Neutrality As Influenced by the United States

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NEUTRALITY AS INFLUENCED BY THE UNITED STATES

CHAPTER I

HISTORY OF NEUTRALITY DOWN TO 1776 A.D.

1. HISTORICAL INTRODUCTION

The history of the law of neutrality has no source in antiquity. The political and hierarchical theories of government in the ancient world left no room for the existence of anything similar to neutrality.

As late as the middle of the 16th century, there was no word exactly corresponding in meaning to the English word 'Neutrality'. Hugo Grotius, 'the father of International Law', termed neutrals, Medii (middle men),[1] and Bynkershoek contented himself with the term 'Non-hostes'.[2]

With the decline of the Holy Roman Empire and the Papacy, and with the rise of national states, the desire for some established regulations to govern their relations commenced to express itself in the maritime codes as early as the 11th and 12th centuries. The earliest of these were the Amalfitan Tables which appeared in the latter part of the 11th century, and the laws of Oleron in the latter part of the 12th century.[3] The Consolato del Mare was one of the earliest and most famous of all the collections of maritime regulations in force on the Mediterranean coasts.

The earliest impulses toward neutrality were prompted by the growing desire for commercial intercourse and its later development was also largely due to the growth of maritime trade. The Crusaders opened the route for new trade on a large scale between the West and Near East. The fascinating tales of the 'Golden East', told by the Polos and other Portuguese and Italian navigators aroused among Occidental adventurers a desire for the gold and silver of the land of Cathay,

[1] *De Jure Belli ac Pacis*, edited by Whewell, Vol. III, p. 288.

[2] *Quaestiones Juris Publici*, Vol. I, Pt. IX, p. 67. Bynkershoek also says of neutrals "Bello Se Non Interponant". *Ibid.*

[3] John Godolphin's *A View of the Admiral Jurisdiction*, pp. 10-14.

and the discovery of the New World across the Atlantic brought the maritime Powers of Europe into sharp conflict.

While the commercial enterprises were rapidly increasing and the Colonial Powers were struggling for maritime supremacy, there were practically no regulations regarding neutrals. Whenever a war broke out between two or more hostile states, all the neighboring states were at perfect liberty either to take part in the contest or to render any kind of warlike aid to one or both of the belligerent powers. Generally speaking, a prince might allow a belligerent to levy troops within his territory, or supply him with ammunition, troops, or ships of war. The only restriction was the fear of immediate war that might result from such hostile conduct.

In course of time, efforts were made in time of peace by different Powers to bind other states by treaty engagements, mutually promising not to render any assistance to the enemy of either contracting party in case of war. Most of the European Powers made such alliances with one another, thus securing as many friends as possible with the hope of limiting the relative strength of their enemies. This was indeed the only means by which states were restrained from certain unneutral conduct down to the middle of the 18th century.

On the other hand, the exercise of the belligerent rights of war had always been excessive. Nearly all the European Powers, when at war, constantly endeavored to cut off altogether the commercial intercourse of their enemies with other states. England has always been struggling for the monopoly of sea trade. As early as the time of Edward I, an attempt was made to induce the Flemings to close their commercial dealings with Scotland, and again in 1295, the masters of the neutral vessels lying in English ports were compelled to give security with promises not to trade with France.[4] Under various excuses, neutral commerce was frequently treated with undue severity, and this consequently led to preventive measures on the part of neutrals.

The principle that neutrals have the right to trade with belligerents without interruption in time of war, as in time of peace, was first advanced by the King of Prussia during the war of 1745.[5] This principle was carefully developed by the

[4] Thomas Rymer's *Foedera*, Vol. I, p. 821; Vol. II, p. 747.

[5] Robert Ward's *Treatise on Maritime Laws*, pp. 74-75.

Commissioners of Frederick the Great, and the King's Tribunal was consequently instructed to establish the rules embodied in them. But in the face of the British opposition, Prussia reluctantly abandoned them.[6]

Opinion of Text-writers

The legal status of neutral states was scantily treated by the early text-writers. Grotius' celebrated work, De Jure Belli ac Pacis, published in 1625, said little on the subject in the meagre chapter, De His Qui in Bello Medii Sunt. Compared with the present idea of neutrality, his conception was vague and imperfect. " . . it is the duty of neutrals", said he, "to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war . . . and in a doubtful case to act alike to both sides, in permitting transit, in supplying provisions, in not helping persons beseiged".[7] He held that the states when parties to an alliance must protect each other.[8]

The first writer of real importance on the subject of neutrality was Bynkershoek, whose Quaestiones Juris Publici appeared in 1737. In addition to enemies and friends, or allies, he distinguished a third class of states, the 'Non-enemies', from which class he excluded all those that are under any treaty obligation to assist either the one or the other of the warring parties. " . . If I am a neutral, I must not do anything that will be advantageous to one party, lest I injure the other. The enemies of our friends can be looked at either as our friends or as the enemies of our friends. If they are regarded as our friends, we are right in helping them and giving them our counsel . . . But when they are the enemies of our friends, we are barred from such conduct which is inconsistent with that equality in friendship. . ."[9]

Wolff defined neutrals in his Jus Gentium, published in 1749, as those "who adhere to the side of neither belligerent", but he asserts that "when the war is a Causa Justa, the belligerent

[6] Charles De Martens' *Causes Célèbres de Droit des Gens*, Vol. II, pp. 97-168.

[7] Grotius, *De Jure Belli ac Pacis*, translated by Whewell, Vol. III, pp. 288-289.

[8] *Ibid.*, Vol. II, pp. 435-438.

[9] Translation from *Quaestiones Juris Publici*, Vol. I, Pt. IX, p. 69.

erents have unimpeded access to neutral territory".[10] Vattel laid down a new theory of nonassistance in 1758. "I do not say", he asserted, " 'to give assistance equally', but 'to give no assistance' ". But he contradicted himself by admitting that "it is lawful and commendable to succour and assist, ... a nation engaged in a just war. It is even a duty incumbent on every nation to give such assistance when she can give it without injury to herself".[11] Vattel asserted, however, a very important principle: namely, the necessity of a declaration of war in benefit of neutrals. According to his view, declarations were necessary not only for the sake of belligerents themselves but also in order, (1) to warn neutrals about the existence of war, and (2) to justify the cause of war in the opinion of neutrals.

Nearly all the authors sanctioned as lawful some acts which are not compatible with the present usage of neutrality. They held that war-like assistance was consistent with neutrality, as long as it be given in accordance with treaty stipulation. Such being the conception of neutrality, most of the European nations freely gave assistance to either belligerent down to the latter part of the 18th century.

II. Freedom of Neutral Commerce

A. *Ownership of Goods and of Vessel.*

From the very beginning of the rudimentary idea of neutrality, an attempt was made to distinguish the character of goods and ships according to their ownership. The treaty of 1221 between Arles and Pisa, which is the earliest known treaty regarding the rights of neutrals in Mediaeval Europe, provided that "any goods of Genoese or other public enemies of Pisa should be restored to the owner when discovered in a ship with men of Arles: and that men of Arles when taken on board Genoese vessel should be treated as if Genoese, and their goods should be retained".[12]

The Consolato del Mare was made at Barcelona about the middle of the 14th century. Its contents were based upon the

[10] Wolff, *Jus Gentium*, p. 672.

[11] *Vattel's Law of Nations*, translated by Joseph Chitty, 1861, p. 332.

[12] Jean Marie Pardessus' *Us et Coutumes de la Mer; ou, Collection des usages maritimes des peuples de l'antiquité et du moyen âges.* Paris, 1847, Vol. II, p. 303.

simple rule, which might be briefly stated as "Spare your friend and harm your enemy."

1. "If an armed ship, or cruiser, meet with a merchant vessel belonging to an enemy, and carrying a cargo, the property of an enemy, common sense will sufficiently point out what is to be done; it is therefore unnecessary to lay down any rules for such a case.

2. "If the captured vessel is neutral property, and the cargo the property of enemies, the Captor may compel the merchant vessel to carry the enemy's cargo to a place of safety, where the prize may be secure from all danger of re-capture, paying the vessel the whole freight which she would have earned at her delivering port; and this freight shall be ascertained from the ship's papers; . . .

3. "If the ship should belong to the enemy, the cargo being either in the whole, or in part, neutral property, some reasonable agreement should be entered into on account of the ship, now become lawful prize, between the captor and the merchant."[13]

According to this rule, an enemy's goods under a neutral flag were subject to confiscation, while a friend's goods were free, even though found in an enemy's vessel. The main object was to seize the goods of an enemy upon the high seas and to respect the property of a friend, whatever the character of the carrier. Neutral ships and neutral goods were spared, while belligerent ships and belligerent goods were liable to capture. The acceptance of the Consolato del Mare by European maritime powers was far from general. The individual interests of each state at each period were the main guide in their practice.

Holland.—To the Dutch is due the honor of being the earliest champions of the freedom of the neutral carrier. The Dutch, the chief carriers of the world during the 16th century, whose obvious interest was therefore in obtaining the immunity of the goods carried in neutral bottoms, persistently endeavored to diminish the severity of belligerent practice. In opposition to the Consolato, they introduced a new principle that "free ships make free goods"; i. e., neutral ship frees enemy goods. They tried to induce other states to accept this proposition, and their efforts were crowned with success in

[13] Sir C. Robinson's translation of the *Consolato del Mare.* Chapter cclxxiii, Sec. 1 ff. Travers Twiss, *The Black Book of the Admiralty.*

twelve treaties made to that effect with other powers during the period from 1650 to 1700.[14]

But the principle of free ship, free goods, was, in some of these treaties, coupled with the converse maxim, enemy ship, enemy goods. The reason is obvious. Whenever possible, the Dutch stipulated the former provision alone, but in case a power would not, they had to grant in return the opposing principle of enemy ship, enemy goods. This new rule became gradually established in treaty regulations by the latter part of the 17th century, and Holland stood forth as the pioneer of the freedom of neutral commerce in time of war. The Dutch themselves were, however, far from being consistent in their practice of the principle which they had endeavored to establish.

France.—France, in the days of her maritime greatness, exercised her belligerent rights in a manner most severe and uncompromising. During the 16th century she laid down the principle in several ordinances, that enemy ship makes friend's property lawful prize. By the Ordinances of 1538,[15] 1543,[16] and 1584,[17] she upheld that principle. This rule, based upon the theory "que la robe d'enemi confisque celle d'ami", condemned the goods of a friend ladened in an enemy's ship. But in the early part of the 17th century, a tendency was shown toward the relaxation of this practice. The treaty with the Porte was the earliest to deviate from the rule embodied in the ordinances. This treaty was made in 1604 and provided that French goods on board the ships of the enemy of the Porte should be restored to the owner, and the goods on French ships belonging to the enemy of the Porte should not be liable to capture.[18] After this treaty, France was inclined during the middle of the 17th century toward the adoption of

[14] Jean Dumont, *Corps Universal Diplomatique du Droit des Gens;* with England, 1667, Vol. XIII, p. 50; 1674, *ibid.*, p. 253; 1674 *ibid.*, p. 282; with France, 1661, Vol. XII, p. 346; 1662, Vol. XII, p. 412; 1678, Vol. XIII, p. 350; with Portugal, 1661, Vol. XII, p. 366; with Spain, 1675, Vol. XIII, 285; Sweden, 1667, Vol. XIII, p. 39.

[15] *Recueil des Anciennes Lois Françaises,* Vol. XII, p. 552.

[16] *Ibid.*, p. 846.

[17] *Ibid.*, Vol. XIV, p. 556.

[18] Jean Dumont, *Corps Universal Diplomatique du Droit des Gens,* Vol. X, p. 40.

the Dutch principles, exempting neutral ships and neutral cargoes from confiscation. In 1646, she had concluded a treaty with the United Provinces, exempting for four years Dutch ships and their neutral cargoes from confiscation, and declaring that "their ships should free their cargoes, notwithstanding the presence in it of merchandise, and even grain . . . belonging to enemies, excepting always the articles of contraband of war".[19] The Declaration of 1650 to the same effect was contrary to the Ordinances of earlier dates above quoted. The treaty of 1655, with the Hanse Towns, stipulated that for fifteen years the Hanse flag would cover the cargo and the goods of neutral subjects, if seized on board the ships of the enemies of France.[20] By the treaty of the Pyrenees in 1659, both the rules of free ship, free goods, and of enemy ship, enemy goods, were adopted in her stipulations with Spain.[21] France, however, soon returned to the old practice of her former Ordinances and even increased their severity. In 1681, the Ordinances of Louis XIV established a new practice, afterwards known as "the doctrine of Hostile Infection or Contagion", by which not only the goods of a friend under an enemy flag, and enemy goods on a neutral vessel, but also the neutral vessel that was laden with enemy goods was liable to capture and confiscation. After this date, France generally adhered to this principle in her ordinances and treaties: yet her practice was so irregular and variable that it is almost impossible to generalize. Sometimes she held the 'infection' rule, and sometimes the free ship, free goods principle; at other times the competing rule of enemy ship, enemy goods, and still at other times both rules in conjunction. After 1744, however, a milder usage was observed, perhaps under the influence of the Dutch, and the exercise of belligerent rights was much less severe, not condemning the neutral vessel that carries enemy goods. In 1778, in her treaty with the United States, France adopted both maxims, free ship, free goods and enemy ship, enemy goods.[22]

[19] Jean Dumont, *Corps Universal Diplomatique du Droit des Gens*, Vol. XI, p. 342.

[20] *Ibid.*, Vol. XII, p. 103.

[21] *Ibid.*, p. 264.

[22] *Treaties and Conventions between the United States and other Powers*, 1871, pp. 249, 251.

Spain.—In her early practice, Spain followed the more severe usage of France and condemned enemy goods in neutral ships as well as neutral goods in enemy ships. She practiced even the doctrine of hostile contagion. By her treaty with the United Provinces in 1650, she adopted the principle of free ship, free goods. This was confirmed by numerous treaties, but it was not until 1780 that her national law definitely and ultimately exempted from capture enemy goods on board a neutral vessel.

Prussia.—The free ship, free goods principle was embodied in the Declaration of Frederick the Great, recommended by his Commissioners. In that year, 1751, Frederick the Great appointed a Commission to consider the legitimacy of sequestrating the capital of the British Silesian creditors. The Commissioners pushed the neutral claims far beyond the limit then recognized and laid down some principles that became the established rules of international law in later years.[23] They claimed for neutrals the right to carry on in time of war as in time of peace accustomed trade with either belligerent, except in contraband of war. They declared for the first time in the history of neutrality the principle of free ship, free goods, to be an actual principle of international law. This enunciation is often referred to as the beginning of the claims for neutral right to be universally acknowledged. These claims were, however, altogether abandoned by Prussia.

Great Britain.—Great Britain was the only great power in Europe that maintained the rule of the Consolato del Mare in principle with any degree of strictness. She always recognized the old principle as a rule of the law of nations. But in practice she appears not to have been always consistent. After the introduction, by the Dutch, of the new principle of free ship, free goods, she adopted it for the first time in her treaty of 1654 with Portugal.[24] Yet this was the combination of both maxims, free ship, free goods, and enemy ship, enemy goods. This treaty remained in force until the revision of the same in 1810, and then it was abandoned by the treaty of Rio de Janeiro. But no alteration of the old rule was made in her treaties with the United Provinces in 1661 and with Denmark in 1655. She at times made treaties of diametrically opposite

[23] T. A. Walker, *The Science of International Law*, p. 401.

[24] Dumont, *Corps Universal Diplomatique*, Vol. XII, p. 82.

character with different states. In 1662, the new rule was included in her treaty with Spain, and from that time on until 1796 thirteen treaties were made with Spain in each of which, except that of 1670, there was an article recognizing the new rule. At times she went so far as to adopt the French practice of hostile infection under one pretext or another.[25]

Down to the 18th century it had been the practice of all European states to exclude foreign ships from commercial intercourse with their colonies, strictly preserving the colonial and coasting trades for their own shipping. In the war of 1756, France, being in a position of naval inferiority to Great Britain, opened her colonial trade to Dutch neutral ships for the carrying of merchandise by giving them special licenses, while shutting off all other neutrals. The British captured the Dutch vessels and condemned them as lawful prize, on the ground that no trade prohibited in time of peace could be allowed in time of war. This principle has been known ever since as the Rule of the War of 1756. The British position appeared justifiable on the ground that the Dutch vessels could no longer be regarded as neutral, as they were practically engaged in the French belligerent service. But the chief difficulty was in the old theory of commerce that the colonial trade must be carried on exclusively in the interest of the mother-country. This theory is no longer tolerated in the new world of free commerce.

B. *Limitations of Neutral Commerce.*

Contraband of War.—The belligerent's right of seizing contraband articles is founded upon his war prerogative, and its justification has always been recognized as incontestable. But as to the question, what should constitute contraband of war, opinion has never been uniform. Grotius' three general classes of articles, especially the third class, 'Usus Ancipitis', things that could be used either for war or for peaceful purposes, were not universally accepted. The three classes are: (1) those articles which are of use in war alone, as arms; (2) those articles that are useless in war, serving only for luxury; and (3) those articles that could be used both for war and peace.[26] The practice of different nations in classification of contraband has been more divergent than uniform.

[25] L. A. Atherley-Jones, *Commerce in Time of War,* pp. 285-286.
[26] *Grotius,* translated by Whewell, Vol. III, pp. 6-7.

During the 17th century, an attempt was made to establish a general rule of contraband by enumerating contraband articles in treaty stipulations. The term 'contraband' was first employed in the treaty of 1625 between England and the Low Countries. England and Sweden agreed, in 1656, upon a list of contraband articles. Some treaties excluded from the list of contraband, provisions that were not intended for war-like use. France, by the treaty of the Pyrenees in 1659 with the Hanse Towns, recognized the exemption from contraband of provisions, save those that were intended for the places blockaded or invested.[27] In 1667 and 1677, Great Britain in her treaties with France exempted from the list of contraband, money, provisions, and even naval stores, while horses, harness, arms and munitions were declared contraband.[28]

Blockade.—The object of blockade is to subdue an enemy by depriving the inhabitants of the blockaded territory of their commercial intercourse by sea with the outside world. This, also, being one of the belligerent rights that arises from the war prerogative, naturally comes into conflict with neutral interests. It has always been claimed that a belligerent has prima facie a right to regulate the methods or measures necessary to reduce his enemy to submission. This claim was carried to such an extent that neutrals were not able to carry on their innocent commerce. 'Paper blockades' with no real force to maintain the investment are examples of extreme belligerent claims against neutral commerce. In 1584 Holland declared the ports of Flanders blockaded but she had no ships of war strong enough to make such declaration effective.

A number of treaties during the 18th century show a tendency in the European states to mitigate the evils of blockade. With the gradual development of commerce, some rules were laid down attempting to regulate the conduct of blockading powers and the treatment of blockade-runners. In 1630, the States-General issued an Edict, asserting that some actual act of violation of blockade on the part of a neutral must be shown, otherwise a neutral vessel could not be charged with blockade-running. In 1689, Great Britain provided in her treaty with Holland that unless a public notification of the

[27] Dumont, *Corps Universal Diplomatique,* Vol. XII, p. 266.
[28] *Ibid.,* p. 328.

blockade should be given before the departure of neutral ships from their ports, the ships would not regard the blockade as binding. But it was not until the following period when the question of blockade was given a serious test that the modern rules of blockade were developed.

The Right of Visit and Search.—Of the several branches of belligerent rights, the right of visit and search affects the freedom of neutral commerce in the most direct manner. Without visit and search, the exercise of all other rights, such as the prohibition of contraband goods, the enforcement of blockade, and the like, would prove impossible. This right was recognized as early as 1164 by the maritime powers of Europe in their relations with Mohammedan states.[29]

But as to the development of this right prior to the 19th century, authors are found to have very little to say except on the question of convoy. Convoy was a new system of immunity from visit and search demanded for neutral merchant ships sailing under the convoy of the warships of their own states. This system was introduced in the middle of the 17th century, and has been adopted by many states of continental Europe. During the Anglo-Dutch war of 1653, Queen Christina of Sweden introduced this system by ordering the convoying ships that "in all possible ways" they should decline to permit their convoyed merchant vessels to be searched.[30] Great Britain has constantly denied the validity of this rule.

III. Neutral Jurisdiction.

The exclusiveness of neutral jurisdiction over its territories and territorial waters is an essential consequence of the doctrine of national sovereignty. Within the sphere of neutral jurisdiction, therefore, no hostile activity or unneutral service is permissible. In case of either or both, neutrality is not perfect. None of the territories, including the three-mile limit of maritime jurisdiction, that belong to a neutral flag may be used as a basis of hostile military or naval operations.

[29] Travers Twiss, *The Law of Nations, The Rights and Duties of Nations in Time of War*, p. 147.

[30] John Thurloe, *A Collection of State Papers*, Vol. I, p. 424.

But the violation of this rule by the acts of the early wars was almost the general usage rather than the exception.[31] Grotius, with his vague conception of neutrality, holds that in a war of doubtful cause, a neutral must act alike toward both parties in the contest "in permitting transit and supplying provisions to the respective parties".[32]

During the 16th and 17th centuries, a neutral state practically allowed either of the belligerents to levy troops, to raise land and sea forces, and to lade and equip warships in neutral jurisdiction without much dispute. Charles I of England allowed an expedition of 6,000 men of his subjects to serve under the banners of Gustavus. In 1667 levies were freely made in England both for the French and for the Dutch. Charles II was requested by the allies to withdraw his auxiliary regiments serving with the French and Charles excused himself on the ground of equal assistance.[33] Numerous treaties were made agreeing upon mutual assistance. Sweden and Great Britain agreed to raise soldiers and seamen at the beat of drums, and also to hire warships in each other's jurisdiction.[34] Thus practically all the European powers freely gave assistance to belligerents while remaining in a condition of "strict neutrality".

There was, however, a noticeable change in the nature of treaty provisions. Those treaties were at first mostly of defensive character, but in practice they were offensive, as they promised mutual war-like assistance. This offensive character of treaties soon became transformed into a prohibition of such defensive alliances, each agreeing not to give the enemy of the other any auxiliary forces or subsidies. By the treaty of 1675, between Louis XIV and the Duke of Brunswick, it was agreed not to permit any levies in the state, not to allow troops to pass through it, nor to permit the formation of any kind of magazine.[35] All that a belligerent could ask from a neutral state was to refrain from rendering any actual assistance to his enemy and from allowing the neutral territory to

[31] Richard Henry Dana, *Notes on Wheaton's International Law*, 1866, 8th, Ed., Sec. 526.

[32] *Grotius*, translated by Whewell, Vol. III, p. 293.

[33] *Sir Thomas Burnet's History of His Own Time*, Vol. I, p. 406.

[34] Dumont, *Corps Universal Diplomatique*, Vol. XII, p. 125.

[35] *Ibid.*, Vol. XIII, p. 314.

be used as a basis of hostile activities. The idea of neutral duties was so vague and imperfect that down to the end of the 18th century there was no question as to the duty of a neutral state to prevent its subjects from any kind of hostile action within its jurisdiction.

CHAPTER 2

History of Neutrality from 1776 to 1793

I. Introductory Remarks.

The Declaration of Independence of the United States proclaimed to the world the birth of a new nation which was destined to further the peace of nations, to promote the freedom of commerce, and to advance the principles of international law, particularly along the lines of neutral right and neutral duty. Under the leadership of the most able and enlightened statesmen, who saw that the real and permanent interests of their country lay in freedom from the interference of European powers, the United States set forth almost at the beginning of its national career the most advanced and definite principles of neutrality. During this period, 1776 to 1793, the obligations of neutral states as well as the commercial freedom of neutral individuals, were made clearer than ever. "A new nation in a new world", remarks John W. Foster, "untrammeled by traditions and institutions of past ages, born to power and greatness almost in a day—from the beginning of its political existence it made itself the champion of a freer commerce, of a sincere and genuine neutrality, of respect for private property in war, of the most advanced ideas of natural rights and justice; and in its brief existence of a century by its persistent advocacy, it has exerted a greater influence in the recognition of these elevated principles than any other nation in the world."[1]

The old commercial doctrine of Europe before the days of Adam Smith was a matter of might and not of right. The European powers admitted no rights to their colonial trade. The United States, on the other hand, has always struggled for the freedom of commerce. The Revolutionary War itself was largely actuated by the desire for the development of the vast natural resources of the American continent without interference from the mother-country. The undue

[1] John W. Foster, *A Century of American Diplomacy*, p. 3.

exercise of belligerent rights and the irregular observance of neutral responsibilities among the European powers produced in America a conscious desire for the establishment of better and more uniform rules.

II. European Practice of Neutrality during this Period

A. *Unneutral Conduct*

In the doubtful days of the American war for independence, Franklin's diplomacy in Europe was remarkably successful and military aid was soon promised by the French Court. Deane wrote to Robert Morris in September, 1776, "I shall send you in October, clothing for twenty thousand men, thirty thousand fusils, one hundred tons of powder, two hundred brass cannon, twenty-four mortars with shells, &c., &c."[2] France as usual did not consider the legality or the illegality of such an interference in the American War. If there was any hesitancy in rendering open assistance to the United States, it was not due to the consideration of her neutral behaviour, but to the obvious fear of "bringing upon themselves the British storm".[3] In fact the French gave all kinds of warlike stores to the colonies as early as 1776, though not publicly at first.[4] The ficticious mercantile firm under the name of Hotalez et Cie., established at Paris to 'sell' to the Americans all kinds of military supplies, was practically a participation in hostilities. This firm existed from 1776 to 1783, during which time the disbursement for the aid of the American Revolution is estimated at over 21,000,000 livres.[5] Furthermore, cruisers were freely fitted out by Americans in French waters and were manned by Frenchmen.[6]

No sooner had Burgoyne's complete surrender finally cleared away the French fears and doubts, than France openly recognized the independence of the American Republic by con-

[2] Francis Wharton, *The Revolutionary Diplomatic Correspondence of the United States,* Vol. II, p. 148.

[3] M. Vergennes' *Memorial to Louis XVI* assured him that "the danger will not be incurred", even if the assistance were given.

[4] *Franklin's Complete Works,* edited by Sparks, Vol. VIII, pp. 190-192.

[5] Foster, *Cent. Am. Dip.,* p. 16.

[6] Henry Wheaton, *History of the Law of Nations,* p. 291.

cluding on February 6, 1778, two separate treaties.[7] The first of these treaties was of amity and commerce and the second, a defensive alliance. The French Court tried to justify itself by contending that the United States was de facto in possession of independence. The recognition was, however, premature and France anticipated that Great Britain would declare war on her as a result of the recognition.

In these treaties France stipulated the acknowledgement of the independence of the United States and combined military movements in the contest, a joint consultation and mutual agreement for the peace negotiations with Great Britain at the conclusion of the war, and a guarantee for the French possessions in America.[8] Article XVII of the treaty of amity and commerce provided that "It shall be lawful for the ships of war of either party, and privateers, freely to carry withersoever they please the ships and goods taken from their enemies. . . ." and on the other hand, "no shelter or refuge shall be given in their ports to such as shall have made prize of the subjects, people or property of either of the parties" except under stress of weather. Article XXII further provided that foreign privateers were not to be fitted out or allowed to sell their prizes in the ports of either. The negotiation of these treaties was based upon the remarkable draft "on the common rules of international law" drawn up by John Adams, a member of the committee appointed by Congress in 1776 for that purpose.

Of these stipulations, the two privileges secured by France, viz., (1) Admission for her privateers with their prizes while her enemies were excluded,[9] and (2) permission for her ships of war to refresh, revictual and repair, &c.,[10] led to a serious controversy afterwards. The latter concession constituted, in addition to the provisions of the consular treaty, the basis for M. Genet's claims. Though denials had been made of the legality of 'stipulated aid', it was not until this time that public opinion began to assert itself in favor of absolute non-assistance. This view was strongly advocated by the United States, and in 1785, a provision was included in its treaty with

[7] *Treaties and Conventions, Senate Document,* 41st Congress, 3rd Session, 1871, pp. 241-253.

[8] *Treaties and Conventions,* 1871, pp. 241 *et seq.*

[9] *Ibid.,* p. 251.

[10] *Ibid.,* p. 250.

Prussia to the effect that any kind of warlike succours was incompatible with neutrality.[11]

Spain, in 1779, and Holland, in 1780, were drawn into war with Great Britain. For religious and political reasons the Spanish people had very little sympathy for the American Revolution. But animated by the military success of the Americans, the Spanish government declared war against Great Britain in the hope of regaining possession of Gibraltar. Among the Dutch, the American influence was almost as strong as in France. Their sympathy for the Americans was, indeed, too strong for bona fide neutrality. The declaration of war by Great Britain against the United Provinces on the 20th of December, 1780, was "grounded upon the alleged fact of their having concluded a secret treaty acknowledging the independence of the United States of America," and also upon their failure to give the succours to Great Britain, which were stipulated by the existing treaty of alliance.[12] Before the declaration of the war, the First League of Armed Neutrality was formed and the United Provinces were invited to join the league. While the States-General still remained undecided, France and England were engaged in a diplomatice struggle in that country, the former endeavoring to confirm the maintainance of Dutch neutrality, while the latter was demanding the Dutch military succours stipulated by the previous treaties. The British Court finally notified the States-General to the effect that in case the promised succours should fail in three weeks' time, the Dutch flag would no longer enjoy the stipulated privileges. And soon after this the British government authorized the seizure of Dutch vessels running between enemy ports.[13] Threatened by the British menace, the Dutch joined the Armed Neutrality, from which they in turn demanded, though with no success, the succours stipulated by the convention of that League.[14]

B. *Disregard of Neutral Commerce*

If the standard of neutral conduct was such that neutral France could furnish warlike assistance to the United States,

[11] *Treaties and Conventions,* 1871, p. 712.
[12] Wheaton, *Hist. Law of Nations,* p. 303.
[13] *Ibid.,* p. 302.
[14] G. F. de Martens, *Recueil des Traites,* Vol. III, p. 223.

and neutral Holland was punished with a declaration of war for the failure to render stipulated succours to Great Britain, it is not surprising that the rights of neutral commerce were disregarded. France, while secretly engaged in violating the most common principles of neutrality, retained in her legislation the severities of her practice against neutral trade. The principle that goods become enemy under an enemy flag was asserted and re-asserted in 1704, 1744, and 1778.

But after the conclusion of the treaty of amity and commerce with the United States, by which the free ship, free goods maxim was stipulated, a remarkable change took place in her treatment of neutral commerce. On July 26th of the same year the French Government issued an Ordinance extending to all neutrals the benefits granted to the Americans. By this ordinance the French cruisers were prohibited from seizing neutral vessels even if bound to or from enemy ports, while the Court reserved the right of revoking such immunity unless the enemy should adopt a reciprocal measure within six months.[15] This policy was largely actuated by the desire to conciliate the neutral powers in the coming contest.

In January 1779, the French Government issued another Ordinance[16] suspending the operation of the former Ordinance of July 26, 1778, in respect to the navigation of all neutral powers except that of Holland. Thus the immunities of neutral trade based upon the free ship, free goods clause, embodied in the treaty of amity and commerce with the United States, were denied to all other neutrals except the Dutch.[17] This policy was pursued by the French government as an inducement offered to the Dutch so that they should remain neutral instead of giving the aid demanded by Great Britain. And besides, there is still another and more justifiable reason for the suspension of the Ordinance, i. e., the continuation by England of the harsh exercise of her belligerent claims. When the French Government issued this Ordinance, the power to revoke these privileges in case the enemy should refuse to adopt a similar measure was clearly reserved. Instead of adopting any such measure of reciprocity, England suspended in March 1780, by an Order in Council, all the special stipulations re-

[15] *Recueil des Anciennes Lois Françaises,* Vol. 25, p. 366.

[16] *Recueil des Anciennes Lois,* Vol. 26, p. 10.

[17] Wheaton, *Hist. Law of Nations,* pp. 294, 302.

specting neutral commerce and navigation embodied in the treaty of alliance of 1674 with the United Provinces, on the alleged ground that the States-General had refused to fulfill the reciprocal conditions of that treaty.[18] This Order directly led Holland to her adhesion to the First League of Armed Neutrality.

In her imminent danger of confronting single-handed the combined forces of France, Spain and Holland, on the one hand, and the United States on the other, the British Court approached the Russian government with a friendly disposition and sent Sir James Harris to Russia to sue for her friendship. The Empress Catherine was much inclined to the British view, but Count Panin, the Chancellor of the Empire, who was working in the interests of France and Prussia, convinced her that Russia's interests would not be maintained by such an alliance.[19] While the two governments were drawing into a diplomatic rapprochement, and while political intrigue in the Court of St. Petersburg was working against it, an incident of the harsh exercise of belligerent rights precipitated the Coalition of the Northern Powers against Great Britain. Two Russian vessels laden with corn were seized by Spanish cruisers on the ground that they were destined to Gibraltar, then in the possession of Great Britain.[20] This was, indeed, nothing unusual in those days but the principle of free ship, free goods, introduced by the French-American treaty and promulgated by the ensuing French Ordinance, had undoubtedly inspired the neutral powers of the north against the extreme exercise of belligerent rights. Immediately after the capture of the Russian vessels by the Spanish cruisers, the Russian Empress, at the instigation of Panin, issued the famous declaration which became the basis of the First Armed Neutrality. This declaration was drawn up on the 26th of February, 1780. The principles set forth in the declaration were: (1) that all neutral vessels may freely navigate from port to port and on the coasts of nations at war; (2) that the goods belonging to the subjects of the powers at war shall be free in neutral vessels, except contraband articles; (3) that the Empress, as to the specifi-

[18] Flassan, *Histoire Générale Raisonnée de la Diplomatique Française*, Vol. VII, pp. 282-297.

[19] Flassan, *Diplomatique Française*, Vol. VII, p. 272.

[20] Wheaton, *Hist. Law of Nations*, p. 296.

cation of the above-mentioned goods, hold to what is mentioned in the 10th and 11th articles of her treaty of commerce with Great Britain, extending these obligations to all powers at war; and (4) that to determine what is meant by a blockaded port, this denomination is only to be given to that port where there is, by the arrangements of the powers which attack it, with vessels stationed sufficiently near, an evident danger in attempting to enter it.[21] The principles declared by the Russian Empress were accepted by the other northern powers and the celebrated League was at once organized. This League proclaimed its intention of protecting neutral rights by means of an armed force against all belligerent violations. This was "constantly menacing the safety of the British Empire until the peace of 1783."[22] As soon as the peace of Versailles terminated the war between England on the one side, and the United States, France and Spain on the other, the northern powers began to lose their interest in the First League of Armed Neutrality.

During the war of the French Revolution, all the members of this Confederation practically put aside the principles they had so solemnly upheld. Russia herself made common cause with Great Britain and Prussia in their attempt to induce Sweden and Denmark to cease all their commercial intercourse with France. In 1793 Russia, Spain, Prussia, Portugal, and the Empire united with Great Britain in her attempt to prohibit all commerce with France.[23] With the support of the Continental powers, Great Britain revived on May 9, 1793, the Rule of the War of 1756 which had been disregarded during the American War of Independence. By this rule, all neutral vessels laden with the produce of French territory or of a French colony, or with provisions or munitions of war either for French colonies or French ports, were to be unmercifully captured by the British cruisers. Under this sweeping condemnation the American ship-owners suffered most, for they remained the only neutral carriers while all the European powers identified themselves as belligerents. In 1793 England applied the Rule of the War of 1756 to the American trade with the French West Indies, and its enforcement was ardently de-

[21] Martens, *Recueil des Traites,* Vol. III, p. 159.
[22] Wheaton, *Hist Law of Nations,* pp. 303-4.
[23] Martens, *Causes Célèbres,* Vol. IV, pp. 47-49.

fended by the British jurists, especially by Sir William Scott, on the old principle that 'trade prohibited in time of peace cannot be allowed in time of war.' But in fact there is no analogy between the two cases of 1756 and 1793. In the former case the property carried by the neutral Dutch was with justice considered as enemy property on the plain ground that the Dutch identified themselves completely with the hostile character of France by arming their neutral flag with the special license of belligerent France. But in the latter, there was no special license for any particular state or states. The colonial trade was thrown open to all neutrals with no distinction whatever. The application of the old principle to the changed condition was simply an unwarranted exercise of the British belligerent power.

In addition to the practice of this rule the British Government issued several Orders in Council during 1793 and 1794, the most obnoxious of which was that of June 8, 1793. This was the occasion for the famous instruction of Jefferson of September 7, 1793. The history of the laws of neutrality during this and the ensuing period is, in the main, that of a series of struggles and controversies between Europe and America—the former claiming the belligerent right to regulate neutral commerce in war, and the latter maintaining the neutral right to continue their accustomed commerce in time of war as in time of peace.

III. American Practice of Neutrality

A. *General History*

During the Revolutionary War the United States adopted the general principles of international law as they existed in Europe. Congress appointed a committee in 1776 to draw up "general principles of international law", which might be uniformly followed by their diplomatic agents abroad in their treaty negotiations with other states. This committee, consisting of Dickinson, Franklin, John Adams, Benjamin Harrison, and Robert Morris, submitted to Congress a draft which was largely the work of Adams. It was asserted in this draft that the subjects of each contracting party shall pay no other duties or imposts than the nationals of the other party shall pay, but shall enjoy, as the nationals, all the rights, liberties,

privileges, immunities and exemptions in trade, navigation and commerce; that the ships of war, and convoys of each contracting party shall protect and defend all vessels and effects belonging to the subjects of the other; that neutral goods in enemy ships be confiscated, unless laden before the declaration of war; that each party will suffer no injury by war vessels or privateers on the subjects or property of the other, and all the subjects of each party shall be forbidden from doing any such damage or injury; that no subject of either party shall apply or take any commission or letter of marque for any ship or ships to act as privateers against the other; and that subjects of each party shall sail with all manner of liberty and security from any port to the places of those who are at enmity with the other party. In reference to this draft, John W. Foster said, "It sets forth principles which had not up to that time been incorporated in any treaty, but which have since been recognized by all nations. . . . . it defined neutrality more perfectly and correctly than had been done before, and assigned to commerce guarantees not therefore enjoyed."[24]

The American government had observed the British usages of international law until 1784, when Congress issued an ordinance instructing the ministers abroad to follow the principles of the Armed Neutrality as a basis for treaty negotiations, if acknowledged reciprocally by other belligerent states.[25] The French treaty of 1778 was evidently based upon the principles embodied in the draft, mentioned above as having been drawn up by the committee of 1776. Another important treaty based upon these principles is that of 1782 with Holland. The latter treaty provided for the free navigation of the merchant ships of either party between enemy ports, contraband excepted; and the punishment and reparation for injuries done to either party by the vessels of war or privateers of the other.[26] In the peace negotiations with Great Britain in 1783 Franklin advocated the abolition of privateering. "The practice of robbing merchants on the high seas", he said, "a remnant of ancient piracy, though it may be accidentally beneficial to particular persons, is far from being profitable to all en-

[24] Foster, *Century of American Diplomacy,* p. 19.

[25] Francis Wharton, *Diplomatic Correspondence,* Vol. VI, pp. 801 *et seq.*

[26] *Treaties and Conventions,* 1871, pp. 610-611.

gaged in it.....Even the undertakers (privateers) finally ruin themselves; a just punishment for their having wantonly, unfeelingly ruined many innocent, honest traders and families, whose substance was obtained in carrying the common interest of mankind." And again in 1785, he said in his private correspondence that "the United States, though better situated than any other nation to profit by privateering. . . . . are endeavoring to abolish the practice by offering in all their treaties with other powers an article engaging solemnly that. . . . . no privateer shall be commissioned on both sides."

The same provisions embodied in the Dutch treaty of 1782[27] were stipulated in that of 1783 with Sweden,[28] as far as neutral trade was concerned, and also in the more important one of 1785 with Prussia.[29] But no definite stipulations, equivalent to the provisions of these treaties were inserted in the treaty of amity, commerce, and navigation with Great Britain of 1794. All that was said concerning privateers was that "more abundant care may be taken for the security of the respective subjects and citizens of the contracting parties, and to prevent their suffering injuries by the men-of-war, or privateers of either party. . ."[30] This shows that Great Britain still held to the severity of her old practice.

The Prussian treaty of 1785 was much appreciated by the Americans at the time chiefly for its moral influence favorable to the new Republic; for Frederick the Great treated the American Diplomats more civilly than any other power did and he also advised Louis XVI to enter into treaty alliance with the colonies even before the treaty of 1778 was concluded. Legally speaking, it is far more important for its stipulations regarding neutrality. This treaty was largely the work of Franklin, one of the negotiators, who succeeded in inserting in it the important principles of neutrality; namely, the regulations against privateering, and the immunity of private property,[31] for which he had so long contended. It was agreed that "all persons belonging to any vessel of war, public or private, who shall molest or injure . . . the people, vessels,

[27] *Treaties and Conventions,* 1871, pp. 607-616.
[28] *Ibid.,* pp. 799-807.
[29] *Ibid.,* p. 715.
[30] *Ibid.,* p. 329.
[31] Wheaton, *Hist. Law of Nations,* pp. 306-308.

or effects of the other party, shall be responsible . . . for damages . . "[32] and that "neither of the contracting Powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels, or interrupt such commerce".[33] It was further agreed that "neither one nor the other of the two states would let for hire, or give any part of its naval or military forces to the enemy of the other to help it or enable it to act offensively or defensively against the belligerent party".[34] Thus the treaty set forth definitely the duty of a neutral state not to give succour under treaty obligations. In addition to this the freedom of neutral commerce guaranteed by this treaty was by no means less important than the rest. Mention should be made here that Franklin's advanced ideas for the exemption of private property and the abolition of privateering were not appreciated by his contemporaries, who referred to them as a " 'beautiful abstraction', a dream of the philosopher who vainly sought to mitigate the cruelties of war".[35] Privateering was formally abolished in 1856 by the Declaration of Paris. The exemption of private property has not yet been accepted and on this account the United States refused to adhere to the Declaration of Paris, 1856.

The consular treaty of 1788 with France, ratified in 1789, caused much diplomatic embarrassment to the United States government. By this agreement it was stipulated that "the Consuls and Vice-Consuls. . . . . shall enjoy a full and entire immunity . . . ", that they "shall be exempt from all personal service . . . ",[36] that they may "establish agents in different ports and places of their departments where necessity shall require . . . ",[37] that they "may establish a chancery, where shall be deposited the Consular determinations, acts and proceedings . . . ", and that they shall exercise police over all the vessels of their respective nations . . ."[38] This treaty furnished ground for M. Genet's exorbitant claim to the right of estab-

[32] *Treaties and Conventions,* 1871, p. 711.
[33] *Ibid.,* p. 713.
[34] *Ibid.,* p. 715.
[35] Foster, *Century of American Diplomacy,* p. 93.
[36] *Treaties and Conventions,* 1871, p. 261, Art. II of the treaty.
[37] *Ibid.,* p. 261, Art. III.
[38] *Ibid.,* p. 264, Art. VIII.

lishing Consular Prize Courts in the territory of the United States. But there was no such concession made in it. Nevertheless, the privileges stipulated by this treaty were somewhat more extensive than usual. At any rate, this treaty, in addition to that of 1778 with France, led to the international embroglio. Out of this complication, however, the United States, fortunately for the history of the laws of neutrality, steered the right course—a course which all other nations were destined to follow sooner or later. The chief questions involved in this complication were the principles of free ship, free goods, and that of neutral sovereignty based upon its territorial jurisdiction.

B. *Neutral Jurisdiction*

The question of French goods taken out of American ships by British cruisers without resistance on the part of the United States was not the only thing concerning which France complained. She was not at all satisfied with the American interpretation of the treaty provision that her enemy's public ships could be admitted to American ports. The United States did not consider herself bound by that treaty to exclude from her ports the public ships of the enemy of France. It was held by the United States that the treaty did entitle the French ships to enter its ports, but it did not expressly prohibit the vessels of other powers from entering American ports and harbors.

While the United States was thus embarrassed in its relations with France, Great Britain and Holland complained about special privileges exclusively granted the French privateers by the United States, permitting them to enter American ports and harbors with their prizes. Such was the diplomatic entanglement of the United States when the famous episode of M. Genet occurred.

Edmond Charles Genet, the French minister, landed at Charleston and started to enlist American citizens to cruise against British commerce, to equip vessels, commission privateers and set up prize courts in the French Consulate "as if the United States had declared war against Great Britain." He claimed these rights as based upon the treaty of alliance and the consular treaty. At that time the opinion of the American people was widely divided as to the reception of

Genet, and the treaty relations with the French Republic. In some parts of the country great enthusiasm was evinced in favor of the French movement. Remembering the war with Great Britain and grateful for the French assistance, the United States was naturally sympathetic toward the revolutionary sentiment, of which France was then the very hotbed. Even Jefferson himself was freely accused of being intimately connected with the French party. He was indeed the heart and soul of the French sentiment in America. Genet relied too much upon the pro-French sentiment. He went so far as to arm himself with the public enthusiasm against the government to which he was accredited. But in spite of all this, Washington's farsighted policy of isolating the American Republic from the politics of monarchical Europe finally prevailed in the Cabinet, which asserted the principle of the inviolability of neutral jurisdiction. The most important questions settled at this time were: (1) that no belligerent prize court should be established in neutral jurisdiction, (2) that a neutral government must prevent its subjects from unneutral services, and (3) that the bona fide trade of neutral individuals must not be interrupted.

(1) *No Belligerent Court in Neutral Jurisdiction.*—The question whether or not a belligerent might condemn its prizes in neutral jurisdiction had been a political and not a legal one. Before the end of the 18th century, the legality of a trial of prizes prosecuted by a competent court of the captor established in a neutral port was held as unquestionable. Most of the European nations frequently claimed such exercise of belligerent rights as the usual functions of their consuls in foreign jurisdiction. Many cases prove that France held this practice as her ordinary usage. M. Genet himself maintained that to grant commissions and letters of marque was one of the usual functions of French consuls in foreign ports.[89] As late as 1799, in the well-known case of the "Flad Oyen", an English vessel captured by a French cruiser and condemned by a French Consular Court within the neutral jurisdiction of Norway, France rejected the English demand for its restoration.

[89] W. E. Hall, *International Law,* 5th edition, p. 591.

This practice was put an end to by the United States Government in the case of Genet's prizes, particularly that of the "Grange".[40] The "Grange" was a British ship captured by a French frigate in Delaware Bay and taken as a prize into the port of Philadelphia. A demand was made for the restoration of the vessel and the liberation of the crew on the ground that the capture was made in the jurisdiction of the United States, a neutral, and in violation of the law of nations.[41] Mr. Jefferson, though the leading spirit of the French movement in America, emphatically asserted that the establishment of the French Consular Courts in the jurisdiction of the United States was an act unwarranted either by the usage of nations or by the treaty stipulations between the United States and France, and also that such an act was one of disrespect toward the territorial sovereignty of the United States. The restoration of the "Grange" was promptly ordered and the decision of the President on the complaint of Great Britain was communicated by Jefferson to Hammond, the British Minister.[42] Thus the practice of the principle that neutral sovereignty was inviolable was well set on foot. Since that time opinion has gradually changed, so that now the establishment of consular courts of a belligerent power in the territory of a neutral state is no longer admitted as compatible with the law of the nations.

(2) *Positive Duty of a Neutral Government.*—The most important principle in connection with neutrality that was settled at this time was that a neutral government is bound not only to abstain from participating in hostile activities, but also to exercise care in preventing all persons, citizens or foreigners, within its jurisdiction, from committing acts of a hostile character. Neutrality consists not only in negative abstention from certain unneutral services and practices, but also in a positive observance of certain neutral obligations. This new attitude was formally inaugurated by Washington's Neutrality Proclamation of 1793. The steps that led up to

[40] *American State Papers,* Vol. I, p. 144.

[41] Thomas Jefferson Randolph, *Memoirs, Correspondence and Miscellanies from the Papers of Thomas Jefferson,* Vol. III, p. 227, Jefferson to M. de Ternant.

[42] Randolph, *Correspondence of Thos. Jefferson,* Vol. III, p. 230.

this most important and famous Proclamation were prompted by the Genet affair.

Prior to the arrival of the French Minister at Charleston, news from the American ministers abroad reached Washington informing him of the special object of Genet's mission to America. As early as April 12, 1793, four days before Genet's arrival, President Washington expressed his opinion in his letter to Secretary Jefferson to the effect that it behooved the government to adopt a strict neutrality and to prevent the citizens of the United States from involving the country with either belligerent. As the result of a resolution adopted at a Cabinet meeting, he issued a proclamation on April 22nd, warning the citizens of the United States to refrain from any proceedings which might contravene a strict and severe neutrality, and at the same time withdrawing all protection from any subject aiding or abetting hostilities or carrying contraband. The main feature of this Proclamation lies in the warning against "all persons, who shall within the cognizance of the courts of the United States, violate the law of nations with respect to the powers at war. . . "

In spite of this rule so definitely proclaimed by the President, Genet started to offer commissions to American citizens, to issue letters of marque, and to fit out privateers to prey on British commerce. Official protests were soon made by the United States Government. The general disposition of the protests was well expressed in Jefferson's letter of June the fifth, the most important of all the communications concerning the dispute. He said in the letter that "it is the right of every nation to prohibit acts of sovereignity from being exercised within its limits by any other nation, and the duty of a neutral nation to prohibit such as would injure one of the warring powers; that the granting military commissions, within the United States, by any other authority than their own, is an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country . . ."[43] A letter of Jefferson to Mr. Morris, American Minister in France, especially valuable as a diplomatic document, can not be neglected here. In this letter, which was dated August 16th, he asserted that "a neutral nation must observe . . . an exact

[43] *Am. State Papers,* Vol. I, p. 150.

impartiality towards the parties . . . . and that no succour should be given to either, unless stipulated by treaty, in men, arms or anything else directly serving for war; that the right of raising troops, being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign Power or person can levy men, within the territory without its consent; . . . . . that if the United States have a right to refuse permission to arm vessels and raise men within their posts and territories, they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments".[44] Here Jefferson also admitted the legality of "stipulated succours", which is not compatible with the modern rules of neutrality.

The intolerable irritation on the part of the American government finally brought about the determination to demand the recall of Genet and to take efficacious measures against further violation of its neutrality. In consequence of this request, the French Government superseded Genet in December by M. Fauchet as its new minister, and instructed him to disarm the privateers and to remove the consuls who violated Washington's Proclamation. But before Genet withdrew from the post, the famous case of Gideon Henfield was prosecuted, leading to the passage of the most important act of 1794.

Henfield, an American citizen, desirous of going to Philadelphia from Salem, Massachusetts, his native town, but unable to pay full fare, asked the master of a packet for passage. He was put on board a British ship, the "William", which had been captured by a French privateer, the "Citoyen", three days before. As prize master of the "William", Henfield reached his desired destination. Upon his arrival, however, he was indicted for serving on board the French cruiser in contravention of the laws of the United States.[45] The verdict of the jury, not guilty, was received by M. Genet and his sympathizers with overwhelming exultation. But this verdict invalidated the rules as proclaimed by the President and maintained by his Cabinet.[46] Thus the Henfield Case proved the inability of the government to enforce the rules

[44] *Am. State Papers,* Vol. I, p. 168.

[45] Francis Wharton, *State Trials of the United States,* pp. 49-89.

[46] John Marshall, *Life of Washington,* Vol. V, p. 435.

enunciated by the Proclamation. This was the direct cause of the passage of the First Foreign Enlistment Act of 1794.[47]

Under these circumstances, Washington urged Congress to make effectual the decisions of the government on neutrality. In his Annual Message of December 3rd he suggested to Congress "measures for the fulfillment of our duties to the rest of the world".[48] This message constitutes the basis of the enlistment act. Meanwhile instructions were issued to the collectors of customs, setting forth "the rules concerning sundry particulars . . . . . as laws of neutrality", prohibiting the "equipment of vessels in the ports of the United States, which are of a nature adapted for war", and "the enlistment of the inhabitants of the United States." Under these rules, asylum to armed vessels of a belligerent, originally fitted out in the United States, or to the prizes of any such vessel, was to be denied. This was not sufficient, however, to carry out the neutral obligations as defined by Washington's cabinet, and the steps gradually leading to the passage of the famous act reveal the earnest desire of American statesmen for the development of neutrality.

C. *Freedom of Neutral Commerce*

Not less important than the principle of neutral jurisdiction was the problem of the freedom of neutral commerce. Ever since the Dutch led the way, in opposition to the old rule of the Consolato del Mare, by introducing the new principle that the neutral flag covers enemy goods, many of the lesser European powers attempted to follow their lead. But the great powers, with the exception of England, adopted no uniform rule. The latter adhered to the old doctrine, "Spare your friend and harm your enemy." The Dutch themselves soon abandoned their new principle, perhaps because of the weakness of their naval forces. The French seized not only the enemy goods in neutral ships, but also the neutral ships that carried enemy goods, under their rule of 'hostile contagion', which had been in frequent operation until the middle of the 18th century.

The United States, accepting the general usages of Great

[47] See next Chapter.

[48] J. D. Richardson, *Messages and Papers of the Presidents,* Vol I, p. 140.

Britain, observed the rule that neutral goods in enemy vessels are free, while enemy goods in a free ship are enemy, as the common law of nations. All of the American jurists accepted this view during the war for independence and even in later days. But the government soon realized the severity of the British practice and at once began to adopt milder rules instead. By the first three treaties that the United States concluded with states other than Great Britain, namely, that of 1778 with France, that of 1782 with the Netherlands, and that of 1783 with Sweden, there was stipulated the free ship, free goods maxim. But by these treaties the converse maxim, enemy ship, enemy goods was also adopted. This was perhaps due to the general opinion of the time, which still favored the old, severe usage. But the combination of these two rules was far from satisfactory to the liberal views of the American statesmen. They advanced still another step and insisted upon asserting that the two principles, free ship, free goods, and enemy ship, enemy goods, were not inseparable. Persistent efforts were made to have inserted in the treaties made after the adherence to the Armed Neutrality, the principle of free ship, free goods without the opposing rule, enemy ship, enemy goods. This view was consistently confirmed by most of the treaties, including the Prussian treaty of 1785, in which the free ship, free goods maxim alone was asserted. At times not only enemy goods in a free ship but also free goods in an enemy ship were protected, and the rule of 'hostile contagion' was never practiced.

By the treaty of 1778 with France, the United States upheld the principle of free ship, free goods. After the conclusion of this treaty, Congress, affirming the free ship, free goods stipulation, issued an ordinance recommending the recognition of this principle in their treaties with other powers upon the condition of reciprocity.[49] The French government, following the American example, also issued an ordinance in the same year prohibiting the capture of neutral vessels running between enemy ports. This ordinance prohibited the seizure of neutral vessels bound to and from enemy ports, and meanwhile the French Government reserved the right to withdraw this immunity in six months if their enemies failed to adopt the same measure reciproc-

[49] Dana, *Wheaton*, p. 587.

ally. France continued to adopt this principle in her treaties down to 1793 when all the European powers abandoned their rules of maritime commerce.[50] The French immunity was also conditioned upon reciprocity. But Great Britain obstinately refused to relax her old practice and continually condemned the goods of her enemy, France, in American neutral ships, according to the practice of her old doctrine, while the latter insistently demanded from the United States Government the actual fulfillment of the treaty obligations by protecting French goods in American vessels from seizure by her enemy, the British. The United States found itself exceedingly embarrassed but so long as Great Britain would not abandon her accustomed rule in any amicable way, it was not expedient for the United States to take up arms against England in order to protect French merchandise.

Under these circumstances the United States excused itself by virtue of the English usage. Mr. Jefferson said in his reply to the French complaints that by the general law of nations, the goods of a friend found in the vessel of an enemy are free and the goods of an enemy found in the vessels of a friend are lawful prize.[51] This was simply a reassertion of the rule embodied in the Consolato del Mare. He further declared that the treaty of 1778 was an exception to the general rule, because it had been concluded before the United States acceded to the Armed Neutrality, and that since the formation of that League, the stipulation of the said treaty was no longer binding. This statement was certainly inconsistent with the early American views, maintained in the first three treaties, and a tendency was shown in it to return to the British doctrine. This was evidently a diplomatic excuse under pressure of French demand. While France was drifting back to her old practice, and while all the great powers of Europe actually suspended the operation of the principles of the League of the Armed Neutrality, the efforts of the United States Government were largely successful in inducing several other states to adopt the milder measures in their treaties.

The Prussian treaty of 1785 was the most important during this period. This was the first treaty by which the United

[50] Martens, *Recueil,* Vol. II, p. 632.

[51] Randolph, *Corres. of Thos. Jefferson,* Vol. III, p. 486.

States adopted the free ship, free goods maxim without the correlative maxim, enemy ship, enemy goods. This treaty asserted only that neutral commerce with either belligerent will not be interrupted and that neutral vessels can go to and from belligerent ports with enemy goods and even with enemy men not active in warlike services.[52]

The Moroccan treaty of 1787 stipulated the new rule without the old rule of enemy ship, enemy goods.[53] Judging by the merit of the new principle itself, it is not surprising to see that the weaker states, like the Netherlands, Sweden and Morocco, agreed with the United States. But the fact that the greater powers, like Prussia, France and even Spain, as well as Great Britain, also accepted this principle by the treaties of Versailles in 1783 seems rather remarkable.[54] Spain, the strongest advocate of the French usage, abandoned the old principle, enemy ship, enemy goods, as early as 1780 and even exempted by its municipal law all neutral vessels that carried enemy goods, as well as the enemy goods found in them.[55] Practically all the European powers showed by adhering to the Armed Neutrality, their inclination toward the liberal views of the United States. But their adoption of the liberal principles was of short duration. As soon as the war of 1793 broke out between France and Great Britain, all the greater powers employed their naval strength in the attempt to hinder neutral commerce with belligerents. The most obnoxious of all the harsh measures against neutrals during this time was the British Order in Council of June 8, 1793, authorizing British cruisers to detain all vessels laden with corn, flour or meal, bound to any port in France, and to seize all vessels with their cargoes that should be found attempting to enter any blockaded port.[56] This order was most detrimental to the American carrying trade for the United States was then almost the only neutral. This was the occasion on which Secretary Jefferson's instruction of September 7, 1793 was issued. He said in part: "When two nations go to war, those who choose to live in peace retain

[52] *Treaties and Conventions,* 1871, p. 710.
[53] *Ibid.,* p. 588.
[54] Martens, *Recueil,* Vol. III, p. 503.
[55] *Ibid.,* p. 98.
[56] Wheaton, *Hist. Law of Nations,* p. 373.

their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual . . . . . in short, that the war among others shall be, for them, as if it did not exist. . . . . The state of war then existing . . . . . furnishes no legitimate right to interrupt either the agriculture of the United States, or the peaceable exchange of its produce with all nations".[57]

D. *Limitations of Neutral Commerce*

Contraband of War.—The continental jurists generally advocated the limitation of the list of contraband articles to the narrowest possible sphere, while the British jurists on the other hand, always endeavored to comprise a large number of articles in their classification of contraband merchandise. The United States at first accepted the British practice, recognizing the three general classes of contraband set down by Grotius. But the United States government soon began to depart from the British practice by diminishing the number of articles of contraband. As early as 1777, American naval officers were instructed to capture only those neutral vessels carrying arms and other contraband goods intended for British warlike use. This was a great contrast to the British ordinance, issued in 1776, declaring "all ships, neutral or otherwise, trading or returning from trade with any of the American rebellious colonies" to be lawful prize.[58] By the French treaty of 1778, the United States limited the denomination of contraband to great guns, bombs, &c., &c., and all other warlike materials, and it was definitely mentioned that all provisions which serve for nourishment of mankind, and ships and all other things proper either for building or repairing ships should not be reckoned among contraband.

In the negotiations of the treaty of 1785 with Prussia, Franklin even attempted to abolish the system of confiscating contraband goods. He tried to substitute detention of the goods for confiscation of the same as a punishment for carrying it. It was agreed that "to prevent all the difficulties and misunderstandings that usually arise respecting the mer-

[57] *Am. State Papers,* Vol. I, p. 239.
[58] Martens, *Recueil,* Vol. III, p. 105.

chandise heretofore called contraband, such as arms, ammunitions, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of one of the parties to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals".[59]

England condemned all kinds of provisions by the Orders in Council and this actuated the United States to accede to the Armed Neutrality. Jefferson contended that provisions "had never been included in this enumeration, and consequently remain articles of free commerce".[60] When M. Genet's movement was at its height, Mr. Hammond complained of the sale of arms and military accoutrements made by American citizens to a French agent at New York.[61] In reply to these complaints, Jefferson stated that such sale could not be condemned as a violation of neutral duties.[62] He further asserted that "our citizens had been free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means of their subsistance perhaps, because of a war existing in foreign and distant countries in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting those that are at peace, does not require from them such an international derangement of their occupations".[63] This celebrated diplomatic statement established a precedent in the upholding of the principle that it is not the duty of a neutral government to prevent its citizens from engaging in individual enterprise in contraband trade. Now this principle is accepted by all nations as an established rule.[64]

Blockade.—Most of the treaty stipulations up to this time were surprisingly silent as to the question of blockade. The

[59] *Treaties and Conventions,* 1871, p. 710.

[60] *Am. State Papers,* Vol. I, p. 239.

[61] Randolph, *Correspondence of Thos. Jefferson,* Mr. Hammond to Jefferson, May 8, 1793.

[62] *Ibid.,* Jefferson to M. de Ternant, May 15, 1793.

[63] Randolph, *Correspondence of Jefferson,* Vol. III, p. 291, Jefferson to Hammond, May 15, 1793.

[64] *The Second Peace Conference at the Hague,* Convention V, Article 8.

earliest mention of the United States in connection with this subject was made when it acceded to the Armed Neutrality and no provision concerning blockade was made in any of the earliest treaties. The reason seems obvious. Blockade had very little chance to give rise to a serious dispute, naval warfare not being fully developed. The most serious test in the history of blockade did not come until the beginning of the 19th century, when the United States was the only neutral to suffer from it and therefore the only neutral to struggle against it.

The Right of Visit and Search.—During this period England based her right upon her force,[65] true to the authoritative assertion of Lampredi that "by the law of nature, a belligerent has a right to detain and a neutral has a right to refuse to be detained, but the neutral has no power to resist, and, therefore, it became a question of force".[66] At one time she made a distinction between the right of search and the right of visit. The former right could be applied in time of war, according to her claim, and the latter in time of peace. No such distinction was admitted by the continental jurists, who held that the two were synonymous, and that this right could be exercised over private merchant vessels only. This latter view has always been the view of the United States.

Much irritated by the British condemnation of almost all ordinary commercial merchandise, the United States made special efforts to stipulate in all its treaties of this period, except that with Great Britain, that in case a neutral vessel detained for search produced its proper passport, no further inquiry should be made. In accord with these stipulations, search of a neutral vessel may not be admitted unless she failed to produce her passport or show some reasonable cause of suspicion.

In regard to the treatment of noxious persons that are at times found in neutral vessels, the United States adopted, in the treaty of 1778 with France, the clause that enemy persons in a neutral vessel should not be taken away unless actually in the service of the enemy. This provision was inserted in

[65] Dana, *Wheaton*, p. 593.

[66] Lampredi's *Del Commercio dei Popoli Neutrali in tempo di Guerra*, was published in 1788.

many treaties, but never in a treaty between England and the United States.

The exemption from visit and search of neutral merchantmen under convoy was stipulated in numerous treaties during this period, but the practice of nations was not consistent. England leaned more and more toward a complete denial of the right. Most other nations, including the United States, entered into treaties providing that the word of the commander of the convoy should be deemed sufficient to protect from visit and search.[67]

[67] Treaties agreeing upon convoy are:—that of 1782 between the United States and the United Provinces, Martens, *Recueil,* Vol. III, p. 437; that of 1783 between the United States and Sweden, Vol. III, p. 574; that of 1785 between the United States and Prussia, Vol. IV, p. 43; that of 1782 between Denmark and Russia, Vol. III, p. 475; that of 1787 between Denmark and France, Vol. IV, p. 212; that of 1787 between the Two Sicilies and Russia, Vol. IV, p. 238; and that of 1787 between Portugal and Russia, Vol. IV, p. 328.

CHAPTER 3

History of Neutrality from 1793 to 1818

I. European Practice of Neutrality

This period forms the darkest chapter in the history of the laws of neutrality. In the desperate struggle between the two rival powers, France and England, each striving to cripple the naval strength of the other, all neutral interests were crushed as between two millstones. Although France had to acquiesce in the American interpretation of the treaty of alliance, she was not at all satisfied with the attitude maintained by the United States Government, and the French party in America still vociferously claimed that the French aid given to Americans in time of their need must now be returned. The British, on the other hand, violated American neutral rights to such an extent that the war of 1812 was the final result. After the downfall of Napoleon, the formation of the Holy alliance led to a violation of the principle of national sovereignty, and a deliberate infringement of international law through its assertion of the right to intervene and crush out revolutionary governments.

A. *Disregard of Neutral Commerce*

When revolutionary France stood against the whole of Europe, Great Britain, with the support of Russia and Prussia behind her, enforced increasingly severe prohibitions against all neutral trade with France by successive Orders in Council. The extention of the Rule of the War of 1756 by the instructions of Nov. 6, 1793, was one of the most severe measures. Naval officers were instructed to "stop and detain all ships laden with goods, the produce of any colony belonging to France, or carrying provisions or other supplies for the use of such a colony . . . . . "[1] Under this rule British cruisers were authorized to seize all vessels of whatever de-

[1] Martens, *Recueil,* Vol. V, p. 600.

scription, ladened with the produce of any French colony, or with any provisions or munitions of war designed for the use of the enemy or the enemy's colonies. This aroused great popular excitement throughout the United States. As a consequence, actual war measures were adopted by the House of Representatives. Washington said in his correspondence to Tobias Lear that "Many measures have been moved in Congress, in consequence of the aforementioned Orders of the British Cabinet . . one for fortifying our principal seaports, which is now in vigorous execution, and for raising an additional corps of eight hundred artillerymen . . . . . "[2] In view of the American protest, this order was somewhat modified on January 8, 1794. The modification was made with these words; "we are pleased to revoke the said instruction; and in lieu thereof, we have thought fit to issue these our instructions . . . . . ", and that part of the Order of June 8, 1793, which condemned all vessels laden with corn, flour or meal, bound for any French port was also recalled on August 18, 1794. This Order declares that "In order that such corn, flour or meal might be purchased . . . . . the masters of such ships . . . . . should be permitted to dispose of their cargoes. . . . . We . . . . . are pleased to revoke the said article until our further order therein . . . . . "[3]

France, on her part, started the crusade against neutral commerce as early as May 9, 1793, by a Decree of the National Convention, authorizing her ships of war and privateers to seize merchant vessels laden with provisions bound to an enemy port, or with merchandise belonging to an enemy, on the ostensible ground of the scarcity of provisions in France. This Decree says that "Les batiments de guerre et corsaires française peuvent arrêter et amener dans les ports de la République les navires neutres qui se trouveront chargés en tout ou en partie, soit de comestibles appartenans à des neutres et destinés pour des ports ennemies, soit de marchandises appartenans aux enemis . . . . . "[4] On January 18, 1789, a law was passed condemning every vessel, neutral or belligerent, ladened in whole or in part with British goods. "En conse-

[2] Jared Sparks, *Life and Writings of George Washington,* Vol. X, pp. 409-410.

[3] Martens, *Recueil,* Vol. V, p. 604.

[4] *Ibid.,* p. 382.

quence tout batiment chargé en tout ou en partie de marchandises anglaises, est declaré de bonne prise, quelque soit le proprietaire des dites marchandises . . . . ",[5] and on the 29th of the following October, an Arrete of the Executive Directory condemned to death as a pirate any neutral subject who should accept a commission from, or serve on board the vessel of, the enemies of France.[6] This retaliation and counter-retaliation continued during the days of the Napoleonic wars. Though the peace of Amiens terminated temporarily the actual hostilities between the rival powers, the war against each other's commerce witnessed no definite end.

The undue claims of the belligerent British were too intolerable even for the Europe of those days to stand without open resistance. As the First League of Armed Neutrality was the result of British aggressions upon neutral commerce, the formation of the Second League was the result of the British denial of the immunity of neutral merchantmen under convoy. A British frigate refused to allow to a Danish ship of war, convoying a fleet of merchantmen near Gibraltar, the immunity from the exercise of the right of visit and search in December, 1799. In consequence a skirmish took place. Soon after this the "Freya", another Danish frigate, met with similar treatment resulting in a loss of life on both sides. The Danish demand for satisfaction was rejected by the British Government. While this controversy was growing serious, the Emperor Paul of Russia invited Sweden, Denmark and Prussia to renew the Armed Neutrality of 1780. Irritated by the continual condemnation of neutral trade and especially by the conflict arising out of the Danish incident, the northern powers revived this League of Neutrality by three separate treaties. They declared these principles (1) that every vessel may navigate freely from port to port, and on the coasts of nations at war, (2) that the property belonging to the subjects of belligerent powers shall be free in neutral vessels, excepting contraband of war, (3) that a blockade must be instituted with vessels sufficiently near so that there is an evident danger in attempting to enter, and that if any vessel should still endeavor to enter by means of force or fraud, after being notified by the commander of the blockading force, she should be

[5] Martens, *Recueil,* Vol. V, p. 399.
[6] *Ibid.*

captured, (4) that neutral vessels shall be detained for just cause and evident fact only, and (5) that the declaration of a commander of a convoy shall be deemed sufficient to prevent any search on board the convoying vessels or those under convoy.[7] In answer to this Northern Confederation, the British Government issued another Order in Council on January 14, 1801, laying an embargo on all vessels of Russia, Denmark and Sweden. The Second League of Armed Neutrality was also of short duration, like that of 1780. At the outbreak of the Napoleonic wars, the members of this League, in their struggle against Napoleon, laid aside all the principles they had so solemnly declared.

The darkest days in the history of international law commenced in 1804 when Napoleon issued an order closing the Neapolitan ports to English trade. In the same year the British, on their side, declared the French ports from Ostend to the Seine to be in a state of blockade. This blockade was extended in 1806 from the Elbe to Brest. Napoleon answered this by the Berlin Decree of November 21, 1806, which declared the British Isles in a state of blockade and which cut off all trade between Great Britain and the rest of the world.[8] Since Napoleon wrote his famous letter to Bernadotte saying "je ne puis lutter.avec l'Angleterre, je ne puis la forcer a paix qu'avec le systeme continental",[9] this blockade has become known as the "continental system". The British response was the Orders of January 7, and of November 11, 1897. By the former one it was declared that "it is hereby ordered that no vessel shall be permitted to trade from one port to another, both of which ports shall belong to, or be in the possession of, France or her allies, or shall be so far under their control as that British vessels may not freely trade thereat".[10] By that of November 11th, all the ports or places of France or her allies were declared to be in a state of blockade so that all trade in the produce or manufactures

[7] Treaty between Russia and Sweden, Martens, *Recueil,* 2nd Ed., Vol. VII, p. 172; that between Russia and Denmark, *Ibid.,* p. 181; that between Russia and Prussia, *Ibid.,* p. 188.

[8] Martens, *Nouveau Recueil,* Vol. I, p. 439.

[9] Napoleon to the Prince Royal of Sweden, March 8, 1811, Martens, *Causes Célèbres,* Vol. V, p. 145.

[10] Martens, *Nouveau Recueil,* Vol. I, p. 445.

of those countries or colonies, from which the British flag was excluded, was declared unlawful, and that any vessel trading from or to those countries or colonies should be confiscated, together with all goods on board, unless they should first stop at an English port and pay duty.[11] Napoleon replied with the Milan Decree of December 17, 1807, declared that all vessels of any nation, laden with any kind of cargo, bound to or from England or her colonies, and all ships that had paid any tax to the English government or had submitted to search by an English ship, should be lawful prize. This system was properly called the "paper blockade", and could hardly be recognized as a legal blockade. While all these decrees and counter-decrees were proclaimed to be of blockades, they were an open violation rather than a practice of the law, and therefore, this brief account of the decrees is given under this topic, the 'Disregard of Neutral Commerce', instead of under that of 'Blockade'.

II. American Practice of Neutrality

A. *Practice in General*

In the way of retaliation for the British enforcement of the Rule of the War of 1756, Congress adopted on March 20, 1794, the first of the long series of Embargo Acts, and also passed on April 7th of the same year a resolution of suspension of intercourse with Great Britain. The British Government modified its offensive Orders to such an extent that American trade in the West Indies was carefully spared, except in respect to French products and French property carried between French ports.[12] 1. The Jay Treaty. Through the unceasing efforts of President Washington, an amicable settlement of the controversy was partially reached by the conclusion of the Jay treaty in 1794. Though concluded on November 19, 1794, it was not ratified until June 24th of the following year, on account of long and heated debate in Congress.[13] In the negotiations most of the important points were agreed upon, but on the questions of impressment and neutral trade Great Britain would not yield. No redress for the impressment of seamen, nor any promise for the abolition of the practice of impressment, could Jay get into the treaty. By

[11] Martens, *Nouveau Recueil,* Vol. I, p. 446.
[12] Martens, *Recueil,* 2nd Ed., Vol. V, p. 604.
[13] Moore, *Digest,* Vol. V, pp. 699-704.

Article 21, American citizens receiving commissions from France were declared pirates, and also by Article 12 it was further stipulated that American vessels might freely carry cargoes from any British port, "Provided always that the said American vessels do carry and land their cargoes in the United States *only*." The payment of a compensation by the British Government to American citizens for the illegal captures made by the British was the most favorable clause in the treaty.[14]

In the main, the partial immunity secured by the Jay treaty was, however, so profitable to the Americans that they were enabled to carry on a most thriving commerce with the West Indies. From the conclusion of this treaty down to the commencement of the Napoleonic wars, American carriers continued to prosper and this aroused the jealousy of the British ship-owners, who urged the severe enforcement of the Rule of the War of 1756. It was in 1805 that Great Britain may be said practically to have commenced hostilities against the United States. Before the expiration of the Jay treaty in 1807, by its own limitation of twelve years, Monroe and Pinkney had signed a treaty with Great Britain which President Jefferson refused to lay before the Senate because it contained a number of stipulations dishonorable to the United States. The most distasteful of these was the stipulation in regard to the Rule of the War of 1756, which Great Britain agreed not to enforce as to the goods upon which a two per cent ad valorem duty had been paid. Another thing almost equally undesirable to America was the right of visit and search which Great Britain obstinately refused to abandon.[15] Thus ended the negotiations between the two countries, and the impressment of American seamen and the spoliation of American merchandise went on until the war of 1812.

2. *Relations with the French Republic*

The Jay treaty openly contravened the French treaty of 1778 in regard to French goods in American vessels. While the former stipulated the protection of enemy goods in neutral vessels, the latter agreed by Article 17 that enemy goods found on neutral vessels should be made prize. French com-

[14] *Treaties and Conventions,* 1781, pp. 318-332.

[15] Carl Schurz, *Life of Henry Clay,* Vol. I, pp. 70-71.

plaints of this stipulation were not altogether unreasonable. Their resentment was later manifested by the extension of the Berlin Decree to American trade.[16] Washington's unceasing efforts to restore peaceful relations with France were not appreciated by the Directory which refused to receive Mr. Pinckney as a new American representative. After a sharp debate Congress approved the President's view and decided to make another effort. A special mission of three envoys was despatched which arrived at Paris on October 4, 1797. A few days after their arrival the envoys were approached unofficially by three persons, known in their correspondence as X, Y and Z, who informed them that, among other things, some sort of bribe, under the term of 'douceur', should be furnished by the United States before its minister would be received by the French Directory. Once a lady diplomat approached and informed them that M. Talleyrand "has assured me that a loan must be made".[17] This statement was confirmed by a written proposition which Talleyrand showed to the American envoys in an interview, and which he burned, containing the words, "France has been serviceable to the United States and they (Americans) now wish to be serviceable to France".[18] To these demands the American diplomats made no conciliatory reply and the negotiations abruptly came to an end.

Meanwhile the high-handed aggression of British war ships upon the American seamen reached its climax in the famous incidents of the "Leopard" and the "Chesapeake" in 1807.[19] In the autumn of the same year the Embargo bill was adopted at an extra session of Congress, forbidding the departure of any American vessel bound to any foreign country. The Commercial Non-Intercourse Act was passed by Congress in February, 1809, against France and England, looking to the withdrawal of the French Decrees and the British Orders. By the attempted negotiation of the Erskine treaty and by the passage of the Non-Intercourse Act on May 1st, the United States repeatedly manifested the American desire for both belligerents to adopt some reciprocal measures, but all proved to be

[16] *Am. State Papers,* Vol. II, pp. 178, 189-190.

[17] John Bach McMaster, *A History of the People of the United States,* Vol. II, p. 374.

[18] McMaster, *History,* Vol. II, p. 373, n.

[19] Richardson, *Papers of the Presidents,* Vol. I, p. 432.

of no avail, and on all sorts of pretexts American ships were mercilessly seized and condemned by the French and English frigates wherever they were found. During this struggle the number of American ships captured by the British was over nine hundred, and by the French more than five hundred and fifty, and American citizens who were impressed by the British were estimated to exceed six thousand.[20] It was not until the assassination of Premier Spencer Perceval, who was a strong advocate of the harsh measure, that the British Orders were repealed on June 23rd. The news of the repeal of the British Orders reached America too late to prevent war, for on June 18, 1812, President Madison signed the Declaration of War against Great Britain.

Generally speaking, the English Orders were the main causes of the war. On the part of England, the most obnoxious measures were withdrawn only five days after the commencement of hostilities. Yet the right of the impressment of seamen was too much for England to yield and consequently the war kept on. Meanwhile, on the side of France, an interesting little episode occurred. Napoleon, in his usual way of political play, caused a manufactured Decree to be shown to the American minister. This Decree was dated April 28, 1810. By this scheme he pretended that he had exempted Americans from the Berlin and Milan Decrees long before the declaration of war in 1812. The fact is that Napoleon was thus attempting to win American friendship in his contest with England.[21]

In the negotiations of the treaty of Ghent, in 1814, the American negotiators claimed the protection of neutral rights as a basis of the peace negotiations, but the British diplomats would not consider anything concerning the principle of neutral rights, the rules of blockade and the right of search and impressment. As a measure of compromise on both sides, the peace was signed December 24, 1814, leaving the principal questions unsettled. Nevertheless, the results of this war were decisive. The practice of the Rule of the War of 1756 was never revived by Great Britain, the enforcement of the Orders in Council were ended once for all, and the impressment of seamen never again became a question. Lord Aberdeen said in his

[20] Schurz, *Clay*, Vol. I, p. 76.
[21] *Ibid.*, p. 87.

correspondence with Mr. Webster on August 9, 1842, "I have much reason to believe that a satisfactory arrangement respecting it (impressment) may be made so as to put at rest all apprehension and anxiety".[22] And besides, the American Republic stood out in the eyes of the world as a neutral power, whose sympathy and friendship would have influence upon the international relations of Europe.

3. *Spanish-American Movements*

The question of the South American colonies soon occupied the attention of the younger American statesmen. From 1808, when Napoleon set his brother on the Spanish throne, to 1815, the date of the downfall of Napoleon, the Spanish American colonies in Central and South America and Mexico had enjoyed freedom of commerce with other nations. In the course of the struggle they rebelled against the mother country and proclaimed their independence. The Spanish Government was too weak to compel the revolted colonies to submission. Americans as well as Englishmen were in sympathy with the South American republics, and as a result the United States was placed in a difficult position in order to maintain its neutrality.

In 1818, Mr. Clay proposed in Congress to send a mission to the South American provinces to express the sympathy of the United States. According to his view the insurgent states were ipso facto independent governments and that the United States was bound by just neutrality to recognize formally their independence by an exchange of ministers. He argued that so long as the United States meant to be impartially neutral, "if the royal belligerent is represented and heard at our government, the Republican belligerent ought also to be heard".[23] This proposition was rejected and in fear of the mediation of the allied powers in the affairs of South America, President Monroe expressed the hope in his Annual Message that European powers would not intervene by force, and would follow the course of neutrality adopted by the United States.[24]

Jackson's Seminole war is often criticised as a violation of

[22] Wharton, *Digest,* Vol. III, p. 228.
[23] Schurz, *Clay,* Vol. I, p. 149.
[24] Richardson, *Papers of the Presidents,* Vol. II, p. 44.

Spanish neutral territory. But his Florida action was justified on the principle of self defense. It was alleged that the Spanish authorities in Florida were agitating war among the Seminoles against the Americans by furnishing munitions of war and other supplies to carry it on and in other acts equally hostile. The governor of Pensacola was called upon to suppress the hostilities and punish the marauders but he refused to do so. Jackson was consequently authorized to enter Florida in pursuit of the Seminoles on the ground of necessity. Jackson overstepped the authority given by the President when he occupied the fort at St. Mark's. Therefore an order was issued by the government to deliver the post unconditionally to any person duly authorized to receive it. There are evidences to prove the truth of Jackson's statement that "Our enemies, internal or external, will use it (the fort of St. Mark's) to the disadvantage of our government. If our troops enter the territory of Spain in pursuit of our Indian enemy, all opposition that they meet with must be put down or we will be involved in danger and disgrace".[25] Jackson further argued that "To prevent the recurrence of so gross a violation of neutrality, and to exclude our savage enemies from so strong a hold as Saint Mark's, I deem it expedient to garrison that fortress with American troops until the close of the present war. This measure is justifiable on the immutable principles of self-defense, and can not but be satisfactory, under existing circumstances, to His Catholic Majesty the King of Spain. Under existing treaties between the two governments, the King of Spain is bound to preserve in peace with the citizens of the United States, not only his own subjects, but all Indian tribes residing within his territory . . . ."[26] All points being considered, the Spanish colonial authorities were largely to blame. The Spanish Government was, however, constantly complaining, and the United States Government determined to observe its neutrality in a most strict sense. This intensified the popular feeling against Spain in favor of her insurgent colonies and the government found it necessary to pass the Neutrality Act of March 3, 1818.

[25] Wharton, *Digest*, Vol. I, pp. 225-226, Jackson to Monroe, January 6, 1818.

[26] *Ibid.*, p. 226.

B. *The Neutrality Acts of 1794 and 1818.*

The most important of all the actions done for the advancement of neutrality during the foregoing period was the issuing of Washington's Neutrality Proclamation. This proclamation constitutes, as noticed above, a new epoch in the history of the laws of neutrality. Nevertheless this proclamation alone was not sufficient to enforce the rules set forth by Washington's Cabinet. During this period, under the stress of warlike sentiment within and agitating movements without, the government deemed it necessary to maintain a strict neutrality. The proclamation was moulded into the legislative acts of Congress, and these acts were then strictly enforced by the decisions of the courts.

President Washington, realizing the weakness of the government in enforcing the rules set forth in his proclamation, urged upon Congress at the opening of the session in December 1793, the adoption of some effectual measures for the better preservation of neutrality. He delivered to Congress his proclamation, dispatches and circulars, with all the facts attached to them. Congress, in accordance with his policy, passed on the 5th of June, 1794, the celebrated legislation henceforth known as the First Foreign Enlistment Act, or as sometimes called, the Neutrality Act of 1794.

The first Foreign Enlistment Act provided for the punishment of,

(a) Any person whatever who should, within the jurisdiction of the United States, (1) personally enlist or (2) hire another to enlist or to go beyond the jurisdiction of the United States with intent to be enlisted, in the service of any foreign state as a soldier, marine or seaman:

(b) Any person whatever who should, within the jurisdiction of the United States, fit out and arm, or attempt to fit out and arm, or to procure to be fitted out and armed, or should knowingly be concerned in the furnishing, fitting out or arming, of any vessel with intent that such vessel should be employed in the service of any foreign state to cruise or commit any hostilities against any state with which the United States should be at peace:

(c) Any person whatever who should, within the jurisdic-

tion of the United States, issue a commission to any such vessel with intent that she should be so employed:

(d) Any person whatever who should, within the jurisdiction of the United States, increase or augment, or should be knowingly concerned in increasing or augmenting the force of any armed vessel in the service of any foreign power at war with another state, with which the United States is at peace: and,

(e) Any person whatever who should, within the jurisdiction of the United States, set on foot or prepare the means for any military expedition or enterprise against the territory or dominion of any foreign prince or state with which the United States is at peace.

It is true that the United States government undertook by these regulations, obligations by no means easy to fulfill. An enormous force of police was required to enforce the rules they set forth. The militia of individual states was not strong enough to put down the violent resistance of some of those who disregarded the authority of the government. Sometimes the militiamen had to march "between seventy and eighty miles to seize a vessel under preparation as a French privateer."[27]

Under the first Foreign Enlistment Act the first prosecution was the case of John Etienne Guinet and John Baptiste le Maitre, brought before the Circuit Court at Philadelphia on May 11, 1795, on a charge of being knowingly concerned in fitting out and arming the vessel, "Les Jumeaux", within the jurisdiction of the United States, for the service of the French Republic against the King of Great Britain with whom the United States was at peace. "Les Jumeaux", originally a British cruiser, passed into French ownership. She entered the harbor of Philadelphia in December 1794, as a merchant ship with only four of her twenty port holes open, and carrying a cargo of sugar and coffee. Baptiste, its first French owner, soon opened all of her port holes and started in repairing. But she left Philadelphia in ballast and went to Wilmington where she received her armament and other equipment. The decision of the jury was a verdict of guilty on the ground that "the converting a slightly armed merchant vessel into a ship of war was as much a fitting out and arming as if the vessel had never been originally armed at all", and Guinet was

[27] Sparks, *Washington*, Vol. II, p. 42.

sentenced to one year imprisonment and a fine of $500.00. "Les Jumeaux" then proceeded from Delaware to San Domingo, and was sold to the French government on February 7, 1795. Commissioned as a French ship of war under the name of the "Cassius", with an American, Samuel Davis, on board as its lieutenant, she soon started out cruising against British commerce. The British brig, "William Lindsay", was her victim, and was condemned as lawful prize in a French court in French jurisdiction. The principal question in this case was, though the "Cassius" was originally equipped and fitted out in the jurisdiction of the United States, and also commissioned under an American citizen, whether the United States had or had not a right to demand a compensation against her, so long as the capture was made on the high seas and carried into a French port under the command of the captor. The capture, therefore, did not compromise the neutrality of the United States and the government refused to interfere with the judicial proceedings in the case.

The revolutionary uprising in South America broke out in 1810. More or less inspired by the political principles of the United States, they declared themselves Republics, independent of their mother countries. The fathers of the American Revolution naturally had a sympathetic feeling toward those colonists struggling for independence. Furthermore, the relations between the two countries, Spain and the United States, had not been a very cordial one, either politically or religiously. All the efforts of the American statesmen to approach the government at Madrid with a friendly disposition had proved to be of no avail. Apart from these reasons, the American people as a whole desired to see their sister-continent free from the oppressions and despotism of the old world.

The Portuguese minister admitted, however, in his communication to Secretary Monroe on December 20, 1816, that the difficulty of enforcing the rules of neutrality lay not in any want of disposition on the part of the government to punish the offenders, but in the lack of force behind the Act of 1794.[28] He solicited the American government to make some "provisions that will prevent such attempts for the future", referring to the fitting out of privateers at Baltimore for the insurgents of Buenos Ayres against Portugal. President Madison sent a

[28] Dana, *Wheaton*, p. 540, M. J. Correa de Serra to Monroe.

special message to Congress on the 26th of December 1816, urging an enlargement of preventive powers so that the government could successfully prevent further "violations of the obligations of the United States as a nation at peace toward belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States".[29]

In April 1817, the Spanish consul filed a libel in the District Court of Virginia against a certain part of the cargoes of the Spanish ships, the "Santissima Trinidad" and the "St. Ander." The said part of the cargoes was alleged to have been piratically taken out of those vessels on the high seas by two armed vessels, the "Independencia del Sud" and the "Altravida". which were manned and commanded by citizens of the United Provinces of Rio de le Plata. The Spanish at Norfolk insisted upon the restitution of the goods in behalf of the original Spanish owners. The three principal reasons presented by the Spanish consul were:

(1) That the commanders of the "Independencia" and the "Altravida" were citizens of the United States; (2) that the said capturing vessels were equipped, fitted out and armed in the United States; and (3) that their force and armament had been illegally augmented within the territory of the United States.

The District Court decreed restitution to the original owners. When the case was appealed to the Circuit Court, that judgment was affirmed, and Justice Story of the Supreme Court also affirmed the decision of the Circuit Court. In the decision of the Court, he held that (1) the "Independencia" originally a privateer, was sold to some men of Baltimore, who dispatched her on a voyage, ostensibly to the Northwest Coast, but in reality to Buenos Ayres, and there she was sold to the government of Buenos Ayres. She was commissioned in that port under Captain Chaytor, a Baltimorean, as a national public ship. Though a bill of sale of the "Independencia" was not produced, it was held that as long as there was no "doubt . . . expressed as to the genuineness of Captain Chaytor's commission", she must judicially be held a public ship of that country, and not the private property of any citi-

[29] Richardson, *Papers of the Presidents*, Vol. I, p. 582.

zens of the United States.[80] (2) As to the question of the original illegal armament, the Court held that "it is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws on our national neutrality..... But there 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..."[81] (3) In regard to the third question, Justice Story said, "The Court is, therefore, driven to the conclusion, that there was an illegal augmentation of the force of the 'Independencia' in our ports, by a substantial increase of her crew ....", and it was further held that such an illegal augmentation was a violation of the law of nations, as well as the municipal law of the United States, and a violation of our neutrality.[82]

On March 3, 1817, Congress passed "An Act more effectually to preserve the neutral relations of the United States." By this statute, any armed vessel that went out of the jurisdiction of the United States was required to give bond with sufficient securities in double the amount of the value of the ship and the cargo that the vessel should not be employed in aiding or augmenting any warlike measure against any prince or state, "or of any colony, district, or people..." with which the United States was at peace.[83]

The Spanish government was still complaining about the fitting out of privateers in American waters to cruise against Spanish commerce. Accompanied with the Spanish complaints was a list of thirty such privateers. President Madison called the attention of Congress to the establishment of military bases in the Amelia Island and at Galveston, which must be checked at once by the government. Consequently the statute of 1817, which was also temporary, for the period of two years, was repealed and a new act of Congress was passed on April 20, 1818. This is the permanent legislation, now known as the Neutrality Act of 1818. This Act was practically the re-enact-

[80] *U. S. Supreme Court Reports,* 7 Wheaton 283, 335.

[81] *Ibid.,* 283, 340.

[82] *Ibid.,* 283, 344.

[83] *Statutes at Large,* Vol. III, p. 370, the words, "of any colony, district, or people", were added to the act of 1794.

ment of that of 1794, with the exception of some modifications. The important sections constituting this act are:

(1) Every citizen of the United States, who within the jurisdiction thereof, accepts or exercises a commission to serve a foreign prince, state, colony, district, or people shall be deemed guilty of high misdemeanor;

(2) Every person who.....enlists or enters himself, or hires or obtains another person to go beyond the jurisdiction with intent to be enlisted.....shall be deemed guilty.....

(3) Every person who.....fits out and arms, or attempts to fit out and arm, or shall knowingly be concerned in the furishing, fitting out, or arming, of any vessel.....shall be deemed guilty....

(5) Every person who.....increases or augments, or procures to be increased or augmented, or shall knowingly be concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel.....shall be deemed guilty.

(6) Every person who.....begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince.....with which the United States are at peace, shall be deemed guilty.....

(7) The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States.....

(8) The President is authorized to employ land or naval forces, or militia, for the purpose of carrying the provisions of this act into effect.....

(9) The same forces are to be employed to compel the departure of such vessels as would contravene the law of nations, or the treaties of the United States with foreign powers.

(10) A bond, double the amount of the value of the vessel and cargo, is required of vessels about to depart from the ports of the United States, owned either wholly or partially by the citizens of the United States, promising that such vessels shall not be employed contrary to the prohibitions of this act.

(11) The revenue officers are to detain any vessel manifestly built or equipped for warlike purposes.

This was the basis of the British Foreign Enlistment Act of

1819, and of similar provisions subsequently adopted in the penal codes of various European states.

III. Freedom of Neutral Commerce

During this period, the United States government endeavored to pursue its liberal policy in the treatment of neutral commerce, and succeeded in inserting the free ship, free goods principle in several treaties with other powers. In the treaty of 1795 with Spain, it was agreed that free ship will make free goods, "no distinction being made who are the proprietors of the merchandise laden theron".[34] In the treaties of 1796 with Tripoli,[35] of 1797 with Tunis[36] and also that of 1797 with Morocco,[37] the United States stipulated the new rule of free ship, free goods, and furthermore, that free goods in enemy ship shall also be free.

In the meantime the American statesmen began to realize the difficulty of establishing the liberal rule and at times altogether abandoned it. By the Jay treaty it was agreed that enemy property in a free ship should be condemned as lawful prize. However, the original draft presented by the American diplomats in the negotiations for the Jay treaty discloses the fact that the United States government had proposed to insert in the treaty the free ship, free goods maxim.[38] But the English Government would not yield to them and the American government considered it more prudent to ratify the treaty without it "if the alternative was war with Great Britain."[39] In 1796, when the term of the Prussian treaty of 1785 had expired, John Quincy Adams tried to renew it, inserting again the free ship, free goods clause without the opposing maxim, enemy ship, enemy goods. Up to this time, 1796, the free ship, free goods principle was adopted practically in all the American treaties except those with Great Britain. This was done either with or without the enemy ship, enemy goods maxim. The constant efforts made by the United States to establish this principle as universal usage proved

[34] Art. XV, *Treaties and Conventions,* 1871, p. 780.
[35] *Ibid.,* p. 837.
[36] *Ibid.,* p. 846.
[37] *Stat. at Large,* Vol. VIII, p. 101.
[38] Wharton, *Digest,* Vol. II, p. 162.
[39] Moore, *Digest,* Vol. V, pp. 702-704.

unavailing. Wheaton says, "the United States were the losers in every direction of that principle", because other powers that adopted this principle in their treaties with the United States would insist upon its observation when injurious to the latter, but disregarded it when beneficial to them.[40]

Consequently in 1798, the American plenipotentiary, Adams, was instructed to propose to the Prussian cabinet the abandonment of the free ship, free goods article in the treaty then being negotiated.[41] Adams at first objected to this omission, stating in his correspondence to the home government, that all maritime powers not having large navies were anxious to see freedom of trade established against Great Britain and resented any act that would support British pretentions.[42] Meanwhile he admitted the undesirability of entering into such treaty obligations, because in case of war between one of the two contracting parties and a third power, these obligations would work only against the Americans. Under these circumstances, he suggested, in accordance with instructions from the home government, that the agreement should be conditional so that in such cases, the neutral bottom should cover enemy goods, "provided the enemy of the warring power admitted the same principle".[43] Thus he conditioned the exercise of this rule on the principle of reciprocity. Wheaton remarks that "this would at once discover the American inclination and attachment to the liberal rule, and yet not make them the victims of their adherence to it, while violated by their adversaries".[44]

After a long series of communications, the treaty was finally concluded on the 11th of July, 1799. It abandoned the liberal principle. The reason for its abandonment is made clear in the following statement taken from the twelfth Article of the treaty:

"Experience having proved that the principle.....according "to which free ships make free goods, has not been sufficiently "respected during the last two wars.....the two contracting "parties propose, after the return of a general peace, to agree, "either separately between themselves or jointly with other "powers.....to concert with the great maritime Powers of

[40] Dana, *Wheaton,* p. 588.
[41] *Am. State Papers,* Vol. IV, pp. 38-47.
[42] Wharton, *Digest,* Vol. III, p. 225, letter of July 17, 1797.
[43] *Am. State Papers,* Vol. I, p. 251.
[44] Dana, *Wheaton,* p. 593.

"Europe such arrangements and such permanent principles as "may serve to consolidate the liberty and safety of neutral "navigation and commerce in future wars. And if.....either "of the contracting parties should be engaged in a war to which "the other remains neutral, the ships of war and privateers of "the belligerent Power shall conduct themselves towards the "merchant vessels of the neutral Power as favorably as the "course of the war then existing may permit....."[45]

In the treaty of 1800 with France, the United States adopted both the principle of free ship, free goods and that of enemy ship, enemy goods.[46] In the negotiations for this treaty, the American minister stated that "sundry nations have in many instances introduced by their special treaties another principle between them, that enemy bottoms shall make enemy goods, and friendly bottoms, friendly goods; but this is altogether the effect of particular treaties, controlling in special cases the general principle of the law of nations, and therefore, taking effect between such nations only as have so agreed to control it." This is a re-assertion of what Jefferson had said in his reply to the French complaints concerning French goods taken out of American ships by the British without resistance on the part of the United States. During the War of 1812, the American prize courts uniformly enforced "the acknowledged rule of international law", subjecting enemy goods in free ships to confiscation, excepting in regard to the property belonging to such powers as practiced the free ship, free goods principle in reciprocity with the United States.[47] The same restriction conditioned on the principle of reciprocity was incorporated in treaties during the latter part of this period and even later.[48]

IV. Limitations of Neutral Commerce

A. *Contraband of War.*

(1) *Contraband in General.*—The tendency of the United States government has always been to restrict the list of contraband, while that of Great Britain has been to expand it.

[45] *Treaties and Conventions,* 1871, pp. 718-719.
[46] *Ibid.,* p. 270.
[47] Dana, *Wheaton,* p. 603.
[48] *U. S. Supreme Court Reports,* 2 Wheaton Appendix, Note 1, pp. 54-56.

Disputes often arose because of this divergence between the two powers.[49] The British condemnation of provisions as contraband was seriously protested by the United States. The question was finally decided by a mixed commission, the award of which was a full indemnification of about $11,000,000 by the British government to the owners of vessels and cargoes seized by British cruisers under the Orders in Council.[50]

(2) *Continuous Voyage.*—The question of continuous voyage first came into prominence in connection with the Rule of the War of 1756. In the wars of the French Revolution, in which this rule was revived, American neutral carriers sought to avoid the application of the rule by first bringing the cargo to an American port and thence carrying it on to the home port. In order to put an end to this mode of commercial transaction, Sir William Scott applied what has since that time become known as the doctrine of continuous voyage. The "Mercury" was one of the earlier cases of a ship and cargo actually condemned under this doctrine.[51] In numerous other cases similar to this one, the British courts held that the cargo that touches a neutral port simply in order to make "a colourable importation" is condemnable.[52] The main ground for this assertion was that if the ship showed any evidence in her papers, or any sufficient reason that she was going to any forbidden port, then it would be immaterial to what port she might immediately proceed. This principle was applied to the latter part of the voyage only, that is, after the vessel had touched at the intermediate neutral port. A vessel, whose ulterior destination was a hostile port, might be allowed to proceed on the first part of her voyage between the port of clearance and a neutral port, but as soon as she was found on the ultimate part of her voyage between the neutral port and her hostile destination, she was liable to capture and condemnation as carrying on an illegal trade. This was the English doctrine of continuous voyage.

[49] Wharton, *Digest,* Vol. III, pp. 411-413.

[50] Moore, *Arbitrations,* Vol. I, pp. 341-344.

[51] *Admiralty Reporter,* Robinson, Vol. V, p. 400.

[52] The "Sarah Christina", 1 Robinson 199; the "Carolina", 2 Robinson 210; the "Nancy", 3 Robinson 71; the "Phoenix", 3 Robinson 154; the "Edward", 4 Robinson 56. American edition published in Philadelphia. All of these cases were decided between the years 1799 and 1802.

B. *Blockade.*

This period witnessed one of the two most remarkable events in the history of blockade. The so-called 'continental system' was nothing more than a paper blockade. As this system was partly discussed above, the further discussion here seems unnecessary. Though the questions of effectiveness of blockade and of the notification of its existence had been frequently debated by European jurists as well as European diplomats during the 18th century, the general practice had never been consistent.

In regard to the question of notification, the United States became an advocate of the practice of special notification as early as 1794.[53] Perhaps due to the American influence, the British Admiralty Court wrote in 1804 in its instructions to Commodore Hood in regard to the blockade of Martinique and Guadeloupe, "not to capture vessels bound to such ports unless they shall have been previously warned....."

The question of the effectiveness of blockade was subjected to a serious discussion as a result of the paper blockades of the Napoleonic wars. The British government appears to have practiced this sort of blockade as early as 1803, and continued it to the end of the Napoleonic wars. The United States always protested against the abusive extension of blockade.[54] In 1807, while engaged in a desperate struggle with Napoleon, Great Britain yielded to the American remonstrances and sanctioned the principle that blockade can be regarded as effective only when it is sufficiently guarded to render the ingress and egress of vessels a matter of imminent danger.

By Spain the practice of paper blockade was kept up until 1816, when Carthagena was declared to be in a state of blockade. By this proclamation, the Spanish government pretended to blockade an area of some 3,000 square miles in extent. The American government at once repudiated it as "evidently repugnant to the law of nations." In consequence of this, the Spanish Vice-Royalty openly confessed that it had no know-

[53] By Art. 18 of the Jay treaty it was agreed that if "vessels sail for a port or place.....without knowing that the same is besieged, blockaded, or invested.....every vessel so circumstanced may be turned away from such port or place....." *Treaties and Conventions,* 1871, p. 328.

[54] Moore, *Digest,* Vol. VII, pp. 788-789.

ledge of the law of nations, and the blockade was raised on September 2, 1817.

C. *Right of Visit and Search.*

(1). *Right of Visit and Search in General.*—The general tendency of the United States in regard to the right of visit and search has constantly been to oppose the strict and severe practice of Great Britain[55] in respect to the exemption of neutral vessels under convoy.

The exemption of convoyed vessels from the belligerent right of visit and search was always denied by Great Britain and insisted upon by the United States. Recent writers on the subject assert that "the decisions of the American courts and the opinion of American jurists support the English view."[56] But in fact, this is only partially true. They have failed to observe the difference between the case of neutral merchantmen under the convoy of belligerent war vessels and that of neutral merchantmen under the convoy of war vessels of their own country. In the former case, there appears some divergency of opinion among the American jurists, while in the latter, the United States is never found to have supported the British view.

(a) *Neutral Merchantmen under Belligerent Convoy.*—The British courts hold that a neutral vessel under enemy convoy will take the belligerent character, and therefore, it must be treated as enemy. This view was accepted by the United States government and supported by Justice Story. In the case of the "Nereide" in 1815, he declared that "the belligerent convoy is naturally bound to resist all visitations by enemy ships whether neutral to the convoyed ships or not. The neutral that secures the belligerent protection also declares that he will not submit until the enemy convoy is conquered."[57]

(b) *Neutral Merchantmen under the Convoy of their own Nation.*—In respect to the neutral merchantmen under the convoy of ships of their own nation, there was no concurrence of opinion between Great Britain and the United States. Great Britain made no distinction between the belligerent convoy and the neutral's own convoy. The British courts denied the right

[55] 1 Robinson 287, Am. Ed.

[56] Atherly-Jones, *Commerce in War*, pp. 322-323.

[57] *U. S. Supreme Court Reports*, 9 Cranch 388, 441.

of convoy, both belligerent and neutral. The United States, on the other hand, always maintained that "the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and when they are bound to an enemy's port, that they have no contraband goods on board shall be sufficient. With these conditions," continued Secretary Forsyth, in his correspondence with the Mexican minister, May 18, 1837, "the United States have at all times been willing to comply ....."[58] This principle was embodied in the treaty of 1797 with Tunis,[59] and in that of 1800 with France.[60]

On June 17, 1801, Great Britain, however, recognized, by joining the famous Maritime Convention of St. Petersburg, the exemption of convoy. Although the rule of entire immunity of convoyed vessels was not formally accepted by Great Britain, it was a decided compromise on her part. It was agreed that merchant vessels sailing under convoy should be required to produce to the commander of the convoy their passports and ship's papers so that when necessary, the commander might prove the verification. It was further stated that this verification being made, that there should be no pretense for any search.[61]

[58] Warton, *Digest,* Vol. III, p. 318.
[59] *Treaties and Conventions,* 1871, p. 847.
[60] *Ibid,* p. 272.
[61] Martens, *Recueil,* 2nd Ed., Vol. VII, p. 263.

CHAPTER 4

History of Neutrality from 1818 to 1861

I. The British Foreign Enlistment Act of 1819.

After the close of the European wars in 1815, British soldiers and sailors were freely enlisted and organized in British jurisdiction for the service of the South American provinces. Under these circumstances, the British government, following the example of the United States, passed in 1819 the Foreign Enlistment Act "to prevent the enlisting or engagement of His Majesty's subjects to serve in foreign service, and the fitting out or equipping in His Majesty's dominion vessels for warlike purposes, without His Majesty's license." This statute was based upon the American Act of 1794, and in its enactment the endeavor was made to follow as closely as possible the American course of legislation. Mr. Canning passed the highest eulogy upon the American system of neutrality. In 1823, when a bill was introduced in Parliament to repeal the Act of 1819, he made a speech in which he said, "If I wished for a guide in a system of neutrality, I should take that laid down by America, in the days of the presidency of Washington, and the secretaryship of Jefferson."

The American Enlistment Act required securities in double the amount of the value of the ship and cargo ready to depart, promising that the same would not be employed in any service contrary to the law. This part of the measure was omitted in the British Act of 1819.

II. Filibusterers.

The American practice of neutrality during this period involved numerous cases under different circumstances. In the famous case of the "Bolivar", the American court decided that Quincy was not guilty, on the ground that the "Bolivar" did not form the intention before the departure from the jurisdiction of the United States. Quincy, an American citizen, sailed under his command a pilot boat, the "Bolivar", from

Baltimore to St. Thomas. On the arrival at St. Thomas, Armstrong, the owner of the "Bolivar", procured funds and fitted her out as a privateer under the flag of Buenos Ayres. After several captures of Spanish vessels made on the high seas, she returned to the United States with Quincy and Armstrong still on board. Quincy was indicted on the ground that he had been knowingly concerned in the fitting out of a vessel "with intent that such vessel should be employed in the service of a foreign prince . . ." The court held that "the offense consists principally in the intention with which the preparations to commit hostilities were made. These preparations . . . must be made within the limits of the United States . . . and the intention . . . should be formed before she leaves the United States."[1] So long as the intention was formed outside of the jurisdiction of the United States, Quincy could not be condemned.

The facilities and countenance rendered by the American government to the agent sent by the German government about 1848, at the time of the German liberal movement, to purchase a ship of war from an American company, were withdrawn when complaints were made of it. When the ship was ready to leave, the American government demanded bonds to the sum of $900,000.

When American sympathy was thoroughly aroused toward the liberal movement in Hungary, and the President of the United States was authorized by a joint resolution of the two Houses of Congress, in March, 1851, to send a ship of war to bring to the United States the Hungarian patriot, Kossuth, then a refugee with the Porte, the neutrality of the United States was severely tested.[2] On his arrival in the United States, Kossuth was received with overwhelming enthusiasm both by the government authorities and by the people.[3] But the reason why he failed in his efforts to secure from the United States not only sentimental but "operative sympathy" in the shape of "financial, national, or political aid", was because the American statesmen realized that the United States was bound under its neutral obligations not to interfere with

[1] *U. S. Supreme Court Reports*, 6 Peters 445.

[2] *Statutes at Large*, Vol. IX, p. 647.

[3] Richardson, *Messages*, Vol. V, p. 119, the President's Message of Dec. 2, 1851.

Hungarian affairs. Henry Clay told Kossuth, "you must allow me to protest against the policy you propose to her (The United States), and he further said that "our ancient policy of amity and nonintervention in the affairs of other nations" must not be abandoned.[4]

At the time of the Cuban insurrections, in 1849 and 1851, the sympathy of the South with Lopez and his followers was so strong that it was hard to enforce the laws of neutrality. Hostile expeditions, organized by American citizens within the jurisdiction of the United States, became very threatening, and President Taylor issued a proclamation against them.[5] But this proved insufficient, and President Fillmore issued another warning against any unlawful acts.[6] Lopez' first expedition was successfully prevented. But another expedition succeeded in escaping, and Lopez' followers were captured as pirates by the Spanish. Lopez was tried by a Southern jury on a charge of violating the neutrality of the United States, and was released. He gathered his scattered forces and made a second descent on the Island in August, 1851. When the news of his capture and garroting, and the death of his fifty followers reached the United States, a mob in New Orleans wrecked the Spanish consulate and defaced a portrait of the Spanish Queen. Mr. Webster offered a reparation for the insult and recommeded to Congress the granting of an indemnity for the damage, thus to restore the diplomatic relations with Spain.

The famous case of the "Caroline" brought out a very important principle. During the progress of the Canadian rebellion in 1838, a body of men fitted out in American territory the "Caroline" for the invasion of British territory. She was attacked by an English force while at anchor on the American side of the Niagara, and was sent adrift over the Falls. The American government complained of the violation of its neutral territory, and the British government answered by pleading self-defense in justification of the act. After an exchange of notes the government at Washington dropped the matter, acquiescing in the British contention of the necessity of self-defense, "instant, overwhelming, leaving no choice of means,

[4] Schurz, *Clay,* Vol. II, p. 394.
[5] Richardson, *Messages,* Vol. V, p. 7.
[6] *Ibid,* p. 111.

and no moment for deliberation".[7] This case constitutes the precedent, upholding the principle that when a state neglects its obligations so as to place another in a position of extreme gravity, leaving no time for deliberation, the principle of inviolability of territory should be subordinated to the principle of self-preservation.

III. The Monroe Doctrine.

After the formation of the Holy Alliance, the allied powers of Europe at Congresses held at Aix-la-Chapelle, Troppau, Laibach and Verona, promulgated and attempted to maintain the doctrine of 'legitimacy'. When George Canning was urging the United States government to adopt a joint action with Great Britain against the concert of Europe, and the government at Washington was much divided in opinion as to the reception or rejection of the British proposal, President Monroe, through the influence of John Quincy Adams, sent to Congress his Message of December, 1823, which contained what has ever since been known as the Monroe Doctrine.[8] In that message he clearly defined the neutral position of the United States. He said in part, "In the wars of the European powers in matters relating to themselves we have never taken any part. . . . It is only when our rights are invaded or seriously menaced that we resent injuries or make preparations for our defense. . . . In the war between those new Governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered, and shall continue to adhere, provided no change shall occur which . . . shall make a corresponding change on the part of the United States indispensible to their security."[9]

IV. The Declaration of Paris.

The Declaration of Paris, made on April 16, 1856, by Great Britain, Austria, France, Prussia, Sardinia and Turkey, adopted the following principles:

[7] Senate Documents, Foreign Relations, 1st Session, 27th Congress, 1841, pp. 15-20, Webster to Fox, April 24, 1841, and Parliamentary Papers, 1843, Vol. LXI, pp. 46-51, Lord Ashburton to Webster, July 28, 1842.

[8] Richardson, *Messages,* Vol. II, pp. 207-220.

[9] *Ibid,* p. 218.

(1) Privateering is and remains abolished.

(2) The neutral flag covers enemy goods, with the exception of articles of contraband.

(3) Neutral goods with the exception of contraband of war, are not liable to capture under enemy flag.

(4) Blockade, in order to be binding, must be effective; i. e., maintained by a force sufficient actually to prevent access to the coast of the enemy.

It was further declared that, "Considering that maritime law, in time of war, has long been the subject of deplorable disputes;

"That the uncertainty of the law and the duties in such a matter gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

"That it is consequently advantageous to establish a uniform doctrine on so important a point;

"The Governments of the undersigned plenipotentiaries engage to bring the present declaration to the knowledge of the states which have not taken part in the Congress of Paris, and to invite them to accede to it."[10]

Concerning the first of these principles, namely, privateering, the United States first made an unequivocal effort to abolish this system by treaty stipulations,[11] and as a result many European powers adopted this position.[12] The second and third articles of the Declaration of Paris; i. e., the principle of free ship, free goods, and that of free goods free in enemy ship, the United States had all this time maintained and had succeeded in having them stipulated in most of its treaties. In 1813 the United States made a special effort to have these principles established. In his correspondence, Secretary Adams definitely asserted that "It is evident, however, that this usage (of condemning free goods in enemy ships) has no foundation in natural right", and is subject to special treaty stipulations.[13] He further said "This search for and seizure of the property of an enemy in the vessel of a friend

[10] Moore, *Digest,* Vol. VII, pp. 561-562.

[11] Wharton, *Digest,* Vol. III, pp. 276-302.

[12] T. G. Bowles, *Defense of Paris,* pp. 166-175.

[13] Wharton, *Digest,* Vol. III, p. 259, Adams to Anderson, May 27, 1823.

is a relic of the barbarous warfare of barbarous ages . . .".[14] Again he said that the government of the United States wished for the universal establishment of this principle (that of free ship, free goods) as a step towards the attainment of the other (the principle that neutral goods laden in an enemy vessel shall be free), the "total abolition of private maritime war".[15] "The principle upon which the government of the United States now offers this proposal to the civilized world is", said he later, "that the same precepts of justice, of charity, and of peace, under the influence of which Christian nations have . . . exempted private property on shore from the destruction or depredation of war, require the same exemption in favor of private property upon the sea."[16]

At the outbreak of the Crimean War in 1854, the United States submitted to the several maritime powers two propositions which the President solicited them to establish as permanent principles of international law. The two rules proposed were: first, that free ship makes free goods, with the exception of contraband of war; and secondly, that the property of neutrals on board an enemy ship is not subject to confiscation, unless the same be contraband of war.[17] Russia and several other neutral powers notified their adhesion to the American overtures, but Great Britain and France did not act upon the two propositions, though forbearing not to reject them.[18] While the United States government was endeavoring to see through its ministers abroad if the European governments could be induced to adopt these principles permanently, the powers then assembled at Paris "put forth a declaration containing the two principles which this government had submitted nearly two years before to the consideration of maritime powers, and adding thereto the following proposition: viz., 'Privateering is and remains abolished', and 'Blockade in order to be binding must be effective' ".[19] The rule con-

[14] Wharton, *Digest,* Vol. III. p. 259, Secretary Adams to Canning, June 24, 1823.

[15] *Ibid.,* p. 261, Secretary Adams to Rush, July 28, 1823.

[16] *Ibid.,* p. 261, Secretary Adams to Mr. Middleton, Aug. 13, 1823.

[17] Moore, *Digest,* Vol. VII, p. 570.

[18] Richardson, *Messages,* Vol. V, p. 412, President Pierce's Message, Dec. 2, 1856.

[19] *Ibid.*

cerning blockade declared by the powers at Paris "is merely the definition of blockade . . . for which this country has always contended".[20] The United States refused to accede to the Declaration of Paris because the powers did not admit the exemption of private property in maritime warfare.

Most of the European powers then held and still hold that private enemy property in land warfare is exempt from belligerent appropriation, but that naval warfare has for its object the destruction of maritime resources. On this ground the property belonging to an enemy is liable to capture whether public or private. Against this argument the United States has contended that the seizure of the property of the private enemy individual in naval warfare is incompatible with the principle of the law of nations. When the United States was invited to adhere to the Declaration of Paris in 1856, the President replied that, if the first article, viz., "Privateering is and remains abolished", be amended so as to add to it a paragraph to the effect that "The private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent unless it be contraband", the United States would accede to the Declaration. This principle expressed in Secretary Marcy's reply was known as the Marcy Amendment or the American Amendment. The Marcy amendment was well received by other powers party to the Declaration, but Great Britain obstinately refused to admit it and consequently the United States declined to become party to the Declaration.[21]

V. Recognition of Belligerency and Independence.

Before and immediately after the American war for independence, the question of the recognition of belligerency and independence had hardly any chance to give rise to serious dispute. After the American colonies took the lead in revolting against the mother country, and had successfully established an independent and new form of government, and after this national spirit mingled with revolutionary principles had been propagated throughout the two hemispheres, many a small

[20] Richardson, Vol. V, p. 413.
[21] Moore, *Digest,* Vol. VII, pp. 562-572.

community followed the new example and rose up in open rebellion and appealed to other powers for the recognition of their independence. During the period of revolutionary propaganda, this question became, for the first time in the history of the law of nations, a subject of the most lively discussion and was frequently of ardent dispute.

If a community is engaged in a struggle for liberty from the yoke of its mother country, a neutral state may recognize the belligerency of the rebelling state so soon as the commercial interests of the neutral are affected by the existence of hostilities, or as soon as its integrity and existence are threatened, but without compromising its neutrality, thus rendering the insurgents the privileges and rights to which belligerents are entitled by the law of war. This being strictly a question of policy or prudence on the part of the recognizing state, neither the act of formal acknowledgment nor the refusal to grant such should afford any legal ground for complaint.

The recognition of independence is, though somewhat similar to that of belligerency, much more serious. There are certain conditions which form the legal basis for such recognition on the part of the neutral. As to these conditions, opinion had been divided and there was no standard until the American war for independence. "The acknowledgment of the independence of the United States by France", says Wheaton, "coupled with assistance secretly rendered by the French Court to the revolted colonies, was considered by Great Britain as an unjustifiable aggression, and under the circumstances it probably was so".[22] On this ground the declaration of war by Great Britain was considered justifiable.

On the other hand, the French argued that their recognition of American independence was based upon the ground that the United States had not only declared their independence, but they had the ability to maintain their de facto government. Here the question again arose as to who should determine such ability or inability.

In 1810 insurrections broke out all over the Spanish-American provinces. The insurgents in Buenos Ayres were completely successful and formally declared themselves independent in 1816. Chile declared its independence in 1818 and maintained it unmolested. Mr. Clay proposed in Congress in

[22] Wheaton, *History of Law of Nations*, pp. 220-294.

1818, to recognize the revolting provinces, which were practically at that time free from the Spaniard.[23] The motion was rejected on the ground that the mother-country might yet have a reasonable chance of success in some places, which, if subdued, would serve as a basis of operations against the rest of the colonies. While existing order in these two provinces remained unaltered, Columbia expelled the Spaniards in 1822 and the struggle soon ceased. President Monroe declared in his message to Congress that "The contest has now reached such a stage and been attended with such decisive success on the part of the provinces that it merits the most profound consideration whether their right to the rank of independent nations is not complete".[24] The Senate Committee on Foreign Affairs, to whom the matter was referred, reported in favor of recognition, with an assertion of the principle that "the political right of the United States to acknowledge the Independence of the South American Republics, without offending others, does not depend upon the justice but upon the actual establishment" of that independence. The Committee further asserted that the recognition of new governments "comprehends, first, an acknowledgment of their ability to exist as independent states, and secondly, the capacity of their particular Governments to perform the duties and fulfil the obligations towards foreign Powers.....".[25] The recognition was soon made by the United States and the British government followed the example soon afterwards.

Although the recognition of the independence of Texas by the United States in 1837 was given before that of any other state, it was not considered premature, for all substantial struggle with Mexico was over in 1836, and Texan independence was fait accompli.[26] When Texas declared itself independent of Mexico in 1836, the Texan flag was admitted into the port of New York as if enjoying full belligerent rights. To a remonstrance made by the Mexican government it was answered on the part of the United States that "it has been deemed sufficient that the party declared its independence, and

[23] Wharton, *Digest,* Vol. I, pp. 527-529.
[24] Richardson, *Messages,* Vol. II, p. 116, President Monroe's Message,
[25] Wharton, *Digest,* Vol. I, p. 531.
[26] Boyd, *Wheaton,* p. 42.

at the time was actually maintaining it".[27] When the Senate Committee on Foreign Affairs recommended to the Senate that the independence of Texas should be acknowledged by the United States, President Jackson sent a special message to Congress on December 21, 1836, advising delay in the recognition. It read in part as follows:

"The acknowledgment of a new state as independent and entitled to a place in the family of nations is at all times an act of great delicacy and responsibility, but more especially so when such state has forcibly separated itself from another of which it had formed an integral part and which still claims dominion over it. A premature recognition under these circumstances, if not looked upon as a justifible cause of war, is always liable to be regarded as a proof of an unfriendly spirit to one of the contending parties. All questions relative to the government of foreign nations, whether of the Old or the New World, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession to enable them not only to decide correctly, but to shield their decisions from every unworthy imputation."[28]

"It is true that with regard to Texas, the civil authority of Mexico has been expelled, its invading army defeated, the chief of the Republic himself captured, and all present power to control the newly organized Government of Texas annihilated within its confines. But, on the other hand, there is, in appearance at least, an immense disparity of physical force on the side of Mexico. The Mexican Republic under another executive is rallying its forces under a new leader and menacing a fresh invasion to recover its lost dominion.

"Upon the issue of this threatened invasion the independence of Texas may be considered as suspended . . . . . Prudence, therefore, seems to dictate that we should still stand aloof and maintain our present attitude . . . . . ."[29]

The fact that the United States took more than ordinary caution in the case of Texas is amply demonstrated in the com-

[27] Wharton, *Digest,* Vol. I, p. 509, Forsyth to Gorostiza, Sept. 20, 1836.

[28] Richardson, *Messages,* Vol. III, p. 266.

[29] *Ibid.,* p. 268.

munications between Secretary Webster and the Spanish minister.[30] But the reported fresh invasion attempted by Mexico was finally abandoned, and the United States consequently acknowledged the independence of Texas in March, 1837, which course was followed by Great Britain and France in 1840. In reply to the complaints of the Mexican government, Secretary Webster reasoned in the correspondence above referred to, saying:

"It is true that the independence of Texas has not been recognized by Mexico. It is equally true that the independence of Mexico has only been recently recognized by Spain; but the United States having acknowledged the independence of Texas although Mexico has not yet acknowledged it, stands in the same relation toward both those governments . . . . . No effort for the subjugation of Texas has been made by Mexico, from the time of the battle of San Jacinto, on the 21st day of April, 1836, until the commencement of the present year, and during all this period Texas has maintained an independent government, carried on commerce, and made treaties with nations in both hemispheres, and kept aloof all attempts at invading her territory."[31]

The conduct of the United States government in regard to the question of Hungarian independence was subject to severe criticism as "unjustifiable towards Austria".[32] The important point that invites our attention in connection with this affair is the assertion of the principle that the sending of a secret agent by a neutral state to examine the political conditions of the revolted community does not constitute a premature recognition.

The mission of Dr. Dudley Mann, the American agent sent by President Taylor in 1849 at a time of overwhelming demand for the recognition of Hungarian independence, was to see whether or not Hungary was in a condition politically to justify the recognition of its independence by the United States. The most assailable and disputable part of this action was that he was invested with the power to declare the willingness of the government to recognize the independence of Hun-

[30] Webster's *Works*, 5th Ed. Vol. VI, p. 434.
[31] *Ibid.*
[32] Boyd, *Wheaton*, p. 42.

gary in the event of her ability to maintain it.[33] The Austrian minister complained of the act as unneutral, and this complaint was ably answered by Secretary Webster in his famous Hülseman letters.[34] The fact was that the United States did not recognize the independence or even the belligerency of Hungary, but confidentially and secretly took its own measures to make sure of its ground before any further step should be taken. When the Hungarian agent to the United States asked for the recognition of Hungarian independence, President Taylor refused to take any immediate action and sent Mr. Mann to Europe and not to Hungary, with secret instructions to obtain all the reliable information that he could in regard to the actual condition of the insurrection. As a matter of fact Mr. Mann did not go into Hungary at all but obtained all the information that he got while residing in other continental countries.[35] As a result of his investigations, Mr. Mann reported that the conditions were not what he had been led to believe they were, and strongly advised the government not to recognize the independence of the Hungarians. Furthermore, he forbore to give publicity to his mission, which was also in accordance with the instruction that he had received from Washington.[36] And besides, the Hungarian patriots might have succeeded in their struggle for liberty had it not been for the interference of Russia. However, Webster was cautious and diplomatic enough not to take any formal action, while Congress offered asylum to the Hungarian exiles after the crushing defeat of 1849.

Boyd admits that the "sympathy which the American people undoubtedly felt for the Hungarians should not have been thus expressed officially, more especially as the geographical position of both countries prevented the United States being in any way concerned in the matter".[37] "The expression of popular sympathy" referred to was President Taylor's Annual Message of December 1849, and the publication of the instructions of Mr. Mann by the order of the Senate on March

[33] Webster's *Works*, Vol. VI, p. 488, Hülseman to Webster, Sept. 30, 1850.

[34] *Ibid.*, p. 491 et seq.

[35] Dana, *Wheaton*, p. 46.

[36] *Ibid.*

[37] Boyd, *Wheaton*, p. 42.

28th, 1850.[38] But as a matter of fact, these instructions were published after the Hungarian war had ceased. Webster ably justified the attitude taken by the President by contending that "governments hostile to popular institutions must expect to see demonstrations of sympathy and feeling by the people of a free country, and expressions may appear in confidential domestic communications of the government itself; but such governments must be content, if the government, in its relation with them during the contest, performs faithfully the duties enjoined upon it by international law, gives no public or official moral support to the insurrection, abstains from recognizing independence until it exists in fact, and executes faithfully the duties of neutrality in the contest, as regards all material aids."

VI. The General Exercise of Neutral Rights

A. *Contraband of War.*

During the Crimean War, Americans sold gunpowder, arms and warlike stores of all kinds to all the belligerents regardless of the destination of those articles. They were also employed by Great Britain and France in transporting troops, provisions and munitions of war to the seat of military operations and in bringing home their sick and wounded soldiers. In reply to the complaint of the Russian government, it was asserted on the part of the United States "that such use of our mercantile marine is not interdicted either by international or our own municipal law, and therefore does not compromise our neutral relations with Russia".[39] President Pierce's Annual Message of December 3, 1854, reaffirmed the Jeffersonian theory of neutral commerce by declaring that "the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality . . . . .".[40] In the case of the "St. Harlampy" it was posi-

[38] Wharton, *Digest,* Vol. I, pp. 189-200.
[39] Richardson, *Messages,* Vol. V, p. 331.
[40] *Ibid.*

tively re-asserted by Secretary Marcy that the neutral has a perfect right to purchase the merchant vessels of the belligerents.[41]

Meanwhile the United States concluded many treaties with European and Central and South American states, restricting the list of contraband articles to the narrowest possible limits.[42] The treaty of 1849 with Guatemala is the common form of American treaties as far as contraband goods are concerned. To this, the treaty of 1825 with Brazil which included military clothes or uniforms as contraband, and several other treaties concluded during this period, are exceptions. During the Crimean war all the principal belligerent powers limited contraband strictly to arms and munitions of war.

B. *Blockade.*

From the downfall of Napoleon to the Declaration of Paris, a number of blockades were instituted on the Baltic Coasts, in several of the South American ports and elsewhere, but these blockades followed no precise or uniform rule as to the notifications, effectiveness or legality. Some proclamations extended to such a large area of the coasts as to say, "we will blockade all blockadeable ports." In 1849, the Danish minister notified a blockade of all the ports of Schleswig and Holstein, and some expressed the intention of a future blockade. In 1825 Brazil declared a blockade of Buenos Ayres and Uruguay extending over twenty degrees of latitude, and maintained by one frigate, one corvette, and three brigs. Calling this a 'blockade', the Brazilian government required all neutral vessels ready to depart to furnish bonds with promise not to violate the blockade of Buenos Ayres. The United States made a formal protest against the legality or the validity of the demand. Henry Clay, Secretary of State, wrote to the American representative in Brazil to the effect that "that measure has no justification whatever in the law of nations . . . . .

[41] Wharton, *Digest,* Vol. III, pp. 652-653, Marcy to Mason, Feb. 19, 1856.

[42] The treaty of 1800 with France, *Treaties and Conventions,* 1871, p. 270; that of 1825 with Brazil, p. 98; that of 1831 with Mexico, p. 549; that of 1836 with Venezuela, p. 878; that of 1836 with the Peru-Bolivian Confederation, p. 667; that of 1839 with Ecuador, p. 232; that of 1850 with San Salvador, p. 749; and that of 1849 with Guatemala, p. 440.

A blockade must execute itself . . . . .The belligerent has no right to resort to any subsidiary means".[43] In this dispute the United States upheld the principle of individual or special notification of blockade.

This and other similar cases illustrate the practice of paper blockade. There was no combined effort made by the European powers for the prevention of such illegal practice until 1856 in the Declaration of Paris. The United States had constantly been contending against the continental system and had made many claims for the damages sustained by the American carriers at the hands of the French cruisers and privateers during the struggle of 1806 and 1807 between Great Britain and France. Satisfaction had been constantly demanded for the illegal captures of neutral commerce, but with no avail. In 1829 President Jackson asserted in his Annual Message to Congress "that they would continue to furnish a subject of unpleasant discussion and possible collision." This long dispute strained the relations between the two governments. In 1831 Louis Philippe concluded a treaty with the United States at Paris, promising the payment of $5,000,000 for indemnity. The United States promptly ratified the treaty in 1832, but the French Chambers refused to appropriate the money. Louis Philippe intimated through the American minister that an earnest message from the President to Congress would serve to induce the French Chambers to give attention to the matter. In consequence of this intimation, President Jackson's message of December 1, 1834, urged the passage of a law, authorizing retaliation upon French property.[45] The vigorous language used in the message was little short of a declaration of war, and France consequently withdrew her minister at Washington, but the appropriation was soon made and the neutral demand of the United States was thus satisfied at last.

C. *The Right of Visit and Search.*

Another controversy settled in this period was that of the question of belligerent convoy between Denmark and the United States. The American neutral merchantmen with

[43] Atherly-Jones, *Commerce in War*, pp. 133 ff.

[44] Schurz, *Clay*, Vol. II, p. 52.

[45] Richardson, *Messages*, Vol. III, p. 105 et seq.

British convoy, then enemy to Denmark, were captured by Danish cruisers under the order of 1810. After a long dispute between the two powers, a treaty was signed in 1830, stipulating an indemnity to be paid by Denmark to the American claimants for the seizure of their property.[46] While admitting that sailing under enemy convoy was a justifiable cause for condemnation, the American commissioners argued that the American merchant vessels had submitted themselves to the British convoy not in order to escape search by Danish crusiers but in order to escape from the Milan and Berlin decrees of France, then an ally of Denmark.[47] Strong arguments were presented in favor of both sides, but even some of the American jurists expressed doubts as to the justification for the position taken by the United States in this controversy.

From 1824 to 1858 the United States made a dozen or more different treaties holding the principle that simple declaration of the commander of the convoy is deemed sufficient to prove the innocence of the merchantmen.[48] By that of 1860 with Venezuela it was further agreed in addition to the usual provisions, not to admit any merchant ship carrying on board contraband of war, to be protected by their convoys. Germany, Austria, Spain, Italy and the Baltic powers all agreed with and accepted the American usage, and France made six treaties during this period with the United States and other American Republics, adopting the same principle.

[46] Martens, *Nouveau Recueil,* Vol. VIII, p. 350.

[47] Dana, *Wheaton,* p. 709.

[48] Treaties that stipulated the exemption of convoy are: That of 1824 with Colombia, *Treaties and Conventions,* 1871, p. 174; that of 1828 with Brazil, p. 100; that of 1831 with Mexico, p. 551; that of 1832 with Chile, p. 124; that of 1836 with the Peru-Bolivian Confederacy, p. 669; that of 1836 with Venezuela, p. 879; that of 1839 with Ecuador, p. 234; that of 1846 with New Granada, p. 184; that of 1849 with Guatemala, p. 442; that of 1850 with San Salvador, p. 751; that of 1851 with Peru, p. 683; that of 1858 with Bolivia, p. 87; and that of 1860 with Venezuela, p. 891.

CHAPTER 5

History of Neutrality from 1861 to 1872

I. Recognition of Belligerency.

When the secession movement was threatening in the South and all the European powers, especially Great Britain, were closely watching its progress, Mr. Black, the Secretary of State, on February 28, 1861, strongly appealed to the European powers not to recognize the independence of the seceding States or to encourage their disunion movement. In his circular to the United States Ministers abroad he said, "It is the right of this government to ask of all foreign powers that the latter shall take no steps which may tend to encourage the revolutionary movement of the seceding States, or increase the danger of disaffection in those which still remain loyal".[1] To this warning Lord Russell replied that England would be reluctant to take any step which might sanction the separation, but that he could not make any promise for England in an affair whose circumstances might vary.[2] Mr. Seward, successor to Secretary Black, instructed the American Ministers abroad to the effect that any Confederate agent seeking for foreign intervention must be prevented from going abroad. In his circular of March 9, 1861, he said, "My predecessor . . . . . instructed you to use all proper and necessary measures to prevent the success of efforts which may be made by persons claiming to represent those States of this Union in whose name a provisional government has been announced to procure a recognition of their independence by the government of Spain."[3]

During the early part of the year 1861, seven States of the Union formed themselves into a separate Confederation with a constitutional government completely organized. Actual hostilities commenced on April 12, 1861, with the bombardment of Fort Sumter. After a two days' struggle the fort fell into

[1] *Diplomatic Correspondence of the United States,* 1861, p. 15.
[2] Lord Russell to Lord Lyons, May 6, 1861.
[3] *Dip. Cor.,* 1861, p. 16.

the hands of the Southern troops. Two hundred thousand men were under arms against the Federal government before the end of the month. President Lincoln's proclamation of the 15th called for 75,000 volunteers to suppress the seceding States, stating that they were " . . . . too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by law."[4]

After land warfare had thus begun, the President of the Southern Confederacy proclaimed on the 17th of April that letters of marque and reprisal might be issued to vessels to cruise against Northern commerce, and in reply to this, President Lincoln issued his proclamation declaring that the entire coast of the Southern States was in a state of blockade. In this proclamation, President Lincoln said, " . . . . . and whereas a combination of persons, engaged in such insurrection, have (sic) threatened to grant pretended letters of marque to authorize the bearers thereof to commit assaults on the lives, property or the goods of the citizens of the country lawfully engaged in commerce on the high seas, and waters of the United States . . . . . I . . . . . have deemed it advisable to set on foot a blockade of the ports within the States aforesaid . . . . . a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave either (sic) of the said ports, she will be duly warned by the commander of one of the blockading vessels . . . . and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo as prize, as may be deemed advisable . . . . . ."[5]

The official copy of this proclamation reached London on the 10th of May and the Queen issued the proclamation of neutrality on the following 14th, recognizing at the same time the belligerency of the Confederate States. This action was considered by the United States government as unfriendly and unneutral, and the question was made the subject of reiterated complaints. The justification of the British recognition lies in the fact, as the British argued, that the state of war was

[4] Richardson, *Messages,* Vol. VI, p. 13.
[5] *Ibid.,* pp. 14-15.

actually in existence, that the Confederate States possessed the de facto government required, that the offer of the letters of marque and the extension of warfare to maritime operations affected neutral commerce,[6] and above all, that Lincoln's proclamation of blockade constituted the virtual admission by the Federal government of the belligerency of the Confederate States. On the other hand, the United States claimed that no public war existed as long as the United States government retained the legal sovereignity over the seceding States, and that, therefore, all the proclamations issued by the Federal government up to the time of the British recognition declared the contest to be, not a public war but a domestic trouble. Therefore, the recognition of the belligerency of the Southern States by Great Britain was not justifiable on any ground of either necessity or moral right. It was further contended that by the time of recognition, no neutral commerce had been seriously affected by the war, and that the probable injury feared by Great Britain in the progress of the naval war was not a sound basis for such action.[7]

The contention over the British recognition of Southern belligerency continued until 1869 when President Grant openly admitted in his message to Congress that "this nation is its own judge when to accord the rights of belligerency, either to a people struggling to free themselves from a government they believe to be oppressive or to independent nations at war with each other".[8] The Supreme Court of the United States decided in the case of Ford v. Surget,[9] that the contest between the United States and the Confederate States was a war from the beginning of hostilities, and declared " . . . . . the government of the Confederate States, although in no sense a government de jure, and never recognized by the United States as in all respects de facto, yet was an organized and actual government, maintained by military power, throughout the limits of the States that adhered to it, except in those portions of them protected from its control by the presence of an armed force of the United States; and the United States, from motives of humanity and expediency, had conceded to the gov-

[6] *Dip. Cor.*, 1861, p. 26.

[7] Seward to Adams, Jan. 19, 1861, *State Papers*, 1862, Vol. II; and also of Jan. 12, 1867, *Ibid.*, Vol. I, 1867.

[8] Richardson, *Messages*, Vol. VII, p. 32.

[9] 1 Otto, 594 ff.

ernment some of the rights and obligations of belligerents." Most of the modern jurists hold the view that the recognition of Confederate belligerency was justifiable on account of the existence of war, of which the blockade proclamation gave evidence.[10]

The French Empire, following the example of Great Britain, also recognized the belligerency of the Confederate States. The French recognition did not at first affect the diplomatic relations between that country and the United States to any great extent, but the attitude taken by the French government afterwards led to formal complaints made by the United States. Secretary Seward's letters to Mr. Dayton, American Minister at Paris, explain the situation. Secretary Seward said in his letter of April 24, 1863, "It gives me great pleasure to acknowledge that, beyond what we deem the original error of France in recognizing, unnecessarily, as we think, the insurgents as a belligerent, we have every reason to appreciate the just and impartial observance of neutrality which has been practiced in the ports and harbors of France by the government of the Emperor."[11] But on the 21st of March 1864, Seward said in his complaint against the French government that " . . . . . the decisions of the Emperor's government, like those of other maritime powers, by which the insurgents of this country, without a port or a court of admiralty, are recognized by France as a naval belligerent, are in derogation of the law of nations and injurious to the dignity and sovereignty of the United States . . . . . and that they (the United States) regard these late proceedings in relation to the Florida and Georgia, like those of a similar character which have occurred in previous cases, as just subject of complaint . . . . . We claim that we are entitled to have our national vessels received in French ports with the same courtesy that we ourselves extend to French ships of war, and that all real or pretended insurgent vessels ought to be excluded from French ports . . . . . " It is significant to notice that by demanding the special privileges granted to American warships in French ports, Mr. Seward demanded from France what France had demanded from the United States during the war of the French Revolution.

[10] *International Law*, Hall, 5th Ed., pp. 38-39.
[11] *Dip. Cor.*, 1863, p. 662.

II. Continuous Voyage as Applied to Blockade and Contraband.

The English view of continuous voyage as asserted by Sir William Scott was applied only to the latter part of the voyage, that is after the ship had left the intermediate neutral port and was directly headed for the enemy destination. But the American courts extended this doctrine beyond the limits of the English interpretation. They freely applied the doctrine to the case of blockade or contraband, and vessels were captured while on their way from neutral port to neutral port, and were condemned as carriers of contraband goods or for intent to violate the blockade of the Southern ports. "They were thus condemned not for an act—for the act done was in itself innocent, and no previous act existed with which it could be connected so as to form a noxious whole—but on mere suspicion of intention to do an act. Between the grounds upon which these (American cases) and the English cases were decided there was of course no analogy. The American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country".[12] But it was argued on the part of American jurists that as long as there is sufficient evidence to prove, either by the ship's papers, or by the admission of the ship's captain, or by the local situation of the course of the vessel, the intention of the ship, or cargo, or both, it was immaterial what was the character of the port from which they sailed or what kind of port they proceeded to, provided that their ultimate aim was either an enemy port or a blockaded place.

In the case of the "Bermuda", which was captured on a voyage from England to Nassau, the Supreme Court decided " . . . . . it makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo. The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade-runners; it never avails them when the ultimate destination is ascertained."[13]

[12] *International Law,* Hall, 5th Ed., pp. 669-670.

[13] 3 Wallace 553.

The "Peterhof" was captured off Galveston while on a voyage from England to Matamoras, a Mexican neutral port. According to the opinion of Mr. Chief Justice Chase, " . . . . . a considerable portion of the cargo of the Peterhof was of the third class (articles used exclusively for peaceful purposes) . . . . . A large portion, perhaps, was of the second class (articles that may be used in peace as well as in war), but is not proved, as we think, to have been actually destined for belligerent use, and can not therefore be treated as contraband. Another portion was, in our judgment, of the first class (articles manufactured primarily and ordinarily for military purposes in time of war), or, if of the second, destined directly to the rebel military service".[14] At the time of the capture of the "Peterhof", Brownsville, then in Confederate territory, was in a state of blockade. Opposite to Brownsville, across the Rio Grande, was Matamoras, a neutral port. The peculiarity of the geographical situation of these ports made the English interpretation of continuous voyage utterly inapplicable. As long as the blockade lasted, all neutral ships or goods destined ultimately to the blockaded ports, transported entirely by sea, were to be condemned as lawful prize, either under the British or American doctrine of blockade. But in the case of contraband goods going from any neutral port to Matamoras, another neutral port, thence to be transported by land to Confederate territory, the English doctrine could not be applied, because the latter part of the journey could not be interfered with because it was on land. Under these circumstances the "Peterhof" was condemned as lawful prize by the District Court of New York on a charge of violation of blockade, and on an appeal brought before the Supreme Court of the United States, the Chief Justice, in the opinion of the Court, held that, " . . . . . while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras."[15]

The case of the "Springbok" is a very important one and has been the subject of much discussion . The "Springbok" left

[14] 5 Wallace, 59.
[15] *Ibid.*, 59.

London on December 9, 1862, with a cargo partly of contraband, on a voyage for Nassau, which " . . . . . was constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violation of blockade and in the conveyance of contraband of war".[16] When about one hundred and fifty miles from Nassau, and therefore on the high seas, she was captured by the Federal cruiser "Sonoma" on the ground that she intended to run the blockade. Both the vessel and the cargo were condemned by the District Court of New York. This decree was, however, reversed by the Supreme Court of the United States in December 1866, so far as the vessel was concerned, because the master declared himself ignorant as to what part of his cargo was contraband. The Court held that there was not sufficient proof of any hostile destination of the cargo known to the owners of the vessel, and therefore she was released.

The condemnation of the cargo of the "Springbok" was decreed by Mr. Chief Justice Chase with the assertion that " . . . we do not now refer to the character of the cargo for the purposes of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned, if really destined for Nassau and not beyond; and . . . . . must be condemned if destined for any rebel port, for all rebel ports were under blockade . . . . . Upon the whole case we cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the Springbok; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation . . . . . attached to the cargo from the time of sailing . . . . . ."[17]

The British government at once made formal complaint which led to a serious dispute between the two powers. The cases were finally referred to a Mixed Commission. Mr. Wharton justly remarked that, "While the great body of foreign jurists, British as well as continental, protested against

[16] 5 Wallace, 1.
[17] *Ibid.*, 26, 27-28.

the decision, it is not a little significant that at the hearing before the commission the British commissioner united in affirming the condemnation . . . "[18] It has to be admitted, however, that the case of the "Springbok" was the most assailable and disputable of all the cases that arose under the doctrine of continuous voyage at this time. On February 22, 1871, Secretary Fish said in his secret instructions to the American commissioners in the American-British Joint High Commission that " . . . . . with the exception of one case, that of the Springbok", out of one hundred and sixty-seven cases, " . . . . the Department of State is not aware of a disposition on the part of the British government to dissent from any final adjudiciation of the Supreme Court of the United States in a prize case."

The most important of all these cases, which were more or less similar in character, was that of the "Stephen Hart." She was captured by the United States ship of war "Supply", off the southern coast of Florida, bound ostensibly from London to Cardenas in Cuba, with a cargo of munitions of war and army supplies. Both the vessel and her cargo were condemned as lawful prize. The decision given by the District Court of southern New York asserted that " . . . . . if the guilty intention, that the contraband goods should reach a port of the enemy existed when such goods left their English ports, that guilty intention cannot be obliterated by the innocent intention of stopping at a neutral port on the way . . . . . And the sole purpose of stopping at a neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage . . . . . This Court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture, as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy . . . . . There must, therefore, be a decree condemning both vessel and cargo."

The "Adela", a British steamer, bound from Liverpool and

[18] Wharton, *Digest*, Vol. III, pp. 404-405.

Bermuda for Nassau, for which latter port she was carrying British mail, was captured and condemned for intended breach of blockade of the southern coast. She was found near Great Abaco Island with no destination sufficiently proved, without sufficient documents, with a large portion of her cargo contraband of war, and with many letters addressed to one of the blockaded ports, a port for which her first officer "admitted that she had intended to run".[18] On the ground of the admission made by the first officer, the Adela was condemned in spite of the denial of the master and other witnesses that she had intended to run the blockade. This case also led to a serious international dispute, and in consequence of this decision, the Minister of State of the Netherlands declared in his speech in the upper Chamber of the States-General, " . . . . . now is it not the clear course, is it not the duty of the Netherlands government, the government of the country which gave birth to Hugo Grotius, to approach the United States of North America, in conjunction with other maritime powers, for the purpose of prevailing on their government to retrace its steps?"

In spite of Mr. Hall's sweeping statement that these decisions " . . . . have been universally reprobated outside the United States, and would probably now find no defenders in their own country", Earl Russell himself openly admitted in his remarks made in the House of Lords on May 18, 1863, that the judgments of the United States prize courts did not evince any disregard of the principles of international law; that the law officers of the Crown after an attentive study and consideration of the decisions which had been laid before them were of the opinion that " . . . . . there was no rational ground for complaint as to the judgments of the American Prize Courts; and that the law of nations in regard to the search and seizure of neutral vessels had been fully and completely acknowledged by the government of the United States. . . . . It has been a most profitable business to send vessels to break or run the blockade of the southern ports, and carry their cargoes into those ports. . . . I understand that every cargo that runs the blockade and enters Charleston is worth a million of dollars, and that the profit of this transaction is immense. It is well-known that the trade has attracted a great

[18] 6 Wallace, 266.

deal of attention in this country from those who have a keen eye to such gains, and that vessels have been sent to Nassau in order to break the blockade at Charleston, Wilmington, and other places. . . . . I certainly am not prepared to declare, nor is there any ground for declaring that the courts of the United States do not faithfully administer the law . . . . . or that they are likely to give decisions founded, not upon the law, but upon their own passions and national partialities."

At any rate it is significant to observe that in later days the American doctrine of continuous voyage was adopted by Great Britain and Italy on at least one occasion. On the ground that a neutral state that has a port adjacent to belligerent territory could easily make all the rules of blockade and contraband impracticable, especially where the belligerent state itself has no seaport, Italy condemned the goods ostensibly bound for the Red Sea littoral, but really for Abyssinia, and Great Britain searched vessels bound for a Portugese African port with alleged contraband articles on board, which were supposed to be destined for the Transvaal.[20]

III. Analogues of Contraband and the Right of Visit and Search.

The United States introduced an unprecedentedly liberal rule during the Civil War in regard to neutral mail steamers. There had been no definite usage established until this time as to the carriage of dispatches and other mail matter in neutral ships. As early as the time of the war with Mexico, the United States exempted British mail steamers going in and out of the port of Vera Cruz from the right of visit and search. On October 31, 1862, Secretary Seward issued instructions to the Secretary of the Navy, which were at once communicated to the ministers of the various foreign states represented at Washington, to the effect that " . . . . . public mails of any friend-

[20] The cases of the "Bundesrath", 1900, and the "Doelwijk", 1896, *The London Times,* Jan. 4, 1900; and *State Papers,* Vol. LXXXVIII, p. 212, and Vol. XCIV, pp. 973 *et seq.*

It was formally agreed by the Declaration of London in 1909, that [Articles 30-31] absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport over land.

ly or neutral power, duly certified and authenticated as such" found on board captured vessels "shall not be searched or opened, but be put as speedily as may be convenient on the way to their designated destinations".[21] The naval officers were directed to deliver all such mail bags unopened to the Department of State at Washington or hand them to a naval or consular representative of the country to which they belonged, to be opened by him on the understanding that documents to which the belligerent government has a right should be delivered to it.

In the case of the "Peterhof" the United States prize court at first directed that the mails found on board the ship be opened in the presence of the British consul. But on appeal from the British authorities to the Secretary of State, the United States Attorney at New York was instructed to forward the entire mail unopened to its destination, although there was reason to believe that it contained some letters that should have been examined. Secretary Seward stated in his letter of April 21, 1863, to Mr. Adams that "I shall, however, improve the occasion to submit some views upon the general question of the immunities of public mails found on board of vessels visited under the belligerent right of search. . . . . The President believes it is not less desirable to Great Britain than it is to the United States, and other maritime powers, to arrive at some regulation that will at once save the mails of neutrals from unnecessary interruption and exposure, and at the same time, prevent them from being made use of as auxiliaries to unlawful designs of irresponsible people seeking to embroil friendly states in the calamities of war."

Up to the time of the Civil War, the United States had always been endeavoring to restrict the denomination of contraband to the narrowest possible limits. But as soon as that war broke out, the government issued a most sweeping list of contraband articles, including in the list of absolute contraband almost everything that "might be useful" whether especially fit for war or not. This list contained for the first time, engines, boilers, machinery for boats and locomotives, and cars for railways. Even provisions, which the United States had always up to this time striven to free from the taint of contraband, were also included.

[21] *Dip. Cor.*, 1863, p. 402.

A serious question arose as to whether or not belligerent persons were to be treated as a sort of contraband. Curiously enough, the United States, despite the fact that it had always combated the English practice of impressing British seamen from the vessels of neutral Americans, claimed in the famous case of the "Trent' the right of taking enemy persons from British neutral ships. The "Trent" was an English mail steamer, carrying on board the Confederate commissioners, Mason and Slidell, on their way to London and Paris as diplomatic agents of the Confederacy. She sailed from Havana for St. Thomas on November 7, 1861, under the command of an officer of the British navy. While passing through the Bahama channel, nine miles from the coast of Cuba, and therefore on the high seas, the "Trent" was stopped by an American frigate, the "San Jacinto", and Mason and Slidell were taken from her by force and carried as prisoners of war to Boston, while the ship was allowed to continue on her voyage. The restoration of the Confederate commissioners was immediately demanded by the British government, and at the same time an apology was requested of the United States for her violation of British neutral rights. The governments of Austria, France, Italy, Russia and Prussia instructed their respective representatives at Washington to sustain the British demand. Captain Wilkes, the commander of the "San Jacinto", contended that the commissioners were embodied belligerent dispatches, and Secretary Seward declared that they were contraband persons. Seward's letter to Lord Lyons, December 26, 1861, states that "the question here concerns the mode of procedure in regard, not to the vessel that was carrying the contraband . . . but to contraband persons." . . . . . "The belligerent captor has the right to prevent the contraband officer, soldier, sailor, minister, messenger, or courier from proceeding in his unlawful voyage, and reaching the destined scene of his injurious service."

Secretary Seward asserted in this same letter that "All writers and judges pronounce naval or military persons in the service of the enemy contraband. Vattel says that war allows us to cut off from an enemy all his resources, and to hinder him from sending ministers to solicit assistance. And Sir William Scott says that you may stop the ambassador of your enemy on his passage. Dispatches are not less clearly contraband, and the bearers or couriers who undertake to carry them fall under

the same condemnation. Sir William Scott, speaking of civil magistrates who are arrested and detained as contraband, says: 'It appears to me on principle to be but reasonable that when it is of sufficient importance to the enemy that such persons shall be sent out on the public service at the public expense, it should afford equal ground for forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations' ".[22]

The British government strongly protested against this position. Earl Russell held that the persons in question and their dispatches were not contraband of war and that the general right and duty of a neutral power to maintain its own communications and friendly relations with both belligerent powers could not be disputed. The difference of opinion between the two governments furnished the basis for a great deal of dispute. Secretary Seward argued that the courts of admiralty "have formulas to try only the claims to contraband chattels, but none to try claims concerning contraband persons" and therefore, "the courts can entertain no proceedings and render no judgment in favor of or against the alleged contraband men",[23] and Dana confirms this opinion by saying that in case the "Trent" were brought into an American prize court, Mason and Slidell "could not be condemned or released by the court."[24] Woolsey gives his opinion substantially in these words: (1) that there is no process known to international law by which a nation may extract from a neutral ship on the high seas, a hostile ambassador, a traitor, or any criminal whatsoever; (2) that if there had been hostile dispatches found on board, the ship might have been captured and taken into port for legal adjudication; (3) that the character of the vessel conveying mails and passengers from one neutral port to another neutral part precludes all possibility of guilt; and (4) that "it ill became the United States—a nation which had ever insisted strenuously upon neutral rights —to take a step more like the former British practice of extracting seamen out of neutral vessels upon the high seas, than like any modern precedent in the conduct of civilized nations, and that too, when she had protested against this

[22] *Senate Doc.*, Vol. IV, 1861-1862, *Ex. Doc.*, No. 8, p. 7 ff.
[23] Seward to Lord Lyons, December 26th.
[24] Dana, *Wheaton*, p. 650.

procedure on the part of Great Britain and made it a ground for war. As for the rest, this affair of the Trent has been of use to the world, by committing Great Britain to the side of neutral rights upon the sea."[25]

Out of this dispute it was made clear that belligerent diplomatic persons were not to be considered as contraband, their conveyance in neutral vessels en route for neutral destinations was not an unneutral service, and that, above all, the captor had no right to decide for himself whether things or persons in question are contraband or not.

IV. The Alabama Cases.

During the American Civil War the Confederacy sought to create a navy that would seriously harass the merchant marine of the United States. As there were no means in the Southern ports for the building of war vessels, commissions were placed with British ship builders, and as a result numerous war vessels were either wholly or partly fitted for service in the ship yards of Great Britain. The United States, as a belligerent, naturally called upon the British government to prevent its neutrality from being violated, by allowing Confederate agents and British subjects to fit out and arm vessels for the Confederate navy. In reply to this demand, Great Britain maintained that the commercial freedom of her subjects could not be interfered with. As a result of this difference of opinion and of the depredations of Confederate vessels built in England, a dispute arose which was not finally settled until the Geneva Arbitration on the so-called 'Alabama Claims' in 1872.

In reference to Great Britain, Bernard remarks that "the present war had placed this country in a situation very new to her, and has forced upon her some sharp but wholesome lessons. She has had to school herself, for the first time, in the practice of neutral duties and feel an interest in neutral rights. She has had to endure without resistance, though not without wincing, the exercise of those rough and galling powers with which international law arms a belligerent, which she herself has so often wielded with a heavy hand. English ship captains have discovered that they must submit to have their vessels stopped and overhauled by foreign cruisers; English

[25] Woolsey, *International Law*, 6th Ed., pp. 338-339.

merchants and ship owners have seen their property seized and carried into a foreign port, there to await the slow and questionable justice of a prize court, missing their markets and losing their expected profits, with little chance, even should the seizure prove to be unfounded, of obtaining any adequate compensation. Our chief industry . . . has been famished for two whole years by the loss of the food it subsisted on . . .[26]

Some authors have expressed their regret that Great Britain had refused to agree with the American view of exempting belligerent property from capture on the high seas, for this might have avoided all the disputes growing out of the Alabama Cases. "Had an agreement been reached," said one of the jurists, "as might have been in 1856, this Alabama case could never have existed. For had European powers accepted at that time the American proposition to declare the exemption from capture of belligerent private property on sea, the United States would have been severally bound by the declaration, and the Southern States could not have dared to ruin its young cause so flagrantly as the employment of the Alabama against merchant vessels would in that case have been."

The British government at first attempted to observe their Neutrality Act of 1819 with good faith. The order of June 1, 1861, interdicted all armed vessels and privateers of either of the belligerents from entering British ports with their prizes,[27] and the instructions of January 31, 1862, show the good intention of the British government.[28]

Soon after the outbreak of the war, the American government proposed to England and France to adopt the arrangements concerning the privileges of the neutral flag and the rules of blockade agreed to by the Declaration of Paris. They added by way of suggestion the further proposal that private property should be entirely exempt from capture on the high seas. The proposal as to the neutral flag and blockade met with no opposition, but as to the exemption of private prop-

[26] Bernard, *Violations of Neutrality by England,* p. 3.

[27] Appendix to the Case of Great Britain laid before the Tribunal of Arbitration at Geneva under the Provisions of the Treaty between the United States of America and Her Majesty the Queen of Great Britain, Vol. 3, p. 18.

[28] *Papers Relating to the Treaty of Washington,* Vol. I, pp. 226-227.

erty from capture, the British Minister replied as follows: "The Ambassador of France came to me yesterday, and informed me that the Minister of the United States had made M. Thouvenel two propositions. The first was that France should agree to add to the Declaration of Paris the plan for protecting private property on sea from capture in the time of war. Mr. Thouvenel wishes to learn the opinion of Her Majesty's Government. Her Majesty's Government decidedly objects to the first proposition. It seems to them that it would reduce the power, in time of war, of all states, having a military as well as a commercial marine." But when forced to pay the indemnity awarded to the United States by the Geneva Arbitration Court for the depredations committed on American commerce during the Civil War by Confederate ships built and fitted in Great Britain, Great Britain came to realize the truth of Franklin's prophetic warning made as early as 1783 that "the practice of robbing merchants on the high seas, a remnant of ancient piracy, though it may be accidentally beneficial to particular persons, is far from profitable to all engaged in it . . ."

The British ship builders and individual merchants, however, found many occasions to avail themselves of illegal profit by constructing and fitting out ships of war destined for the Confederate Navy and to cruise against the commerce of the United States. The cruisers named by the United States as having been constructed or fitted wholly or in part for warlike use in Great Britain were: the "Sumter", the "Nashville", the "Florida" with her tenders the "Clarence", the "Tacony" and the "Archer", the "Alabama" with her tenders the "Tuscaloosa", and the "Retribution", the "Georgia", the "Tallahassee", the "Chickamauga" and the "Shenandoah".[29] Of these the four principal ones are the "Florida", the "Georgia", the "Alabama" and the "Shenandoah". The cases of all of these ships were included under the general head of the 'Alabama Claims'.

It was the Alabama, first known as No. '290', that of all the Confederate cruisers did the most damage to American shipping, and caused so many American vessels to seek the protection of the English flag. She was built at the ship yards

[29] *Papers Relating to the Treaty of Washington,* The Case of the United States, p. 320.

of Messrs. Laird at Birkenhead, near Liverpool, as a war vessel, and there seemed to be no desire on the part either of the agents or the builders to disguise that fact. She was launched on the 15th of May, 1862, fully provisioned, but unarmed. While the vessel was being finally fitted out, Mr. Adams wrote to Earl Russell, pointing out the fact that the ship known as the '290' was ostensibly being fitted out as a vessel of war and was in charge of men who were notoriously Confederate agents.[30] The Law Officers of the Crown were charged to look into the matter at the earliest possible moment. This they did, but reported that it did not seem to them that there was any cause for apprehension because the ship was not armed in any way. But they further added that the customs officers at Liverpool would be instructed to keep a close watch on the vessel.[31]

While the British government was discussing at London what should be done with the '290', that vessel quietly slipped out of the roadstead with a party of ladies and gentlemen on board and apparently bound for a trial trip, but instead the ship went on down the Mersey, sending the guests back on the tug "Hercules". She left Liverpool on the 28th of July and arrived at Terceira, one of the Azores on the 10th of August. There she met the British ships, "Agrippina", and "Bahama", which had on board her armament, and was fitted out and completely armed.[32] The '290', now known as the "Alabama", was then turned over to Captain Semmes and his crew, composed almost entirely of Englishmen. For nearly two years the "Alabama" cruised over the Atlantic, and even as far as the Indian Ocean on her destructive career. "The vessel known first as the gunboat 'No. 290', and now as the Alabama", wrote Mr. Adams in a letter to Earl Russell, "is roving over the seas capturing, burning, sinking and destroying American vessels without being lawfully authorized from any source recognized by international law, and in open defiance of all judicial tribunals established by common consent of civilized nations as a restraint upon such a piratical mode of warfare".[33] She was, however, at last sunk by the United States ship of war, "Kearsarge," off Cherbourg on June 9, 1864.

[30] *Papers Relating to the Treaty of Washington,* Vol. 3, p. 81.

[31] Appendix to the British Case, Vol. I, p. 181.

[32] *Papers Relating to the Treaty of Washington,* Vol. I, pp. 150-151.

[33] Adams to Earl Russell, Oct. 23, 1863.

The damage done by the "Alabama" and other Confederate cruisers in this category was tremendous and great popular excitement was aroused against Great Britain throughout the Union. Mr. David Ross, of the English Bar, said in September, 1867, "During a somewhat prolonged visit to the United States in the year 1865, I talked freely and frequently with men of all conditions of life in the northern and western states, and none of them, so far as I can recollect, had the slightest ill-will to England on account of the Trent affair, because they seemed to think that England was right in the extreme course she adopted; but I met comparatively few who could talk with common patience of the Alabama depredations, and I doubt if I met one who would have raised his voice for peace if the President of the United States had decided that redress must be had by war." Under these circumstances, all the accusations charged against Great Britain of a want of diligence, 'a war in disguise', and 'a consistent course of partiality toward the insurgents', may be more or less of an exaggeration, but as a matter of fact, the British authorities failed to observe their neutral duties. In spite of the ample evidence furnished by Mr. Adams to Earl Russell of the ultimate destination and use of the iron-clad rams that were under construction in England for the Confederacy, Earl Russell said in a letter to Mr. Adams, that "Her Majesty's Government are advised that they can not interfere in any way with these vessels".[84] On October 26th of the same year he wrote again to Mr. Adams that "In the meantime I must request you to believe that the principle contended for by Her Majesty's Government is not that of commissioning, equipping, and manning vessels in our ports to cruise against either of the belligerent parties—a principle which was so justly and unequivocally condemned by the President of the United States in 1793, as recorded by Mr. Jefferson in his letter to Mr. Hammond of the 13th of May of that year. But the British government must decline to be responsible for the acts of parties who fit out a seeming merchant ship, send her to a port or to waters far from the jurisdiction of British Courts, and there commission, equip, and man her as a vessel of war."

The United State government, nevertheless, claimed compensation for the damages done by the Confederate cruisers

[84] Earl Russell to Mr. Adams, Sept. 1, 1863.

built in Great Britain, on the ground that Great Britain had been derelict in the strict neutral attitude that she should have maintained. In spite of all the denials made by Earl Russell of England's liability for these damages, the United States persistently demanded that their claims be recognized, until at last they were referred to the Geneva Arbitration of 1871.

The suggestion that the claims be arbitrated was in the first instance made by the United States, but was strongly opposed by Earl Russell. The English government throughout had assumed an attitude that apparently precluded all possibility of arbitration, or of any adjustment. On August 30, 1865, Earl Russell wrote to Mr. Adams and said: "In your letter of October 23, 1863, you were pleased to say that the Government of the United States is ready to agree to any form of arbitration. Her Majesty's Government have thus been led to consider what question could be put to any Sovereign or State to whom this very great power should be assigned. It appears to Her Majesty's Government that there are two questions by which the claim of compensation could be tested. The one is: Have the British Government acted with due diligence, or, in other words, with good faith and honesty, in the maintenance of the neutrality they proclaimed? The other is: Have the Law Officers of the Crown properly understood the Foreign Enlistment Act when they declined in June, 1862, to advise the detention and the seizure of the Alabama, and on the other occasions when they were asked to detain other ships building or fitting in English ports? It appears to Her Majesty's Government that neither of these questions could be put to a foreign government with any regard to the dignity and character of the British Crown and the British nation. Her Majesty's Government are the sole guardians of their own honor . . . Her Majesty's Government must therefore decline either to make reparation or compensation for the captures made by the Alabama, or to refer the question to any foreign state. Her Majesty's Government conceive that if they were to act otherwise, they would endanger the position of neutrals in all future wars . . ."[35]

But on October 14, 1865, the Earl wrote again to Mr. Adams and said, "Her Majesty's Government are ready to consent to the appointment of a Commission to which shall be referred all

[35] *Dip. Cor.*, 1865, Part I, p. 545.

claims arising during the late Civil War, which the two Powers shall agree to refer to the Commissioners".[36] To this, Mr. Adam replied on November 21, 1865, in his correspondence with the Earl of Clarendon, "I am directed, therefore, to inform your Lordship that the proposition of Her Majesty's Government for the creating of a joint Commission is respectfully declined."[37]

The advisability of reopening the subject became, by the latter part of 1866, a topic of general discussion in the English press, and the Government—Lord Stanley had succeeded Earl Russell as Foreign Secretary—was understood to favor an amicable settlement of the dispute. The Prime Minister, Earl Derby, gave countenance to such a view in a speech at the Mansion House.[38] The London Times supported the view that Earl Russell had rejected Mr. Adams' demands on rather narrow grounds, and urged that the claims were "not forgotten by the American people", and that they never would be forgotten until they were submitted to "some impartial adjudication".[39] On March 6, 1868, most of the members who spoke on the Alabama Claims in the House of Commons, including Lord Stanley himself, favored the adoption of a conciliatory attitude toward the United States.[40]

In June, 1868, President Johnson appointed Mr. Reverdy Johnson to succeed Mr. Adams as the United States Minister at London, with instructions to seek an amicable arrangement of several vexatious questions. Mr. Johnson arrived in England and negotiated for several months with Lord Stanley and his successor, Clarendon. At length, on January 14, 1869, the Johnson-Clarendon convention providing for the settlement by a commission of private claims was signed. A strong opposition was raised in the United States against this arrangement because it left unsettled the great questions at issue. Charles

[36] The Official Correspondence on the Claims of the United States in respect to the Alabama, Earl Russell, 1867, p. 165.

[37] The Official Correspondence on the Claims of the United States in Respect to the Alabama, p. 223.

[38] Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the Second Session of the Fortieth Congress, Government Printing Office, 1868, Part I, p. 25.

[39] *The London Times,* November 17, 1866, and January 4, 1867.

[40] *Ibid.,* March 7, 1868.

Sumner was the most active and influential of the agitators.[41] The Senate refused to ratify the treaty and the strained relations between the two powers remained unaltered.

President Grant, in his Message to Congress on December 5, 1870, expressed his regret at the failure of the two governments to come to some understanding on the subject. Early in January, 1871, Sir John Rose visited Washington on a confidential mission, expressing the desire of the British government for better relations between the two countries. On the 3rd of February, 1871, Secretary Fish wrote to the British Minister that the President assented to the proposal to create a Joint Commission to arrange for a settlement of the various causes of difference between the two Powers. The Joint High Commission was consequently organized at Washington on February 7, 1871.[42] After many and long deliberations, the commissioners finally agreed to and signed, on the 8th of May, 1871, the treaty that became known as the Treaty of Washington. By this famous treaty, the Alabama claims were referred to a Tribunal of Arbitration to sit at Geneva. This Tribunal was to consist of five arbitrators appointed respectively by the President of the United States, Her Britannic Majesty, the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil. The members thus appointed constituted the celebrated Court of the Geneva Arbitration. In order to guide the procedure of the court, it was provided by Article VI of the Treaty of Washington that "in deciding the matter submitted to the Arbitrators, they shall be governed by the following three rules . . .

"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.

"Secondly.—Not to permit or suffer either belligerent to

[41] *Memoirs and Letters of Charles Sumner,* Edward L. Pierce, Vol. 4, p. 312.

[42] *Papers Relating to the Treaty of Washington,* Vol. I, p. 9.

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 and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."[48]

The claims laid by the United States before the tribunal for consideration were of two kinds:

(1) Claims for the direct losses entailed by the destruction of vessels and their cargoes by insurgent cruisers, and the expenditures incurred in the pursuit of the cruisers, and

(2) The claims for indirect losses or damages growing out of the interference with the American merchant marine, the increased rates of insurance and the prolongation of the war.

It is not necessary here to go into detail in every argument used by the two countries in support of their claims, but it would be interesting to see where the difference of opinion lay on the question of what constituted 'due diligence'. The three rules of the Treaty of Washington charged the commission to determine the validity of the claims of the United States by applying the rule of 'due diligence' to the conduct of Great Britain. Naturally the arguments of both sides were largely taken up with definitions of the term, for it was upon this point that the success of either side lay.

Three views or definitions of the term, 'due diligence' may be found in the arguments and the decision of the Court in the Geneva Arbitration: the views of the United States, of Great Britain, and of the Court. In the case of the United States we find the position of that country on the question defined 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, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, and thus possibly

[48] *The Treaty of Washington,* Article VI.

dragging it into a war which it would avoid; a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and imposes upon it the obligation, when it receives the knowledge of an intention to commit such acts, to use all the means within its power to prevent it.

"No diligence short of this would be 'due'; that is, commensurate with the emergency, or with the magnitude of the results of negligence".[44]

Great Britain, on the other hand did not place as strict an interpretation on the term, 'due diligence', as did the United States. "Due diligence," says the British Case, "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 of justice, equity, and general expediency on which the law of nations is founded." The definition is limited in more concise words a little later in the Case. "It would commonly, however, be unreasonable and impracticable to require that it should exceed that which the governments of civilized states are accustomed to employ in matters of their own security or that of their own citizens".[45] From these two quotations from the Case of Great Britain, it can be gathered that, according to the English view, the responsibility of a neutral for acts done in violation of its neutrality, and harmful to one of the belligerents, is limited by the requirements of its municipal law. The United States did not agree with this interpretation of 'due diligence', and did not consider that municipal law marked the limit of a nation's responsibility. "The obligation of a neutral to prevent the violation of the neutrality of its soil is independent of all interior or local law. The municipal law may and ought to recognize that obligation; but it can neither create nor destroy it, for it is an obligation resulting directly from International Law, which forbids the use of neutral territory for hostile purpose.

"The local law, indeed, may justly be regarded as evidence, as far as it goes, of the nation's estimate of its international

[44] *Papers Relating to the Treaty of Washington,* Vol. I, p. 67.
[45] *Ibid.,* pp. 237-238.

duties; but it is not to be taken as the limit of those obligations in the eye of the law of nations."[46]

The opinion of the Court on this question was very general in its terms, and in no way adequately defined it. " . . . 'due diligence' . . . ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed . . ."[47] However, the Court supported the United States in its claim that municipal law should not be the measure of international obligations, in these words, ". . . the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on a plea of insufficiency of the legal means of action which it possessed."[48]

Article VI of the Treaty of Washington, besides giving the three rules of action to guide the Arbitration Court in its award, invited other maritime powers to accede to the principle of 'due diligence', but no powers availed themselves of the opportunity, for the simple reason that no adequate or strict interpretation of the term had been evolved by the Court. However, the discussions had their effect on international law, generally in the practice of nations from that time to the present, and in particular in the XIII Convention of the Second Hague Conference where it was held that "A neutral government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which has been adapted, in whole or in part, within the said jurisdiction to warlike use."[49]

The Court awarded the United States a lump sum of $15,500,000 damages for the direct losses, but the claims for damages due to indirect losses were thrown out on the ground that they were confused with the general and necessary costs of the war itself, irrespective of the depredations of the Confederate cruisers.[50]

[46] *Papers Relating to the Treaty of Washington,* Vol. I, p. 47.
[47] *Ibid.,* p. 50.
[48] *Ibid.,* p. 51.
[49] Second Hague, XIII Convention, Art. 8.
[50] *Papers Relating to the Treaty of Washington,* Vol. IV, p. 53.

As a result of the controversy leading up to the final establishment of the Geneva Arbitration Court by the Treaty of Washington, the British Foreign Enlistment Act of 1819 was amended. A royal commission was appointed in January 1867 to investigate the conditions of the existing laws available for the enforcement of British neutrality and to see if there was any need for a better provision than that existing. As a result of this action, the Commissioners drew up an act which was adopted as the Foreign Enlistment Act of 1870. This statute furnished preventive measures against further violations of neutral duties on the part of British subjects or of any person within the jurisdiction of the laws of Great Britain, and laid severe restrictions upon British ship builders. In the main, this act followed the American Neutrality Act of 1818 more closely than the former had done. The sense of neutral obligations became stricter and the freedom of neutral individuals became more restricted. The offence of illegal enlistment was prohibited under heavy penalty of fine and imprisonment, including even a master or owner of a ship, who knowingly ships or engages to ship an illegally enlisted person. The act prohibited any hostile expedition from leaving the waters of Great Britain, and provided for the prevention of the preparation of such an expedition, and penalized any person who should prepare or fit out, or assist in preparing or fitting out, or who took part in any such illegal expedition. The act further prohibited any augmentation of warlike forces and provided punishment for any person who, by the addition of guns or of any warlike equipment, was knowingly concerned in such augmentation. Most significant of all was the prohibition of illegal ship building. The act prohibited any person, without license from Her Majesty, to build, or agree to build, to issue or deliver a commission to, to equip, to dispatch, or allow to be dispatched, any ship with the intent or knowledge of the fact that the same would be employed in the military or naval service of any foreign state with which Great Britain was at peace. In case a person should build or equip a vessel for a belligerent power in pursuance of a contract made before the outbreak of the war, he was required to give such security as was demanded by the government and to allow any measures for the prevention of the departure of the ship from British waters that the government might see fit to impose, and more-

over the ship could not be dispatched or sent out without license from Her Majesty's government, until the end of the war. This provision was decidedly more satisfactory than the precautions taken in the former act, for in place of leaving the question of the legality of equipping, building or sending out a ship to which suspicion was attached, to the ship builder, it was provided that the government authorities were to take all the responsibility of searching or detaining such a vessel.

This act went beyond anything that was demanded by the United States before the Geneva Tribunal, and it was acknowledged even in countries other than England that the act was in advance of the requirements of international law. The conduct of a nation in regard to keeping its neutrality intact might safely be left to its municipal standard, where such an act as this exists, and in all probability if this had been the standard in England at the time of the Civil War and the law had been strictly enforced, there never would have been occasion to bring England before the bar of international justice in the Geneva Arbitration Court. Many authors seem rather inclined to agree with Walker, who concluded his elaborate discussion on this subject by stating that "if administered with resolution by British ministers, and with good faith and reasonable diligence by British subordinate officials, they will in any event preserve Great Britain from the condemnation of another Geneva Tribunal, and at least, they evince the real desire of the Island Kingdom to equip herself for the performance of a great international duty."[51]

[51] Walker, *The Science of International Law*, p. 502.

CHAPTER 6

Summary Review

The early history of the law of nations allowed of no such idea as neutrality, as we understand it now. The very elementary ideas of neutrality began with the gradual decline of the Roman Church and the Roman Empire. The earlier writers on international law, beginning with Hugo Grotius, endeavored to define neutrality, and their opinions were of considerable value to its development. But their ideas of it were more or less vague and imperfect, admitting the legality of warlike assistance rendered by neutrals to belligerents under certain circumstances as consistent with neutrality.

Having no definite rules to regulate the relations between neutrals and belligerents, international commerce was entirely at the mercy of warring states and was afforded no protection whatever. The principle of the inviolability of neutral territory, important as it has now become, was practically unknown down to the latter part of the 18th century. Belligerents were left entirely free to transport their troops across neutral territory, to raise land and naval forces in neutral states, and to arm and equip vessels of war in neutral jurisdiction. States had, on the other hand, neither the right to prevent neutral operations in their territory nor were they held responsible for the acts of their subjects in entering the service of a foreign state, or from engaging in any other service hostile to one of the belligerents. The subjects of neutral states, as well as the states themselves, were at perfect liberty to give all sorts of warlike succours to either, or both, of the belligerent parties, as their individual interests or sentiments should dictate.

The rudimentary ideas of neutrality were found in some of the early maritime codes of European countries, the Consolato del Mare being the most famous of them all. The principle of the Consolato, namely, 'spare your friend and harm your enemy', was a manifestation of the growing desire to distinguish neutrals from belligerents and for protecting the lat-

ter. Great Britain, acknowledging the justice of this principle, always insisted upon condemning enemy's ships and enemy's goods, while liberating friend's ships and friend's goods. Some of the other European powers practiced this rule but none of them to the extent that England did.

During the 16th century the Dutch, desirous of avoiding belligerent search on the high seas, introduced the liberal principle of free ship, free goods. Most of the European maritime powers did not welcome the introduction of this new principle, and the Dutch in their efforts to insert this rule in their treaties with other states introduced the converse principle of enemy ship, enemy goods. The French exercise of belligerent rights, followed later by Spain, was the most extreme of all the European countries. Under the doctrine of hostile infection, they condemned neutral vessels for carrying enemy goods. It goes without saying that under such circumstances international trade was in a most deplorable condition down to the end of the 18th century.

The declaration of the independence of the United States in 1776 marks the introduction of a new era in the history of the laws of neutrality. "From the beginning of its political existence," says John W. Foster, "it (the United States) made itself the champion of a free commerce, of a sincere and genuine neutrality, of respect of private property in war, of the most advanced ideas of natural rights and justice; and in its brief existence, by its persistent advocacy, it has exerted a greater influence in the recognition of these elevated principles than any other nation in the world." The most important questions, the settlement of which was largely influenced by the United States, were (1) the recognition of independence, (2) the inviolability of neutral jurisdiction, and (3) the freedom of neutral commerce.

During the American war for independence, neutral France was drawn into war with England largely by the influence of American diplomacy. In the accustomed way of neutrals in those days the French Court gave freely, though secretly at first, all kinds of warlike assistance to the Americans in their struggle for independence. The formal recognition of American independence by the treaty of amity and commerce between the United States and France was premature, and as a result, Great Britain declared war against France. From this

instance, it became universally understood that a premature recognition of the independence of a revolted colony by a neutral country justified the mother-country in declaring war against the neutral.

Since the successful establishment of the American Republic, the question of the recognition of independence and of belligerency has become the subject of the most lively discussions between nations. More or less inspired by the American Revolution, many of the European colonies in the Western Hemisphere, especially those of Spain and Portugal, revolted from the mother-country and demanded from neutral powers the recognition of their political existence. The general rules of such recognition as understood at the present time, were largely established through the influence of the United States in its relations with the European and South American revolutionary movements. The wise discretion and the judicious statements of the American statesmen shown in the diplomatic correspondence of the time set forth a correct example which the nations of the world follow.

During the American Civil War, the British recognition of the belligerency of the Confederate States aroused tremendous excitement and feeling against Great Britain in the United States. But the American government acquiesced in the British interpretation of the recognition, thus acknowledging that it was not premature. Out of this dispute it was made clear that such a recognition is justifiable on the following conditions: when neutral commerce is affected by the contest, as the British trade was by the Civil War; and when war actually exists, as it was manifested by Lincoln's blockade proclamation.

The celebrated Genet affair settled a most important question in the history of neutrality. The principle of the inviolability of neutral territory was first proclaimed by President Washington in 1793. In order to maintain the neutrality of the United States during the progress of the war between England and France, Washington warned the citizens of the United States, in his famous Neutrality Proclamation, to refrain from any warlike participation in the contest. This Proclamation marked also the inauguration of the new principle that a neutral state has a positive duty to prevent its citizens from any hostile action in the service of a foreign state

against another with which the neutral country is at peace.

In order to fulfill the neutral duties set forth in the proclamation and to meet the difficulties that stood in the way of the execution of the orders by the government authorities, Congress passed the first Foreign Enlistment Act of 1794, prohibiting any person from performing unneutral services, within the jurisdiction of the United States, against any state with which the United States was at peace.

During the revolutionary uprisings in South America, the government of the United States found the first Foreign Enlistment Act inadequate as a means of procedure against the expeditions that were being fitted out daily in the ports of the United States to help the revolting colonies in their struggles for independence, and as a result the second Act was passed in 1818. By this Act, the President of the United States was authorized to use the land and naval forces to prevent any illegal expedition and the District Courts were empowered to detain any vessel ready to sail unless a bond of security was furnished with the promise that the vessel should not be employed contrary to the terms of the law. This Act became the basis for the legislation of many European states in later years, the act of 1819 in England being the most prominent. Under the difficulties of maintaining its neutrality during the revolutionary uprisings in South America, the British government closely followed the American Act of 1818, excepting the requirement of security to be furnished by the vessel about to depart. This part of the act was later adopted by Great Britain in her Foreign Enlistment Act of 1871, after there had been ample opportunity furnished during the American Civil War to prove the necessity of the requirement. The fact that the British government carefully followed the American neutrality acts could never be better shown than by the well known statement of Mr. Canning: "If I wished for a guide in the system of neutrality, I should take that laid down by America in the days of the Presidency of Washington and the Secretaryship of Jefferson . . ."

Had the Alabama dispute been left permanently unsettled, the action of England would have furnished an unfortunate precedent for neutral states in future wars. The British government represented by Earl Russell, endeavored to apply to the expeditions of the "Alabama" and the other Confederate

ships the principle of individual contraband trade, and therefore had repeatedly asserted that "Her Majesty's Government can not in any way interfere with these vessels." Furthermore, the Earl refused to submit these claims to a court of arbitration that had been proposed by the United States. Treating them as hostile expeditions, and not as contraband trade, the United States insisted upon claiming that it was a neutral duty incumbent upon the British government to have kept the ships from leaving English waters, and as it failed in this duty, the British government must compensate the United States for the damage done to American commerce. These claims were never given up until the British government at last consented to submit them to a court of arbitration at Geneva, the final award of which compelled Great Britain to pay a heavy indemnity for the direct damages sustained by the citizens of the United States. By this Arbitration it was decided that the British government failed to use due diligence in allowing the Alabama and the other vessels to depart from British jurisdiction, and also by admitting them afterwards into its various colonial ports as public vessels of the Confederate States. Since the settlement of this dispute no neutral state would make the mistake of treating as contraband trade hostile expeditions fitted out within its own jurisdiction to serve against a nation with which it was at peace.

At the time of the Revolution the United States followed the practice of Great Britain in regard to the treatment of neutral commerce. Enemy ships and enemy goods were condemned, and free ships and free goods were allowed to go free. But the United States government soon gave up this practice and in 1778 the principle of free ship, free goods, was adopted in a treaty with France. The French government, following the provisions of the treaty with the United States, in spite of its former practice of hostile infection, issued an ordinance exempting from seizure all neutral ships bound to or from enemy ports. But on account of the continued severity of the British rule, this ordinance was soon afterward revoked by the F ·ch government.

.ıce the United States began to mitigate the severity of the English treatment of neutral trade, it never advocated the principles of the Consolato del Mare. Its chief endeavor was to establish permanently the principle of free ship, free goods,

and it therefore repeatedly asserted that the two maxims, free ship, free goods and enemy ship, enemy goods, were not inseparable. Although these two opposite rules were both adopted in some of the treaties between the United States and other parties during this period, the United States never accepted the principle of enemy ship, enemy goods, alone. Either with or without the enemy ship, enemy goods, clause, the United States inserted the free ship, free goods, maxim practically in all of its treaties down to 1799, when it deliberately abandoned the liberal rule in its treaty with Prussia. Through their experiences, the American statesmen discovered the fact that the United States was always the loser in the practice of the liberal principle, so long as the other powers would not adopt the same principle, and consequently decided not to insist any longer on the establishment of the liberal rule.

During the struggle between Napoleon and England, each trying to cripple the other on the sea, the United States was the only power that still claimed the freedom of neutral commerce. As a result of this claim, the French government was compelled to pay an indemnity to the United States for damage done to American ships by French cruisers. The English government still continued in its old practice of the Rule of the War of 1756 and of impressing British seamen from American vessels on the high seas. The United States retaliated against these outrages by the Non-Intercourse and the Embargo Acts. By the Jay treaty of 1794, England agreed to pay to the United States a sum for the illegal captures made by British men-of-war under the authority of the Orders in Council. But still the impressment of seamen and the disregard of the rights of neutral trade kept on until 1812, when the United States at last declared war on England. From the close of that war the right of impressment as it was practiced by Great Britain and the doctrine of the Rule of the War of 1756 have never become questions of serious international dispute.

At the outbreak of the Crimean War, the United States proposed to the European powers to adopt two principles, viz.: (1) that free ships make free goods, with the exception of contraband of war, and (2) that neutral goods in enemy ships may not be confiscated, with the exception of contraband. After the war the powers assembled at Paris and set forth

these principles in connection with two others, in the celebrated Declaration of Paris. The articles in addition to those proposed by the United States were: (1) that declaring that blockade to be binding must be effective, and (2) that doing away with the practice of privateering. Both of these had been advocated by the United States for some years, especially that against privateering, which had formed a part of Franklin's negotiations with Great Britain in 1783. The evil of the paper blockade had always been condemned by the United States, especially during and since the stormy days of the Napoleonic Wars. Although the powers at Paris refused to adopt the Marcy Amendment, and the United States consequently declined to become a party to the Declaration, the direct influence of the United States upon that Declaration was, indeed, inestimable.

From the early days of its history the United States had earnestly endeavored to restrict the list of contraband articles to the narrowest possible limit, in opposition to the English tendency of expanding it. Franklin went as far as to contend that the rule of confiscating contraband goods as a punishment for carrying them was too severe, and that, therefore, the detention of such goods should be substituted for this rule. The famous assertion of Jefferson that "our citizens have always been free to make, vend, and export arms" has ever since been accepted as the established rule; that is, that a neutral government is not required to interfere with individual trade in contraband goods so long as the goods are a part of a bona fide commercial transaction.

The British condemnation of provisions as contraband was strongly protested by the United States. The compensation agreed upon in the Jay treaty to be paid by the British government for the illegal capture of American vessels and cargoes, was mainly the result of the controversy concerning provisions.

The very important principle that neutral mail steamers be exempt from seizure was introduced by the United States during the Civil War. Secretary Seward's instructions that public mails of any friendly or neutral power should be delivered unopened and unsearched to the proper neutral authorities were communicated to all the foreign powers and the rule gradually became universal.

The liberal tendency of the United States toward contraband

articles was totally changed during the Civil War. The list of contraband articles published by the Federal government included almost everything that might be useful in war. Furthermore, in the case of the Trent, the Federal government at first advocated Captain Wilkes' principle of treating as analogues of contraband the belligerent diplomatic persons found on neutral vessels bound for a neutral port. From the discussion that arose on this incident, however, it was clearly established that such persons are not to be treated as contraband and that a belligerent captor should not forcibly extract such persons from a neutral vessel.

It has been mentioned above that the practice of paper blockade was always condemned by the United States. Napoleon's 'continental system' caused much damage to American merchants and shipping, and as a result of it the French Chambers appropriated $5,000,000, after much delay, to the United States as indemnity for the damage done. The European powers realized the evil of such blockades and formally declared at Paris in 1856 that blockades in order to be binding must be effective.

The British government always denied the exemption from search of a merchant vessel sailing under the convoy of either a belligerent or a neutral war ship. The United States also condemned merchant vessels sailing under a belligerent convoy, but always contended that a neutral merchant vessel under the convoy of a ship of war of its own state must be exempt from the belligerent right of visit and search. This immunity of ships under neutral convoy was provided for in many of the treaties between the United States and other powers. In 1801, Great Britain also admitted the American usage by joining the Maritime Convention of St. Petersburg, which urged this principle.

According to the British doctrine of continuous voyage, neutral vessels bound for an enemy port from an enemy or enemy colonial port, but stopping and breaking the voyage at some intermediate neutral port for the purpose of getting a set of papers showing a colourable importation, were condemned when captured on their way from the intermediate neutral port to the ultimate hostile destination. But the United States went so far, in the Civil War, as to condemn vessels for contraband trading and attempt to break blockade even on the

first leg of the voyage when the ships were going from neutral port to neutral port, when there was suspicion that the goods had an ultimate hostile destination. This American doctrine was severely criticised as being unjustifiable, but since that time it has gained recognition as a part of international law by its incorporation in the London Conference of 1908-09. But here it was applied to the carrying of absolute contraband only and not to blockade.

In the main, the influence of the United States upon the laws of neutrality has been profound and far reaching. Comparing the present system of neutrality as a whole to that which obtained in the early days down as far as the year 1776, its advancement has been far greater than has been that of any other branch of international law. That this advancement has been a great blessing to all mankind goes without saying. The sphere of hostile operations has been vastly limited, the means of peaceful intercourse between nations in time of war has been guaranteed to a great extent, and, above all, the freedom of neutral commerce enlarged and safeguarded. In spite of all the opposition raised by the great European maritime powers, the United States, by its persistent advocacy of liberal views, contributed a larger portion of influence toward these accomplishments than any other nation in the world.

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