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## The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade

**ABSTRACT.** Drawing on archival sources, this Note explores an early experiment in humanitarian intervention undertaken by the Court of Vice Admiralty at Sierra Leone through the suppression of the West African slave trade during the early decades of the nineteenth century. Part I discusses the social and geopolitical pressures that helped British abolitionists realize their hopes of creating a free colony in Africa. Part II demonstrates the manner in which Robert Thorpe, Chief Judge of the Court of Vice Admiralty at Sierra Leone, enforced Britain's 1807 Act for the Abolition of the Slave Trade against British and foreign traders alike. Part III argues that Thorpe's court, in conjunction with aggressive interdictions by the British Navy and privateers, forced Europe's great slaving powers to the negotiating table and secured their abandonment of the slave trade through the creation of multilateral institutions equipped to adjudicate captured slave ships. This Part also discusses the *Le Louis* case, which demonstrated the impact of Thorpe's court on the legal regime governing free navigation. Part IV then analyzes the relevance of Thorpe's experiment in humanitarian intervention to current interdiction efforts undertaken by the Proliferation Security Initiative.

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**INTRODUCTION**

In 1807 the British Court of Vice Admiralty at Sierra Leone embarked on an unprecedented experiment in international humanitarian intervention under the auspices of its Chief Judge, Robert Thorpe. From the court's seat at Freetown, Thorpe authored and implemented a judicial policy that hastened the demise of the trans-Atlantic slave trade and challenged the principles of free navigation that remain the subject of fierce legal controversy to this day. During the first half of the nineteenth century, the British colony of Sierra Leone served as a naval base from which the Royal Navy aggressively intercepted and captured foreign vessels involved in the trans-Atlantic slave trade. Thorpe's court adjudicated cases involving those captive ships and released their human cargo into the colony. The court ordered the release of so many captive Africans in Sierra Leone that, by 1850, approximately 40,000 freed slaves lived in the precincts of Freetown alone.<sup>1</sup>

This Note offers a historical narrative of this early and bold judicial experiment in humanitarian intervention. First, the Note will explain the role that British courts played as the enforcers of a nascent international legal norm prohibiting the slave trade. Second, in recounting Chief Judge Robert Thorpe's tenure on the court, it will offer a case study of judicial actors at the vanguard of social and legal change.<sup>2</sup> Third, it will present, for the first time, a full account of the direct historical context of the celebrated *Le Louis* case, which affirmed the principle that no state may board, search, or otherwise exercise jurisdiction over the ships of another state in peacetime.<sup>3</sup> Finally, it will discuss how the work of Thorpe's court relates to current challenges to the traditional law-of-the-sea regime governing freedom of navigation, paying particular attention to the challenges posed by the Proliferation Security Initiative.

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1. P.E.H. Hair, *The Enslavement of Koelle's Informants*, 6 J. AFR. HIST. 193, 193 (1965).
  2. Robert Cover's seminal work, *Justice Accused*, presents a similar study on the role of American judges in the abolition of slavery. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975). In many ways, Cover's study of American judges caught between the formal demands of the law and the moral demands of conscience serves as an intellectual touchstone of this Note. However, because the sources that survive from the Court of Vice Admiralty at Sierra Leone are quite limited, I cannot provide a psychological portrait of Robert Thorpe as complete as that which Cover was able to provide of Lemuel Shaw.
  3. (1817) 165 Eng. Rep. 1464 (High Ct. of Adm.). The case is frequently included or cited in international law textbooks as upholding the principle of noninterference in navigation on the high seas. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 240 n.62 (5th ed. 1998); W. MICHAEL REISMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 650-52 (2d ed. 2004).

The research presented in this Note fills an important gap in the existing literature on the abolition of the slave trade. In his masterful study of the Royal Navy's role as the strong arm of Britain's abolitionist ambitions, Christopher Lloyd wrote that "[t]he Slave Trade was . . . suppressed by the twin weapons of diplomatic pressure and the exercise of naval power."<sup>4</sup> The role of these twin powers can hardly be overstated. Yet absent from Lloyd's study—and the historiography of Sierra Leone altogether—is an account of the role that the Court of Vice Admiralty played as the third pillar supporting the suppression of the slave trade. The court, which sat from 1807 until it was replaced by the Courts of Mixed Commission in 1817, mediated between the twin powers of diplomacy and naval might. Of the three premier historians of Sierra Leone,<sup>5</sup> only Christopher Fyfe has discussed the work of the Court of Vice Admiralty, and his treatment of the subject is quite cursory.<sup>6</sup>

A possible reason for this gap in the historiography is that the British admiralty courts followed civil rather than common law procedure. Because the study of the admiralty courts requires knowledge of this distinctive body of law, historians of English law and British history have frequently overlooked the records of admiralty courts, thus neglecting the central role these courts played in adjudicating international disputes.<sup>7</sup> Moreover, case law reporting by the High Court of Admiralty in London was not formalized until 1798,<sup>8</sup> while

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4. CHRISTOPHER LLOYD, *THE NAVY AND THE SLAVE TRADE: THE SUPPRESSION OF THE AFRICAN SLAVE TRADE IN THE NINETEENTH CENTURY*, at x (1949). Although dated in its ideological undertones, Lloyd's book is indispensable to understanding the position of the British Navy as the strong arm of British abolitionism.
  5. Christopher Fyfe, John Peterson, and A.B.C. Sibthorpe have written the definitive histories of Sierra Leone. See CHRISTOPHER FYFE, *A HISTORY OF SIERRA LEONE* (1962); JOHN PETERSON, *PROVINCE OF FREEDOM: A HISTORY OF SIERRA LEONE 1787-1870* (1969); A.B.C. SIBTHORPE, *THE HISTORY OF SIERRA LEONE* (4th ed. 1970).
  6. FYFE, *supra* note 5, at 107, 109, 115-16.
  7. The history of the British courts of admiralty reads rather like a biography with missing chapters. Certain periods in the history of the courts are well documented; for example, the eighteenth and early nineteenth centuries. See RICHARD HILL, *THE PRIZES OF WAR: THE NAVAL PRIZE SYSTEM IN THE NAPOLEONIC WARS, 1793-1815* (1998) (discussing the role of the British Admiralty in waging war against Napoleon, but not its role in the abolition of the slave trade); RICHARD PARES, *COLONIAL BLOCKADE AND NEUTRAL RIGHTS: 1739-1763* (photo. reprint 1975) (1938); E.S. ROSCOE, *STUDIES IN THE HISTORY OF THE ADMIRALTY AND PRIZE COURTS* (1932). Other periods, including the one with which this Note is concerned, remain unaccounted for by historians.
  8. ROSCOE, *supra* note 7, at 35-36. Some earlier records from the admiralty courts do survive, and have been published for general reference. See HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION (M.J. Prichard & D.E.C. Yale eds., 1993); 1 *SELECT PLEAS IN THE COURT OF ADMIRALTY* (Reginald G. Marsden ed., London, Selden Society 1894).

reporting by the courts of vice admiralty was never formalized at all. Consequently, what records do survive from the vice admiralty courts are relatively few, dispersed, and incomplete. Scholars of the history of Sierra Leone appear to have overlooked the archival sources that constitute the core of this account: the correspondence and court records of the Court of Vice Admiralty at Sierra Leone.<sup>9</sup>

The British courts of vice admiralty were, by merit of their prize jurisdiction, uniquely situated to deal with politically sensitive legal questions. Prize cases—cases stemming from disputes over the wartime rights of neutrals and belligerents to engage in trade and transport by sea—were invariably shot through with political, diplomatic, and military considerations. These cases required a judge to be legally ambidextrous—to be as proficient in the laws of his home state as he was in treaty law and the law of nations, all the while bearing in mind the impact of his decisions on military and diplomatic affairs. Courts with prize jurisdiction sat at the intersection of wartime diplomacy and international law, and their judges (particularly Thorpe) were acutely aware of this fact. Consequently, British admiralty courts proved especially fruitful ground for the development of international public policy.

Part I of this Note will show how humanitarian and geopolitical imperatives forced the interests of private philanthropists and public officials to converge squarely on Freetown in 1807. In the process, this Part will explain how the American and French Revolutions led to Britain's abolition of the slave trade and the establishment of a colony at Sierra Leone. Part II will focus on the manner in which Chief Judge Robert Thorpe carved out a commanding legal regime from his humble Court of Vice Admiralty at Sierra Leone, attempting to make Great Britain the enforcer of a near-universal ban on the West African slave trade. Part II will also track the development of Thorpe's early experiment in humanitarian intervention through its almost eight-year duration (1808-1815). Part III will then illustrate how diplomatic pressure led to the ultimate demise of Thorpe's tenure as Chief Judge of the Court of Vice Admiralty at Sierra Leone—but not until after the pressure Thorpe exercised from the bench had helped set in motion the demise of the slave trade itself. Part IV will demonstrate how the reevaluation of the freedom of the seas regime that Thorpe helped precipitate has a modern parallel in the current

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9. The Public Record Office (PRO) in London holds the correspondence between Chief Judge Thorpe and members of the British government, along with copies of ships' logs and case records. The files in London do not include all of the work undertaken by the Court of Vice Admiralty at Sierra Leone, but they are sufficiently comprehensive to provide insights into its workings.

Proliferation Security Initiative, which seeks to constrain the seaborne trade in weapons of mass destruction.

## I. THE HISTORICAL CONTEXT

In order to understand the legal context in which Robert Thorpe presided over the Court of Vice Admiralty at Sierra Leone, it is important to understand the historical context in which the colony itself was established. The origins of the Sierra Leone colony were bound up with the aspirations of British abolitionists—private individuals who strove to effect humanitarian change on an international scale. The first British settlement at Sierra Leone in 1782 was the culmination of what one historian has called “the great period of abolitionist euphoria.”<sup>10</sup> The creation of a free territory on the slave coast of Africa, in which not only the trade in slaves but also the institution of slavery itself was forbidden, buoyed abolitionist hopes that a general ban on the slave trade in Britain would soon follow.<sup>11</sup> Two sets of political pressures militated toward the fulfillment of this goal. The first was the problem of London’s black poor, whose numbers had swelled with the arrival of black loyalists from North America in the wake of the American Revolution. The second was the shadow of Napoleon Bonaparte.

### A. *The Population Imperative*

The first blacks who settled in the Sierra Leone colony were largely former slaves who had fought for the British (and had thus been freed) during the

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10. F.E. Sanderson, *The Liverpool Abolitionists, in LIVERPOOL, THE AFRICAN SLAVE TRADE, AND ABOLITION: ESSAYS TO ILLUSTRATE CURRENT KNOWLEDGE AND RESEARCH* 196, 196 (Roger Anstey & P.E.H. Hair eds., 1976) [hereinafter *ESSAYS TO ILLUSTRATE CURRENT KNOWLEDGE*].

11. Opposition to such a ban came largely from Bristol and Liverpool, port cities that had prospered from the “horrid trade.” Yet public opinion, often intensified by evangelical zeal, overpowered the influence of the slave traders. When statistics on slave mortality rates and the brutal methods employed in the slave trade were presented to Parliament in 1792, public outcry reached new heights; and when slave traders protested that abolition vitiated the spirit of free-market capitalism, abolitionists replied that capitalism could never condone the treatment of human beings as chattel. For additional discussion of capitalism and ideology in the abolitionist movement, see Seymour Drescher, *Capitalism and Abolition: Values and Forces in Britain, 1783-1814, in ESSAYS TO ILLUSTRATE CURRENT KNOWLEDGE, supra* note 10, at 167. See also *THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION* (Thomas Bender ed., 1992).

American Revolution.<sup>12</sup> After the British defeat, hundreds of freed slaves who had served in the vanquished army found themselves in poverty in London. Thousands more made their way to Nova Scotia, following Britain's promises of free land—promises that would ultimately prove empty.<sup>13</sup> This new population, referred to as the “black poor,” attracted the attention of an influential alliance between evangelical Christians, who saw the black poor as victims of a trade the evangelicals sought to abolish, and prominent London merchants and bankers, who sought to reward black loyalists for their service to Britain. These two groups banded together to form the Committee for the Black Poor in 1786.<sup>14</sup> Yet, as Stephen Braidwood has noted, the Committee “realised at a very early stage that the provision of immediate relief, however welcome, was no long-term answer to the problem of deep poverty among London's black population.”<sup>15</sup> Resettlement in Africa was the Committee's solution.<sup>16</sup>

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12. STEPHEN J. BRAIDWOOD, *BLACK POOR AND WHITE PHILANTHROPISTS: LONDON'S BLACKS AND THE FOUNDATION OF THE SIERRA LEONE SETTLEMENT 1786-1791*, at 24 (1994). See generally MARY LOUISE CLIFFORD, *FROM SLAVERY TO FREETOWN: BLACK LOYALISTS AFTER THE AMERICAN REVOLUTION* (1999) (detailing the difficult circumstances in which black loyalists found themselves after the American Revolution and their attempts to resettle in Canada, England, and Sierra Leone). While the war raged, Britons and colonials alike competed for the loyalty and service of the captive North American slave population. Historian Edgar J. McManus has noted that “[t]he bargaining power of [American] slaves grew tremendously during the war, and masters found themselves under heavy pressure to make concessions in order to obtain loyal service.” EDGAR J. MCMANUS, *BLACK BONDAGE IN THE NORTH* 153 (1973). McManus also pointed out that some slaves found themselves able to negotiate the terms of their own sale, even to the extent that they were able to require that prospective buyers promise them manumission after a certain term of labor. *Id.* at 153-54.
  13. Christopher Fyfe, *Introduction* to ‘OUR CHILDREN FREE AND HAPPY’: LETTERS FROM BLACK SETTLERS IN AFRICA IN THE 1790S, at 1 (Christopher Fyfe ed., 1991). For additional information on Britain's promises of free land, see FYFE, *supra* note 5, at 31-35.
  14. BRAIDWOOD, *supra* note 12, at 64-67.
  15. *Id.* at 70.
  16. See *id.* at 83. This proposal was first presented to the Committee when the dubious character of Henry “The Flycatcher” Smeathman, a botanist, entomologist, and traveler who was known to dabble in bigamy and hot air balloons, stepped onto the scene. Smeathman nurtured ambitions of establishing an African settlement under his own control. See Deirdre Coleman, *Henry Smeathman, the Fly-Catching Abolitionist*, in *DISCOURSES OF SLAVERY AND ABOLITION: BRITAIN AND ITS COLONIES, 1760-1838*, at 141 (Brycchan Carey et al. eds., 2004). Back in London, he presented these plans to the Committee for the Black Poor. See FYFE, *supra* note 5, at 14-15. Suspicious as Smeathman's proposal was, it became all the more suspect when it was revealed not only that creditors were pursuing him, but that he was amenable to enslaving his prospective pioneers. BRAIDWOOD, *supra* note 12, at 83-94.

The evangelical abolitionist Granville Sharp stepped forward, determined to effect this resettlement. Long a champion of the abolitionist cause,<sup>17</sup> Sharp envisioned a “Province of Freedom” in Africa for freed slaves and poor blacks. He won the support of the Clapham Sect, a group of prominent abolitionists that included Member of Parliament William Wilberforce<sup>18</sup> and the future Governor of Sierra Leone Zachary Macaulay.<sup>19</sup> The Committee also recruited Olaudah Equiano, an ardent abolitionist and former slave who had purchased his own liberty and who would later serve as commissary for the voyage to Africa.<sup>20</sup> With the financial backing of private donors and the support of the British Navy, Sharp and the Committee organized the first settlement expedition to Sierra Leone. In May 1787, 411 settlers arrived at the River Sierra Leone at the beginning of the malaria- and fever-ridden rainy season. They purchased approximately twenty square miles of land from a local Temne chief and named their settlement Granville Town.<sup>21</sup>

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17. See E.C.P. LASCELLES, GRANVILLE SHARP AND THE FREEDOM OF SLAVES IN ENGLAND 63-80 (1928) (providing an account of the philosophical and religious forces that helped to mold Sharp’s commitment to the abolitionist cause).
18. One of the crowning achievements of Wilberforce’s political career was his success in enacting an 1833 law abolishing slavery in all parts of the British Empire except for India and St. Helena. See JOHN POLLOCK, WILBERFORCE 306-08 (1977); see also Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36 (U.K.).
19. PETERSON, *supra* note 5, at 21-22.
20. Equiano ultimately resigned from his position, unable to turn a blind eye to the embezzlement committed by the leader of the voyage, Joseph Irwin, a friend of Henry Smeathman. Olaudah Equiano, *The Interesting Narrative of the Life of Olaudah Equiano, or Gustavus Vassa, the African* (1814), reprinted in THE CLASSIC SLAVE NARRATIVES 172-73 (Henry Louis Gates, Jr. ed., 1987). Equiano discussed the episode in his autobiography, writing:
- Thus ended my part of the long-talked-of expedition to Sierra Leona; an expedition, which, however unfortunate in the event, was humane and politic in its design; nor was its failure owing to government; every thing was done on their part; but there was evidently sufficient mismanagement, attending the conduct and execution of it, to defeat its success.
- Id.* at 174.
21. BRAIDWOOD, *supra* note 12, at 181-85. The Temne did not consider this “purchase” a sale of property in the Western sense (i.e., involving an alienation of property rights in perpetuity). On the contrary, such arrangements were considered a form of tenancy in which the tribal landlord retained certain rights over the territory, including the ability to help himself to gifts from it and the right to mediate disputes among its inhabitants. The settlers at Sierra Leone rejected all such claims to tribal lordship over the area. See V.R. Dorjahn & Christopher Fyfe, *Landlord and Stranger: Change in Tenancy Relations in Sierra Leone*, 3 J. AFR. HIST. 391, 395-96 (1962).



### B. *The Geopolitical Imperative*

The young settlement at Sierra Leone attracted the attention of the British government with the outbreak of the Napoleonic Wars. The English evangelicals who were preoccupied with the problem of London's black poor also saw a message from God emblazoned on the map of Europe in the form of Napoleon Bonaparte. They viewed the revolution in France and the ascendancy of Napoleon as divine punishment for Western Europe's sinful participation in the slave trade.<sup>22</sup> Whether or not Napoleon's forces represented the vengeful hand of God at work, two things quickly became clear to the British government. First, if Britain was to retain a foothold in West Africa, she needed to turn Sierra Leone into a crown colony. Second, the slave-trading ships based in Bristol and Liverpool would be far better utilized in the defense of British interests against Napoleon than in the traffic of human cargo.

By 1807, the privately sponsored humanitarian experiment at Sierra Leone was foundering. Attempts to establish local agriculture were failing, as were attempts to establish regular trade contacts with the colony's hinterlands.<sup>23</sup> Moreover, French raids laid waste to parts of the settlement, and the French fleet repeatedly destroyed supplies en route to the colony from England.<sup>24</sup> Facing the risk of losing a strategic naval base at Sierra Leone, along with the loss of the abolitionist cause in Africa altogether, the British government declared Sierra Leone a crown colony in August 1807. The Board of Directors of the Sierra Leone Company regrouped, forming an association called the

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22. Abolitionist James Stephen wrote that the slave-trading powers had

dragged away every year 74,000 of [Africa's] unhappy children; and a great part of her coast began to be almost destitute of inhabitants. . . . But the eye of the Almighty was over them; and to avenge devoted Africa at least, if not to save her, he dropped down among them the French [R]evolution.

JAMES STEPHEN, *NEW REASONS FOR ABOLISHING THE SLAVE TRADE* 61-62 (London, J. Butterworth & J. Hatchard 1807).

23. The inland trade from Freetown failed in large part because the Sierra Leone colonists refused to trade in slaves with local peoples, particularly the Fula. A striking exception to African participation in the slave trade during the late eighteenth and early nineteenth centuries were the Baga, who lived in the Rio Pongus and Rio Nuñez area. Winston McGowan, *African Resistance to the Atlantic Slave Trade in West Africa*, 11 *SLAVERY & ABOLITION* 5, 5-29 (1990) [hereinafter McGowan, *African Resistance*]. For a discussion of the establishment of inland trade, see Winston McGowan, *The Establishment of Long-Distance Trade Between Sierra Leone and Its Hinterland, 1787-1821*, 31 *J. AFR. HIST.* 25, 25-32 (1990).
24. A dizzying account of one such raid can be found in *SUBSTANCE OF THE REPORT OF THE COURT OF DIRECTORS OF THE SIERRA LEONE COMPANY, DELIVERED TO THE GENERAL COURT OF PROPRIETORS ON THURSDAY THE 26TH OF FEBRUARY, 1795* (Phila., Dobson 1795).

African Institution. The Institution purported merely to offer helpful advice to a British government too preoccupied with war to pay much attention to the fledgling colony.<sup>25</sup> In reality, the Institution came very close to governing Sierra Leone, just as it had done in the days of the Sierra Leone Company. Indeed, as Zachary Macaulay wrote to then Colonial Governor Robert Ludlam in 1807, “I have *no doubt* the [Westminster] government will be disposed to adopt almost any plan which we may propose to them with respect to Africa, *provided we will but save them the trouble of thinking.*”<sup>26</sup>

Westminster did have more pressing concerns. In order to confront Napoleon’s fleet, it would have to muster all naval resources available. Banning British subjects from participating in the slave trade would free up many of the ships of Bristol and Liverpool, cities that had prospered from that trade. Thus was abolitionist zeal coupled with brute necessity to secure the passage of the 1807 Act for the Abolition of the Slave Trade.<sup>27</sup> The Act forbade all British subjects throughout the United Kingdom and her colonies from buying, selling, transporting, or otherwise transferring ownership of slaves. Slaves could neither be transported into the Empire from Africa, nor traded among British subjects within the Empire. Furthermore, the Act prohibited British subjects from so much as outfitting a ship for the transport or trade of slaves, rendering all the trappings of such a voyage, from ship to shackles, confiscable by the government.

In May of 1807, a Court of Vice Admiralty was established at Sierra Leone. It was here that the travails of Robert Thorpe, Chief Judge of the Sierra Leone Colony, began.

## II. CHIEF JUDGE THORPE AND THE COURT OF VICE ADMIRALTY

On May 2, 1807, the British Foreign Secretary issued letters patent establishing a Court of Vice Admiralty at Sierra Leone. The letters patent conferred upon the court a prize jurisdiction

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25. REPORT OF THE COMMITTEE OF THE AFRICAN INSTITUTION, READ TO THE GENERAL MEETING ON THE 15TH JULY, 1807, at 50 (London, Phillips 1807) (pledging that “we mean not to colonize in Africa, or to trade there on our own account, but only to assist and give a right direction to the enterprize of others, and to excite the industry of the natives of that continent”).

26. ROBERT THORPE, A LETTER TO WILLIAM WILBERFORCE, ESQ. M.P., VICE PRESIDENT OF THE AFRICAN INSTITUTION 32 (London, F.C. & J. Rivington 1815).

27. Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36, arts. I-III (U.K.).

to be limited to the prosecution and That only of captured [slaves] seized or taken on or near the Coast of Africa together with the Ships Vessels or Boats in which they shall be so seized and taken and all the Goods Wares Merchandize and Effects found on board the same.<sup>28</sup>

It would fall to the Chief Judge of the court to test the limits of the court's jurisdiction on an ad hoc basis. With the West Africa Squadron—the British naval force charged with the defense of the West African coast<sup>29</sup>—hauling in slave ships for condemnation as prize irrespective of nationality, the task of presiding over the court was an unenviable one.

This Part will demonstrate how, by drawing on international law, contemporary British case law, and his own conception of natural law, Chief Judge Thorpe managed to cobble together a body of legal principles with which to enforce a near-universal prohibition of the slave trade. The geographic area over which he claimed jurisdiction extended far beyond the precincts of Freetown and the hulls of British-flagged ships. From the Court of Vice Admiralty at Sierra Leone, Thorpe would adjudicate disputes over Spanish, Portuguese, and Dutch ships, placing a judicial imprimatur on the naval campaigns of the West Africa Squadron. Thorpe would thus attempt to crush the slave trade both by force and by force of law.

#### A. Thorpe's Jurisdictional Dilemma

According to the letters patent establishing the Court of Vice Admiralty at Sierra Leone, “the Chief Civil Judge of the said Settlement of Sierra Leone

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28. Letters Patent Establishing a Court of Vice Admiralty at Sierra Leone (May 2, 1807) (on file with PRO, Admiralty 5/51). I have supplied the term “slaves” in brackets, although the word in the manuscript source is illegible. The term seems accurate because, according to Sir William Scott, the Court of Vice Admiralty at Sierra Leone “was intended merely to carry into effect the provisions of the Slave Regulation Acts.” Letter from William Scott, Judge of the High Court of Admiralty, to the Earl of Bathurst, Sec’y of State for War & Colonies (Aug. 5, 1812) (on file with PRO, Colonial Office 267/35).

29. Service in the West Africa Squadron was often thankless work. Naval historian Leslie Gardiner has described it as

a task force of out-of-date sloops and frigates, far from the limelight, from Their Lordships' notice and from the modest comforts of Channel or Mediterranean warships. This was the station to which the bad hats, the unfortunates and those without Interest were banished, to work out their penance and sacrifice their healths and tempers and drop far behind in the betting when the promotion lists were made up.

LESLIE GARDINER, *THE BRITISH ADMIRALTY* 218 (1968).

[was] to be the Judge of such Court.”<sup>30</sup> Robert Thorpe, a British barrister based in Nova Scotia and a devoted abolitionist, assumed that position in 1808.<sup>31</sup> He took over the post from Alexander Smith, former storekeeper to the Sierra Leone Company and interim acting judge.<sup>32</sup>

A review of Thorpe’s correspondence at the time of his appointment reveals how difficult his new position was. “I was placed at the head of the Vice Admiralty Court without my knowledge and without Salary,” he wrote to Lord Liverpool, then Secretary of State for War and Colonies. “[I]t was a new kind of Investigation, [as] I had read Civil Law merely as a Gentleman at College and had a little practice in the Ecclesiastical Court but none in the Admiralty . . . .”<sup>33</sup> Further complicating these unique circumstances, Thorpe had little by way of institutional precedent on which to rely. He found the court in shambles: too corrupt, too disorganized, and too poorly staffed to enforce the abolition of the slave trade. Thorpe described the state of affairs upon his arrival in the colony as follows: “I found a Tradesman had nominally presided in this Court, he condemned, he purchased the Cargo and then retailed it, the precedents were erroneous, the officers insufficient and dissatisfied, and the practice indecorous, as there was no Salary every thing was slovenly . . . .”<sup>34</sup>

Moreover, Thorpe, apparently unlike his predecessor, was troubled by Westminster’s vague instructions and repeatedly sought official approval for an expansive power to condemn slave ships. His requests for the clarification of his authority met with little cooperation. For example, in an 1812 letter to Lord Liverpool, an exasperated Thorpe asked for a clear mandate to condemn slave ships. He explained that he found the court’s prize commission “inadequate to meet the various Cases that arose.”<sup>35</sup> What was the judge to do, for example, if a British ship captured a trading vessel outfitted with chains and shackles and

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30. Letters Patent Establishing a Court of Vice Admiralty at Sierra Leone, *supra* note 28.

31. The records of the Court of Vice Admiralty at Sierra Leone state that Thorpe served as agent for the Crown in both an 1809 case involving the condemnation of a cargo of 167 slaves, and a separate 1809 case involving the illegal sale of an African woman by the name of Fee Seng Be, alias Betsey. Thorpe acted as both judge and prosecutor in these cases, a dual function characteristic of the civil law system employed in the courts of admiralty. See *infra* text accompanying note 43; see also Records of the Court of Vice Admiralty at Sierra Leone (on file with PRO, High Court of Admiralty 49/97).

32. FYFE, *supra* note 5, at 115-16.

33. Letter from Robert Thorpe, Chief Judge, Court of Vice Admiralty at Sierra Leone, to Lord Liverpool, Sec’y of State for War & Colonies (Feb. 6, 1812) (on file with PRO, Admiralty 1/4221).

34. *Id.*

35. *Id.*

all the trappings of the slave trade, but with no slaves on board? Were only the ships that were actually carrying slaves at the time of capture lawful prize? Thorpe urged Lord Liverpool to allow him to exercise the most expansive jurisdiction possible, not only to free captive slaves, but also to ensure that the humanitarian efforts of the West Africa Squadron were vindicated in court – in effect, to ensure that these exercises of naval might bear a judicial imprimatur.<sup>36</sup>

Notwithstanding the unclear mandate of his court's prize commission, Thorpe remained committed to using the Court of Vice Admiralty at Sierra Leone to enforce the ban on the slave trade. He saw his court both as a judicial counterpart to the Royal Navy and as a powerful deterrent to would-be slave traders. So committed was he to this project that he assumed an informal prosecutorial role in the capture of ships in addition to his formal adjudicative function. As Thorpe explained in one letter to London:

The Governor has had Information of some of His Majesty[']s subjects at Goree and in the Rio Pongus dealing in Slaves [of] late, if we can bring them within reach of the Law, it will have an excellent effect, they are rich and highly considered. I caused to be arrested one of the greatest American Slave Traders, he carried off many of His Majesty's subjects which he now holds in Slavery, on his Plantation in America, we have much Testimony to collect, and if we make a complete example of this fellow, it will alarm the American Factors widely and put many to flight, it is wonderful what artful contrivances those wretches have to escape the Law and Our Ships of War . . . .<sup>37</sup>

Thorpe's eagerness to prosecute American slave traders is particularly striking. Although these traders were acting in contravention of an 1807 act of the U.S. Congress banning the slave trade,<sup>38</sup> they were captured beyond what would, at least in the abstract, be considered the territorial waters of Sierra Leone. At that time, Goree was Portuguese-controlled, and the Rio Pongo was populated largely by Portuguese and Spanish slave factors<sup>39</sup> who operated

36. *Id.* For an example of the West Africa Squadron's activities, see *infra* notes 94-95.

37. *Id.*

38. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (prohibiting the importation of slaves into any part or place within the jurisdiction of the United States after January 1, 1808).

39. "Factors" were slave traders who set up grim posts known as factories on the inland coasts of Sierra Leone's rivers. "Factories took many forms," wrote historian Bruce L. Mouser, but usually consisted of living quarters above or adjoining the store, a warehouse, a barracoon to contain marketable slaves, a courtyard large enough to protect

independently of their respective governments. Britain made no claim to sovereignty over these areas, but her Navy did not shy away from capturing slave ships thought to have kidnapped black settlers from Sierra Leone for the purposes of the slave trade.<sup>40</sup>

This is precisely what happened in the *Bixby* case described by Governor William Maxwell in a letter to Lord Liverpool on May 8, 1812. The Royal Navy captured an American citizen by the name of Joseph Bixby (alternately called Biseby in the letter) on the Rio Pongo; he was subsequently convicted in Sierra Leone of kidnapping two boys from the colony and selling them into slavery.<sup>41</sup> Maxwell had him imprisoned and, pending Westminster's decision, committed to the custody of Lieutenant Mitchener of the H.M.S. *Protector*.<sup>42</sup> Cases of this kind appear to have arisen with some frequency in Thorpe's first four years in Sierra Leone. He noted in exasperation in 1812 that "the Americans swarm on the Coast, their Factors and Agents are evidently spread, and with Spanish or Portuguese Flags, papers and citizenships they still carry on the Slave Trade extensively."<sup>43</sup>

Engaging in an illegal slave trade under false colors posed a particularly vexing problem to Thorpe, for Portugal retained some rights—the precise extent of which were unclear—to the African slave trade under its 1810 treaty with Britain. Under this treaty, Britain agreed that Portuguese slave ships originating from that state's African dominions would be exempt from capture

visiting caravans and their merchandise, and usually a wharf where visitors anchored their ships. Only the most wealthy could afford to fortify their factories with cannon purchased from visitors' ships. Others salvaged cannon from shipwrecks, which occurred frequently along the coast.

Bruce L. Mouser, *Trade, Coasters, and Conflict in the Rio Pongo from 1790 to 1808*, 14 J. AFR. HIST. 45, 48 (1973).

40. In his 1815 *Letter to Wilberforce*, Thorpe wrote that the areas "were [n]ever considered as belonging to Great Britain, nor did British jurisdiction ever extend over them in any shape." THORPE, *supra* note 26, at 18. It could therefore be that the hope Thorpe expressed in 1812 of bringing the slave traders operating there "within reach of the Law" was really a desire to arrest them while they were visiting Sierra Leone. See *supra* text accompanying note 37. However, the fact that the court so consistently convicted traders captured outside Sierra Leone suggests that Thorpe's inconsistency on the matter was the product of a change in his opinions over time.
41. Letter from William Maxwell, Governor of Sierra Leone Colony, to Lord Liverpool, Sec'y of State for War & Colonies (May 8, 1812) (on file with PRO, Colonial Office 267/34). Sadly, the case was not officially reported, and the records do not reveal whether the boys were ever recovered and returned to their home.
42. *Id.*
43. Letter from Robert Thorpe to Lord Liverpool, *supra* note 33.

by British ships.<sup>44</sup> However, the actual boundaries of colonial territories were still somewhat amorphous. Further complicating matters, enterprising Spanish and Portuguese merchants were establishing slave posts in areas not yet officially recognized by Britain as Spanish or Portuguese territory. These traders operated with the blessing of local African rulers, enjoying a landlord-stranger relationship with their hosts<sup>45</sup> and often marrying into the families of local elites.<sup>46</sup> Consequently, it was sometimes difficult to determine whether slaves originated in what could properly be called Spanish or Portuguese dominions, notwithstanding the nationality of their captors.<sup>47</sup>

Also of concern to Thorpe were Dutch and Danish traders who, like the Spanish and Portuguese, traded for slaves even though, as he wrote,

they have no right to that trade because they have no Dominions to supply [slaves] from, but they send small Craft to the Rivers in the bight of Bissao and bring in small vessels what they want, deposit them in those Islands and when they have collected a sufficient cargo ship them off.<sup>48</sup>

Moreover, continued Thorpe, "I fear the Dutch, Danes or Nations will soon get Can[n]on, and the old trade [in slaves] will be reestablished."<sup>49</sup> Thus, the Dutch and Danish problem was twofold. First, how could Thorpe enforce the ban on the slave trade against Dutch and Danish ships? Whereas a bilateral treaty had delimited, however loosely, the lawful boundaries of the Portuguese

44. The Anglo-Portuguese Treaty of 1810 stipulated that the Prince Regent of Portugal would adop[t] the most efficacious means for bringing about a gradual abolition of the Slave Trade throughout the whole of his Dominions. And actuated by this principle, His Royal Highness the Prince Regent of Portugal engages that his Subjects shall not be permitted to carry on the Slave Trade on any part of the Coast of Africa, not actually belonging to His Royal Highness's Dominions . . . .

Treaty of Friendship and Alliance Between His Britannic Majesty and His Royal Highness the Prince Regent of Portugal, Port.-U.K., Feb. 19, 1810, 1 B.S.P. 547, 555-56. Thorpe discussed the limits of this treaty in his letter to Lord Liverpool of February 6, 1812. See Letter from Robert Thorpe to Lord Liverpool, *supra* note 33.

45. See *infra* text accompanying note 73.

46. McGowan, *African Resistance*, *supra* note 23, at 7.

47. See Kenneth C. Wylie, *The Slave Trade in Nineteenth Century Temmeland and the British Sphere of Influence*, 16 AFR. STUD. REV. 203, 206-08 (1973).

48. Letter from Robert Thorpe, Chief Judge, Court of Vice Admiralty at Sierra Leone, to the Earl of Bathurst, Sec'y of War & Colonies (Nov. 20, 1812) (on file with PRO, Colonial Office 267/35).

49. *Id.*

trade in slaves, no such treaties existed between Britain and the Spanish, Dutch, or Danes. With respect to American and Danish ships, Britain could always claim to be helping to enforce national bans on the international slave trade;<sup>50</sup> no such ban existed in the Netherlands until 1814.<sup>51</sup> Second, how could Britain prevent the Dutch and Danes from securing a foothold in West Africa? The Secretary of State for War and Colonies entertained ambitious proposals for the containment of the Dutch and Danish traders but ultimately Westminster took no direct action on the matter.<sup>52</sup>

Although Westminster was determined that the British Navy should give vigorous effect to the abolition of the slave trade, it did not give clear guidance to the courts of vice admiralty on how to deal with the legal fallout of this policy. When Thorpe requested that his judicial superiors in England advise him on how to approach cases in which Spanish- and Portuguese-flagged ships had been captured while carrying on an illicit American slave trade, Sir William Scott, Judge of the High Court of Admiralty, offered the following stultifying reply:

[I]t would be particularly Improper for me to furnish the Instructions required, as being the person to whom the Appeal immediately lies, and whose duty it will be to examine these Cases when they come regularly before me with all the Evidence that properly belonged to them, the only Instruction which I should presume to give is that [you] must obey Acts of Parliament and respect Treaties; but that if they should unfortunately Clash, the Obligations of the Treaties will merit . . . particular Attention.<sup>53</sup>

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50. The United States banned the slave trade in 1807, *see supra*, note 38, and Denmark banned the slave trade in 1792. Edict of the King of Denmark and Norway, Concerning the Slave Trade, Mar. 16, 1792, 1 B.S.P. 971.

51. Decree of the Sovereign Prince of the Netherlands, Relative to the Abolition of the Slave Trade, June 15, 1814, 3 B.S.P. 889.

52. For example, a proposal from one W. Hutton urged the following:

Presuming on the local knowledge which I have of some Dutch and Danish Settlements on the Coast of Africa . . . I am emboldened to take the liberty, to suggest the Capture of the said Settlements to your lordship; and which, I feel no hesitation in saying, may be accomplished without the loss of a Man, and without the smallest expence to the revenue, either in capturing the said Settlements, or retaining them in our possession, after they are captured.

Letter from W. Hutton to the Earl of Bathurst, Sec'y of State for War & Colonies (Sept. 11, 1812) (on file with PRO, Colonial Office 267/35).

53. Letter from William Scott, Judge of the High Court of Admiralty, to John Croker, First Sec'y of the Admiralty (Aug. 5, 1812) (on file with PRO, Colonial Office 267/35).



A charitable interpretation of this response would attribute to Justice Scott a profound appreciation of judicial due process. The more likely explanation is that he was content to leave the problem to be handled by a lower court judge. Indeed, Scott commented that Thorpe would have to “find his own way in the construction and application of the Law, and if he happens to mistake it, his mistakes must be corrected by the Court of Appeal to which he is subject, and from whose decisions . . . he is to draw his Instruction for his future Judicial conduct.”<sup>54</sup> On a more fundamental level, Scott’s reply points to a unique attribute of prize jurisdiction: the convergence of executive and judicial authority.<sup>55</sup> On one hand, this split personality could allow for tremendous efficacy in enforcing international obligations. On the other, it could just as easily allow for spectacular abuses, as will be discussed in Part III.

*B. Thorpe’s Theory of Prize Jurisdiction over Slave Ships*

Left to his own devices in formulating a policy toward the adjudication of captured slaving vessels brought into his court, Thorpe turned to three bodies of law in order to cobble together a rationale that would support the condemnation of these ships as lawful prize. The first was the law of Great Britain; the second, treaty law; and the third, “justice, humanity, [and] policy.”<sup>56</sup> The resulting judicial policy was expansive in its grasp, rendering any slave ship not explicitly protected by treaty with Britain open to capture by British ships and condemnation by British courts. It put the Royal Navy and the Court of Vice Admiralty at Sierra Leone in the unique position of being the enforcers of a near-universal ban on the slave trade.

In a letter to London on November 20, 1812, Thorpe reasoned that Great Britain’s 1807 Act for the Abolition of the Slave Trade was an authoritative declaration of the unlawfulness of the trade under the Law of Nations. Thorpe claimed that because the Act recognized the fundamental injustice and inhumanity of the slave trade, it compelled him to enforce the ban on the slave trade not only against British ships, but also against the ships of any state not explicitly authorized by treaty to trade in slaves. Because Portugal was the only

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54. *Id.*

55. Prize courts were largely responsible for adjudicating legal questions of wartime rights and dealing with the legal implications of executive decisions. From an institutional perspective, prize courts led to a direct convergence of the executive and judiciary in that all prize cases could be appealed to a subcommittee of the Privy Council, known as the Lords Commissioners of Prize Appeal. *See infra* text accompanying note 109.

56. Letter from Robert Thorpe to the Earl of Bathurst, *supra* note 48.

state to have signed such a treaty with Britain, slave ships from all other nations were fair prize.<sup>57</sup>

Thorpe's policy may seem bold, if not altogether revolutionary. But when read in the context of British antislavery law, it was a logical continuation of the judgment of Lord Mansfield in the 1772 case of *Somerset v. Stewart*.<sup>58</sup> That judgment had the much-celebrated (and excoriated) effect of abolishing slavery on English soil. However, the exact text of the judgment was more limited in scope, holding only that slavery "is so odious, that nothing can be suffered to support it, but positive law."<sup>59</sup> That is, in the absence of any positive law in Britain permitting slavery, any slave brought onto English soil was to be considered free. In the absence of such domestic laws, the British government was not bound to execute the positive laws of any other jurisdiction (in the *Somerset* case, Virginia) to enforce the master-slave relationship. The holding did not rule out the possibility that slavery might someday be legislated into existence in Britain, but it was received by British slaveholders and abolitionists alike as dealing a deathblow to the institution in their country.<sup>60</sup>

There is a certain intellectual symmetry between the *Somerset* ruling and the judicial policy articulated by Thorpe, for underlying both is the assumption that the laws of nature prohibit slavery.<sup>61</sup> Only by mutual agreement through a

57. *Id.*

58. (1772) 98 Eng. Rep. 499 (K.B.). An alternate spelling of the case name is *Sommersett v. Steuart*. (1772) 20 Howell's State Trials 1, 79-82 (K.B.). Mark S. Weiner has recently provided valuable biographical sketches of the parties to the case. See Mark S. Weiner, *New Biographical Evidence on Somerset's Case*, 23 SLAVERY & ABOLITION 121 (2002).

59. 20 Howell's State Trials at 82. For an excellent discussion of the geographic limitations of *Somerset*, see William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 105-18 (1974).

60. For discussion of the reception of the case in the United Kingdom and the United States, see COVER, *supra* note 2, at 87-99. Abolitionist Granville Sharp, often hailed as the "Father of Sierra Leone," funded the case on Somerset's behalf. STEVEN M. WISE, *THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY* 123-25, 217-18 (2005).

61. A variation on this idea persists to this day in the form of the *jus cogens* prohibition of slavery. Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* as a peremptory norm of international law, "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation can be permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 344. The distinction between the contemporary approach to slavery and that of the late eighteenth or early nineteenth centuries is that there can be no derogation—even by mutual consent—from a principle of *jus cogens*. See BROWNIE, *supra* note 3, at 514-17.

treaty—treaties being the positive law of nations—could states contract out of the obligation not to participate in the slave trade. Thus, Francis Hargrave, counsel for James Somerset, structured his client’s case around natural law sources,<sup>62</sup> arguing:

Slavery has been attended in different countries with circumstances so various, as to render it difficult to give a general description of it. The Roman lawyer . . . calls slavery, a constitution of the law of nations, by which one is made subject to another contrary to nature. But this, as has been often observed by the commentators, is mistaking the law, by which slavery is constituted, for slavery itself, the cause for the effect; though it must be confessed, that the latter part of the definition obscurely hints at the nature of slavery.<sup>63</sup>

The “Roman lawyer” to whom Hargrave referred is the *Digest of Justinian*, the legal text from which most early-modern writers on the law of nations derived their conceptions of natural right.<sup>64</sup> What is most striking about the passage Hargrave cited is that the *Digest* emphatically asserts that slavery is contrary to the law of nature.<sup>65</sup> According to the *Digest*, slavery is instituted by the law of nations, defined by Grotius as “the law which has received its obligatory force from the will of all nations, or of many nations.”<sup>66</sup> This tradition holds that because the law of nations is based on custom and practice, its content is mutable over time and distance; the law of nature, being universal and eternal, is immutable. Consequently, slavery was not, as many Scholastic writers asserted, consistent with nature,<sup>67</sup> but was a positive state imposed from without.<sup>68</sup> Turning to the writings of Bodin, Gentili, Pufendorf, Locke, and

62. See WISE, *supra* note 60, at 151-54.

63. 20 Howell’s State Trials at 25.

64. PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 94-101 (1999).

65. DIG. 1.5.4.1. (Florentinus, De Statu Hominum) (stating “Seruitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur,” or “Slavery is an institution of *jus gentium*, whereby one is subjected to the ownership of another contrary to nature” (translation by the author)).

66. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [OF THE LAW OF WAR AND PEACE, IN THREE BOOKS] 44 (photo. reprint 1995) (Francis W. Kelsey trans., The Clarendon Press 1925) (1646).

67. See RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 65-67 (1999).

68. Hargrave argued:

Grotius describes slavery to be, an obligation to serve another for life, in consideration of being supplied with the bare necessities of life. . . . [But the

Huber,<sup>69</sup> Hargrave argued that the right to enslave peoples was historically derived from the practice of states rather than from natural right, thereby showing that this “most pernicious institution”<sup>70</sup> could only find legitimacy in the positive laws and practices of states.<sup>71</sup>

### C. *The Geographic Scope of the Court’s Jurisdiction*

With this juridical tradition as support, Thorpe laid out the parameters of the West Africa Squadron’s policy of coercive abolition. First, only nationals of states that had passed statutes legalizing the slave trade—statutes whose legitimacy Britain recognized through bilateral treaties with the states themselves—could participate in the African slave trade. Second, any Europeans found trading in slaves in an African territory not under the dominion of their home state would be fair game for capture by the Royal Navy or British privateers. The reasoning was that, in the absence of European dominion over such territory, the laws of nature would proscribe slavery there by default. It is notable that Thorpe did not entertain the possibility that some of the territories in which the slave trade occurred were within the dominion of indigenous peoples, and that their historical practices might therefore be a legitimate source of title to slaves. Thorpe’s silence on this point is telling because conceding it would have laid bare a troubling fact: The slave trade was undertaken by Europeans and Americans with the cooperation of local African groups. Moreover, this concession would have undermined Britain’s pretenses of acting as the strong arm of the abolitionist cause, because such a concession would have required an enormous exertion of military force on the continent of Africa itself.

The reach of the Sierra Leone prize court would therefore extend as far as the illicit European trade in slaves. According to Thorpe, this trade was indeed widespread:

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definition] by Grotius, and many other definitions which I have seen, if understood strictly, will scarce suit any species of slavery, to which it is applied. Besides, it omits one of slavery’s severest and most usual incidents; the quality, by which it involves all the issue in the misfortune of the parent. In truth, as I have already hinted, the variety of forms, in which slavery appears, makes it almost impossible to convey a just notion of it in the way of definition.

20 Howell’s State Trials at 25 (footnote omitted).

69. *Id.* at 27-34.

70. *Id.* at 26-27.

71. *Id.* at 33-67.

[I]n the Rio Pongus those Renegade Factors, who a few months since renounced Slave trading, are still supplying those fast-sailing Ships and Schooners that come under Spanish Colours & American Navigators & who proceed with such alertness that this Cargo will be landed and the Slaves put on board in Forty eight hours . . . .<sup>72</sup>

The geographical extent of the trade that Thorpe deemed illegal was vast, comprising approximately 2500 kilometers of coastline. Thorpe fixed these boundaries with the imperial constitution in mind. European powers, he argued, could trade in slaves only on soil within their dominions (i.e., colonies) and only when Britain had acknowledged the parent state's right to engage in such trade by treaty. At the time Thorpe sat on the bench, the only West African territory that could properly be called a European colony was Angola. Spanish, Portuguese, Dutch, and Danish trading stations dotted the West African coast, but none of these were colonies. As one historian has explained, "in the period of the slave trade, Europeans did not appear in West Africa north of the equator as invaders or masters, but as equal trading partners."<sup>73</sup> Thorpe was determined to put an end to the illicit trade in slaves, whether undertaken by equal trading partners or not. The prize court at Freetown was to be the place of reckoning.

### III. DEALING A DEATH BLOW TO THE EUROPEAN SLAVE TRADE

The task that Judge Thorpe undertook was Herculean: He sought to enforce unilaterally a universal ban on the slave trade. Moreover, Thorpe sought to do this without a clear mandate from his Government, relying instead on a legal tradition favorable to his cause and on humanitarian principles that he viewed as moral imperatives. This Part will show how Thorpe's ideals fared when they encountered the harsh realities of life in Sierra Leone: a self-interested merchant community, the need for cheap and abundant labor, and a system of government-sponsored incentives for abolitionism that yielded perverse results. This Part will culminate in an analysis of the diplomatic and legal crisis that Thorpe's activities in Sierra Leone precipitated back in Westminster, focusing on the historic case of *Le Louis* and the genesis of the Courts of Mixed Commission.

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72. Letter from Robert Thorpe to the Earl of Bathurst, *supra* note 48.

73. Christopher Fyfe, *Freed Slave Colonies in West Africa*, in 5 THE CAMBRIDGE HISTORY OF AFRICA 170, 170 (John E. Flint ed., 1976).

A. *British Abolitionism Becomes Lucrative*

Following the British prohibition of the slave trade in 1807, Westminster established powerful incentives for the enterprising British privateer to take up the cause of abolitionism, regardless of the depth of his convictions. On May 16, 1808, one year after the vice-admiralty court was established at Freetown, the King issued an Order in Council offering a bounty for captured slaves of £40 per man, £30 per woman, and £10 per child, in lieu of prize money for the ship itself.<sup>74</sup> While the condemned slave ship and its fittings would become the property of the British government, a generous bounty would be paid to the captors for its human cargo. According to one historian, “[b]etween 1807 and the middle of 1815 the Treasury paid naval captains [alone] £191,100 in slave-bounties.”<sup>75</sup>

Between 1807 and 1811, 1991 slaves were released from captivity by Thorpe’s court;<sup>76</sup> what became of them when they left the custody of their captors depended greatly on the intentions of whatever colonial governor happened to be in power at the time. Some governors were content to leave the liberated slaves to fend for themselves. During the administration of Governor William Maxwell (1811-1814), many recaptives<sup>77</sup> released at Freetown made their way to the outskirts of the main settlement and established small villages.<sup>78</sup> Others, however, found themselves “apprenticed” as quasi-slaves to local farmers and merchants pursuant to the Act for the Abolition of the Slave Trade.<sup>79</sup> Neither the irony nor the injustice of this state of affairs was lost on

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74. Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36, art. VIII (U.K.).

75. FYFE, *supra* note 5, at 136.

76. *Id.* at 114.

77. “Recaptives” is the term frequently used in the literature to describe Africans who had initially been captured for the slave trade, but who were subsequently “recaptured” by abolitionists for liberation.

78. *Id.* at 119.

79. Article VII of the Act reserved to the Crown the right

to enter and enlist [recaptive Africans] . . . into His Majesty’s Land or Sea Service, as Soldiers, Seamen or Marines, or to bind the same, or any of them, whether of full Age or not, as Apprentices, for any Term, not exceeding fourteen Years, to such Person or Persons . . . as to His Majesty shall seem meet.

Under Article XVI, the Crown also reserved the right “to make such Orders and Regulations for the future Disposal and Support of such Negroes as shall have been bound Apprentices under this Act.” In effect, the Act authorized the Crown and its officials to commit recaptives to terms of forced labor subject to discretionary renewal. Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36, arts. VII, XVI (U.K.).

Thorpe, who grew increasingly disenchanted with the ends to which Freetown's political magnates were directing his judicial labors.<sup>80</sup>

The governors of Sierra Leone were not particularly renowned for the depth of their humanitarian commitment.<sup>81</sup> In fact, many were motivated more by profit than compassion in their abolitionist efforts. Zachary Macaulay, called "the great shopkeeper of the colony" by Thorpe,<sup>82</sup> appears to have presided over a price-fixing racket of sorts at Freetown, even acting as agent for the captors of slave ships in the vice-admiralty court at Freetown.<sup>83</sup> As mentioned above, condemned ships and their fittings became the property of the Crown.<sup>84</sup> They would most often be auctioned off at Freetown to the highest bidders and re-registered as British ships.<sup>85</sup> It appears that a circle of the colony's most prominent merchants conspired together to depress the value of bids so as to enable one another to purchase confiscated goods at below-market prices for subsequent resale.<sup>86</sup>

80. As discussed in Part II, Thorpe's legal formulation for the condemnation of foreign slave ships was carefully reasoned and closely followed available legal precedents. Furthermore, Thorpe's correspondence indicates that his motives for condemning slave ships captured in accordance with this formulation were pure. With his health failing in the harsh climate of Sierra Leone, Thorpe wrote to the Earl of Bathurst: "Be assured My Lord could the forfeit of my life be useful in emancipating Africa from the cruel bondage she has been so long subjected I should not hesitate to sink on her burning sand . . ." Letter from Robert Thorpe to the Earl of Bathurst, *supra* note 48. Thorpe expressed a similar sentiment in his letter to Liverpool of February, 1812. Letter from Robert Thorpe to Lord Liverpool, *supra* note 33.
81. A contemporary joke was that "there were always two governors of Sierra Leone—the one who had just arrived, and the one who had just returned." LLOYD, *supra* note 4, at 15. In 1811 alone the colony had three governors, each of whom saw fit to approach the question of what to do with the recaptives according to his own lights. They were Captain Edward Columbine, Lieutenant Robert Bones, and Lieutenant-Colonel William Maxwell. SIBTHORPE, *supra* note 5, at 25.
82. THORPE, *supra* note 26, at 29. Macaulay was governor of Sierra Leone in 1796 while it was still under the control of the Sierra Leone Company. See SIBTHORPE, *supra* note 5, at 225. He remained a prominent businessman in the colony long after his governorship. FYFE, *supra* note 5, at 122-23, 166-67.
83. This allegation is made persuasively in the Memorial of William Henry Gould Page to HRH the Prince Regent in Council (June 24, 1815) (on file with PRO, Foreign Office 72/182/72-73) [hereinafter Memorial of William Henry Gould Page], and is supported by the corrupt business practices described by Thorpe in his *Letter to Wilberforce*, which suggested that the capture and liquidation of ships was favored at the expense of the development of the local economy. THORPE, *supra* note 26, at 28-35.
84. See *supra* text accompanying note 75.
85. Act of May 27, 1814, 54 Geo. 3, c. 59 (U.K.) (permitting ships that had been taken and condemned due to their use in the slave trade to be registered as British-built ships).
86. Memorial of William Henry Gould Page, *supra* note 83.

Meeting the demand for low-cost merchandise required a steady supply of captured ships, which the more unscrupulous of Sierra Leone's colonial governors were happy to procure. Governor Maxwell, for example, aggressively deployed ships to despoil slave factories in the estuaries of the Sierra Leone River.<sup>87</sup> An 1815 memorial addressed to the Privy Council on behalf of a group of Havana-based Spanish ship owners spoke of one stunning foray:

[T]he late Governor William Maxwell Esquire thought fit to dispatch an armed expedition against the Settlement of Cape Mesurado (distant upwards of two hundred miles from Sierra Leone) which seized at that place Property to a large amount, in Ships merchandize and Slaves, this being taken to Sierra Leone was there condemned, as like matter of course . . . and the Owners of the Factories sent to Sierra Leone, imprisoned and sentenced by this all-condemning Tribunal to fourteen years transportation [in New South Wales].<sup>88</sup>

Aggressive interceptions of slave ships by both the Royal Navy and privateers became the norm along the West African coast. Sometimes these interceptions occurred indiscriminately. The same memorial speaks of an expedition deployed by Governor Maxwell to distant Spanish settlements along the Rio Nuñez and Rio Pongo for the purpose of despoiling the slave factories there. The expedition returned to Sierra Leone with three Spanish ships, their human and chattel cargo, and ivory, cotton, and other merchandise valued at over £10,000. In addition, the expedition arrested three white men, including one Spaniard and one American.<sup>89</sup>

The men were tried at Sierra Leone in April of 1814, while Thorpe was visiting London in order to air his grievances over the governance of the colony.<sup>90</sup> Governor Maxwell had appointed a friend of his, Dr. Robert Purdie,

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87. A handwritten roster kept by an administrative official at Sierra Leone provides the names of over 1500 captive Africans who were released into the colony in 1812 alone, approximately three-quarters of the total number released at the Freetown during the previous four years combined. See *Disposal of Captured Negroes Received in the Colony of Sierra Leone During the Year 1812* (n.d.) (unpublished manuscript, on file with PRO, Colonial Office 267/35).

88. Memorial of William Henry Gould Page, *supra* note 83.

89. *Id.* The document is silent as to the nationality of the third prisoner.

90. His most impassioned plea for reform came in the form of his *Letter to Wilberforce*. Thorpe wrote:

[H]ere is involuntary servitude for life, established by an Act of Parliament, purporting to abolish slavery. . . . [A]nd the seat of this new slavery is in Freetown, in the colony founded by the most benevolent men, on the most liberal



the Colonial Surgeon, to act as Chief Judge in Thorpe's stead.<sup>91</sup> The three accused remained in prison for seven months before being sent to Portsmouth, England, where they were supposed to board a ship for the penal colony at Botany Bay, Australia. Luckily for the convicts, they arrived at Portsmouth just after the ship bound for Botany Bay had departed. Through an agent, they appealed their sentences to the Prince Regent<sup>92</sup> in Council (i.e., the Privy Council), who released them from the sentence imposed by the court in Sierra Leone.<sup>93</sup> The Council gave no further explanation for its decision. However, because the appellants do not appear to have sought compensation for their financial losses, it is quite likely that the Council did not see any use in detaining them further. In fact, prolonging their detention would have only been likely to incur the anger of diplomatic officials from Spain and the United States.

Besides, by then the Privy Council had bigger problems brewing.

### *B. Toward a Diplomatic Crisis*

Once legally consecrated by Thorpe, the vigor with which British ships captured foreign slavers triggered a diplomatic crisis between Spain and Britain. Under Thorpe's legal formulation, any West African territory or waterway not within the dominion of a power authorized by treaty to carry on the slave trade was fair game for incursion by British naval vessels and privateers. This included the Rio Nuñez and Rio Pongo, along which Spanish slavers were particularly active. As British incursions into these areas increased in number and intensity, Spanish merchants and the Spanish government alike

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plan: exalted as the freest spot on earth, to enlighten benighted Africa; and displayed to the world as the finest example of British liberty, and British philanthropy!!!

....

Thus the abolition Act is to give us slaves without purchase, by seizing them from our allies; and then the framers of this magical act (which is to free and enslave at the same moment), acknowledge, that they look forward to its removing many objections to our purchasing Africans, for the same avowed and specific purpose ourselves!

THORPE, *supra* note 26, at 46-47.

91. FYFE, *supra* note 5, at 120-21.

92. George III was, by this time, incapacitated by mental illness. Prince George served as Regent in his stead.

93. Memorial of William Henry Gould Page, *supra* note 83.

began pressuring Westminster to intervene on their behalf. This pressure would force the British government to rethink the degree of judicial discretion it would allow Thorpe to exercise.

In January 1813, the Spanish Ship *Juan* set sail from Havana, Cuba for the western coast of Africa, bearing a cargo of dry goods. Her Havana-based owner, Don Luis Martinez, did not hear of her for eleven months. Finally, in November of 1813, one Bartholomew Maria Maestre returned to Havana from the Rio Pongo bearing news of the ship. On May 27, 1813, the deposition of the *Juan*'s captain stated that the ship had been

captured by an armed vessel under English Colours and carried into the port of Sierra Leone but [Maestre] did not know the name of the vessel which had made the said Capture, nor whether any proceedings had been instituted against the said Ship Juan in the Vice Admiralty Court of that Settlement . . . [.]<sup>94</sup>

Archival documentation of this period from the Foreign Office indicates that Don Martinez's predicament was not unusual. In fact, the *Juan* was but one of over two hundred Spanish ships captured and condemned as prize at Freetown.<sup>95</sup>

When the captive ships arrived at Freetown, their captains and masters were detained by British authorities. Unable to correspond with the ships' respective owners (or with anyone else, for that matter), they were left to languish in Freetown prisons until either released or condemned to transportation. Consequently, ship owners and investors might spend months waiting for any news of the fate of their vessels.<sup>96</sup> Such was the case of the *Juan*, whose master, Juan Jose Patrollo, was detained for almost a year before returning to Havana in July of 1814.<sup>97</sup>

When the owner of the *Juan* learned that his ship had been captured, he immediately filed a protest with Spanish government officials in Cuba, as did scores of other merchants and ship owners in Havana, the main hub of the Spanish slave trade to the New World.<sup>98</sup> In the vast majority of cases, the ship owners could not pursue formal appeals to the Lords Commissioners in London because their window of opportunity had closed. While some may

94. Deposition of Juan Jose Patrollo, *In re The Juan* (June 24, 1815) (Ct. Prize App.) (handwritten court clerk's manuscript, on file with PRO, Foreign Office 72/182/78-79).

95. Memorial of William Henry Gould Page, *supra* note 83.

96. *Id.*

97. Deposition of Juan Jose Patrollo, *supra* note 94.

98. LLOYD, *supra* note 4, at 26-27.

never have had sufficient documentation to bring the claim in any event, others may have learned that their ships had been captured long after the expiration of the statutory period in which an appeal could be filed.<sup>99</sup>

Because Spanish government officials could provide little relief to the Cuban merchants, the Governor of Havana authorized a meeting of the planters, merchants, and ship owners of the city “to consider of the proper measures to be taken to procure compensation for the ruinous losses to which they [had] thus been subjected.”<sup>100</sup> With the Governor’s blessing, they resolved to employ an agent in London, William Page, to represent their claims before the Privy Council. Privy Councilors could negotiate directly with foreign governments for the release of ships, just as they could interpret treaties on a case-by-case basis, thus keeping the power to shape foreign relations at least nominally within the grasp of the King-in-Parliament.<sup>101</sup>

Page presented a litany of complaints to the Council. Not only did he enumerate cases involving the seizure of ships and the indefinite detention of their captains, he attached to one memorial ten long pages of affidavits attesting to the destruction of factories along the Rio Pongo by British ships, which carried the slaves back to Freetown to cash in for bounty.<sup>102</sup> Westminster could no longer turn a blind eye to events in Sierra Leone. On October 31, 1815, Christopher Robinson, a judge in the High Court of Admiralty and member of Doctors’ Commons,<sup>103</sup> issued an advisory letter to

99. As Page’s Memorial notes:

[T]he impossibility which the Captains experienced (being Strangers and surrounded by Enemies) of giving the requisite Security to obtain copies of the Proceedings, the period for entering Appeals, according to the Prize Act (namely twelve months and a day) elapsed in many cases, before the owners could even learn the fate of their ships . . .

Memorial of William Henry Gould Page, *supra* note 83.

100. *Id.*

101. At some point in time the Lords Commissioners began to see themselves not as an ad hoc committee of the Privy Council, but as judicial officers presiding over an independent court of law. Historians have yet to determine precisely when or why this change occurred. For a general discussion of these issues, see PARES, *supra* note 7, at 102-08.

102. Memorial of William Henry Gould Page, *supra* note 83; see also Deposition of Juan Jose Patrollo, *supra* note 94.

103. Doctors’ Commons, so called for the doctors of law who were its members, was the equivalent of an inn of court for the civil lawyers of England. It was a professional association as well as a social one, and its most distinguished members frequently advised admiralty judges and lawyers on the resolution of cases and points of law. See G.D. SQUIBB, DOCTORS’ COMMONS: A HISTORY OF THE COLLEGE OF ADVOCATES AND DOCTORS OF LAW (1977). Christopher Robinson soon would become the Chief Judge of the High Court of

the Foreign Secretary that would bring an abrupt end to Thorpe's expansive interpretation of the British right to capture slave ships. Robinson wrote: "There has never been any Principle avowed by any Court of Justice in England by which Cruizers can have been envisaged to venture on the Seizure and detention of Vessels, being bona fide Spanish property, engaged in the Slave Trade . . . ."<sup>104</sup> This advice doubtlessly would have been of inestimable value to Thorpe when he sought counsel from Lord Liverpool in 1812.<sup>105</sup> However, it is possible that at that time the British government was emboldened by Spain and Portugal's dependence on British military might to expel Napoleon's forces from the Iberian Peninsula, and therefore was willing to allow abolitionist measures in Africa that were more audacious than it would have under normal circumstances.

The letter effected a radical change in official policy back in London, and Thorpe was forced to comply with the legal analysis of his superior, Judge Robinson. These events shook the foundations of the abolitionist project over which Thorpe had set out to preside from the bench. Two years after Page presented his memorial on behalf of the Havana merchants, and after two additional years of discussion between the two governments, Spain and the United Kingdom concluded a treaty under which Spain agreed that the Spanish slave trade would be illegal as of May 30, 1820.<sup>106</sup> In return for this concession, the British Treasury paid £400,000 to the Spanish government as compensation for injuries committed against her nationals by the West Africa Squadron and British privateers. A similar compensation package in the amount of £300,000 had been paid to the Portuguese government when, under the Anglo-Portuguese Treaty of January 22, 1815, the Portuguese agreed not to engage in the African slave trade north of the Equator.<sup>107</sup> (No such compensation was offered to the Dutch, who had already agreed to ban the slave trade under an Anglo-Dutch treaty in 1814.<sup>108</sup>)

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Admiralty. See JOSEPH HAYDN, *THE BOOK OF DIGNITIES* 423 (photo. reprint 1970) (3d ed., London, W.H. Allen & Co. 1894).

104. Letter from Christopher Robinson, Admiralty Judge, to Viscount Castlereagh, Sec'y of State for Foreign Affairs (Oct. 31, 1815) (on file with PRO, Foreign Office 38/2364/313).
105. See *supra* notes 53-56 and accompanying text.
106. Treaty for the Abolition of the Slave Trade, Spain-U.K., Sept. 23, 1817, 4 B.S.P. 33, available at [http://www.pdavis.nl/Treaty\\_1817.htm](http://www.pdavis.nl/Treaty_1817.htm).
107. Treaty on the Gradual Abolition of the Slave Trade, Port.-U.K., Jan. 22, 1815, 3 B.S.P. 937, available at [http://www.pdavis.nl/Treaty\\_Portugal.htm](http://www.pdavis.nl/Treaty_Portugal.htm). For a more detailed discussion of these compensation packages, see Convention on Payment for Ships, Port.-U.K., Jan. 21, 1815, 3 B.S.P. 936; and FYFE, *supra* note 5, at 136-38.
108. Convention Between Great Britain and the Netherlands Relative to the Dutch Colonies; Trade with the East and West Indies; &c., Neth.-U.K., Aug. 13, 1814, 2 B.S.P. 370.

### C. *Le Louis in Context*

It is in the context of this recalibration of British abolitionist policy that we can best understand one of the most celebrated cases heard in the Prize Court of Appeals,<sup>109</sup> the case of *Le Louis*, which affirmed the principle of free navigation in time of peace. However, it also articulated a sobering principle that warns those contemplating humanitarian intervention that “a nation is not justified in assuming rights that do not belong to her merely because she means to apply them to a laudable purpose; nor in setting out upon a moral crusade of converting other nations by acts of unlawful force.”<sup>110</sup>

While diplomatic and executive channels were fully engaged in resolving the Spanish and Portuguese claims, a public debate was raging over the likelihood of a revived French slave trade. The 1814 Treaty of Paris, which brought the Napoleonic Wars to a short-lived end, allowed France to keep the territories she had acquired in Senegal. This, combined with the 1801 revival of slavery by Napoleon, led to fears that France would become a great slaving power in West Africa. Therefore, Britain insisted on an additional protocol to the Treaty of Paris under which France agreed to end its slave trade within five years.<sup>111</sup> At the time of the Treaty’s conclusion, one British writer lamented the apparent hypocrisy of British policy toward France:

She has instituted courts for the purpose of confiscating slave ships, . . . she has condemned to the pains and penalties of felony every British subject . . . who shall be concerned in buying or selling slaves either in Asia or Africa . . . she has been employing her naval and military forces in destroying the very last strongholds of the slave trade. . . and [she] has branded and punished as felons of a high order the miscreants who had stained the British name by continuing to carry it on. And while she has done all this . . . she coolly stipulates for the admission of the

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109. The Prize Court of Appeals was a subcommittee of the Privy Council. It was the court of final appeal within the system of admiralty jurisdiction. Counting among their ranks some of the key architects of state policy, the Lords Commissioners were in a unique position to develop legal doctrines against the backdrop of diplomatic and military exigencies because, within the Council, judge and statesman were one and the same. For a discussion of this body in the nineteenth century, see ROSCOE, *supra* note 7, at 74-75.

110. *Le Louis*, (1817) 165 Eng. Rep. 1464, 1480 (High Ct. of Adm.).

111. Additional Articles, Treaty of Paris, Fr.-U.K., May 30, 1814, 1 B.S.P. 151, 172-73.

whole body of the French people to the full and free exercise of this criminal traffic . . . .<sup>112</sup>

No matter how profound or sincere the convictions that may have motivated Britain's experiment in humanitarian intervention on the western coast of Africa, passion alone could not sustain it.

By 1815, the eight-year-long experiment was beginning to wind down, straining under the weight of French, Portuguese, and Spanish protests. The 1817 case of *Le Louis*,<sup>113</sup> adjudicated on appeal in the High Court of Admiralty, brought the experiment to its jurisprudential end. In 1816, the *Queen Charlotte*, a British ship, captured the French slave ship *Le Louis* near Cape Mesurado and brought her to the prize court at Freetown for adjudication. The ship was condemned by the court, but her owners appealed the decision to London. Judge William Scott decided the appeal with a degree of clarity and precision conspicuously absent from his advice to Thorpe on the matter five years before.<sup>114</sup>

Judge Scott's ruling cut to the heart of the legal assumptions underpinning Britain's policy of intercepting and condemning slave ships. It held that, all states being sovereign and equal, all states have an equal right to the free navigation of the high seas. With the exception of the rights of war that permit belligerents to search neutral ships during wartime,<sup>115</sup> no state could claim the right to interrupt foreign navigation. Scott therefore issued the following admonition to Britain: So long as your own security is not jeopardized by the slave trade, "you have no right to prevent a suspected injustice towards another by committing an actual injustice of your own."<sup>116</sup> He thus dealt a deathblow to Thorpe's efforts to impose a unilateral international ban on the West African slave trade.

The ruling in *Le Louis* undermined any legal claim that Britain could make for the enforcement of her ban on the slave trade against the nationals of other states. Notwithstanding this ruling, by 1817 British naval ships and privateers

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112. OBSERVATIONS ON THAT PART OF THE LATE TREATY WITH FRANCE WHICH RELATES TO THE AFRICAN SLAVE TRADE 8 (London, Ellerton & Henderson 1814). For similar lines of argument, see THE SPEECH OF SIR SAMUEL ROMILLY, IN THE HOUSE OF COMMONS, ON THE TWENTY-EIGHTH JUNE, 1814, ON THAT ARTICLE IN THE TREATY OF PEACE WHICH RELATES TO THE SLAVE TRADE 14-16 (London, J. M'Creery 1814).

113. *Le Louis*, 165 Eng. Rep. 1464.

114. See *supra* text accompanying notes 53-56.

115. See, e.g., O.H. Mootham, *The Doctrine of Continuous Voyage, 1756-1815*, 8 BRIT. Y.B. INT'L L. 62, 63-67 (1927).

116. *Le Louis*, 165 Eng. Rep. at 1479.

along the West African coast—supported by the Court of Vice Admiralty at Sierra Leone—had set in motion the ultimate demise of the European trade in African slaves. The pressure exerted by the Court of Vice Admiralty at Sierra Leone helped bring the major slaving states of Europe to the negotiating table with Britain, by then the world's mightiest sea power. Diplomatic channels secured the agreement of those states to withdraw from traffic in human beings over the course of the coming years.

Moreover, by no means did the decision in *Le Louis* mark the end of abolition through interception. Instead, it heralded the beginning of a multilateral effort on the part of Britain, France, Portugal, and Spain to enforce their respective bans (or, in the case of Portugal, restraints) on the West African slave trade through the Mixed Prize Commissions. From 1819 to 1871, these mixed commissions, constituted by treaty for the suppression of the slave trade, sat at Freetown, Havana, New York, and major ports in Africa and Latin America. The bilateral treaties between the United Kingdom and Spain,<sup>117</sup> Portugal,<sup>118</sup> and the Netherlands,<sup>119</sup> respectively, stipulated that nationals of each state party to the treaty would preside over the judicial proceedings. The commissions had no jurisdiction over the captain or crew of ships—only over the ships themselves and their cargo. Captain and crew would be turned over to the authorities of the states of which they were nationals. The decisions of the commissions would be final: No appeal would be allowed. Hence, the commissions were founded on and administered through the cooperative efforts of all of the states whose nationals were involved in the slave trade.<sup>120</sup>

Thus, the bold unilateralism of the Court of Vice Admiralty at Sierra Leone yielded to the conciliatory multilateralism of the negotiating tables of Europe and, ultimately, to the deliberations of mixed commissions the world over. Although Thorpe's judicial experiment ended in 1815, he remained committed to the cause of abolitionism. Consistent in his principles, if not in the manner he considered fit to implement them, Thorpe returned to England in order to urge the British government to continue its campaign to end the slave trade through diplomatic channels. In this manner, the vision of one judge influenced the policies of a state, and, in turn, the policies of that state spread to many, thereby setting in motion Europe's abolition of the slave trade.

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117. Treaty for the Abolition of the Slave Trade, Spain-U.K., *supra* note 106.

118. Treaty on the Gradual Abolition of the Slave Trade, Port.-U.K., *supra* note 107.

119. Treaty for Preventing Any Traffic in Slaves, Neth.-U.K., May 4, 1818, 5 B.S.P. 125, available at [http://www.pdavis.nl/Treaty\\_NL.htm](http://www.pdavis.nl/Treaty_NL.htm).

120. For a thorough account of the structure and workings of the mixed commissions, see Leslie Bethell, *The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century*, 7 J. AFR. HIST. 79, 79-89 (1966).

#### IV. THE TRADE IN WEAPONS OF MASS DESTRUCTION: SOME LEGAL PARALLELS

Although two centuries old, the lessons to be gleaned from the work of Chief Judge Thorpe at the Court of Vice Admiralty at Sierra Leone are relevant to contemporary problems in international law. The basic problem Thorpe faced was how to stop a trade in human chattel, notwithstanding the fact that it was protected in some cases by treaty and in others by principles of free navigation. How could a British naval vessel lawfully intercept a slave ship on the high seas and then bring it to a British court for condemnation as prize (1) in time of peace, and (2) when certain traders possessed a positive right to engage in the slave trade by treaty with England? To this question, Thorpe urged the following answer: Treat slave traders as *hostes humani generis*—the equivalent of pirates under international law—and leave them open to the same sort of treatment one would give such enemies of humankind. Slave ships could thus be intercepted and captured in any place and by any state.<sup>121</sup> However, because other states did not agree that slave traders were *hostes humani generis*, Thorpe soon recognized the contradiction inherent in his attempt to enforce unilaterally against states a norm that only he and a community of abolitionists conceived of as universal.

There is a similar paradox inherent in the Proliferation Security Initiative (PSI) today.<sup>122</sup> Announced by President George W. Bush in 2003, the PSI is a multilateral attempt to curb the international trade in weapons of mass destruction (WMD) and their components through the interdiction of ships carrying on such trade.<sup>123</sup> The existing legal regime governing the high seas would seem to militate against the interdictions and confiscations under the PSI. Article 110 of the United Nations Convention on the Law of the Sea

121. THORPE, *supra* note 26, at 64.

122. For overviews of the PSI and the challenges it poses to existing norms of international law, see Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131 (2005); and Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507 (2005).

123. See Bureau of Int'l Sec. & Nonproliferation, U.S. Dep't of State, Proliferation Security Initiative, <http://www.state.gov/t/isn/c10390.htm> (last visited Feb. 3, 2006). The announcement named sixteen participating states. There are presently fifteen confirmed participating states in the PSI, while an additional sixty states have agreed to cooperate with the eleven core PSI states. For an explanation of how another historic precedent may help untangle some of the knotty problems arising from the PSI, see Tara Helfman, *Neutrality, the Law of Nations, and the Natural Law Tradition: A Study of the Seven Years' War*, 30 YALE J. INT'L L. 549, 585-86 (2005).



guarantees ships complete immunity from interference on the high seas unless there is a reasonable basis upon which to suspect that the ship is engaged in, inter alia, piracy or the slave trade.<sup>124</sup> Yet nowhere does Article 110 allow for interference in the transport of noncontraband weapons, rendering it difficult for states to prevent weapons from falling into the hands of terrorists or rogue governments. Hence the question arises, on what legal grounds can states forcibly interdict ships suspected of carrying weapons of mass destruction in order to prevent deadly goods from falling into the hands of dangerous people?

Although it took shape in negotiating rooms through a distinctly multilateral effort, the PSI has its origins in an episode that posed a direct legal challenge (much like those represented by Thorpe's prize cases) to the legal regime governing free navigation: the *So-San* incident. In December 2002, Spanish ships, working in conjunction with U.S. intelligence agencies, interdicted the *So-San*, a North Korean ship bound for Yemen. Buried under tons of bags of concrete, the interdicting forces found fifteen Scud missiles along with WMD components. In the absence of any treaties to the contrary, the trade in WMD is the formal equivalent of trade in any licit good. Consequently, the U.S. government was forced to permit the vessel and its cargo to complete its voyage.<sup>125</sup>

Since the PSI was announced, the United States and other PSI countries have done what Britain and the slave trading powers of Europe did in Thorpe's wake: hasten to the negotiating table. Under the leadership of the United States, sixteen states have committed to participating in the PSI as of January 2005. An undisclosed number of interdictions have taken place through their cooperation. In addition, the United States has begun concluding bilateral interdiction treaties with the world's leading ship-registry states.<sup>126</sup> The first of these treaties was concluded with Liberia in February 2004. Under the terms of these treaties, each state recognizes the right of the other to interdict ships sailing under its flag on the high seas if they are suspected of transporting WMD. The right "can normally be exercised only if a request for authorization is first made to the flag state. But the treaty also stipulates that authorization may be presumed, if such a request is made and two hours pass without a

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124. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397.

125. David E. Sanger & Thom Shanker, *Reluctant U.S. Gives Assent for Missiles To Go to Yemen*, N.Y. TIMES, Dec. 12, 2002, at A1.

126. SHARON SQUASSONI, CONG. RESEARCH SERV., REPORT NO. RS21881, PROLIFERATION SECURITY INITIATIVE (PSI) 3-6 (2005), *available at* <http://www.fas.org/spp/starwars/crs/RS21881.pdf>.

response.”<sup>127</sup> The treaty serves as a model to be replicated by other states and has been put to such use. The United States has concluded five further boarding agreements and is reportedly in negotiations with two dozen other states.<sup>128</sup> However, none of these treaties stipulate what is to be done with WMD found on board, nor is the interdicting state authorized to confiscate them.<sup>129</sup>

The international community is only beginning to deal with the challenges to international security posed by a free trade in WMD. However, if the defiant and ultimately successful challenge that Robert Thorpe made to the slave trade is any indication of the course we ought to take, the possibility for constraint of this new deadly trade is promising.<sup>130</sup>

## CONCLUSION

While Robert Thorpe quickly learned that he could not single-handedly enforce a universal ban on the slave trade from his humble bench at Freetown, he could and did help set into motion the political and diplomatic engines of change. By applying an expansive interpretation to prevailing treaty regimes and by drawing upon the traditions of natural law and liberty as received by British courts, Thorpe provided judicial consecration for the abolitionist spirit upon which the Sierra Leone Colony was founded. And when the colony's leading members began to subvert this spirit, Thorpe made himself the champion of Sierra Leone's recaptives and the scourge of Freetown's magnates.

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127. Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 530 (2004).

128. The United States has since concluded similar treaties with the Marshall Islands and Panama. SQUASSONI, *supra* note 126, at 3.

129. Bureau of Int'l Sec. & Nonproliferation, U.S. Dep't of State, Ship Boarding Agreements, <http://www.state.gov/t/isn/c12386.htm> (last visited Feb. 3, 2006) (listing agreements with Belize, Croatia, Cyprus, Liberia, the Marshall Islands, and Panama).

130. The development of the legal regime governing the continental shelf also follows this pattern. In 1945, President Truman issued a proclamation stating: “[T]he United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.” Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945). This claim of sovereignty was the first of its kind, and immediately prompted other states to make similar claims. This process ultimately led the Law of the Sea Conference to adopt the Continental Shelf Convention in 1958. For accounts of the genesis of the Convention, see R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 142-45 (3d ed. 1999); ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 20-26 (1993); and J.R.V. PRESCOTT, *THE POLITICAL GEOGRAPHY OF THE OCEANS* 144-47 (1975).

Through his judicial decisions, he sought to bring an end to the odious commerce undertaken by Western Europe's slaving powers; through his letters and his pamphlets, he laid bare the hypocrisy of Freetown's leaders.

Cumulatively, Thorpe's efforts forced Britain to the point of diplomatic crisis. If Westminster was to quiet the clamor of the Spanish, Portuguese, Dutch, and Danes, it would have to replace its policy of benign neglect toward Sierra Leone with vigorous diplomacy. Thorpe's judicial experiment at Freetown thus brought the slave-trading powers of Europe to the negotiating table with Britain. The Court of Vice Admiralty at Sierra Leone served as a model for the Mixed Prize Commissions: international tribunals constituted by treaty for the adjudication and condemnation of ships involved in the slave trade. Thus did the unilateral claim asserted by one state (i.e., that the slave trade is unlawful) spread to a group of states, and subsequently enter into the body of general norms of international law. For what Thorpe could not bring to a grinding halt, he instead brought to a gradual end. This is a dynamic that is beginning to unfold in the case of the PSI today. Whether this multilateral effort will help to control the international traffic in WMD, however, remains to be seen.