belligerent was increasingly drawn into question during the maritime wars of the Seventeenth Century. Id., p. 121 n. 'u' (citing Jenkinson [Lord Liverpool], Discourse on the Conduct of Great Britain in Respect to Neutral Nations [1801], p. 48).

³² Neutral trade in items such as food destined for areas under siege or blockade was of course always prohibited. See, e.g., E. Castrén, *supra* note 17, p. 546; *infra* notes 55, 69. Article 10 of the 1766 Treaty between G.B. and Russia restricted contraband to 'munitions of war', which Article 11 defined as 'canons, mortiers, armes-à-feu, pistolêts, grenades, boulets, balles, fusils, pierres-à-feu, mèches, poudre, salpêtre, souffre, cuirasses, piques, épées, ceinturons, pôches à cartouches, sêlles et brides, au delà de la quantité qui peut être nécessaire pour l'usage du vaisseau, etc.'. H. Wheaton, *supra* note 22, p. 298 n. 'u'.

³³ J.H.W. Verzijl, *supra* note 3, p. 106.

left Europe with first a 'Holy Alliance', and later, the 'Concert of Europe', of Great Powers pledged to act together to prevent the outbreak of war in their mutual relations. In turn, the effects of this European defensive alliance were also felt in the Western Hemisphere.³⁴ Verzijl³⁵ thus attributes 1815, and the signing of the peace treaties to end the Napoleonic wars, as the end of the early period of neutrality. After 1815 the relative power and influence of the major European players altered; there was a re-balancing and consolidation of territorial control not seen since the Peace of Westphalia in 1648. The Concert of Europe had charged itself with the task of mutually ensuring a Europe of peace and stability. After the treaties of peace were signed at Paris in 1814 – 1815 between France on the one hand, and the other allied European powers of Austria, Britain, Prussia, and Russia on the other, the aim to secure Europe against future French military ambitions was considered complete.³⁶ Uneven developments in imperialism and industrial power continued apace, and fewer entities possessed sufficient war-making power to threaten and complete successfully an interstate conflict. This meant a greater imbalance in state-to-state 'equality of arms', fewer warlike actors, and fewer wars for conquest in Europe. More importantly, fewer 'real' warlike players meant fewer opportunities to challenge the more controversial neutral rights and duties. The appearance of an increasingly strict approach to neutrality was facilitated.

A new situation had also now to be confronted. Questions of neutrality had begun by 1815 to arise – albeit rarely – in the case of full-scale civil wars, a phenomenon which was arguably the outgrowth of 'popular guerrilla warfare'³⁷ as waged by late Eighteenth and early Nineteenth Century national liberation movements in Europe.³⁸ One fairly logical consequence therefore of the post-1815 re-balance of power was that most European wars 1815 – 1870 were civil rebellions fought for some form or other of national liberation, rather than traditional inter-state war, properly so-called.³⁹ Moreover, the new system of intervention designed in 1815 reflected a resolve to

³⁴ E.g., that part of the 'Monroe Doctrine' of 1823 preventing European intervention in American affairs. See Dana, *supra* note 9, pp. 82 – 94 n. 36.

³⁵ J.H.W. Verzijl, *supra* note 3, p. 46.

³⁶ See H. Wheaton, *supra* note 22, pp. 423 – 445. The Vienna Congress also declared slavery to be an 'odious crime'. Dana, *supra* note 9, p. 168.

³⁷ A phrase coined in relation to the doctrine of popular guerrilla insurgency for national liberation which 'crystallised' about 1830 in Europe. G. Best, *supra* note 2, p. 265.

³⁸ E.g., the American War of Independence, and the French Revolution. For a brief, but useful overview of the transition to 'civil' war between 1815 and 1870, see *id.*, pp. 257 – 295.

³⁹ One notable exception was the Crimean War.

maintain a new stewardship over the peace of Europe, and the Concert of Europe was, a fortiori, capable of extension to every revolutionary movement deemed to endanger the new social order. In other words, the view was quickly formed that the Great Powers – which France re-joined in 1818 at the Congress of Aix-la-Chapelle – had in fact afforded themselves a perpetual pretext to prevent disruption to the newly re-established monarchical system.⁴⁰

Friction also resulted from so-called ‘mixed’ external-internal state conflicts.⁴¹ The collective efforts of the Great European Powers came in turn to be divided between those states which wished to nominate an ‘intervenor’ state and those which preferred to exercise more collective rights of interference. Thus, states continued to develop laws of neutrality, if only in order to make it less likely that the activities of their citizens might draw the neutral state into a war,⁴² and many began slowly and unilaterally to curtail particular activities of their nationals from the outset of a foreign war.⁴³ To this end, each neutral state was faced with a choice: it could either expressly prevent or prohibit various private activities during a foreign war, or it could challenge the actions taken by an over-zealous belligerent against its private neutral commercial activity. As previously mentioned, the latter option required a considerable neutral ability to self-help, either through the possibility of strong diplomatic protest, or armed reprisals.

⁴⁰ H. Wheaton, *supra* note 22, pp. 517 – 519, 521. This view led to the ‘Monroe Doctrine’, *supra* note 34. See also A. Carty, The Decay of International Law (Manchester: Manchester University Press, 1986), p. 92; Q. Wright, ‘The American Civil War, 1861 – 1865’, in The International Law of Civil War (R. Falk, ed.) (Baltimore: Johns Hopkins Press, 1971), pp. 99 – 102.

⁴¹ E.g., French intervention in 1822 in the Spanish revolution, Spanish intervention during the Portuguese constitutional crisis of 1826 and during the Portuguese civil war of 1834, and the collective offer of assistance in the negotiated separation of the Netherlands and Belgium in 1830. Wheaton notes that a show of Christian solidarity prompted action taken in the 1828 Greek Revolution by France, Britain, and Russia; this followed similar intervention in 1826 to place Greece under Western protection against the Turks. H. Wheaton, *supra* note 22, pp. 560 – 563. See also Dana, *supra* note 9, pp. 88 – 93 n. 36.

⁴² See, e.g., H. Wehberg, ‘La Guerre Civile et le Droit International’ [1938] 63 Recueil des Cours 7, 85 – 89; J.H.W. Verzijl, *supra* note 3, pp. 106 – 109 (enactments passed 1818 – 1849), 114 – 115 (neutrality proclamations issued regarding the Austro-Sardinian/French war and the war between the Argentine Confederation and Buenos Aires, both in 1859).

⁴³ E.g., the U.S. Neutrality Law of 20 April 1818, c. 88, S.8, 3 Stat. 449. See A.P. Rubin, *supra* note 21, pp. 21 – 26; C.S. Hyneman, ‘Neutrality during the European Wars of 1792 – 1815’ [1930] A.J.I.L. 279. Cf. A. Carty, *supra* note 40, pp. 91 – 93.

As for the extension of neutrality laws to civil wars, the difficulty was that interstate war is one thing, but civil wars or insurrections, by definition, are generally matters of internal, domestic concern which at first sight appear to give far less scope to the issue of inter-state neutrality. The adoption of an 'equal', impartial approach towards revolutionaries fighting against their government was also more difficult to reconcile within the context of rules developed to maintain peaceful commercial relations during an inter-state war. Moreover, the conventional origins of neutrality made the extension of this area of law to civil wars difficult. Nevertheless, an analogous application of the rules of neutrality adopted for international wars was possible in a civil war context,⁴⁴ as a formal stance of neutrality might just as easily be necessitated by the interruption of normal, bi-lateral, peacetime trade during a large-scale civil war, and awkward questions regarding the relevance of neutrality law to a 'civil war' could naturally await the war's conclusion.⁴⁵

2.c. The Declaration of Paris 1856.

In 1856, a major step towards the development of 'known' rules of neutrality was taken. The Declaration of Paris, formulated at the end of the Crimean War, marked a new consensus among 'civilised' nations regarding in particular some of the most problematic aspects of maritime neutrality. More importantly, this consensus in treaty form was evidence of a newly emerging commonality of attitude to the non-use of privateers in maritime warfare, a commonality which nonetheless would have little or no effect during the ACW, which followed soon after.

By means of brief overview, the events which led to the Declaration were as follows. The Ottoman Empire had not been included in the system of public law established by the Congress of Vienna.⁴⁶ While this fact generally did little to lessen the disputes which occurred between Russia and the Ottoman Porte throughout the early Nineteenth Century, the outbreak in 1853 of the Crimean War in the Black Sea between Russia on the one hand, and an uneasy alliance of Turkey, France, Britain, Prussia and Sardinia on the other, effectively destroyed the Holy Alliance. The Crimean War thus led to a proliferation of neutrality declarations and similar decrees

⁴⁴ This is argued, for example, by J.H.W. Verzijl, *supra* note 3, p. 102.

⁴⁵ E.g., the uncertainty underlying the characterisation of the American Revolution, or 'War of Independence'.

⁴⁶ H. Wheaton, *supra* note 22, p. 556.

by those Powers which did not wish to participate.⁴⁷ The content of these many proclamations differed mainly to the extent they each encompassed or stressed particular aspects of neutrality in reflecting various prior, bi-lateral agreements, which again highlights the importance of the conventional origins of neutrality law.⁴⁸

The belligerent powers also adopted specific policies towards the neutrals. Most crucially, all the belligerents from the outset proclaimed voluntarily they would not issue letters of marque to privateers.⁴⁹ Privateers, as private armed vessels awarded commissions (or, letters of marque) by a state,⁵⁰ allowed a belligerent to increase its sea-power quickly. However, privateers also had an unsavoury reputation, 'as tending to encourage a spirit of lawless depredation'.⁵¹ The prohibition of letters of marque effectively prevented the use of privateers between the belligerents.

At the war's end, and despite variations in practice, the representatives of seven states⁵² assembled at the Congress of Paris in 1856 to conclude the peace terms and to formalise various practices devised for the Crimean War. In particular, they adopted as the last Act of the Congress the four rules of the Declaration of Paris Respecting Maritime Law.⁵³ Article One abolished privateering between the signatories.⁵⁴ Articles Two and Three provided for the commercial rights of neutral

⁴⁷ See J.H.W. Verzijl, *supra* note 3, pp. 109 – 114, for citation to the relevant neutrality declarations and similar decrees.

⁴⁸ *Id.*, p. 114. For example, G.B., which entered the war alongside France on 24 March 1854, had earlier issued a proclamation which banned the fitting-out or equipping of warlike vessels in her ports.

⁴⁹ A 'letter of marque' was a privateer's licence to commit acts of hostility.

⁵⁰ The term 'privateer' may refer both to a private vessel and its owner. The privateer was officially licensed to seize and plunder enemy ships. A term frequently used synonymously with that of 'privateer' in the literature of the time is 'cruiser', meaning a speedy warship.

⁵¹ Dana, *supra* note 9, p. 380 n. 173, refers to the abolition of privateering in Article 23 of the U.S.-Prussian Treaty of 1785 (not renewed in the treaty in 1799), and to other efforts to abolish the practice in the early Nineteenth Century.

⁵² Austria, France, Britain, Prussia, Russia, Sardinia, and Turkey.

⁵³ Reprinted in A. Roberts and R. Guelff (eds.), Documents on the Laws of War (Oxford: Clarendon Press, 2d ed. 1989), p. 24. See also C.H. Stockton, *supra* note 9, pp. 356 – 368; H.W. Malkin, 'The Inner History of the Declaration of Paris' [1927] VIII B.Y.I.L. 1.

⁵⁴ The Declaration of Paris is merely a compact between the signatories, which can only treat each other's privateers as pirates. Dana, *supra* note 9, pp. 380, 381 n. 173.

merchant ships during war.⁵⁵ Article Four required blockades to be effective.⁵⁶ The total number of parties to the Paris Declaration grew to fifty-one. The United States did not join because, as a young country, it insisted it must remain able to call up privateers, a situation which would be re-thought at the outbreak of the ACW.⁵⁷

2.d. Privateering and the ACW.

With the outbreak of the ACW in 1861, the issue of privateering leapt quickly to the forefront. The first rule of the Declaration of Paris, which was applicable only between its signatories, had made it all the more clear that the conversion of merchant ships into warships was to be a controversial side-effect.⁵⁸ The conversion of merchant ships, which were otherwise largely immune from attack, allowed states

The Declaration has never been formally abandoned. A. Roberts and R. Guelff, *supra* note 53, p. 23. See also H. Lauterpacht (ed.), *supra* note 22, p. 462 n. 1.

⁵⁵ 'Free ships make free goods, with the exception of contraband' meant that neutral merchant ships were safe from capture or attack, even when carrying enemy goods (except contraband). There was no attempt to define 'contraband' in the 1856 Declaration, as this was often left to the belligerents of each war. See H. Lauterpacht (ed.), *supra* note 22, p. 460 n. 3, adds that 'only the neutral flag covers enemy goods, not the flag of a belligerent ...'. See also E. Castrén, *supra* note 17, p. 546.

⁵⁶ To be lawful denial, belligerent blockades had to be effective, in the sense of preventing access to an enemy coast. An ineffective blockade or 'paper' blockade, and a 'pacific' blockade were considered acts falling short of war. See F.E. Smith, *supra* note 8, pp. 146 - 148; E. Castrén, *supra* note 17, pp. 290 ff.; T.E. Holland, Lectures on International Law (T.A. Walker and W.L. Walker, eds.) (London: Sweet and Maxwell, 1933), pp. 130 - 150.

⁵⁷ See A. Roberts and R. Guelff, *supra* note 53, p. 23; Q. Wright, *supra* note 40, pp. 80, 82, 94 - 97; Dana, *supra* note 9, pp. 380 - 381 n. 173. A rejected American amendment to the Declaration provided for the complete immunity of all private property at sea not contraband. See, e.g., Article 23, Treaty of Friendship between the U.S. and Prussia, 1785, quoted in H. Wheaton, *supra* note 22, p. 306. See also H. Fujita, 'Commentary: 1856 Paris Declaration', in The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries (N. Ronzitti, ed.) (London: Martinus Nijhoff, 1988), pp. 66, 70; Dana, *supra* note 9, pp. 381 - 383 n.173. See also H. Lauterpacht (ed.), *supra* note 22, p. 461 n. 1 (citing Smith, [1938] 63 Hague Recueil 624, [1939] 55 Law Quarterly Review 237, and Rowson [1947] XXIV B.Y.I.L. 160, 166).

⁵⁸ The conversion of merchant ships into warships at sea was particularly controversial. Cf. A. Roberts and R. Guelff, *supra* note 53, p. 79.

to fill gaps in regular navies almost as quickly as had privateers.⁵⁹ The Southern Confederacy, which prior to secession did not have an independent navy, offered letters of marque to subjects of all countries by proclamation of Mr. Jefferson Davis, the President of the new Confederacy, on 17 April 1861. This meant the Southern Confederacy was in a position only to recognise Articles Two and Three of the Declaration. The Northern Federal Union quickly began negotiating to accede to the Declaration of Paris in its entirety a few days after this, but only on condition neutral third state signatories to the Declaration did not recognise the validity of Confederate letters of marque.⁶⁰

In turn, Lord Russell of the British government sent inquiries on 6 May 1861 to the French government regarding the means by which to obtain from each of the belligerents a formal recognition of Articles Two and Three of the Declaration.⁶¹ British and French acceptance of a Confederate undertaking to observe only these two Articles meant in effect that the Confederacy would enjoy the advantages of commissioned privateers,⁶² which would not only increase the power of the Confederate naval forces, but also afford greater protection to blockade-runners. Continuing Federal assertions of sovereignty over Confederate territory further complicated this attempt at compromise. There was the risk Confederate privateers would be treated as pirates or public enemies by the United States, while receiving treatment as 'legal' belligerents by the other signatories of the Declaration.⁶³ Such a

⁵⁹ J. Stone, Legal Controls of International Conflicts (London: Stevens, 1954), p. 576. Merchant ships converted into warships of the regular navy can thus be distinguished from privateers granted letters of marque.

⁶⁰ J.B. Moore, *supra* note 4, p. 564. After G.B. opened direct negotiations, the Confederate government in Richmond, Virginia, passed resolutions to declare the observation of the Second and Third Articles of the Declaration of Paris, 'but to maintain the right of privateering ...'. *Id.*, p. 565.

⁶¹ See *id.*, pp. 563 – 4; Dana, *supra* note 9, pp. 380, 382 n. 173.

⁶² See *supra* notes 49 – 50, and accompanying text; the U.S. ultimately declined to sign the Declaration. Dana, *supra* note 9, pp. 380, 382 n. 173. The Americans hinted in Geneva that such a Confederate advantage could have 'unhappily force(d) the U.S. into a war with G.B.'. J.B. Moore, *supra* note 4, p. 565. Cf. H.W. Malkin, *supra* note 53, pp. 42 – 43.

⁶³ In view of the dangers, 'no avowedly foreign private armed vessels took letters of marque from the Confederate government'. Dana, *supra* note 9, pp. 380, 383 n. 173. Congress authorised President Lincoln to issue letters of marque, but he declined to make use of this power. *Id.*, p. 382 n. 173.

result would be divisive as regards practice on the high seas, particularly with regard to belligerent rights of stop and search for contraband.

The Confederates managed to fit-out by May 1861, or soon afterward, a number of armed vessels, mostly of small tonnage, which made a considerable number of captures.⁶⁴ To complicate matters further, the anticipated success of Confederate blockade-runners in eluding the Federal blockade was accompanied by the extension of the doctrine of continuous voyage by the Federal authorities regarding the carriage of merchandise by neutral vessels.⁶⁵ Even though neutral trade generally was prohibited if destined for areas under siege or blockade, Great Britain argued throughout the ACW that the Federal Union's blockade was not 'effective', which in turn 'offered extraordinary inducements to persons to attempt to elude it'.⁶⁶ This meant in turn that the issue of 'free ships, free goods (except contraband)' became relevant. The most simple case of the carriage of goods by neutral merchant ships occurs when the goods are taken directly to a belligerent port. In view of the risks involved in running an enemy blockade, however 'ineffective', a more common method is to go first to a neutral port, off-load, pay import duties, and re-load the goods for ultimate transport or transshipment to the 'real' enemy destination. The second (or final) leg of the journey can of course be made by land or sea. Ships papers reflect only the first, neutral port. If stopped and searched mid-Atlantic and en route between neutral ports, the carriage of goods, or contraband for that matter, appears innocent.

The presumption on the part of the Federal authorities that such 'partial' contracts of carriage must also imply a further, or final, destination was based on the principle of dolus non purgatur circuitu,⁶⁷ and resulted in a 'neutral' consignor having a 'paper duty' to prove that the ultimate destination of his cargo was innocent.⁶⁸ Moreover, the presumption that innocent trade carried on between two neutral ports would in fact result in supplies reaching the Confederacy in breach of the blockade led to incidents which did little to lower existing levels of Anglo-American tension, or to verify the existence of many 'known' rules of neutral duty during the ACW. Thus, merchant ships which supplied either the Northern or the Southern states were entangled in a war on trade as much as were warships and privateers, as ship losses

⁶⁴ 'These vessels were said to have taken from 60 to 70 prizes'. J.B. Moore, *supra* note 4, pp. 594 – 595.

⁶⁵ Practice in this respect began to alter before the Crimean War. H. Lauterpacht (ed.), *supra* note 22, pp. 814 - 820.

⁶⁶ J.B. Moore, p. 604. See *infra* notes 156, 168, and accompanying text. See also Article Four of the 1856 Declaration of Paris, *supra* note 56.

fell into two basic categories: privateers and warships lost in actual naval combat, and merchant vessels lost in attempting to run the blockade.⁶⁹ In particular, a somewhat over-zealous Federal surveillance of British trading interests and practices nearly enlarged the war on many occasions, as is now discussed.

3. The Outbreak of War 1861 – 1865: an Overview of British Neutrality.

The ACW was viewed factually, and from the outset, as an ‘international’ conflict, an event attributable neither to the automatic operation of treaties of alliance and defence, nor to gratuitous foreign meddling in internal state affairs.⁷⁰ The war lasted from 13 April 1861⁷¹ to 9 April 1865,⁷² ending in defeat for those Southern states

⁶⁷ H. Lauterpacht (ed.), *supra* note 22, p. 816. See also J.B. Moore, *supra* note 4, p. 581; *infra* note 148, and accompanying text.

⁶⁸ H. Lauterpacht (ed.), *supra* note 22, p. 461.

⁶⁹ D. Stick, Graveyard of the Atlantic: Shipwrecks of the North Carolina Coast (Chapel Hill: University of N.C. Press, 1952), p. 50. The profit motive was crucial. For example, the acting ensigns of one blockading vessel received \$9,589.67 each as their share from the sale of just one captured ship; the cabin boy of another received the equivalent of six years pay. *Id.*, pp. 64 – 65. Cf. T.E. Holland, *supra* note 56, p. 131 n. 1: ‘no questions of “contraband”, or of “free ship, free goods”, are raised by the institution of a blockade, but for the fact that some members of Parliament seem to be of the contrary opinion’. As privately owned vessels, blockade runners were required by Confederate law to provide at least one-third of their cargo space for government stores. They were ‘small, fast steamers, able to run past the blockading vessels under cover of darkness’, and operated largely between Nassau and Bermuda, and Wilmington, N.C.. D. Stick, *above*, this note, pp. 61, 63 - 64.

⁷⁰ See, e.g., J.H.W. Verzijl, *supra* note 3, p. 116. Several Southern States began to discuss secession immediately upon the election of President Lincoln on 6 November 1860, due in large part to his known views on slavery. See, e.g., D. Lazare, ‘America the Undemocratic’ [Nov. – Dec. 1998] 232 New Left Review 3, 16 – 22, for a discussion of the entrenchment of the institution of slavery in the U.S. Constitution of 1787, which benefited wealthy planters. In 1861, fewer than 25% of the 1.6 million white households in the South owned slaves, no more than 3% owned more than 20, while only 3,000 planters owned more than 100. *Id.*, p. 17 n.30 (citing R.C. Heilbroner and A. Singer, The Economic Transformation of America: 1600 to the Present (1984), pp. 127 – 128). On 31 January 1865, the U.S. Congress finally voted by 119 votes to 56 for the Thirteenth Amendment abolishing slavery, after which the draft amendment was sent to the states for ratification.

⁷¹ The date of the fall of Fort Sumter, at Charleston, South Carolina. Between the election of President Lincoln, and the fall of Fort Sumter, the states of South Carolina, Alabama,

which had seceded from the Union to form a break-away Confederacy. Although the Southern defeat was predictable to the extent it conformed with the principle that 'superior force, sooner or later, decides everything',⁷³ a military victory by the Northern Federal Union was not always assured.⁷⁴

Crucially, the United States alleged throughout those four years that Great Britain's declaration of neutrality on 13 May 1861 had been 'premature', and that the Confederates were thereby 'encouraged' to continue fighting.⁷⁵ There were also many points throughout the rebellion when Federal accusations were made regarding many alleged breaches of Great Britain's declared neutrality. By the end of the war in 1865, Anglo-American relations were at their worst since 1814.⁷⁶ The sections which follow are limited to factual circumstances faced by neutral third states which are of crucial importance to an understanding of the bases for British liability in Geneva in 1872.

3.a. Neutrality and Civil War in the Context of the ACW.

The United States President, Abraham Lincoln, effectively asserted a state of belligerency⁷⁷ on 19 April 1861 when he declared a maritime blockade of the Southern coastline,⁷⁸ an international act which should not be confused with a municipal decree of closure which does not involve the international consequences of neutrality law.⁷⁹ So far as Great Britain, the first state to proclaim neutrality,⁸⁰ was concerned,

Georgia, Florida, Mississippi, Louisiana, and Texas announced their secession from the Union. See J.B. Moore, *supra* note 4, pp. 561 – 562.

⁷² The date of the Confederate surrender in Appomattox, Virginia.

⁷³ G. Best, *supra* note 2, p. 275.

⁷⁴ Stick credits Southern cotton production for the Confederate ability to fight four years of war. D. Stick, *supra* note 69, p. 60.

⁷⁵ See *infra*, notes 120, 131, and accompanying text.

⁷⁶ J.B. Moore, *supra* note 4, p. 495.

⁷⁷ See The Prize Cases [1862] 2 Black 635; the Hiawatha [1862] 2 Black 676.

⁷⁸ South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, and extended 27 April to North Carolina and Virginia. J.B. Moore, *supra* note 4, p. 594; J.H.W. Verzijl, *supra* note 3, p. 116. The blockade stretched about 2500 nautical miles, and was universal in the sense it was impartially applied. H. Lauterpacht (ed.), *supra* note 22, pp. 770 - 771.

⁷⁹ T-C. Chen, The International Law of Recognition (London: Stevens, 1951), p. 384. The blockade was characterised as being 'for the purpose of collecting the revenue in the disturbed part of the country, and for the protection of the public peace, and of

the proclamation of blockade automatically triggered the law of neutrality for third states. The French government issued its declaration of neutrality on 10 June 1861; the Queen of Spain followed on 17 June; the Dutch Government⁸¹ declared neutrality in the same month, followed by the Emperor of Brazil on 1 August. Neutrality declarations, the content of which all varied in accordance with past state practice, were also issued by Prussia, Denmark, Belgium, Russia, Portugal, Hawaiian Islands, Bremen, and Hamburg.⁸²

As mentioned previously, the practice of applying rules of neutrality during a civil war was a relatively new one which developed analogously within a slowly emerging consensus in Europe as to the neutral practices required between 'civilised' nations. Moreover, predictions regarding the expected extent and scale of the ACW, as well as general uncertainty concerning the Constitutional legality of the secession by the Southern states,⁸³ led neutral third states quickly to regard the war as a full-scale belligerency rather than a domestic insurgency. While there has never been any general 'right' to a recognition of belligerency during a civil war, such a recognition is possible when a de facto state of affairs disturbs international peace, neutral trade, and diplomatic relations to a significant degree. A stance of neutrality in accordance with known conditions of fact is better substantiated. Thus, while a rebellious non-state belligerent generally lacks the legal, or de jure, qualification to wage war, a belligerent community can be treated by analogy as if it were a 'sovereign state' once its actual ability to wage war correctly is recognised.⁸⁴ To gain, or be accorded, a contemporaneous, third state recognition of war, rebels needed, among other things, to demonstrate

the lives and properties of quiet and orderly citizens', until Congress could meet on 4 July. J.B. Moore, *supra* note 4, p. 562.

⁸⁰ J.H.W. Verzijl, *supra* note 3, p. 115. See Dana, *supra* note 9, pp. 439, 440 n. 208, regarding the general regulations of all British ports, and special regulations for the ports in the British West Indies.

⁸¹ For example, Dutch neutrality instruments excluded privateers from Dutch ports, prohibited privateering by Dutch nationals, and prescribed the observance of neutral duties by Dutch commerce. J.H.W. Verzijl, *supra* note 3, p. 115.

⁸² See J.B. Moore, *supra* note 4, p. 595, regarding the many declarations, decrees, or notifications issued by maritime powers.

⁸³ For a recent discussion of the ACW as a 'second American revolution', see, e.g., D. Lazare, *supra* note 70, pp. 17 – 20.

⁸⁴ T-C. Chen, *supra* note 79, pp. 304 – 306 (citation omitted); Dana, *supra* note 9, pp. 29, 30 n. 15.

... [T]he existence of a de facto political organisation of the insurgents, sufficient in character, population and resources, to constitute it, if left to itself, a state among the nations, reasonably capable of discharging the duties of a state; the actual employment of military forces on each side, acting in accordance with the rules and customs of war, such as the use of flags of truce, cartels, exchange of prisoners, and the treatment of captured insurgents by the parent state as prisoners of war; and, at sea, employment by the insurgents of commissioned cruisers, and the exercise by the parent government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral vessels at sea. If all these elements exist, the condition of things is undoubtedly war; and it may be war, before they are all ripened into activity.⁸⁵

In such a situation, belligerency should be recognised,⁸⁶ the result of which was of course to trigger the laws of neutrality, and the outbreak of the ACW presented the community of nations with just such a de facto state of affairs. However, as a parent government might never concede to its rebels any recognition of 'true' belligerency,⁸⁷ third states were faced also with the practical consequences of their attitude to the ACW.⁸⁸ Foreign recognition of civil war as 'belligerency' carried the risk of diplomatic rupture, as third states which were sufficiently powerful both to recognise the civil war and to enforce their neutral rights effectively transformed the

⁸⁵ Dana, *supra* note 9, pp. 29, 30 n. 15. The Confederacy had formed a government, commanded territory, and possessed organised armed forces. See also T-C. Chen, *supra* note 79, pp. 312 – 332; The Prize Cases [1862], *supra* note 77, p. 670.

⁸⁶ See H. Lauterpacht (ed.), *supra* note 22, pp. 248 – 249; L. Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflict to 1949' [1998] 47 I.C.L.Q. 337. Cf. C. Greenwood, 'The Concept of War in Modern International Law' [1987] 36 I.C.L.Q. 283; J.L. Kunz, 'Bellum Justum and Bellum Legale' [1951] 45 A.J.I.L. 528.

⁸⁷ Chen notes that the term 'recognition of belligerency' was unknown in the literature before 1856. T-C. Chen, *supra* note 79, p. 337 (citing W.L. Walker, 'Recognition of Belligerents and Grant of Belligerent Rights' [1937] 23 Grotius Transactions 178 – 179).

⁸⁸ While some writers take the view that the recognition of belligerents is an act of unfettered political discretion, H. Lauterpacht (ed.), *supra* note 22, p. 250 n. 2 (citations omitted), third state recognition may be viewed as 'a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent government'. Dana, *supra* note 9, pp. 29, 30 n. 15.

'rebels' into de facto belligerents for purposes of international consumption. In this way, neutral self-help was an essential ingredient of the law of neutrality, yet a decision to recognise belligerency in the face of parent government opposition was and remains a serious matter.

3.b. Neutral 'Due Diligence' and British Practice.

The degree of neutral state 'due diligence' required to maintain an attitude of impartiality toward belligerents in 1861 varied in accordance with prior diplomatic practice, economic links, geographical position, and the ability of each neutral state to self-help. Above all, 'due diligence' was largely a function of neutral state necessity.⁸⁹ Therefore, any evidence of states adopting neutral policies designed, inter alia, to prohibit private individuals from supplying war material or loans of any kind to a belligerent⁹⁰ could also be viewed as a function of that state's ability to self-help. In other words, as powerful states were in a better position to enforce their vision of 'due diligence', many of the operative and largely self-regulatory rules of neutrality at the time continued to exhibit some interesting distinctions. In turn, the issue of whether, and to what extent, additional, self-imposed neutral state duties, assumed unilaterally, might be indicative of an emerging consensus in approach among 'civilised' nations would arise at the Geneva Arbitration.

For example, it was a generally held view that a neutral State could choose whether or not to place itself under a duty to repress trade in armaments, even though a stance of state neutrality was not compromised by such trade; it was in any event the practical duty of an opposing belligerent to police it. Britain's own proclamation of 13 May 1861, which 'recalled' the prohibitions laid down in the Foreign Enlistment Act of 3 July 1819,⁹¹ had little or no effect beyond the strict confines of the twelve articles of this 1819 instrument, which were aimed primarily at preventing three things: foreign enlistment, the premeditated equipping of armed ships for use in a war against a belligerent which was at peace with Britain, and the reinforcement of belligerent

⁸⁹ Cf. H. Wehberg, *supra* note 42, p. 89; T-C. Chen, *supra* note 79, pp. 366 – 367.

⁹⁰ For specific reference to so-called 'real' neutrality programmes 1815 - 1907, which lay down precise rules for the behaviour of government and citizen alike towards belligerents, see J.H.W. Verzijl, *supra* note 3, pp. 104 – 147.

⁹¹ 59 Geo. iii. c. 69 (in force 6 June by proclamation). Dana, *supra* note 9, pp. 448, 450, 471 – 473 n. 215. This Act was replaced by the Foreign Enlistment Act of 9 August 1870. See J.H.W. Verzijl, *supra* note 3, p. 107 (citation omitted).

warships in British waters without Her Majesty's licence.⁹² Thus, Britain did not prohibit its citizens from supplying arms to the Confederates, and the British government was involved in armaments transactions with Commission agents for both sides.⁹³ Moreover, while it was illegal in both the United States⁹⁴ and Great Britain⁹⁵ for private individuals to raise loans to assist rebels fighting the government of a friendly foreign state, elsewhere the issue could turn on the charging of a reasonable rate of interest.⁹⁶

Nevertheless, Britain had to prohibit separately on 1 June 1861 the bringing into British waters of captured vessels and cargoes by belligerent warships and privateers in order to preserve British neutrality. In January 1862, Britain instructed its Admiralty to prevent hostilities occurring in British waters. Warships of both parties were admitted in British harbours on an equal footing within the confines of British

⁹² The latter two prohibitions were to prove the most difficult to monitor, and are excerpted in pertinent part as follows:

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

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

[Emphasis added.] See *infra* notes 123, 132, 145 - 151, and accompanying text.

⁹³ This principle held firm at the Geneva Arbitration, where there was no complaint regarding the sale of military supplies or arms in the ordinary course of business. See *infra* note 180, and accompanying text.

⁹⁴ Kennet v. Chambers [1852] 14 Howard 38.

⁹⁵ De Wütz v. Hendricks [1824] 11 State Trials 125, 9 Moore 586. See also F.E. Smith, *supra* note 8, p. 133.

⁹⁶ The issue of private loans to a belligerent was less clear. F.E. Smith, *supra* note 8, p. 133; H. Lauterpachht (ed.), *supra* note 22, pp. 743, 847.

practice at the time,⁹⁷ but the most serious difficulties arose between the United States and Great Britain for the latter's alleged negligence in permitting Confederate warships to be built in and depart from British ports.⁹⁸ Despite the evidence in support of many American allegations that Confederate cruisers were being built and equipped in British territory, the English courts refused to convict so long as the ships concerned remained in British waters,⁹⁹ or on departure, remained 'incapable of attack and defence'.¹⁰⁰ Accusation and counter-accusation thus flew between the two governments regarding whether, and to what extent, the British presumption of a ship's innocence was a breach of neutral duty._

British shipbuilders thus were under no legal obligation to inquire into the use to which a vessel might be put.¹⁰¹ Instead, the suspect ships would sail from a British port, and complement or assemble their equipment, armament and manning elsewhere, even if actually obtained from their port of departure. For example, the Alabama, regarding which many of the claims made in Geneva were to arise,¹⁰² was constructed for Confederate use in Liverpool in 1862, equipped and armed on the coasts of neutral Terceira (Azores) with the help of two vessels from Britain, the Agrippina and the Bahama. The Alexandra was released in 1863 in Liverpool with incomplete equipment. The Confederate ship Florida was constructed in Liverpool, supposedly for the Italian Government under the name Orebo, and provided with a crew, provisions and armaments with the help of a British vessel, the Prince Alfred, at Green Cay. The Shenandoah departed from London as an ordinary merchant ship, the Sea King, and was later converted to a Confederate cruiser near the island of

⁹⁷ Known as the '24 hours rule', a gap of 24 hours must separate the exit of two opposing belligerent ships from a neutral harbour. E. Castrén, *supra* note 17, pp. 520, 525. Further provisions extended to matters such as the requirement of leave to enter the ports of Nassau, and other Bahama Islands. J.H.W. Verzijl, *supra* note 3, pp. 119 – 120.

⁹⁸ The Foreign Enlistment Act of 1819 did not expressly prohibit the construction of ships. See *infra* note 150. See also D. Stick, *supra* note 69, p. 61 ('[s]o great was the exodus of steamers from the Clyde to blockade-running activities that the Times, of London, said in 1863: "Should the demand continue at this rate, there will soon be scarcely a swift steamer left on the Clyde"'); E. Castrén, *supra* note 17, p. 505.

⁹⁹ J.H.W. Verzijl, *supra* note 3, p. 119.

¹⁰⁰ F.E. Smith, *supra* note 8, p. 137; Dana, *supra* note 9, pp. 450, 470 n. 215 (discussion of the issue of intent in this context), and pp. 450, 474 - 478 n. 215.

¹⁰¹ See Atty. Gen'l. v. Sillem and Others [1863] 2 Hurlstone and Caldman 431; cf. The British Consul v. The Ship Mermaid, Bee's Am. Adm. Rep. 69. See also E. Castrén, *supra* note 17, p. 505.

¹⁰² Eighteen claims would become known as the 'Alabama claims'.

Madeira; she augmented her crew at Melbourne.¹⁰³ In response, the United States government took the view, over continuing protest from Britain, that a suspect ship might consist of illegal contraband, was destined ultimately for the Confederacy, and hence was presumed to be in breach of the blockade.¹⁰⁴ American cruisers thus began to search for and seize vessels destined for or merely en route to Nassau and other neutral ports.

Further examples abound of disagreement over neutral rules which extended from isolated cases of friction¹⁰⁵ to more specific matters, and regarding which there was no real consensus in practice, and a great deal of correspondence. Moreover, there were many points at which Britain and the United States nearly went to war. The profits of shipbuilding and blockade-running meant that Confederate personnel and agents were welcome in British ports, giving rise to Federal apprehension that Britain would accord full diplomatic recognition of Confederate independence. Strategic and economic considerations such as industrial links with Southern cotton¹⁰⁶ and concern over the territorial integrity of Canada¹⁰⁷ further complicated the Anglo-American diplomatic scene. British protests were voiced regarding the pursuit of American deserters into Canadian territory, and the enlistment in Canada of men to serve in the Federal army. In short, evidence was present of the difficulties encountered by the neutral third state which finds itself in geographical and/or trade proximity to both warring parties.¹⁰⁸

3.c. The 'Trent'.

The United States alleged throughout the war that the neutral policies adopted by Great Britain in regard to the Confederates were generally inadequate, and constituted proof of negligence, if not of an active intent to assist the rebels. In turn, the United States was accused throughout the conflict of interfering with 'peaceful'

¹⁰³ J.H.W. Verzijl, supra note 3, pp. 118 - 119; F.E. Smith, supra note 8, p. 137.

¹⁰⁴ See supra note 67, and accompanying text; H. Lauterpacht (ed.), supra note 22, p. 819. The general rule was that a carrying vessel which was deemed ignorant of the ultimate destination of the cargo could not itself be seized - only the cargo. *Id.*, p. 785 n. 4 (citations omitted).

¹⁰⁵ H. Lauterpacht (ed.), supra note 22, p. 843.

¹⁰⁶ Stick notes that cotton sold for approximately eight cents per pound in Southern ports, about eighty cents in Europe, and for about one dollar in the Northern states. D. Stick, supra note 69, p. 61.

¹⁰⁷ See, e.g., Q. Wright, supra note 40, pp. 78 - 82.

¹⁰⁸ See J.H.W. Verzijl, supra note 3, p. 116.

British trade, and of a somewhat overly-prescriptive attitude to the rights and duties of neutrality. The vigilance of the American navy in policing sections of the blockade of the Southern ports thus led to many incidents in which normal British maritime intercourse could be disrupted.¹⁰⁹ As early as the latter part of November 1861, Britain prepared herself to go to war with the United States as a result of what she considered to be a belligerent act of war against one of her ships – the Trent - by the Federal navy.¹¹⁰ The problem, in a diplomatic nutshell, was the unlawfulness of belligerent ‘trespass’ on neutral British shipping, the peaceful conduct of which should not have given offence.¹¹¹

The incident occurred as follows. The carriage of enemy persons or despatches was considered an un-neutral service by the two states when carriage was on a neutral vessel for, or on behalf of, the enemy. Even then, enemy persons and/or despatches could not be seized validly from a neutral vessel unless the neutral vessel itself was also seized, and the incident investigated properly by a court, as the complicity of the ship’s captain required proof. When four Confederate officials, charged with a quasi-diplomatic mission to Britain, were seized by an American steamer from the British mail boat, the Trent, which travelled between the two neutral ports of Havana and Nassau,¹¹² there was no evidence that the commander of the Trent had in any way colluded with the Confederate government. As the vessel was allowed to continue her voyage, the seizure of the men was deemed illegal.¹¹³ The act of stopping a British vessel, and of seizing passengers (whom the American government, but not the British, regarded as ‘contraband of war’), was felt to be an act of unaccountable aggression against British neutrality, particularly in view of the fact that the seizure occurred in the Bahaman Channel. Moreover, the fact that the men were

¹⁰⁹ Large sections of the Southern ports were effectively neutralised by Federal forces by 1863. Stick notes that ‘[a]t one time there were three separate lines of blockading vessels past which the [blockade-running] steamers had to go; one some forty miles at sea, a second approximately ten miles out, and a third close to shore’. D. Stick, *supra* note 69, p. 62. See also Q. Wright, *supra* note 40, pp. 90 – 93.

¹¹⁰ See, e.g., Dana, *supra* note 9, pp. 534, 539 – 553 n. 228; E. Castrén, *supra* note 17, pp. 570 – 571.

¹¹¹ The twin issues of ‘continuous voyage’ (the Trent’s destination was not a hostile port) and the uncertain lawfulness of the seizure of persons as ‘contraband’, were very much in contention. Dana, *supra* note 9, pp. 534, 546, 548 - 553 n. 228.

¹¹² The four men had succeeded in running the blockade in fast steamers to Havana. From Nassau, they were to transfer to one of a regular line of steamers to England. *Id.*, pp. 534, 540 n. 228.

¹¹³ J.H.W. Verzijl, *supra* note 3, p. 116; H. Lauterpacht (ed.), *supra* note 22, p. 843.

subsequently released did little to assuage wounded British pride over this breach of her sovereignty, and the British government began to despatch troops to Canada, and to prepare vessels.

Of perhaps more crucial importance, Dana notes in this context that

At this time, the United States was straining its utmost efforts to subdue a rebellion of gigantic proportions. Its navy was not then sufficient to blockade the entire Southern coast, and its armies were slowly gathering from the people; and all, and more than all the forces collected were required for the civil war. It was well understood that the necessity of preparing to meet England at that moment, in even a probable or possible war by sea and land, would require the raising of the blockade, the withdrawal of a large part of our troops from the Southern frontier, and, substantially, the leaving of the Confederates to a de facto independence. A war, of course, made them the allies of England, and secured their recognition as a sovereignty.

[A]s things stood, it did not require actual war with England to compel the raising of the blockade, and the withdrawal of the chief part of the army from the South, thus effecting the success of the rebellion and the severance of the Republic.¹¹⁴

As one example of the ease with which a belligerent could over-step its perceived 'rights' and breach those claimed by neutrals, provoking a wider war, the Trent is illustrative. By early December 1861, however, the British government received the apologies and remedial action it had demanded, and the 'Trent crisis' was diffused.

4. The Arbitration at Geneva.

After the war's end in April 1865, the British Law Officers urged the British government to end wartime relations, which it did on 2 June. On 23 June, the blockade was raised by Presidential proclamation, and by October, relations of peace were fully restored between the two countries.¹¹⁵ Uneasy negotiations began soon after to arbitrate Britain's alleged infractions of the laws of neutrality and, in particular, complaints about British shipbuilding for the Confederates. The British

¹¹⁴ [Emphasis added.] Dana, supra note 9, pp. 534, 547 - 548 n. 228.

¹¹⁵ T-C. Chen, supra note 79, p. 395 (citations omitted). Chen adds that 'this is a simple case where fact and law coincided'. See also Q. Wright, supra note 40, p. 86.

government, too, had claims, and negotiations went on for some years. It was finally agreed to adjudicate their differences before an Arbitration Tribunal situated in Geneva.¹¹⁶ The parties entered into the Treaty of Washington on 8 May 1871 for this purpose, and the award was made by the five-member Tribunal on 14 September 1872.¹¹⁷

To abbreviate somewhat the facts underlying the agreement to arbitrate, the British were unwilling for some time to allow the issue of British liability for the depredations of Confederate cruisers to go forward, though the government was prepared to express official regret for the damage caused. Moreover, the British government had modified their Foreign Enlistment Act in 1870 in such a way as to conform generally with the rules the arbitration would employ, but this did not obviate the fact that such rules which now were new to the domestic law had not, in the British view, formed part of the law of nations during the ACW. Therefore, the fact that British liability in Geneva would hinge on the fundamental issue of 'due diligence', or as the British preferred to characterise it, the 'good faith and honesty' with which the British had observed neutral duties, did little to assuage apprehension regarding the ultimate definition to be ascribed to this term.

Moreover, and in order to prove British negligence, the 'theory' of the American case would rest on allegations of hostile British government 'animus', in the sense of an inclination to ignore international obligations so as to 'affect their [H.M. Government's] own course, (and) affect the action of their subordinates'.¹¹⁸ This meant generally that the British would face allegations that the government did not act with 'due diligence' (yet to be defined), and related allegations that the law officers of the Crown did not properly understand, and hence, properly interpret, the Foreign Enlistment Act. However, to the extent that proof of hostile 'animus' might depend on a particular interpretation of individual acts which under normal circumstances form no part of the formal duty of neutral non-discrimination,¹¹⁹ such as the establishment of

¹¹⁶ Treaty of Washington of 8 May 1871, supra note 4. G.B., the U.S., Brazil, Italy, and Switzerland each chose one arbitrator: Sir Alexander Cockburn (G.B.), Mr. C.F. Adams (U.S.), Mr. J. Staempfli (Switz.), Baron (later Viscount) d'Itajuba (Brazil), and Count Sclopis di Salerano (It.).

¹¹⁷ The award is printed in full in J.B. Moore, supra note 4, pp. 653 - 659.

¹¹⁸ Id., p. 592.

¹¹⁹ See id., p. 661. The duty of non-discrimination means the duty to treat belligerents formally, not materially, on the basis of equality, and thus does not cover activities such as neutral state expressions of sympathy with one belligerent and disapproval of the other.

Confederate agencies in England, the open favouritism shown to the Confederate cause by the great commercial houses of Liverpool, or public pronouncements which speculated on the improbability of the re-establishment of the Union, the British showed little concern, and ignored these latter completely.

The breadth of issues which was raised between the United States and Great Britain both before and during the Geneva Arbitration is wide in scope and detail, and it is the purpose of this section therefore to confine it as follows. First, the extent of the damages claimed by the United States is outlined, after which the operative rules of the arbitration are given. The structure and merits of the case are then sketched, with particular attention given to the issues of 'due diligence', the 'Alabama claims', and the claims for compensation. The award is then placed in context.

4.a. The Assessment of Damages.

The claim against the British government after the war was estimated by Senator Sumner, the Chairman of the United States Senate Committee on Foreign Relations, to be in the region of \$15 million. In a speech to the Senate on 13 April 1869, he added the following estimates regarding damages due to the nation

... The loss may be seen in various circumstances: as, in the rise of insurance on all American vessels; the fate of the carrying trade, which was one of the greatest resources of our country; the diminution of our tonnage, with the corresponding increase of British tonnage; the falling off in our exports and imports, with due allowance for our abnormal currency and the diversion of war.

... Beyond the actual loss in the national tonnage, there was a further loss in the arrest of our natural increase in this branch of industry, which an intelligent statistician puts at 5% annually, making in 1866 a total loss on this account of 1,384,953 tons, which must be added to 1,229,035 tons actually lost. The same statistician, after estimating the value of a ton at \$40 gold, and making allowance for old and new ships, puts the sum total of national loss on this account at \$110 million. Of course this is only an item in our bill. No candid person ... can doubt that the rebellion was originally encouraged by hope of support from England, Not weeks or months, but years, were added in this

A. Gioia, 'Neutrality and Non-belligerency', in International Economic Law and Armed Conflict (H.H.G. Post, ed.) (Dordrecht: Martinus Nijhoff, 1994), p. 81 n. 107.

way to our war, so full of costly sacrifice. Besides the blockade, there was the prolongation of the war. The rebellion was suppressed at a cost of more than \$4000 million, a considerable portion of which has been already paid, leaving \$250 millions as a national debt to burden the people. If, through British intervention, the war was doubled in duration, or in any way extended, as can not be doubted, then is England justly responsible for the additional expenditure to which our country was doomed¹²⁰

Most of these allegations pertain to the cost of waging war on commerce, with ship losses falling into the two main categories of warships and merchant ships.¹²¹ Many of the heads of damage indicated in this speech by Senator Sumner were in fact impossible to quantify. Termed the so-called 'indirect' or 'national' claims, they unfortunately captured the mood of the time. In turn, these claims were to prove problematic at the Geneva Arbitration.

4.b. The Three Rules of Washington.

The rules of neutral duty,¹²² which were made the law of the tribunal by mutual agreement, were inserted in Article VI(1) of the Treaty. Termed the Three Rules of Washington, they were as follows:

That a neutral government is bound –
 First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.¹²³

¹²⁰ J.B. Moore, *supra* note 4, pp. 511 - 512. The speech was received as formulating the demands on which the future negotiations of the U.S. would be based. It also set the standard of public expectation. See also F.E. Smith, *supra* note 8, p. 137.

¹²¹ See *supra* note 69, and accompanying text. The main allegations concerned those British-built ships which caused damage.

¹²² J.B. Moore, *supra* note 4, p. 547

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly. To exercise due diligence in its own ports or waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

In consenting to arbitrate in accordance with these three 'known' rules of neutral duty, Britain expressly declared in Article VI(2) of the Treaty that

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of the principles of International Law which were in force at the time when the claims mentioned in Article I arose,¹²⁴ but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them.¹²⁵

Thus, Great Britain agreed to arbitrate the Alabama claims in accordance with rules it expressly maintained were not operable from 1861 – 1865, largely because future Anglo-American relations were dependent on such co-operation. This made it all the

¹²³ The British had objected strongly to the inclusion of 'construction' of a vessel in the prohibition against 'fitting out, arming, or equipping' contained in the draft First Rule of Washington as too broad. *Id.*, p. 542. See also supra notes 95 - 96.

¹²⁴ The so-called 'Alabama claims'.

¹²⁵ An earlier statement read as follows. 'It being a condition of this undertaking that these obligations should in future be held to be binding internationally between the two countries'. J.B. Moore, supra note 4, p. 544; J.H.W. Verzijl, supra note 3, pp. 117 - 118; H. Lauterpacht (ed.), supra note 22, p. 715.

more crucial to distinguish differences in position as to the correct interpretation of these rules, as would be done throughout the thirty-two meetings subsequently held.

4.c. The Structure and Merits of the Case.

The United States opened the six chapters of its case with a brief synopsis of the provisions of the Treaty regarding the Alabama claims.¹²⁶ The second chapter, entitled 'The unfriendly course pursued by Great Britain towards the United States from the outbreak to the close of the insurrection', detailed the allegedly 'unfriendly' British acts.¹²⁷ The third chapter of its case was entitled 'the duties which Great Britain, as a neutral, should have observed toward the United States'.¹²⁸ The fourth chapter was entitled 'Great Britain failed to perform its duties as a neutral'.¹²⁹ The fifth chapter of the American case concerned Britain's failure to perform the duties of a neutral by tracing the origin and career of each of the Confederate cruisers. The sixth and final chapter dealt with the American claims for compensation.¹³⁰

To prove 'animus', the United States emphasised the following: (1) the premature British recognition of the belligerency;¹³¹ (2) British collusion with France regarding the Declaration of Paris; (3) British refusal to amend its domestic neutrality laws on American request; (4) British lack of 'due diligence' in preventing the departure from Liverpool and other domestic ports of Confederate warships and rams¹³² built and/or

¹²⁶ J.B. Moore, *supra* note 4, p. 560.

¹²⁷ *Id.*, pp. 560 – 566. An over-arching theme was thus proof of British 'animus'.

¹²⁸ *Id.*, p. 567 - 580.

¹²⁹ *Id.*, pp. 580 - 589

¹³⁰ *Id.*, pp. 589 – 591.

¹³¹ The U.S. alleged that British recognition occurred ten days prior to official receipt in London of President Lincoln's proclamation of blockade. Owing to British opposition on this point, it was not expressly included in the terms of reference for the tribunal. T-C. Chen, *supra* note 79, p. 382 [citation omitted].

¹³² 'Rams' or 'iron-clad rams' were specially designed ships of war, the first and most famous of which were the Merrimac (an iron-clad former schooner, renamed the Virginia by the Confederates) and the Monitor (a new type of Federal gunboat equipped with a revolving turret). The Confederates commissioned several iron-clad rams, while the Federals completed more than thirty monitors. D. Stick, *supra* note 69, p. 53.

equipped there; (5) British conduct in the affair of the Trent;¹³³ (6) the hospitality allegedly enjoyed on British soil by Confederate government administrative bureaux; and (7) a desire for Confederate success allegedly expressed by British government ministers.¹³⁴

These were of course serious allegations, against which Great Britain defended itself as follows. An exposition of the subject matter of the arbitration as ‘understood’¹³⁵ was followed by a statement of propositions of international law with which, it was urged, British policy had been consistent.¹³⁶ In synopsis, the duty of a neutral government is first to act impartially toward the belligerent powers. Secondly, a neutral power is bound to recognise maritime commissions issued by each belligerent, and the captures made by each. Moore records the next British proposition as follows:

Where either belligerent is a community or body of persons not recognised by the neutral power as constituting a sovereign state, commissions issued by such belligerent are recognised as acts emanating, not indeed from a sovereign government, but from a person or persons exercising de facto, in relation to the war, the powers of a sovereign government.¹³⁷

Ever conscious of the American need to prove ‘animus’, the chronology of events leading to Britain’s recognition of the belligerency was then detailed, as based on British awareness, inter alia, of the secession movement after the election of President Lincoln.¹³⁸ In other words, the British proclamation of neutrality, issued 13 May 1861, was not premature, but, instead,

¹³³ The circumstances of which nearly brought the British into the war in 1861, as did the use of the British legation in Washington to forward correspondence to Richmond, Virginia. J.B. Moore, *supra* note 4, p. 564. See *supra* Section 3(C).

¹³⁴ Examples of which are detailed in J.B. Moore, *supra* note 4, p. 566.

¹³⁵ I.e., claims regarding the Alabama, the Florida, the Georgia, and the Shenandoah.

¹³⁶ J.B. Moore, *supra* note 4, pp. 593 – 4.

¹³⁷ *Id.*, p. 593.

¹³⁸ *Id.*, pp. 594 – 595. See also The Prize Cases [1862], *supra* note 77 (large-scale insurrection constitutes war in the legal sense), *aff’d. in* Thorington v. Smith [1868] 8 Wall. 1, Williams v. Bruffy [1877] 96 U.S. 176, Ford v. Surget [1878] 97 U.S. 1018, and Baldy v. Hunter [1897] 171 U.S. 208. Cf. Editorial Comment, Borchard “Neutrality” and Civil Wars’ [1937] 31 A.J.I.L. 304.

[W]as published fourteen days after the receipt in London of the news that Fort Sumter had been reduced by bombardment, that the President of the United States had called out 75,000 men, and that Mr. Jefferson Davis had taken measures for issuing letters of marque; twelve days after receipt of intelligence that President Lincoln had published a proclamation of blockade; nine days after a copy of that proclamation had been received from Her Britannic Majesty's consul at New York, and three days after the same proclamation had been officially communicated to Her Majesty's secretary of state for foreign affairs by the United States minister, Mr. Dallas.¹³⁹

The third part of the British case concerned the issue of international rights and duties.¹⁴⁰ The British case then dealt with specific ships built in British shipyards allegedly for the Confederate navy and against which the United States made its main complaints.¹⁴¹ In view of their importance to the future course of the law of neutrality, the respective positions assumed by each party, regarding (1) the content of 'due diligence', and (2) British shipbuilding, now follow.

4.c.i. The Issue of Due Diligence.

The American case outlined what was felt were 'the duties which Great Britain, as a neutral, should have observed toward the United States'.¹⁴² Moore notes the American position, in pertinent part, as follows:

The United States understand that the diligence which is called for by the rules of the Treaty of Washington is a due diligence – that is, a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall ... prevent its soil from being violated; a diligence that shall ... deter designing men from committing acts of war upon the soil of the neutral against its will, and thus possibly dragging it into a war which it would avoid; a diligence which prompts the neutral ... to discover ... acts forbidden by its good faith as a neutral, and imposes upon it the obligation, when it receives the

¹³⁹ J.B. Moore, supra note 4, pp. 594 - 595.

¹⁴⁰ Id., pp. 599 - 604.

¹⁴¹ Id., pp. 605 - 611.

¹⁴² Id., p. 567.

knowledge of an intention to commit such acts, to use all the means in its power to prevent. No diligence short of this would be “due”; that is, commensurate with the emergency or with the magnitude of the results of negligence.¹⁴³

As this statement reveals, the American position shifts the responsibility to police neutrality onto the neutral in proportion to that neutral’s enforcement abilities. This clearly imposes a high burden on powerful states. Moreover, the aim of this stance was largely to introduce American criticism of British municipal law which permitted Confederate ship-building.

In defence, the British case emphasised the minimal, and largely undefined, standards of neutral conduct in pertinent part as follows

Due diligence on the part of a sovereign government signifies that measure of care which the government is under an international obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations ... on which the law of nations is founded. The measure of care which a government is bound to use in order to prevent within its jurisdiction certain classes of acts, from which harm might accrue to foreign states or their citizens, must always (unless specifically determined by usage or agreement) be dependent, more or less, on the surrounding circumstances, and can not be defined with precision in the form of a general rule. Thus, the rules which exist in Great Britain ... differ, from those which exist in France, Germany, or Italy. ... [A]nd foreign states can not justly complain of this unless it can be clearly shown that these rules and modes of procedure conflict in any particular with natural justice, or, in other words, with principles commonly acknowledged by civilised nations to be of universal obligation.¹⁴⁴

In other words, and in the absence of a specific obligation, it was the duty of the belligerent to police neutrality.

4.c.ii. The ‘Alabama’ Claims.

¹⁴³ [Emphasis added.] Id., pp. 572 – 573.

¹⁴⁴ [Emphasis added.] Id., pp. 600 – 601.

The United States next gave details of specific breaches of British neutrality, instances of which included the open operation in Liverpool of branches of the Confederate Departments of War, Navy and the Treasury,¹⁴⁵ contracts made for the construction and purchase of Confederate ships in exchange for future crops of Southern cotton,¹⁴⁶ and the exchange of Confederate cotton for cargoes of arms and war munitions transhipped from Liverpool.¹⁴⁷ As a result, it was alleged, British colonial authorities had ‘converted the port of Nassau into an insurgent port, which could not be blockaded by the naval forces of the United States’.¹⁴⁸

An account of shipbuilding in Liverpool for the Confederacy followed. First discussed was the Alabama¹⁴⁹ which escaped from Liverpool in May 1862 after orders were sent for her arrest. Then, in March 1863, the gunboat Alexandra was launched at Liverpool, but subsequently seized by Liverpool customs officers on 5 April and prosecuted under the Foreign Enlistment Act. The special jury returned a verdict in favour of her owners. As reported by Moore, the American case made the following points regarding the Court of Exchequer’s interpretation of the statute:

... [T]hough her hostile character was clearly proved, ... [t]he judge said that a neutral might make a vessel and arm it, and then offer it for sale to a belligerent; that, a fortiori, “if any man may build a vessel for the purpose of offering it to either of the belligerent powers, ... may he not execute an order for it?”¹⁵⁰ That “to ‘equip’ is ‘to furnish with arms’; in the case of a ship especially, it is ‘to furnish and complete with arms’; that ‘equip’, ‘furnish’, ‘fit out’, or ‘arm’ all mean precisely the same thing”; ... “the question is whether you think that this vessel was fitted. Armed she certainly

¹⁴⁵ Confederate agents were also established in the British West Indies. ‘Purchases made in England were sent to Nassau in British bottoms and were there trans-shipped into steamers of light draft and great speed, constructed for the purpose, ...’. Id., p. 581.

¹⁴⁶ Id., pp. 580 – 581. See also D. Stick, *supra* note 69, p. 61.

¹⁴⁷ Coal was also a problem, even though it was not listed as contraband. J.B. Moore, *supra* note 4, pp. 581 – 582.

¹⁴⁸ Id., p. 581. Lord Palmerston had countered: ‘it would not do for U.S. ships of war to harass British commerce on the high seas under pretence of preventing the Confederates from receiving things that are contraband of war’. Id., p. 583.

¹⁴⁹ The assumption was that the Alabama was a duly commissioned warship. T-C. Chen, *supra* note 79, p. 382.

¹⁵⁰ Shipbuilding was not forbidden. See *supra* note 98; *infra* note 180.

was not, but was there an intention that she should be finished, fitted, or equipped in Liverpool? Because, gentlemen, I must say, it seems to me that the Alabama sailed away from Liverpool without any arms at all; merely a ship in ballast, unfurnished, unequipped, unprepared; and her arms were put in at Terceira, not a port in Her Majesty's dominions. The Foreign Enlistment Act is no more violated by that than by any other indifferent matter that might happen about a boat of any kind whatever".

The American case concluded: 'this ruling was not reversed, and stood as the law of England till after the close of the civil war'.¹⁵¹ The case then proceeded to two ironclads¹⁵² regarding which Britain risked war.¹⁵³ The American case then shifted to the history of army purchases and blockade-running, and complained that Confederate ships were welcomed in British jurisdiction until 15 March 1865.¹⁵⁴ The origin and career of British-built Confederate cruisers were then outlined.¹⁵⁵

The British defence was fairly short and to the point: the blockade was so 'imperfect' it created a situation in which it was profitable to build 'a certain class of ship'.¹⁵⁶ Moreover, commerce in contraband carried through the blockade constituted an 'enterprise() which Her Majesty's Government could not undertake to prevent, and the repression of which belonged to the United States as a belligerent power'. Britain

¹⁵¹ J.B. Moore, supra note 4, p. 586. The Crown's application for a new trial failed. The bill for costs and damages was £3,700, as the ship had been held by customs for three years. The ship later cost British colonial government more than £300. *Id.*, p. 606. See also Dana, pp. 471 n. 218, 474 – 477; infra note 170.

¹⁵² See supra note 132.

¹⁵³ British unwillingness to intervene constituted grounds for war between the U.S. and G.B.. J.B. Moore, supra note 4, p. 587.

¹⁵⁴ *Id.*, p. 589.

¹⁵⁵ Specifically, the Sumter, the Nashville, the Florida and her tenders, the Clarence, the Tacony, the Archer, the Alabama and her tender the Tuscaloosa, the Georgia, the Tallahassee (or the Alustee), the Chickamauga, and the Shenandoah.

¹⁵⁶ J.B. Moore, supra note 4, pp. 604 – 605. Cf. the U.S. Supreme Court's earlier opinion in The Santissima Trinidad [1822] 7 Wheaton 283, at 340 (Mr. Justice Story):

...[T]here is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation.

had banned the dismantling and sale of belligerent warships in its ports.¹⁵⁷ The British Orders of 1 June 1861, and 31 January 1862 were noted,¹⁵⁸ and described as ‘more stringent and comprehensive than those of any other neutral government’.¹⁵⁹

With regard to specific American complaints about ship-building, with the exception of the Florida and the Alabama, the British case asserted it had investigated in every case.¹⁶⁰ Where reasonable evidence¹⁶¹ was produced, the vessel was seized, and proceedings instituted, but the government had been unable to sustain seizure in all cases due to insufficient evidence, erroneous information, or changes in circumstances subsequent to government surveillance.¹⁶² The ironclad rams remained under seizure from October 1863 until May 1864. The British government bought them for £220,000 to prevent their use by the belligerents. Finally, Britain had to beware of ‘mere peculiarities in construction’ which led to mistaken inferences, ‘especially in cases where the vessel is constructed with a view to some employment which, though commercial, is out of the ordinary course of commerce’.¹⁶³

4.c.iii. Claims for Compensation.

The American claims for compensation were divided into two classes: (1) direct losses growing out of the destruction of vessels and their cargoes by the ‘insurgent’

¹⁵⁷ On the other hand, ‘it was not the duty of a neutral government to prohibit the sale in its territory of a ship owned by a belligerent to a neutral purchaser’. J.B. Moore, *supra* note 4, pp. 597 - 598.

¹⁵⁸ See *supra* Section 3(B), text.

¹⁵⁹ J.B. Moore, *supra* note 4, p. 596.

¹⁶⁰ E.g., the Canton/Pampero was seized 10 December by Glasgow customs collectors, declared forfeit in April 1864, and remained under seizure until the war’s end. The British government was unable to establish reasonable suspicion in 1864 regarding the Amphion and the Hawk, and in 1865 regarding the Virginia, the Louisa Ann Fanny, and the Hercules. *Id.*, p. 606.

¹⁶¹ ‘By reasonable evidence is understood testimony which, though not conclusive, offered nevertheless a reasonable prospect that the government might be able, when the time for trying the case should arrive, to sustain the seizure in a court of law’. *Id.*, p. 608.

¹⁶² See *supra* note 92, and accompanying text.

¹⁶³ J.B. Moore, *supra* note 4, pp. 607 – 608. The British case then described its efforts to prevent ‘the Anglo-Chinese Flotilla’ falling into Confederate hands.

cruisers,¹⁶⁴ and (2) national expenditure pursuing those cruisers, the transfer of commercial sea traffic to the British flag, higher insurance costs, and the prolongation of the war, which increased costs generally. There then followed a detailed statement of the cost of pursuing Confederate cruisers, estimated at \$26,101,907.31, exclusive of interest.¹⁶⁵ No estimate was given to the tribunal regarding the so-called ‘national’ or ‘indirect’ claims.¹⁶⁶ Otherwise, the American case by the terms of the Treaty asked for interest to the day when the award was payable – twelve months after the date of award, at 7% interest (the legal rate in New York); 1 July 1863 was suggested as an ‘average day’ from which to compute the interest.¹⁶⁷

Moore reports that Britain contended strongly that ‘there were no grounds on which the United States could maintain a claim for pecuniary indemnity’:

... [A] charge of injurious negligence on the part of a sovereign government, in the exercise of any of the powers of sovereignty, must be sustained on strong and solid grounds. It was not enough to show that a government had acted on an opinion from which an arbitrator could be induced to dissent; or that a judgement pronounced by a court of competent jurisdiction, and acted upon by the Executive, was tainted with error On the contrary, it was necessary to show that there had been “a failure to use, for the prevention of an act which the government was bound to endeavour to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation”... (I)t was not reasonable “that a belligerent state ... should ... claim indemnity from the neutral for losses ... which it had not actively and diligently exerted itself to prevent and

¹⁶⁴ Including the (a) destruction of vessels and property of the U.S. Government; (b) destruction of vessels and property under the American flag; and (c) damages or injuries to persons, growing out of the destruction of each class of vessels’. *Id.*, p. 589.

¹⁶⁵ This sum comprised two principal items: \$ 7,080,478.70 (incurred in cruising against Confederate ships), and \$19,021,428.61 (the amount, including increased war premiums, claimed for the seizure, detention, and destruction of vessels by Confederate cruisers).

¹⁶⁶ *Supra*, note 120, and accompanying text. This issue, first formulated by Senator Sumter, threatened to derail the entire proceedings, and the Geneva Arbitrators were asked to declare that the indirect claims were non-justiciable. J.B. Moore, *supra* note 4, pp. 643 – 646; J.H.W. Verzijl, *supra* note 3, p. 118.

¹⁶⁷ J.B. Moore, *supra* note 4, p. 590.

arrest".¹⁶⁸

The British position thus relied throughout on the rationale for the rights and duties of traditional neutrality law: the belligerent must police the carriage of contraband as the belligerent was responsible for the disruption of normal peacetime trade.

4.d. The Award.

The tribunal re-convened in mid-June 1872 to receive the written arguments from each side, at which point Britain requested an eight months adjournment in order that the two governments could devise a supplementary treaty. The source for such late British discontent was the so-called 'indirect claims', and American attempts to trace these claims back to the allegedly 'premature' British recognition of the war. Although ultimately settled without the need for further adjournment, the controversy surrounding the 'indirect claims' so nearly ruptured the proceedings that the British arbitrator, Sir Alexander Cockburn, professed himself to be unprepared when the tribunal re-convened in mid-July to consider the facts, the general principles of law, and the case of each cruiser. When the reading of opinions did get underway, on 17 July, further 'special argument' was allowed, prompted in each case by the British arbitrator, which concerned, *inter alia*, the meaning of 'due diligence', the recruitment of men for the Shenandoah at Melbourne, the entry of the Florida into the port of Mobile, the question of interest, and the general subject of the statement of claims.¹⁶⁹

As discussed above, Great Britain agreed to arbitrate on the basis of the Three Rules of Washington, even though these rules were not yet accepted as principles of general international law. These rules clearly favoured the American case from the outset, and Britain expressly maintained they were not operable from 1861 – 1865. In turn, the award made clear that neutral 'due diligence' 'ought to be exercised ... in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part', and that a violation of neutrality had occurred with the 'construction, equipment, and armament' of vessels. As for American attempts to prove hostile British 'animus', the consensus of the tribunal seems instead to have been that the British were guilty only of failures of 'watchfulness', in that the 'feebleness in certain branches of the public service resulted in great detriment to the United States'.

¹⁶⁸ [Emphasis added.] *Id.*, pp. 610 - 611.

¹⁶⁹ *Id.*, pp. 632 - 646, 649 - 650. See *supra* note 166.

As for the ships, the arbitrators held the British government liable for the acts of the Alabama,¹⁷⁰ the Shenandoah,¹⁷¹ the Florida,¹⁷² and four tenders.¹⁷³ On the other hand, no liability was found regarding the Sumter and the Nashville,¹⁷⁴ the Retribution,¹⁷⁵ the Georgia, the Tallahassee, and the Chickamauga.¹⁷⁶ The award of a gross sum of \$15,500,000 was reached on 2 September by a majority of 4 votes to 1; Sir Alexander Cockburn, the British arbitrator, dissenting. Double claims were disallowed, as were claims for 'gross freights' insofar as they exceeded 'net freights'. Interest was disallowed for the costs incurred in pursuing the Confederate cruisers, and the loss of prospective earnings.¹⁷⁷

5. Conclusions.

Issues of public order and organisation are frequently solved by means of the use of armed force,¹⁷⁸ and the ACW was no exception. The war proved to be a long and costly dispute, not merely due to the countless sufferings of the American peoples, but also in terms of the many values which had to be re-cast forcibly. Widespread system change was the result. Various doctrines and theories were effectively

¹⁷⁰ Unanimous with regard to Rules I and III, adding 'the (British) Government ... cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed'.

¹⁷¹ By 3 votes (Adams, Staempfli, Sclopis) to 2 (d'Itajuba, Cockburn), in respect of Rules II and III, and regarding acts committed after February 1865, prior to which the Tribunal was unanimous that no liability attached.

¹⁷² By 4 votes (Adams, Staempfli, Sclopis, d'Itajuba) to 1 (Cockburn), in respect of all three Rules.

¹⁷³ The Tuscaloosa (the Alabama), and the Clarence, Tacony and Archer (the Florida). The Tribunal was unanimous that such auxiliary vessels 'must ... be submitted to the same decision'. See J.H.W. Verzijl, *supra* note 3, p. 118.

¹⁷⁴ Unanimous.

¹⁷⁵ By 3 votes (Cockburn, d'Itajuba, Sclopis), to 2 (Adams 'yes' (all acts); Staempfli 'yes' (for the loss of the Emily Fisher)).

¹⁷⁶ Unanimous. Claims also made against the Sallie, the Jefferson Davis, the Music, the Boston, and the V.H. Joy, were excluded for lack of evidence.

¹⁷⁷ The Tribunal allowed interest at 6% per annum in gold. J.B. Moore, *supra* note 4, p. 651 n. 1. Sir Alexander Cockburn refused to sign the award. His dissent was published in a supplement to the London Gazette of 24 September 1872, and by the U.S. government in [1872] IV(2) For. Rel. 48, as a note to Protocol No. XXXII. See J.B. Moore, *supra* note 4, pp. 652, 659 – 661; J.H.W. Verzijl, *supra* note 3, p. 118.

¹⁷⁸ See T-C. Chen, *supra* note 79, p. 422.

overthrown during the war; others were elevated to unprecedented heights. In the latter category are found the laws of maritime neutrality, construed through the perspectives, first, of known discrepancies in third state neutral practice during civil wars, and secondly, of levels of impartial 'due diligence', perceived neither as uniform nor 'due' from self-declared and largely self-regulating neutral third states.

The Three Rules of Washington carried merely conventional authority at the time,¹⁷⁹ but Lauterpacht asserts they were 'the starting-point of the movement for the universal recognition' that neutral impartiality places burdens on neutrals to prevent their subjects from supplying belligerents.¹⁸⁰ Admittedly, the terms for arbitration put a non-British construction upon the term 'due diligence', i.e., the diligence 'due' to a belligerent must be proportional to the risks that belligerent would otherwise incur.¹⁸¹ More controversially, perhaps, the Geneva Arbitration marked the beginning of a more cautious approach to neutrality generally, and declarations of neutrality would hardly ever again be made in connection with a civil war.¹⁸²

The British approach to freedom of trade during others' wars supported a fundamental, commercial proposition: a neutral government need only extend equal

¹⁷⁹ F.E. Smith, *supra* note 8, p. 138.

¹⁸⁰ H. Lauterpacht (ed.), *supra* note 22, p. 716. The Geneva Arbitrators did not alter the rule that vessels could be built, etc., for a belligerent within the territory if neither commissioned directly nor made ready for immediate hostilities. F.E. Smith, *supra* note 8, p. 139. Cf. H. Lauterpacht (ed.), *supra* note 22, p. 714 (a 'hair-splitting' distinction); A.P. Rubin, *supra* note 21, p. 21 – 25; F.J. Merli, Great Britain and the Confederate Navy 1861 – 1865 (Bloomington: Indiana University Press, 1970), pp. 235 - 249. Geneva also did nothing to disturb private neutral trade in armaments. See, e.g., J.H.W. Verzijl, *supra* note 3, pp. 116, 166; E. Castrén, *supra* note 17, p. 505. The U.S. conceded also that the Second Rule of Washington applied only 'to the use of a neutral port by a belligerent for the renewal or augmentation of such military supplies or arms for the naval operations referred to in the rule'. J.B. Moore, *supra* note 4, p. 575.

¹⁸¹ H. Lauterpacht (ed.), *supra* note 22, pp. 757 – 758, who also argues that for purposes of international law, the accepted meaning of 'due diligence' is 'such diligence as can reasonably be expected when all the circumstances and conditions of the case are taken into consideration'. See, e.g., Article 8 of Hague Convention XIII, 1907, reprinted in A. Roberts and R. Guelff, *supra* note 53, pp. 86 – 89, which substitutes the words 'to use due diligence' with 'to employ the means at its disposal'.

¹⁸² E.g., the San Domingo rebellion (1864), two Cuban rebellions (1870, 1875), the Carlist rebellion in Spain (1874), the Balkan rebellion (1878), the Columbian revolt (1885), and the Brazilian rebellion (1893).

facilities to each belligerent, for instance to purchase coal and other supplies, or to undergo repairs. This meant that many British citizens profited hugely from the ACW, and from the 'known' laws of neutrality to which Great Britain adhered. The British position on the enforcement of neutrality was beneficial to its ship-builders, armaments manufacturers, and cotton industries, to name a few. The British government remained unwilling, until pressured so to do, to intervene in the commercial activities of its citizens, a stance nonetheless which could easily have threatened British neutrality, given the geographical proximity of British colonial ports to the American coastline, and the historic trade routes located there.

In a similar vein, the British stance had its strategic dimension: a divided United States, coupled with a new Confederate ally, might be no bad thing. Great Britain's status and early position on the issue of neutrality during the ACW obliged the United States to exercise greater caution on the high seas, despite the latter's view that Confederate privateers were mere pirates. Britain established diplomatic contact with the Confederate government in Richmond, Virginia, and conceded its awareness that its colonial ports were important to the Confederacy as a result of the blockade. Last, but by no means least, Britain followed the traditional rationale of neutrality law and left the policing of the carriage of contraband to the belligerents.

Thus, the position in which the United States appeared to find itself regarding certain modes of neutral trade during the ACW was not dissimilar to that of belligerents in the pre-modern era of neutrality when faced with a stance of non hostes, which also meant that a certain 'equality of arms' was a pre-requisite to the success of any state's particular neutral policies. Particular 'rules' of neutrality were made operative through modes of neutral and belligerent self-help. The content of neutral rules could only be as good as each state's ability to police and enforce its own position within them. The rules of neutrality therefore were a function of given circumstances, and hence, inherently flexible.

The shift, after Geneva, of a greater degree of responsibility onto neutral states to prevent certain types of private trade with one belligerent to the detriment of the other gives a valuable insight into the award of compensation made to the United States in Geneva. The United States won the war. British concerns regarding its future colonial trading interests were clearly in evidence when it agreed to arbitrate on the basis of rules it denied were in force during the ACW. Moreover, the formulation of American claims for compensation after the war reflected that country's growing strength and ability to enforce its own version of the applicable 'rules'. With the rapid approach of 'total war', however, the distinction between neutral and un-neutral

service would be made practicably meaningless, making it irrelevant, if not impossible, to sustain neutral burdens. Soon, a new belligerent war aim of transforming 'Neutral Countries' into 'Supply Centres', the practical consequence, would be but a step away.

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