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Antislavery Courts and the Dawn of International Human Rights Law

ABSTRACT. Between 1817 and 1871, bilateral treaties between Britain and several other countries (eventually including the United States) led to the establishment of international courts for the suppression of the slave trade. Though all but forgotten today, these antislavery courts were the first international human rights courts. Over the lifespan of the treaties, the courts heard more than 600 cases and freed almost 80,000 slaves found aboard illegal slave trading vessels. During their peak years of operation, the courts heard cases that may have involved as many as one out of every five or six ships involved in the transatlantic slave trade. Historians have given these international antislavery courts scant attention, and legal scholars have almost completely ignored the courts. Most legal scholars view international courts and international human rights law as largely a post-World War II phenomenon, with the Nuremberg trials of the Nazi war criminals as the seminal moment in the turn to international law as a mechanism for protecting individual rights. But in fact, contrary to the conventional wisdom, the nineteenth-century slavery abolition movement was the first successful international human rights campaign, and international treaties and courts were its central features. The history of the antislavery courts also reveals a more complex interrelationship between state power, moral ideas, and domestic and international legal institutions than many contemporary theories of international law and relations acknowledge. Moreover, the antislavery movement's use of international law and legal institutions as part of a broader social, political, and military strategy can help us better understand the potential role of international law today in bringing about improvements in human rights.

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ARTICLE CONTENTS

INTRODUCTION	552
I. ORIGINS OF THE ANTISLAVERY COURTS	555
A. The Rise of British Abolitionism	557
B. Abolitionism and British Foreign Policy, 1807-1814: Unilateralism	563
C. British Foreign Policy at the End of the Napoleonic Wars: A Network of Treaties	569
II. THE COURTS OF MIXED COMMISSION FOR THE ABOLITION OF THE SLAVE TRADE	579
A. Overview of Court Operations	579
B. The Courts in Operation: Impact and Limitations	595
1. Impact: Volume of Cases	595
2. Limitation: Nonparticipation	602
3. Limitation: Other Loopholes	610
4. Limitation: Reluctant Treaty Partners	614
5. Limitation: Faltering Domestic Support	619
C. From Crisis to Success: The Final Abolition of the Slave Trade	621
1. Portugal	622
2. Brazil	624
3. Spain, Cuba, and the United States	626
III. INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL COURTS: RETHINKING THEIR ORIGINS AND FUTURE	629

INTRODUCTION

Almost exactly two centuries ago, in March 1807, both the United States and Great Britain passed landmark legislation prohibiting the slave trade. The anniversary of this event has been marked with fanfare in both countries.¹ But these celebrations mask the fact that the transatlantic slave trade continued for another sixty years before it was finally suppressed. This Article is about those sixty years and the surprising and forgotten role that international law and international courts played in the extinction of the slave trade.

Between 1817 and 1871, bilateral treaties between Britain and several other countries (eventually including the United States) led to the establishment of international courts for the suppression of the slave trade.² Though all but forgotten today, these antislavery courts were the first international human rights courts. They were made up of judges from different countries. They sat on a permanent, continuing basis, and they applied international law. The

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1. See Robert Barr, Associated Press, *In Liverpool, Abolition's Bicentenary Revives the Memory of Slavery*, WASH. POST, Mar. 18, 2007, at A15.
 2. Some of the treaties referred to them as "Mixed Courts of Justice," while others referred to them as "Mixed Commissions." Compare Treaty Between His Britannic Majesty and His Majesty the King of the Netherlands, for Preventing Their Subjects from Engaging in Any Traffic in Slaves art. VII, Gr. Brit.-Neth., May 4, 1818, 5 B.S.P. 125 [hereinafter Anglo-Dutch Treaty of 1818] (referring to "Mixed Courts of Justice"), with Additional Convention to the Treaty of 22 January 1815 Between His Britannic Majesty and His Most Faithful Majesty, for the Purpose of Preventing Their Subjects from Engaging in Any Illicit Traffic in Slaves art. VIII, Gr. Brit.-Port., July 28, 1817, 4 B.S.P. 85 [hereinafter Anglo-Portuguese Treaty of 1817] (referring to "Mixed Commissions"). On occasion, they are referred to in various records as the "Courts of Mixed Commission." See, e.g., List of Cases Adjudged in the Courts of Mixed Commissions at Sierra Leone, Between the 1st of January 1822, and the 1st of January 1823, enclosed in Letter from E. Gregory & Edward Fitzgerald to George Canning (Jan. 1, 1823), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, 1822-23, class B, at 14, in 9 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1823-24). Because the procedures provided for by the various treaties are basically identical, this Article uses the terms "courts" and "commissions" interchangeably. Similarly, for ease of reference, they are referred to as "antislavery courts," though they only exercised jurisdiction over the slave trade and not the institution of slavery itself.

The records of the commissions are housed in the Public Records Office (now known as the U.K. National Archives) in London. F.O. 312 (Cape Town); F.O. 313 (Havana); F.O. 314 (Spanish Town); F.O. 315 (Sierra Leone); F.O. 128, 129, 131 (Rio de Janeiro). Copies of cited materials are on file with the author. In addition, much of the correspondence between the British commissioners and the Foreign Office, as well as diplomatic correspondence between the British government and the governments of other nations related to the treaties, is reproduced in the annual volumes of BRITISH & FOREIGN STATE PAPERS [hereinafter B.S.P.] and the slave trade series of the Irish University Press's BRITISH PARLIAMENTARY PAPERS. In citations in this Article, correspondence is ordered in chronological order.

courts explicitly aimed to promote humanitarian objectives. Though the courts were extremely active for only a few years, over the treaties' lifespan, the courts heard more than 600 cases and freed almost 80,000 slaves found aboard illegal slave trading vessels.³ During their peak years of operation, the courts heard cases that may have involved as many as one out of every five or six ships involved in the transatlantic slave trade.⁴

These international antislavery courts have received scant attention from historians,⁵ and legal scholars have almost completely ignored them.⁶ To be sure, the cases they adjudicated represented only a fraction of the transatlantic slave trade from West Africa, and they left the East African slave trade untouched. Social, economic, political, and military factors created an environment amenable to the formation of the courts, and it is difficult to untangle the causal role played by these factors from the role of the courts themselves in the ultimate global abolition of the slave trade. The final suppression of the slave trade only occurred when changes in attitudes toward the trade in various countries led to effective enforcement of domestic laws against the traffic; these changes in domestic attitudes appear linked at least in part to international efforts to ban the slave trade, though other factors likely played a role as well. But regardless of the weight of various causal factors in the suppression of the slave trade, an international legal institution that had a direct and tangible impact on nearly 80,000 human lives should be far more than a footnote in the history of international law. Modern international

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3. See Leslie Bethell, *The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century*, 7 J. AFR. HIST. 79 (1966).
 4. See *infra* text accompanying notes 205-207.
 5. The most comprehensive treatment is a fourteen-page article published in 1966. See Bethell, *supra* note 3; see also LESLIE BETHELL, THE ABOLITION OF THE BRAZILIAN SLAVE TRADE 122-50 (1970) (discussing the Brazilian mixed commission). As I will discuss in Part I, the extensive historical literature on the British abolition movement and the transatlantic slave trade focuses on the social, economic, and political forces that led Great Britain to spearhead efforts to suppress the transatlantic slave trade, and it mentions the courts' role only in passing. None of these historians examine the courts from the perspective of their role in the history of international law.
 6. The only legal scholarship discussing the courts in any depth is a recent South African article that focuses on the commission located in Cape Town, which operated for a short time and heard only a handful of cases. See J.P. Van Niekerk, *British, Portuguese, and American Judges in Adderley Street: The International Legal Background to and Some Judicial Aspects of the Cape Town Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century* (pt. 3), 37 COMP. & INT'L L.J. S. AFR. 404 (2004). The courts are simply not mentioned in most books and articles on international courts and tribunals or on international human rights law.

courts—about which tens of thousands of scholarly pages have been spilled—measure their successes on a much smaller scale.⁷

In addition to its intrinsic historical interest, the story of the antislavery courts has important implications for contemporary issues in international law. Most legal scholars view international courts and international human rights law largely as post-World War II phenomena, with the Nuremberg trials of the Nazi war criminals and the founding of the United Nations as the seminal moments in the turn to international law as a mechanism for protecting individual rights.⁸ But in fact, the nineteenth-century slavery abolition movement was the first successful international human rights campaign, and international treaties and courts were its central features.⁹

The history of the antislavery courts also reveals a more complex interrelationship between state power, moral ideas, and domestic and international legal institutions than many contemporary theories of international law and relations acknowledge. Great Britain, the main instigator of the antislavery treaties, no doubt would not have campaigned so strongly for abolition if it had been truly devastating to its economic and political interests. Yet substantial evidence shows that Britain's abolition policy was motivated by genuine humanitarian concerns and that the policy inflicted significant economic costs on its empire. Of equal significance, Britain used international law as one important tool for persuading other countries to abandon a widespread and profitable practice. Britain was the nineteenth century's greatest naval power, and its initial efforts to suppress the slave trade were military and unilateral, involving seizures of slave vessels by the British navy and condemnation of those ships in British courts. Over time, however, Britain found it could not rely on its military power alone, but instead had to utilize that power in conjunction with cooperative legal action to achieve its goals. Over several decades, Britain convinced one country after another to ratify

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7. The International Court of Justice, for example, has heard only 136 cases in the past sixty years, most of which have had little tangible impact, and yet it is mentioned in more than nine thousand law journal articles. Similarly, the International Criminal Court has yet to hear a single case but is mentioned in more than five thousand articles.
 8. See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* 1 (1990) ("The contemporary idea of human rights was formulated and given content during the Second World War and its aftermath."). To the extent these accounts acknowledge the nineteenth-century antislavery treaties as predecessors to modern international human rights laws, they usually relegate them to a brief reference or a footnote. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW* 376 (2d ed. 2005).
 9. For an accessible history of the early abolition movement written for a popular audience, see ADAM HOCHSCHILD, *BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE'S SLAVES* (2005).

increasingly powerful treaties against the slave trade. At the same time, these international legal mechanisms would have been ineffective without Britain's military and economic power. At critical moments, Britain was forced to deploy its "hard" powers, as well as its domestic laws and courts, to bring reluctant treaty partners back into the legal fold. In short, neither raw coercive power nor international law alone was enough to achieve the abolition of the slave trade. Both were necessary.

Each time and place in history is different, of course, and yet this episode is evocative of contemporary problems in international relations, including efforts to foster democracy and human rights both through the use of force and/or through international legal institutions, including courts. The antislavery movement's use of international law and legal institutions as part of a broader social, political, and military strategy can help us better understand the potential role of international law today in bringing about improvements in human rights. In more theoretical terms, the history of the antislavery courts suggests a need for a thicker, more robust account of the relationship between power, ideas, and international law. In short, this forgotten bit of history should change the way we think about international courts and international human rights law – their origins, limits, and potential.

I. ORIGINS OF THE ANTISLAVERY COURTS

In 1800, slavery was a fundamental part of the world's economic and social order. Though not practiced in Europe itself, European colonies in the Western Hemisphere relied heavily on slave labor to support their plantation economies. Slave trading ships crossed the Atlantic flying the flags of all the seafaring European nations, as well as of the newly independent United States of America. In the first decade of the nineteenth century, an estimated 609,000 slaves arrived in the New World.¹⁰

Within a relatively short time span, however, things began to change. In 1807, Britain became the first major country, followed shortly by the United States, to ban its subjects from participation in the slave trade.¹¹ By the early

10. See DAVID ELTIS, *ECONOMIC GROWTH AND THE ENDING OF THE TRANSATLANTIC SLAVE TRADE* 249 tbl.A.8 (1987).

11. See Act for Abolition of the Slave Trade, 1807, 47 Geo. 2, c. 36 (Eng.). The United States also enacted legislation banning the slave trade in 1807, but it did not take effect until the following year. See Act of Mar. 2, 1807, ch. 22, 2 Stat. 426. The Kingdom of Norway and Denmark banned the importation of slaves into its West Indian possessions in 1792. See Edict of the King of Denmark and Norway, Concerning the Slave Trade, Mar. 16, 1792, in 1

1840s, more than twenty nations—including all the Atlantic maritime powers—had signed international treaties committing to the abolition of the trade. By the late 1860s, only a few hundred slaves per year were illegally transported across the Atlantic.¹² And by 1900, slavery itself had been outlawed in every country in the Western Hemisphere.

The abolition of slavery has received a great deal of attention from historians,¹³ but much less from scholars of international law. And yet the abolition of chattel slavery remains perhaps the most successful episode ever in the history of international human rights law. Slavery is one of the few universally acknowledged crimes under international law.¹⁴ Though powerful countries today defend torture¹⁵—another practice placed strictly off limits by international law—no nation today officially defends slavery. To be sure, modern forms of forced labor remain a significant human rights issue affecting millions of people, but the type of widespread, legalized chattel slavery that was commonplace in the nineteenth century has mostly disappeared.¹⁶

How did such a dramatic shift occur in disparate societies around the world in less than a century? Changes in the world economy in the nineteenth century certainly created the conditions that made the abolition of slavery more feasible. But the best historical evidence suggests that slavery did not die an accidental death of abandonment in the face of competition from industrial

B.S.P. 971; Bernard H. Nelson, *The Slave Trade as a Factor in British Foreign Policy, 1815-1862*, 27 J. NEGRO HIST. 192, 193-94 (1942).

12. ELTIS, *supra* note 10.

13. See, e.g., ROGER ANSTEY, *THE ATLANTIC SLAVE TRADE AND BRITISH ABOLITION, 1760-1810* (1975); DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* (1975) [hereinafter DAVIS, *AGE OF REVOLUTION*]; DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* (1966) [hereinafter DAVIS, *SLAVERY IN WESTERN CULTURE*]; SEYMOUR DRESCHER, *FROM SLAVERY TO FREEDOM: COMPARATIVE STUDIES IN THE RISE AND FALL OF ATLANTIC SLAVERY* (1999); ELTIS, *supra* note 10.

14. See Rome Statute of the International Criminal Court art. 7(1)(c), July 17, 1998, 2187 U.N.T.S. 93 (criminalizing enslavement); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (criminalizing the slave trade).

15. See Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

16. Sadly, even this form of slavery may not have been completely eradicated. See, e.g., ANTI-SLAVERY INT'L, *IS THERE SLAVERY IN SUDAN?* (2001) (suggesting that the nineteenth-century antislavery movement's success should not be read to diminish the significance of modern forced labor trafficking); see also INT'L LABOUR ORG., *A GLOBAL ALLIANCE AGAINST FORCED LABOUR* 10 (2005) (estimating that 12.3 million people are currently victims of forced labor and other modern forms of slavery).

capitalism.¹⁷ Slavery was eradicated, intentionally, by people who had come to believe it was morally wrong. It was eradicated in part by military force, but also by coordinated legal action – including, surprisingly, international courts.

A. *The Rise of British Abolitionism*

The indisputable star of the international abolition story is Great Britain. Britain was, along with the United States, one of the first major countries to ban the slave trade. Unlike the United States,¹⁸ Britain, whose ships were responsible for more than half of the trade in the years leading up to the ban, enforced its prohibition on slave trading with persistent vigor. Moreover, Britain soon became the main advocate of international treaties banning the trade. Though it received little immediate benefit, Britain devoted significant material resources to suppressing the slave trade. As one historian has explained, slavery was unlike other issues in foreign policy at the time:

Although the British saw abolition as in the national and indeed international interest, it was not a matter of national survival and honor, nor was it even likely to result in any short-run gain for the country. The ultimate goal was not the winning of territory or trade concessions, but rather the imposition of a conception of freedom¹⁹

By one modern estimate, Britain's effort to suppress the slave trade cost an average of nearly two percent of its annual national income for each year between 1807 and 1867,²⁰ and the direct costs of its annual suppression efforts

17. See, e.g., ELTIS, *supra* note 10, at 15, 204 (concluding a detailed analysis of economic data by asserting that “[t]he market for African slaves in the Americas, as with slavery itself, thus did not fade away in the second half of the nineteenth century, rather it was suppressed”).

18. See, e.g., W.E. BURGHARDT DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638-1870*, at 109 (1896) (noting that the Act To Prohibit the Importation of Slaves into Any Port or Place Within the Jurisdiction of the United States, ch. 22, 2 Stat. 426 (1807), “came very near being a dead letter”).

19. ELTIS, *supra* note 10, at 104.

20. See Chaim D. Kaufmann & Robert A. Pape, *Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade*, 53 INT'L ORG. 631, 631 (1999); see also STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 107-09 (1999) (discussing the fact that Britain's antislavery campaign was contrary to its material interests). The costs Britain incurred included diplomatic, legal, and naval costs; emancipation indemnities to planters; lost customs revenues; lost income from the slave trade, including supplies to slave traders; reduced exports to West Africa and the British

between 1816 and 1862 were roughly equal to the total profits it had received from the trade between 1761 and 1807.²¹ During the height of its suppression efforts in the 1840s, somewhere between one sixth and one quarter of the ships in the Royal Navy were involved in antislavery patrols.²²

Not surprisingly, there is an extensive historiography of the causes and origins of British abolitionism. Early historians described the British government's campaign to eradicate the slave trade as one of pure idealism. As one oft-quoted historian put it, "[t]he unwearied, unostentatious and inglorious crusade of England against slavery may probably be regarded as among the three or four perfectly virtuous pages comprised in the history of nations."²³ Later historians viewed skeptically these claims of pristine moral motives. In 1944, Eric Williams published an influential revisionist history, *Capitalism and Slavery*, in which he argued that economic self-interest motivated Britain's antislavery campaign.²⁴ Williams contended that by the turn of the nineteenth century, the British plantation economies in the West Indies were already in decline, while industrial capitalism was on the rise. As industrial capitalists came to dominate the British economy and political system, he argued, they pushed for the abolition of slavery to advance their own interests.²⁵

The next generation of historians acknowledged some connection between the rise of capitalism and the abolition of slavery but rejected Williams's account as overly simplistic.²⁶ Among other things, Williams's account was not supported by the evidence; the economic decline of British West Indian plantations did not begin until well *after* the abolition of the trade.²⁷ In fact,

West Indies; losses in the sugar trade; and higher sugar prices for British consumers. See Kaufmann & Pape, *supra*, at 637.

21. See ELTIS, *supra* note 10, at 97.
22. See Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479, 492 (1990).
23. WILLIAM EDWARD HARTPOLE LECKY, HISTORY OF EUROPEAN MORALS 153 (1929), quoted in CHRISTOPHER LLOYD, THE NAVY AND THE SLAVE TRADE, at xiii (2d ed. 1968).
24. See ERIC WILLIAMS, CAPITALISM AND SLAVERY (1944). Williams, an Oxford-trained historian, later became a political leader and the first Prime Minister of Trinidad & Tobago, leading the country to independence within the Commonwealth and serving as its head from 1956 until his death in 1981. See generally ERIC WILLIAMS, INWARD HUNGER (1969). His anticolonial agenda may have influenced his earlier scholarly writings.
25. WILLIAMS, CAPITALISM AND SLAVERY, *supra* note 24, at 154-57.
26. See, e.g., SEYMOUR DRESCHER, CAPITALISM AND ANTISLAVERY (1986); Roger T. Anstey, *Capitalism and Slavery: A Critique*, 21 ECON. HIST. REV. 307 (1968).
27. See, e.g., Kaufmann & Pape, *supra* note 20, at 636. Britain dominated both the slave trade and the sugar industry in the years immediately before the Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36 (Eng.) (repealed 1824): "British ships carried 52 percent of slaves transported between 1791 and 1805, and British colonies also produced 55 percent of

both the slave trade and slave colonies were highly profitable to Britain at the time of abolition and would likely have remained so for many years.²⁸ It was abolition itself, not some other factor, that led to both the absolute and relative decline of British plantation colonies in the Caribbean.²⁹ As one economic historian explained:

In 1800, if one were to argue in terms of economic self-interest, the British should have been actively encouraging the slave trade and slave settlements throughout the world. Such a policy would have been highly effective in achieving national goals as laid down by the amalgam of London merchants and landed gentry who dominated the British government at this time. It would also have best served the material aims of manufacturers and wage earners alike.³⁰

Though disagreeing on many details, historians now largely concur that British abolitionism arose out of a confluence of factors, including Enlightenment philosophy and religious revival movements.³¹ Abolition was also only one part of a broader humanitarian movement in England: other areas of concern included poor laws, labor standards, and prison conditions.³² As for the role of capitalism, some have suggested that the antislavery movement served to legitimate free labor, thereby reinforcing the interests of new capitalist elites in Britain.³³ Others have challenged the degree to which antislavery did deflect attention from domestic labor issues and have suggested instead that capitalism's key contribution to the antislavery movement was a cognitive one, namely an awareness of cause and effect across the marketplace that brought home to British consumers the causal connection between their

the world's sugar in 1805-06 – and both percentages were rising.” Kaufmann & Pape, *supra* note 20, at 634. The West Indian trade made up more than half of Britain's total colonial trade. *Id.*

28. See generally SEYMOUR DRESCHER, *ECONOCIDE: BRITISH SLAVERY IN THE ERA OF ABOLITION* (1977).
29. See ELTIS, *supra* note 10, at 5-6.
30. *Id.* at 6.
31. See, e.g., DAVIS, *SLAVERY IN WESTERN CULTURE*, *supra* note 13, at 365-445 (describing religious and Enlightenment sources of antislavery thought).
32. See Thomas W. Laqueur, *Bodies, Details and the Humanitarian Narrative*, in *THE NEW CULTURAL HISTORY* 176 (Lynn Hunt ed., 1989).
33. See David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823*, in *THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITION AS A PROBLEM IN HISTORICAL INTERPRETATION* 17, 71 (Thomas Bender ed., 1992) [hereinafter *THE ANTISLAVERY DEBATE*] (“The antislavery movement, like Smith's political economy, reflected the needs and values of the emerging capitalist order.”).

demand for sugar, the demand for slave labor on the sugar plantations of the West Indies, and the horrors of the “Middle Passage”—the voyage across the Atlantic in the hold of a slave ship.³⁴ More recently, historians have also countered the emphasis on elite interests by demonstrating the genuine importance of widespread, popular support in Britain for the abolitionist cause.³⁵ For their part, international relations scholars have puzzled over the degree to which abolition affected British foreign policy, finding Britain’s actions against the slave trade unexplained by conventional theories of international relations.³⁶

Regardless of its precise origins, the abolition movement indisputably became an important force in British politics in the late eighteenth and early nineteenth centuries. Early abolition efforts did not strike at the heart of the problem—the institution of slavery itself, which was not abolished in British colonies until 1833—but focused first on limiting the geographical reach of slavery, and second on restricting the trade in slaves from Africa to the New World.

On both sides of the Atlantic, opponents of the slave trade conceptualized the issue in terms of human rights, and spoke as well of a religious and moral obligation. Upon introduction of an early and unsuccessful bill to ban the slave trade in 1776, one member of the British Parliament argued that the “[s]lave-trade was contrary to the laws of God, and the rights of man.”³⁷ Speaking in support of legislation to ban the slave trade in 1806, Lord Grenville likewise characterized slavery as contrary to the “rights of nature” whereby “every human being is entitled to the fruit of his own labour.”³⁸ President Thomas Jefferson’s message to the U.S. Congress in 1806 supported legislation against the slave trade because it would “withdraw the citizens of the United States

34. Thomas L. Haskell, *Capitalism and Origins of the Humanitarian Sensibility* (pt. 1), in *THE ANTISLAVERY DEBATE*, *supra* note 33, at 107, 111.

35. Seymour Drescher, *Whose Abolition? Popular Pressure and the Ending of the British Slave Trade*, 143 *PAST & PRESENT* 136, 166 (1994). For a detailed account of the leaders and key moments in the popular movement against the slave trade, see HOCHSCHILD, *supra* note 9.

36. See Kaufmann & Pape, *supra* note 20, at 631-32 (noting that realism and liberal institutionalism “focus on states’ material interests and therefore cannot offer much advice on how costly international moral action might be accomplished,” while constructivism, though it focuses on “the ways in which political discourse can shape states’ conceptions of their interests,” does not take into account the purely domestic coalition politics that appear to have shaped British foreign policy on the slave trade).

37. 1 THOMAS CLARKSON, *ABOLITION OF THE AFRICAN SLAVE TRADE BY THE BRITISH PARLIAMENT* 40 (Augusta, P.A. Brinsmade 1830) (quoting David Hartley).

38. GR. BRIT. PARLIAMENT, *SUBSTANCE OF THE DEBATES ON A RESOLUTION FOR ABOLISHING THE SLAVE TRADE* 99 (1806) (statement of Lord Grenville).

from all further participation in those violations of human rights which have been so long continued on the unoffending inhabitants of Africa.”³⁹

From the beginning, law was a key weapon in the abolitionists’ arsenal. In 1772, in the landmark case of *Somerset v. Stewart*,⁴⁰ a British court held that slavery would not be legally recognized within Britain itself. James Somerset, a slave from Virginia, had been brought to England by his master, Charles Stewart, who intended ultimately to return with Somerset to America. Once in England, however, Somerset’s situation came to the attention of abolitionists, who helped him file a petition for habeas corpus seeking his release.⁴¹ The court held that slavery was “so odious” and contrary to natural law that it could only be justified by positive law.⁴² Thus, despite the practical “inconvenience”

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39. Thomas Jefferson, President of the United States, Sixth Annual Message (Dec. 2, 1806), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 408 (James D. Richardson ed., 1898); see also DU BOIS, *supra* note 18, at 80 (quoting petitions for the abolition of the slave trade to the United States that describe the trade as “an outrageous violation of one of the most essential rights of human nature” and “degrading to the rights of man”); EXECUTIVE COMM. OF THE AM. ANTI-SLAVERY SOC’Y, *SLAVERY AND THE INTERNAL SLAVE TRADE IN THE UNITED STATES OF NORTH AMERICA* 162 (photo. reprint 1969) (1841) (referring to “the cause of human rights”). This view of the slave trade as a “human rights” issue was carried on through the later part of the nineteenth century, as when Yale College President Theodore Dwight Woolsey’s 1906 edition of *Introduction to the Study of International Law* explained that under the “correct views of human rights” slavery was a status unprotected by the law of nations and that “new views of men’s rights” had led to the prohibition of the slave trade in international law. THEODORE DWIGHT WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* 236-37 (6th ed. 1906).
40. (1772) 98 Eng. Rep. 499 (K.B.). For a discussion of similar cases in French courts, see SUE PEABODY, “THERE ARE NO SLAVES IN FRANCE”: THE POLITICAL CULTURE OF RACE AND SLAVERY IN THE ANCIEN RÉGIME (1996).
41. See HOCHSCHILD, *supra* note 9, at 48-51 (describing the role of abolitionists in bringing Somerset’s case).
42. *Somerset*, 98 Eng. Rep. at 510. For a discussion of the natural law underpinnings of *Somerset* and other antislavery cases, see ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 8-30 (1975). As Cover notes, jurists in England and the United States during the eighteenth and nineteenth centuries had conflicting and incompletely theorized views of the relationship between natural law, statutory law, the common law, and the law of nations. Slavery was a particularly complicated case, because although originally seen by some philosophers as a natural part of the order of the world (and perhaps even mandated by God), over time other philosophers came to view it as contrary to natural law. At the same time, slavery was sanctioned by the Roman predecessor of the law of nations, the *jus gentium*. As early as the third century, the Roman jurist Ulpian pointed out slavery as the sole example of a conflict between the *jus naturale* and the *jus gentium*, a contradiction that was later recognized by Justinian. See DAVIS, *SLAVERY IN WESTERN CULTURE*, *supra* note 13, at 83. Full exploration of the way that natural law, statutory law, the common law, and the law of nations were conceptualized in the nineteenth century is beyond the scope of this Article, but it is sufficient to note that in the face of a direct conflict between some kind of

that might follow from the decision – which Stewart had argued would include the liberation of some 14,000 slaves in England valued by their owners at a total of £800,000 – the court ordered Somerset’s release.⁴³

Having succeeded in establishing that any slave who touched British soil would be free, the abolitionists next focused their efforts on banning the transport of slaves from Africa to the New World. The immediate abolition of slavery was deemed politically infeasible because it was too vital to the economies of the West Indian colonies. The slave trade, although lucrative for the British merchants who participated in it and a vital source of new slaves for British colonies, was a somewhat easier target. For one thing, the slave trade was viewed as the cruelest part of the system. Accounts by sailors and freed slaves of the horrors of the Middle Passage were widely circulated in Britain. Abolitionists also argued that cutting off the supply of fresh slaves would induce owners to treat their existing slaves better and thus reduce horrific mortality rates on plantations; better treatment of slaves, they argued, might even improve productivity.

Abolitionist leaders succeeded in putting the abolition of the slave trade on the political agenda in the late 1780s and early 1790s. Under the leadership of William Wilberforce, a bill for the abolition of the trade passed the House of Commons in 1792, but was blocked in the House of Lords.⁴⁴ After this initial progress, however, almost a decade followed in which the movement made little headway. The French Revolution had provoked fear in Britain’s ruling classes and led to a crackdown on political agitation; the public meetings and petition campaigns that had propelled abolition onto the parliamentary agenda came to a halt.⁴⁵ Though Wilberforce continued to introduce antislavery legislation each year, the legislation received little attention, and other matters, such as the war with France, dominated Britain’s political agenda.

In the spring of 1806, the abolitionists finally changed tactics and used the renewed war with France to their advantage. The crucial first step was the passage of the Foreign Slave Trade Act,⁴⁶ which prohibited British subjects from participating in the slave trade with the current or former colonies and possessions of France and its allies.⁴⁷ Framed as a national security measure rather than a humanitarian one, the Act easily passed the House of Commons.

positive law (including the law of nations) and natural law, judges of the time felt themselves obliged to apply the positive law. See COVER, *supra*.

43. *Somerset*, 98 Eng. Rep. at 509.

44. See HOCHSCHILD, *supra* note 9, at 233–34.

45. See *id.* at 241–55.

46. See Act To Prevent the Importation of Slaves, 1806, 46 Geo. 3, c. 52 (Eng.).

47. HOCHSCHILD, *supra* note 9, at 302–03; Drescher, *supra* note 35, at 141–42.

Proslavery forces realized the potential importance of the measure by the time it reached the House of Lords, and submitted a petition with more than four hundred signatures from the key trading center of Manchester opposing the Act. The abolition forces responded within hours with a counter-petition from Manchester bearing more than 2300 signatures.⁴⁸ The House of Lords quickly agreed to the Act.⁴⁹

Having gained this wedge, the abolitionists promptly renewed their efforts to achieve a broader ban. Conditions were favorable in more ways than one. First, the petition campaign in support of the Foreign Slave Trade Act had shown that popular support for abolition was both widespread and deep, even in regions where trading interests were strong. Although British voting rights would not be expanded beyond a limited segment of the population for another twenty-five years, strong popular sentiment influenced politics.

The slave trade became an issue in key parliamentary elections in the fall of 1806.⁵⁰ By that time, two changes since the 1790s had reduced the perceived threat of foreign competition with British commercial interests in the West Indies: first, the war with France had reduced French power in the West Indies and on the high seas; and second, a Haitian slave revolt had led to the independence of France's most productive sugar colony. And so it happened that, in early 1807, both houses of Parliament finally passed the Act for the Abolition of the Slave Trade.⁵¹ As of May 1, 1807, the law completely prohibited participation in the slave trade by British subjects and the importation of slaves to British possessions. The British navy began to enforce the ban, and the slave trade under the British flag rapidly decreased.⁵²

B. Abolitionism and British Foreign Policy, 1807-1814: Unilateralism

Following passage of the 1807 Act, it quickly became clear that it would be in Britain's interest to encourage the suppression of slave trading by other countries as well. If other nations continued to tolerate the trade, the only effect of Britain's ban would be to shift the trade from British-flagged ships to the ships of other nations. In addition, the Caribbean colonies of other nations

48. Drescher, *supra* note 35, at 142.

49. *See id.* at 142-44.

50. *See id.* at 145-48.

51. Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36 (Eng.) (repealed 1824).

52. *See* David Eltis, *The Nineteenth-Century Transatlantic Slave Trade: An Annual Time Series of Imports into the Americas Broken Down by Region*, 67 *HISP. AM. HIST. REV.* 109, 136 tbl.V (1987).

would continue to receive infusions of new slaves, putting British possessions that could not receive such reinforcements at an economic disadvantage. Thus, the British West Indian planters, who had been the strongest opponents of the 1807 Act, quickly became supporters of British efforts to stamp out the slave trade carried out by other nations.

At the time, other countries showed little interest in implementing an effective ban on the trade. Though there had been abolition movements in France and the United States, abolitionists were not sufficiently influential in domestic politics in either of those countries in 1807 to force their governments to devote significant resources to the suppression of the slave trade, particularly on the high seas. Like Britain, France initially drew a distinction between slavery in its colonies and slavery on French soil. Long before the much-celebrated decision by the British court in *Somerset*, French admiralty courts had granted numerous petitions for freedom on behalf of slaves who had been brought within the French mainland.⁵³ In 1794, the revolutionary government in France abolished slavery in its colonies,⁵⁴ and the French slave trade was temporarily dampened.⁵⁵ This abolition effort was short-lived, however, for the trade was never effectively suppressed and Napoleon reauthorized slavery in French colonies in 1803.⁵⁶

The United States had prohibited the outfitting of slave ships in American ports in 1794⁵⁷ and enacted legislation completely banning the slave trade under the American flag and into American ports in March 1807. That legislation took effect in 1808, the earliest date allowed by the Constitution.⁵⁸ Within a decade, the United States had effectively suppressed slave imports

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53. See PEABODY, *supra* note 40, at 23-40, 88-93. Alarm about the number of blacks in Paris, however, led Louis XVI to enact a measure in 1777 prohibiting the entry of new blacks (free or slave) into France, requiring the registration of those already present, and prohibiting the Admiralty Court from hearing any further freedom petitions. The new law was not well enforced, and the Admiralty Court began granting freedom petitions again as early as 1778. *See id.* at 120-33.
54. See DAVIS, *AGE OF REVOLUTION*, *supra* note 13, at 29.
55. See Roger Anstey, *The Slave Trade of the Continental Powers, 1760-1820*, 30 *ECON. HIST. REV.* 259, 263-64 (1977).
56. See DAVIS, *AGE OF REVOLUTION*, *supra* note 13, at 29-31.
57. See WARREN S. HOWARD, *AMERICAN SLAVERS AND THE FEDERAL LAW 1837-1862*, at 25-27 (1963).
58. Article I, Section 9 of the U.S. Constitution reflected a compromise between Northern and Southern states and provided that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight"

into its own territory.⁵⁹ But in the face of sectional divisions between North and South, the United States devoted few resources to enforcing the ban against U.S.-flagged ships on the high seas.⁶⁰

Abolitionist movements had even less power in Spain and Portugal, the other major maritime powers with significant plantation colonies in the New World.⁶¹ Both of those countries permitted the trade to continue unrestricted under their flags, and the slave trade from Africa to Cuba and Brazil flourished.

Britain thus resorted initially to unilateral military action to suppress the slave trade. The 1807 Abolition Act was enacted during the Napoleonic Wars, during which Britain claimed the right under the law of nations to search ships on the high seas to determine whether they were enemy ships or, if neutral ships, whether they were violating principles of neutrality by, for example, carrying contraband for the enemy or running a blockade. Although the primary efforts of the British Navy were in pursuance of the war effort, Britain also began using this search right, derived from international law, as a method to suppress the slave trade. Ships found carrying cargoes of slaves were brought into British vice admiralty courts around the Atlantic for condemnation as prizes under the law of nations.⁶²

The British appellate courts first addressed this issue in the case of *The Amedie*.⁶³ While sailing under the flag of the United States from Africa to Cuba with a cargo of 105 slaves, *The Amedie* was captured by a British warship in 1808. Though the United States was a neutral in the war at that time, its ships were arguably subject to search under the law of nations to ensure that they were not violating neutrality. The British vice admiralty court in Tortola condemned the ship as a lawful prize, and the court in London affirmed. The court observed that the British Parliament had clearly “declared the African slave trade is contrary to the principles of justice and humanity.”⁶⁴ While noting that the United States had also banned the trade as a matter of domestic law, the court acknowledged that the positive law of nations, either by treaty or custom, did not completely ban the slave trade:

59. See Eltis, *supra* note 52, at 136 tbl.V.

60. See DU BOIS, *supra* note 18, at 108-09.

61. See, e.g., BETHELL, *supra* note 5, at 6 (noting that the Portuguese Foreign Minister responded to British overtures about banning the slave trade in 1807 by saying it was “utterly impracticable” for Portugal even to discourage, let alone ban, the slave trade).

62. See Tara Helfman, Note, *The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade*, 115 YALE L.J. 1122 (2006).

63. *The Amedie*, (1810) 12 Eng. Rep. 92 (P.C.).

64. *Id.* at 96.

[W]e cannot legislate for other countries; nor has this country a right to controul any foreign legislature that may think proper to dissent from this doctrine and give permission to its subjects to prosecute this trade. We cannot, certainly, compel the subjects of other nations to observe any other than the first and generally received principles of universal law.⁶⁵

Using the same natural law reasoning as the court in *Somerset*, however, the court concluded that it was entitled to presume the slave trade unlawful unless some positive law authorized it. Having found the trade presumptively illegal, the court put on the claimant “the whole burden of proof . . . to shew that by the particular law of his own country he is entitled to carry on this traffic.”⁶⁶ Even where the claimant was able to demonstrate domestic legal authority, the court intimated that “persons engaged in such a trade cannot, upon principles of universal law, have a right to be heard upon a claim of this nature in any court” and that, in any event, “no claimant can be heard in an application to a court of prize for the restoration of the human beings he carried unjustly to another country for the purpose of disposing of them as slaves.”⁶⁷ Thus, the court upheld the condemnation of the ship and its cargo;⁶⁸ the slaves were freed, and the ship itself was awarded as prize to its captor, as was customary.⁶⁹

Throughout the Napoleonic Wars, Britain continued the practice of seizing foreign slave ships, including American, Spanish, Portuguese, Dutch, and French vessels.⁷⁰ Other nations protested Britain’s heavy-handed search tactics,⁷¹ both in relation to captured slave ships and in relation to maritime commerce more generally, as exceeding permissible bounds under the law of nations. Indeed, British search and seizure of American ships, though not specifically slave ships, was one of the main bones of contention that led to the

65. *Id.*

66. *Id.*

67. *Id.* at 96-97.

68. *Id.* at 97.

69. *Id.* at 92. Under prevailing practice in the nineteenth century, the proceeds from a ship condemned as a prize were shared between the government and the crew of the ship that made the capture. The precise division of the proceeds was set by statute and periodically was amended.

70. For other cases, see, for example, *Donna Marianna*, (1812) 165 Eng. Rep. 1244 (Adm. Ct.); *Fortuna*, (1811) 165 Eng. Rep. 1240 (Adm. Ct.); *Africa*, (1810) 12 Eng. Rep. 156 (P.C.); and *Anne*, (1810) 12 Eng. Rep. 158 (P.C.). See also Helfman, *supra* note 62 (discussing cases tried before the vice admiralty court in Sierra Leone).

71. See LLOYD, *supra* note 23, at 62-63 (describing Portuguese diplomatic protests in 1813 related to capture of Portuguese-flagged slaving vessels off the coast of Africa).

War of 1812.⁷² But Britain persisted in these unilateral seizures through the end of the Napoleonic Wars. As the following tables show, Britain captured a nontrivial number of ships during this period.

Table 1.

CASES IN BRITISH VICE ADMIRALTY COURTS DURING NAPOLEONIC WARS⁷³

YEAR	NUMBER OF CASES TRIED IN BRITISH VICE ADMIRALTY COURTS	% OF KNOWN VOYAGES TRIED IN BRITISH VICE ADMIRALTY COURTS
1806	4	1
1807	3	1
1808	6	9
1809	10	11
1810	27	17
1811	27	13
1812	14	12
1813	10	9
1814	22	20
1815	27	18
1816	30	14
1817	4	2

72. See DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 11-13 (1989).

73. Data on known slave voyages in this and other numerical charts in this Article are derived from David Eltis et al., *The Trans-Atlantic Slave Trade: A Revised and Enlarged Database* (forthcoming 2008) [hereinafter Eltis, *Slave Trade Database*]. The online version of the database is a much-expanded version of the database that was published in 1999. See DAVID ELTIS ET AL., *THE TRANS-ATLANTIC SLAVE TRADE: A DATABASE ON CD-ROM* (Cambridge Univ. Press, rel. 1999). This chart was created from raw data by using the year of departure variable ("YEARDEP") for year and the variable describing the outcome of the voyage ("FATE") to count all voyages adjudicated in vice admiralty courts each year as well as the total number of voyages of any outcome in that year. The author is extremely grateful to David Eltis for providing the most recent version of the database for use in this Article. For a discussion of this data, and its limits, see *infra* text accompanying notes 208-210.

In one sense, the end of the Napoleonic Wars in 1814-15 was a peculiar time for Britain to change the direction of its antislavery policies. After all, Britain won the war, and, more than that, had established itself as *the* dominant maritime power. But with the end of hostilities, Britain's unilateral actions became more suspect. The right to search foreign-flagged vessels was linked under the law of nations to a state of warfare, and its scope was controversial even in that context. It was clear that there was no general right of peacetime search, aside from cases of piracy. Although the British courts would not begin to invalidate the peacetime search and seizure of foreign-flagged slaving vessels until 1817, the writing was already on the wall. Unilateral British suppression efforts in peacetime would not be perceived as legitimate by its own courts, let alone by other countries, many of which had already insinuated that Britain was not interested in the slave trade at all, but was simply using the humanitarian cause as a cover for its self-interested efforts to dominate maritime commerce.⁷⁴

In July 1816, the British government acknowledged that the peacetime searches were illegal under international law,⁷⁵ and the following year, British courts began invalidating seizures of slave ships, starting with the case of *Le Louis*, issued on December 15, 1817.⁷⁶ *Le Louis* involved a French vessel seized in 1816 and condemned by the British vice admiralty court at Sierra Leone. The condemnation was reversed on appeal in an opinion authored by Sir Walter Scott.⁷⁷ Although the court acknowledged that French law prohibited the slave trade, the court found that Britain had no legal authority to search the ship on the high seas.⁷⁸ Noting that the customary law of nations provided no generalized right to search in peacetime, the court concluded that Britain could not search or seize a French ship in conditions of peace unless the ship was engaged in piracy or the search was directly authorized by a treaty with France. The court found, first, that the slave trade was not piracy under the general law of nations. Second, the court concluded that the 1815 treaty in which France had agreed to ban the slave trade was not sufficient to confer a right of peacetime search. Thus, there was no legal basis for the search and seizure.⁷⁹ In

74. See HOWARD, *supra* note 57, at 4-6.

75. See ELTIS, *supra* note 10, at 109.

76. See *Le Louis*, (1817) 165 Eng. Rep. 1464 (Adm. Ct.).

77. *Id.* at 1473.

78. *Id.* at 1475.

79. *Id.* at 1482. For an interesting similar turn-about in American case law, compare Justice Story's decision upholding an American ship's capture of a French slave vessel on *Somerset*-type reasoning in *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846-48 (C.C.D. Mass.

the face of this positivist, formal view of the status of international law on the slave trade, it was clear that if Britain wanted to suppress the slave trade, it would need to persuade other countries to commit to the project and to enter into treaties that would give legal legitimacy to its actions.

*C. British Foreign Policy at the End of the Napoleonic Wars:
A Network of Treaties*

The end of the Napoleonic Wars not only made it something of a necessity for Britain to address the slave trade issue on a multilateral basis, but also presented an opportunity for the British government to make the issue a bargaining chip in the series of diplomatic negotiations and realignments that inevitably followed the war. In the years following the Napoleonic Wars, Britain successfully negotiated for clauses related to the slave trade in a number of multilateral and bilateral treaties. Although the multilateral treaties ultimately included only statements of principle against the slave trade with no enforcement mechanisms, several of the bilateral negotiations ultimately resulted in treaties that not only banned the slave trade but also provided for enforcement of the ban in international mixed courts.

The British government faced strong domestic political pressure to make abolition a central feature of the immediate postwar negotiations. When the Foreign Secretary, Viscount Castlereagh, returned from the initial peace treaty negotiations in France in the summer of 1814, he was greeted with euphoria and praise for having brought the long war to a successful conclusion. These accolades, however, were quickly supplanted by criticism for having agreed to a provision in the treaty that allowed France to renew its participation in the slave trade (participation that had been dampened or eliminated during the war) for five more years.⁸⁰ Wilberforce, the leader of the abolition movement in Parliament, immediately described the treaty provision as the “death-warrant of a multitude of innocent victims, men, women and children.”⁸¹ Lord Canning pointed out that Castlereagh had opposed the 1807 Act abolishing the

1822) (No. 15,551) with Justice Marshall’s invalidation of a similar seizure with *Le Louis*-type reasoning in *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

80. See Drescher, *supra* note 35, at 159; see also Additional Article to the Definitive Treaty of Peace Between Great Britain and France, Gr. Brit.-Fr., May 30, 1814, 3 B.S.P. 890 (acknowledging that the slave trade is “repugnant to the principles of natural justice and of the enlightened age in which we live” and pledging to cooperate with Britain at the upcoming Congress to induce agreement for abolition of the trade, as well as committing to abolish the trade in the course of five years, but preserving the right of France to engage in the trade in the interim).

81. Drescher, *supra* note 35, at 159.

trade, thereby implying that he had not pursued the issue with sufficient diligence in the peace negotiations.⁸²

Abolitionist leaders reached out to the public for support. In what may have been the largest popular petition campaign in Britain's history, more than three-quarters of a million people (out of a national population of approximately twelve million) signed petitions denouncing this provision of the peace treaty with France.⁸³ Debates over the slavery article tainted local victory celebrations around the country, with pictures of Africans in chains being displayed at some festivals.⁸⁴ In his correspondence, the Duke of Wellington commented on the "degree of frenzy" in London about the slave trade, noting that "[p]eople in general appear to think that it would suit the policy of this nation to go to war to put an end to that *abominable* traffic."⁸⁵ Both the House of Commons and the House of Lords passed resolutions urging that the slave trade issue be brought up at the upcoming Congress of Vienna, where the countries involved in the just-concluded war hoped to transform the initial peace agreement into an arrangement for long-term stability in Europe.⁸⁶

Canning's suspicions about Castlereagh were largely correct: Castlereagh did not view abolition as a proper element of British foreign policy, suggesting in private that it was wrong "to force it upon nations, at the expense of their honour and of the tranquility of the world. Morals were never well taught by the sword."⁸⁷ But stung by the public outcry, Castlereagh and Prime Minister

82. See *id.* at 159-60; see also *House of Commons*, TIMES (London), June 7, 1814, at 2 (describing the reaction to Lord Castlereagh's presentation of the peace treaty).

83. See HOCHSCHILD, *supra* note 9, at 316-17; Drescher, *supra* note 35, at 160; Nelson, *supra* note 11, at 194 (noting that more than six hundred petitions from various towns and associations were submitted to Parliament in July 1814).

84. See Drescher, *supra* note 35, at 161.

85. See *id.* at 164 (quoting Letter from Arthur Wellesley, Duke of Wellington, to Viscount Castlereagh (June 17, 1814); Letter from Arthur Wellesley, Duke of Wellington, to Viscount Castlereagh (July 6, 1814)).

86. See Address of the House of Commons to the Prince Regent of Great Britain (May 3, 1814), in 3 B.S.P. 893, 893-94 (1815-16) (urging that "His Majesty's Government would employ every proper means to obtain a Convention of the Powers of Europe for the immediate and universal abolition of the African Slave Trade" at the Congress which "afford[s] a most auspicious opportunity for interposing the good offices of Great Britain to accomplish the above noble purpose"); see also Nelson, *supra* note 11, at 194.

87. BETHELL, *supra* note 5, at 12.

Liverpool felt compelled to instruct British negotiators to redouble their efforts to conclude antislavery treaties with France, Spain, and Portugal.⁸⁸

Castlereagh directed the Duke of Wellington, who had been sent to Paris, immediately to reopen the issue with the French government. Wellington was instructed to press for immediate abolition of the slave trade by the French, as well as rights of reciprocal search on the high seas to enforce the ban. Recognizing that this proposal would not go over well with the French government, Castlereagh noted that “[t]o soften the exercise of this power, perhaps it might be expedient to require the Sentence of Condemnation to be passed in the Courts of Admiralty of the Country to which the Ship detained belongs.”⁸⁹

The French negotiator rebuffed Wellington’s initial approach, pointing out that the public sentiment against the trade in France was not as strong as in Great Britain.⁹⁰ Castlereagh then sent word to Wellington that he should offer France a material inducement for cooperation on the slavery issue—either a cash payment or an island in the West Indies.⁹¹ This offer, too, was rejected.⁹²

While negotiations with France were momentarily stalled, Britain proved more successful in its negotiations with the Netherlands, which in August 1814 formalized by treaty the promise it had made in June 1814 to prohibit the slave trade.⁹³ Negotiations with the United States ending the War of 1812 also included discussion of the slave trade. The United States, which had already banned the slave trade by statute,⁹⁴ was amenable to including a provision on the topic in the peace treaty. Thus the Treaty of Ghent, signed between Great

88. Castlereagh was apparently quite susceptible to public opinion. He ended up committing suicide in 1822, partly in reaction to his perception of his unpopularity. *See generally* J.A.R. MARRIOTT, *CASTLEREAGH: THE POLITICAL LIFE OF ROBERT, SECOND MARQUEES OF LONDONDERRY* (1936).

89. Letter from Viscount Castlereagh to the Duke of Wellington (Aug. 6, 1814), *in* 3 B.S.P. 891, 893 (1815-16).

90. Letter from the Duke of Wellington to Viscount Castlereagh (Aug. 25, 1814), *in* 3 B.S.P. 901, 902 (1815-16).

91. Letter from Viscount Castlereagh to the Duke of Wellington (Oct. 4, 1814), *in* 3 B.S.P. 907, 907 (1815-16).

92. Letter from the Duke of Wellington to Viscount Castlereagh (Nov. 5, 1814), *in* 3 B.S.P. 913, 913 (1815-16).

93. Convention Between Great Britain and the Netherlands Relative to the Dutch Colonies; Trade with the East and West Indies art. VIII, Gr. Brit.-Neth., Aug. 13, 1814, 2 B.S.P. 370, 374-75 (promising to forbid subjects from “taking any share whatsoever in such inhuman Traffic”). Sweden, too, was persuaded to enter into a treaty banning the trade, but Sweden was not a major maritime power.

94. *See supra* note 11 and accompanying text.

Britain and the United States on December 24, 1814, declared that “the traffic in slaves is irreconcilable with the principles of humanity and justice,” and both nations pledged to “use their best endeavours” to abolish the trade, though the treaty did not include particular mechanisms for enforcing this promise.⁹⁵

Throughout the summer and fall of 1814, the British government tried to obtain similar agreements from Spain and Portugal. Britain’s emissary in Madrid, Sir Henry Wellesley, initially sent word that he was not optimistic about obtaining any abolition agreement whatsoever from the Spanish government.⁹⁶ Following the British public outcry in reaction to the French treaty, Wellesley told his Spanish counterpart, the Duke of San Carlos, that any treaty they might conclude would not be well-received in London unless it included an abolition clause. San Carlos responded that the continuance of the slave trade was essential to the viability of Spain’s colonies and its abolition was inconceivable in the immediate future. Wellesley only managed to secure a provision agreeing to limit the traffic under the Spanish flag to Spanish citizens and to Spanish possessions.⁹⁷

This concession was unsatisfactory to the government in London, which faced continuing pressure to show some progress on the issue. Wellesley thus received instructions to use the cash-incentive approach. He offered the Spanish government a loan of 10,000,000 Spanish dollars in exchange for the immediate abolition of the slave trade.⁹⁸ The Spanish government, though in serious need of the money, declined the offer.⁹⁹ A month later, the Spaniards—perhaps still hoping for the money—made a counteroffer, suggesting that they would immediately ban the trade everywhere except in the zone from the equator to ten degrees north of the equator.¹⁰⁰ Anything short of total abolition, however, remained unacceptable to London.¹⁰¹

95. Treaty of Peace and Amity Between His Britannic Majesty and the United States of America art. X, Gr. Brit.-U.S., Dec. 24, 1814, 2 B.S.P. 357, 364.

96. Letter from Sir Henry Wellesley to Viscount Castlereagh (June 17, 1814), *in* 3 B.S.P. 920 (1838).

97. Letter from Sir Henry Wellesley to Viscount Castlereagh (July 6, 1814), *in* 3 B.S.P. 920 (1838).

98. Letter from Sir Henry Wellesley to Viscount Castlereagh (Aug. 25, 1814), *in* 3 B.S.P. 926 (1838).

99. Letter from Sir Henry Wellesley to Viscount Castlereagh (Sept. 20, 1814), *in* 3 B.S.P. 931 (1838).

100. Letter from Sir Henry Wellesley to Viscount Castlereagh (Oct. 23, 1814), *in* 3 B.S.P. 932 (1838).

101. Letter from Earl Bathurst to Sir Henry Wellesley (Nov. 11, 1814), *in* 3 B.S.P. 934 (1838).

Negotiations with Portugal proved more promising. Before the war had begun, the Portuguese government had grudgingly agreed to a treaty in 1810 in exchange for British support against the French. That treaty committed Portugal to the gradual abolition of the slave trade, and, in particular, limited the trade of slaves by Portuguese subjects to that carried on between the mainland and Portuguese ports in Africa and Brazil.¹⁰² During the war, Portugal had become indignant when Britain had invoked the treaty as an excuse to unilaterally seize and condemn Portuguese ships in its vice admiralty courts, and the issue remained an irritant in Anglo-Portuguese relations at the end of the war. But Portugal was heavily dependent on England for military and financial support, and, in January 1815, Britain finally succeeded through a combination of bribery and threats in persuading Portugal to enter into new treaties restricting the slave trade. In the first of these treaties, the Convention of January 21, 1815, Britain agreed to pay Portugal £300,000, ostensibly as compensation for Portuguese ships illegally condemned by British vice admiralty courts.¹⁰³ In a companion treaty, signed on January 22, 1815, Britain forgave the remainder of a £600,000 loan made earlier to Portugal, and Portugal agreed to ban the slave trade north of the equator and to adopt measures necessary to enforce the ban.¹⁰⁴ Although this was progress, it was not a great victory, since the majority of Portugal's slave trade was destined for Brazil, which lies south of the equator.

While pursuing these various bilateral negotiations, Britain was simultaneously trying to obtain a multilateral agreement on the slave trade at the Congress of Vienna, where representatives of all the European powers had gathered to sort out a wide variety of issues related to the settlement of the war.¹⁰⁵ Beginning in December 1814 and throughout January and February 1815, the diplomatic representatives meeting in Vienna intermittently discussed the slave trade.¹⁰⁶ While Russia, Austria, and Prussia were quite supportive of

102. See BETHELL, *supra* note 5, at 7-9.

103. Convention Between Great Britain and Portugal Relative to the Indemnification of Portuguese Subjects for Certain Detained Slave-Trade Vessels, Gr. Brit.-Port., Jan. 21, 1815, 2 B.S.P. 345-48.

104. Treaty Between Great Britain and Portugal, for the Restriction of the Portuguese Slave Trade; and for the Annulment of the Convention of Loan of 1809, and Treaty of Alliance of 1810, Gr. Brit.-Port., Jan. 22, 1815, 2 B.S.P. 348-55.

105. See generally Jerome Reich, *The Slave Trade at the Congress of Vienna—A Study in English Public Opinion*, 53 J. NEGRO HIST. 129 (1968).

106. See generally BRITISH DIPLOMACY 1813-1815: SELECT DOCUMENTS DEALING WITH THE RECONSTRUCTION OF EUROPE (C.K. Webster ed., 1921) [hereinafter BRITISH DIPLOMACY]; 10 CORRESPONDENCE, DISPATCHES, AND OTHER PAPERS OF VISCOUNT CASTLEREAGH, SECOND MARQUEES OF LONDONDERRY 213-61 (Charles William Vane ed., London, William Shoberl

Britain's proposals related to the slave trade, none of these countries had significant maritime empires. France, Portugal, and Spain were as recalcitrant in the multilateral negotiations as they had been separately.

It appears that the idea of an international body aimed at suppression of the slave trade first emerged during these negotiations at Vienna. And while no permanent international legal structures were created as a result of either the Congress of Vienna or the subsequent meetings between the great European powers, the idea of such structures was very much on the table. The Russian Czar Alexander I had some grandiose ideas about a permanent international league of like-minded Christian monarchs that would preserve peace and order in Europe.¹⁰⁷ This line of thinking culminated in the Holy Alliance initially signed between Russia, Prussia, and Austria in the fall of 1815 and later joined by most of the "crowned heads" of Europe.¹⁰⁸

Britain stayed out of the Holy Alliance—which Castlereagh privately pronounced a "piece of sublime mysticism and nonsense."¹⁰⁹ But Britain did spearhead the more limited and less metaphysical November 1815 treaty of the Quadruple Alliance, which established a mutual security and cooperation system for Europe and provided for regular meetings among the major powers.¹¹⁰ Consistent with the overall discussion at Vienna of creating stable frameworks for cooperation, Britain firmly supported the creation of some kind of permanent international commission to deal specifically with the slave trade, although it was not yet clear what the powers and responsibilities of such a commission would be.¹¹¹

The effort to address the slave trade issue at the Congress of Vienna ended on February 8, 1815, with the delegates adopting a nonbinding declaration that condemned the slave trade, but placed no firm time limit on its abolition:

Having taken into consideration that the commerce, known by the name of "the Slave Trade" has been considered, by just and enlightened men of all ages, as repugnant to the principles of humanity and universal morality;

1852); HILDE SPIEL, *THE CONGRESS OF VIENNA: AN EYEWITNESS ACCOUNT* (Richard H. Weber trans., Chilton Book Co. 1968) (1966).

107. See TIM CHAPMAN, *THE CONGRESS OF VIENNA: ORIGINS, PROCESSES AND RESULTS* 60-61 (1998).

108. See *id.* at 61.

109. Letter from Viscount Castlereagh to the Earl of Liverpool (Sept. 28, 1815), in *BRITISH DIPLOMACY*, *supra* note 106, at 383.

110. See CHAPMAN, *supra* note 107, at 61-62.

111. See Letter from Viscount Castlereagh to the Earl of Liverpool (Nov. 21, 1814), in *BRITISH DIPLOMACY*, *supra* note 106, at 233-35; see also Reich, *supra* note 105, at 135-36.

... [T]he Plenipotentiaries ... proclaim[], in the name of their Sovereigns, their wish of putting an end to a scourge, which has so long desolated Africa, degraded Europe, and afflicted humanity; ... Too well acquainted, however, with the sentiments of their Sovereigns, not to perceive, that however honorable may be their views, they cannot be attained without due regard to the interests; the habits, and even the prejudices of their subjects; the said Plenipotentiaries at the same time acknowledge that this general Declaration cannot prejudge the period that each particular Power may consider as most advisable for the definitive Abolition of the Slave Trade.¹¹²

In modern international relations terms, this would be classified as soft law at best, and “cheap talk” at worst. Soon thereafter, the allies had more pressing problems to worry about. Napoleon returned with his army from exile, and the war restarted. Oddly enough, the renewal of the war proved to be a good thing for the abolitionist cause. In an apparent bid for English support, Napoleon did what the restored royal government had refused to do and issued a proclamation completely banning the slave trade on March 29, 1815.¹¹³ Though clever, this was not enough to win British support. Napoleon met final defeat before Wellington’s army at Waterloo in June 1815.

Napoleon’s return broke the diplomatic impasse with France on the slave trade issue. On July 30, 1815, Talleyrand informed the British government that Louis XVIII had issued a complete and immediate ban on the slave trade.¹¹⁴ The final peace treaty signed in Paris on November 20, 1815, included the ban.¹¹⁵

While the French agreement served to assuage British public opinion somewhat, it was clear to the British government that a substantive ban on the slave trade was likely to be ineffective without some provision for mutual rights of search and seizure.¹¹⁶ British colonial officials in Sierra Leone (the site

112. Reich, *supra* note 105, at 139-40 (quoting delegates to the Declaration of the Powers on the Abolition of the Slave Trade (Feb. 8, 1815), in 32 PARLIAMENTARY DEBATES 200-01 (T.C. Hansard ed., London 1816)).

113. See Martha Putney, *The Slave Trade in French Diplomacy from 1814 to 1815*, 60 J. NEGRO HIST. 411, 424-25 (1975).

114. See *id.* at 426.

115. See *id.* at 427. As noted in the British press, the treaty was implemented by way of a French ordinance prohibiting the slave trade and providing for confiscation of any vessels importing slaves into the French West Indian possessions. *French Papers*, TIMES (London), Feb. 7, 1817, at 2.

116. See Answers from Sierra Leone to the Queries of Viscount Castlereagh (April 1817), in 6 B.S.P. 38, 45 (1818-19).

of the most active vice admiralty courts during the Napoleonic Wars) responded to an inquiry from Castlereagh about the state of the slave trade and the most effective means of suppressing it by noting the need for such treaty provisions. They also noted that any scheme for enforcement of the ban was “less liable to objection” if the captured vessels were to be condemned “either by the Courts of his own Country, or by a Tribunal to be specially appointed for that purpose.”¹¹⁷

The idea of mixed arbitral commissions to settle disputes between nations had already become an established part of international diplomacy. The 1794 Jay Treaty between Britain and the United States had ushered in the modern era of international arbitration by including provisions for the establishment of an arbitral commission consisting of representatives from each country to settle claims arising out of the American Revolutionary War.¹¹⁸ More recently, the November 1815 peace treaty with France had included a provision for arbitration of public and private claims arising out of the Napoleonic Wars.¹¹⁹ The previous arbitration commissions had all been created to settle *past* claims; none had prospective jurisdiction over *future* disputes. But the talk of forward-looking international cooperation mechanisms at Vienna combined with the concept of mixed commissions to adjudicate disputes to form the idea for the antislavery courts.

Continuing negotiations finally bore fruit in 1817 when Britain successfully concluded agreements with the Netherlands, Portugal, and Spain that allowed for mutual rights of search and established mixed courts to try and condemn captured slave ships. The Anglo-Portuguese Treaty was signed on July 28, 1817, the Anglo-Spanish Treaty on September 23, 1817, and the Anglo-Dutch Treaty on May 4, 1817.¹²⁰ Unlike all of the previous, retrospective arbitration commissions, the courts set up by the new treaties would have prospective jurisdiction, that is, jurisdiction to adjudicate cases that might arise in the indefinite future.

117. *Id.* (emphasis added).

118. Treaty of Amity, Commerce and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116.

119. See Convention Relative to the Claims of the Subjects of the Allied Powers upon France art. V, Nov. 20, 1815, 3 B.S.P. 315, 321-26; see also Letter from Viscount Castlereagh to the Duke de Richelieu (Oct. 27, 1818), in 6 B.S.P. 59 (1818-19) (noting that the provisions for judge and arbitrator were like those in a previous convention between Great Britain and France for adjudicating private claims); Memorandum of the British Government, enclosed in Letter from Viscount Castlereagh to Earl Bathurst (Nov. 28, 1818), in 6 B.S.P. 77, 83 (1818-19) (similar).

120. See *infra* notes 122-126 and accompanying text.

It is not entirely clear what induced these three countries to agree to this novel scheme, nor whether they fully understood just how novel it was at the time. The Netherlands, which had agreed easily to the treaty banning the trade in 1814, appeared to need little persuasion to take additional steps to make the paper ban effective in practice. For their part, Spain and Portugal seemed motivated by financial incentives, though the amounts they were paid did not come close to compensating them for the economic losses that would accompany real abolition of the trade. Britain agreed in the 1817 treaty to pay Spain £400,000, ostensibly to settle claims for vessels captured during the years of unilateral antislavery activity by Britain, as well as to compensate Spain “for the losses which are a necessary consequence of the abolition of the said Traffic.”¹²¹ Britain had already agreed in the 1815 treaties to pay Portugal £300,000 in cash and forgive £600,000 in loans. Apparently, however, Britain had never made good on these earlier promises. In the 1817 Anglo-Portuguese Treaty, Britain agreed to pay the £300,000 owed under the 1815 treaty in two installments along with interest.¹²² But as discussed more fully below, the United States resisted joining the mixed court system until 1862. France never participated.

The scope of each treaty was slightly different. The Spanish treaty banned the trade throughout the Spanish empire as of May 30, 1820, with a five-month grace period for vessels that had “cleared out” lawfully prior to that date.¹²³ Slave trading from ports on the coast of Africa north of the equator was banned immediately as of the date of ratification, again with a grace period for the completion of voyages already underway.¹²⁴ The Portuguese agreement reiterated the limits in the 1815 treaty, namely that the prohibition extended only to Portuguese ships trading north of the equator or to non-Portuguese

121. Treaty for the Abolition of the Slave Trade arts. III-IV, Gr. Brit.-Spain, Sept. 23, 1817, 4 B.S.P. 33, 36-37 [hereinafter Anglo-Spanish Treaty of 1817]. Not everyone in London was thrilled with this concession. “Why,” asked one newspaper writer, “should England pay Spain for performing an act of humanity and justice?” *TIMES* (London), Oct. 13, 1817, at 2.

122. British diplomats would not let their Spanish and Portuguese counterparts soon forget about the cash payments; for years to come, when Spain and Portugal were less than enthusiastic about enforcing the treaties, the British would remind them that they had been paid in advance for their cooperation. See, e.g., Draft of a Note To Be Presented by Lord Howard de Walden to the Portuguese Government, *enclosed in* Letter from Viscount Palmerston to Lord Howard de Walden (Apr. 20, 1839), in *CORRESPONDENCE WITH FOREIGN POWERS RELATING TO THE SLAVE TRADE*, class B, at 71, 76-78, in 17 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1968) (1839).

123. Anglo-Spanish Treaty of 1817, *supra* note 121, art. I.

124. *Id.* art. II.

possessions.¹²⁵ The Dutch had already agreed in 1814 to ban the trade completely, and the new treaty simply created an international enforcement mechanism.

Most significant, these treaties, unlike earlier declarations and treaties, were not merely “cheap talk.” They contained robust enforcement mechanisms to carry out the promised ban on the trade. Each of the new treaties provided for the mutual right of search and seizure of suspected slave vessels and the vessels’ trial and condemnation before the courts of mixed commission. The treaties declared that:

In order to bring to adjudication with the least delay and inconvenience, the Vessels which may be detained for having been engaged in an illicit Traffic of Slaves, there shall be established . . . 2 Mixed Commissions, formed of an equal number of Individuals of the 2 Nations, named for this purpose by their respective Sovereigns.¹²⁶

These new courts were empowered to “judge without Appeal, according to the letter and spirit of the Treaty of this date.”¹²⁷

In addition, all three treaties were explicitly humanitarian in nature. The opening paragraph of the Anglo-Spanish treaty, for example, stated that “His Catholic Majesty concurs in the fullest Manner in the sentiments of His Britannic Majesty, with respect to the injustice and inhumanity of the Traffic in Slaves.”¹²⁸ And so in 1817, the world’s first international human rights courts were created.¹²⁹

125. Anglo-Portuguese Treaty of 1817, *supra* note 2, art. II.

126. Anglo-Spanish Treaty of 1817, *supra* note 121, art. XII. The presence of Spanish and Portuguese judges under instructions from their governments did not render the courts “cheap talk.” At most this would have meant acquittal in half the cases, given the system for breaking tie votes. *See infra* text accompanying note 132.

127. Regulation for the Mixed Commissions, Which Are To Reside on the Coast of Africa, and in a Colonial Possession of His Catholic Majesty art. I [hereinafter Regulation for the Mixed Commissions], *appended to Anglo-Spanish Treaty of 1817, supra* note 121.

128. *Id.* pmb1.

129. Multilateral negotiations regarding the slave trade also continued for several years. At the Congress of Aix-la-Chapelle in 1818, the Russian government pushed for a permanent international institution “composed of elements drawn from all civilized States” including “a directing Council, and a judicial system” that would form “a Body Politic, neutral in its character, but exercising these High authorities over all States.” Memorandum of the British Government (enclosure 5), *enclosed in Letter from Viscount Castlereagh to Earl Bathurst* (Nov. 23, 1818), in 6 B.S.P. 65, 79 (1818-19). In its most ambitious iterations such an organization would have criminal as well as civil jurisdiction over persons engaged in the illegal slave trade and would have at its disposal an international naval force with the right to visit and search ships flying all flags. *Id.* By late 1818, however, the British government

In sum, in the years following the Napoleonic Wars, Britain had effected a sea change in the status of the slave trade under international law. Just a few years earlier, the trade had been presumptively lawful under the law of nations. Now, the most powerful nations in the world had all agreed in principle to its suppression. Britain had moved beyond unilateral action based on vague conceptions of natural law toward concrete, positive treaty obligations and international enforcement mechanisms. Even when, in later years, Britain was sometimes forced to turn back to unilateral action, it was able to do so with greater legitimacy because it could point to the international commitments embodied in these treaties and argue that the treaties justified its actions.

II. THE COURTS OF MIXED COMMISSION FOR THE ABOLITION OF THE SLAVE TRADE

A. Overview of Court Operations

Under each of the treaties, one court was to be set up in a British possession, and another in a Spanish, Portuguese, or Dutch possession, respectively. Thus, courts were set up in Freetown, Sierra Leone; Havana, Cuba; Rio de Janeiro, Brazil; and Suriname.¹³⁰ Annexes to the treaties provided detailed regulations for the courts. These provided the basic procedural rules under which the courts operated, but as with contemporary international courts, their procedures evolved over time in light of practical circumstances and as the treaties were amended to close loopholes. Pursuant to the treaties, each nation appointed a commissioner, sometimes referred to as the “commissary judge.” Each nation also appointed a “commissioner of arbitration” or “arbitrator.” (These two officers were often collectively referred to as the “commissioners.”) Finally, the government of the territory in which the court sat appointed a registrar, who acted as the court’s chief administrator and assisted in the taking of evidence.¹³¹

(perhaps because of its unsuccessful attempts to convince France to agree to courts of mixed commission) was skeptical of the “practicality of founding, or preserving in activity, so novel and so complicated a system” and thought it might be more feasible to treat slave traders as pirates, subject to trial in national legal systems. *Id.*

130. In terms of structure, the anti-slave trade treaty regime cannot be neatly characterized as bilateral or multilateral. Formally, the courts were bilateral institutions. But they functioned as part of a *de facto* multilateral treaty network, organized as a hub-and-spoke system with Britain at the center. Some nations had more effective bilateral treaties with Britain than others, but many were simultaneously party to multilateral agreements against the slave trade, such as the agreement at the Congress of Vienna.

131. See, e.g., Regulation for the Mixed Commissions, *supra* note 127, art. II.

In the event that the two judges could not agree on the outcome of the case, one of the two arbitrators would be selected by lottery to cast the deciding vote.¹³² As it happened, on many occasions, one or more of the judges or arbitrators was absent. Due to the prevalence of tropical diseases in the locations where the courts sat, it was not uncommon for the European officials to fall ill, and many died in the course of duty.¹³³ While Britain promptly replaced its fallen representatives, many other nations did not, leaving very long stretches in each of the courts where at least one and sometimes both of the non-British slots remained vacant.¹³⁴ After some initial confusion and

132. *Id.* art. III.

133. See, e.g., Letter from Oct. Temple & H.W. Macaulay, Comm'rs at Sierra Leone, to Viscount Palmerston (June 30, 1834), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 63, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (reporting the death of a Brazilian judge); Letter from H.W. Macaulay, Comm'r at Sierra Leone, to Viscount Palmerston (Aug. 14, 1834), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 8, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) ("informing your Lordship of another loss which the Courts of Mixed Commission and his Majesty's service have sustained" in the death of the Lieutenant-Governor of the Colony and Commissary Judge *ad interim*); Letter from J. de Aranjó Ribeiro to the Duke of Wellington (Dec. 18, 1834), in CORRESPONDENCE WITH FOREIGN POWERS RELATING TO THE SLAVE TRADE, class B, at 37, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (reporting the appointment of a new Brazilian judge at Sierra Leone, approximately six months after the death of the preceding judge); Letter from W. Fergusson & M.L. Melville, Comm'rs at Sierra Leone, to Earl of Aberdeen (Jan. 23, 1842), in CORRESPONDENCE WITH BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE, class A, at 10, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (reporting the death of a judge); Letter from Jos. T. Crawford, Acting Comm'r at Havana, to Viscount Palmerston (July 17, 1847), in CORRESPONDENCE WITH BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 88, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1847-48) (reporting the death of a judge).

134. For example, of the 109 cases heard by the Anglo-Brazilian court at Sierra Leone, only twenty-eight were decided with the participation of Brazilian judges, while the remaining eighty-one were decided by British judges alone. Of the cases in which a Brazilian judge was present, in eighteen the British and Brazilian judges agreed on the outcome, while in the other ten, the judges did not agree and the case was decided by the arbitrator. In each of these cases, the arbitrator selected voted with the judge from their own nation. See Return of Vessels Adjudicated in the British and Brazilian Court of Mixed Commission at Sierra Leone, enclosed in Letter from James Hook & N.W. MacDonald, Comm'rs at Sierra Leone, to Viscount Palmerston (Apr. 6, 1847), in CORRESPONDENCE WITH BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL

controversy, the governments generally agreed that in the absence of one or more officials, the courts should proceed with whoever was present.¹³⁵

The judges and arbitrators were not always lawyers.¹³⁶ Sometimes they held other public offices contemporaneously; for example, the Governor of Sierra Leone and other colonial officials were occasionally called upon to serve as the British judge or arbitrator on the mixed courts after the incumbent died and until a replacement could arrive from London.¹³⁷

Pursuant to the treaties, ships of each nation's navy were to be provided with "special Instructions" entitling them to "visit such Merchant Vessels of the 2 Nations as may be suspected, upon reasonable grounds, of having Slaves on board."¹³⁸ The instructions were quite detailed, specifying that the searches should be conducted "in the most mild manner, and with every attention

OFFICERS, RELATING TO THE SLAVE TRADE, 1847-48, class A, at 22-30, *in* 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1847-48). The Brazilian judges' absences were intermittent, as was the court's caseload. Brazilian judges did not participate in decisions from September 1828 through April 1829; February 1837 through January 1842; September 1843 through May 1844; and April 1845 through the close of the commission in July 1845. In many years when judges were present, however, no cases were decided at all. *Compare id. with* Letter from Oct. Temple & H.W. Macaulay, Comm'rs at Sierra Leone, to Viscount Palmerston (June 30, 1834), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, 1835, class A, at 63, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (reporting the death of a Brazilian judge who had served for six years, in which few cases were decided).

135. See Letter From George Canning, Sec'y, to Comm'rs at Sierra Leone (Nov. 26, 1822), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANNAH, RIO DE JANEIRO, AND SURINAM RELATING TO THE SLAVE TRADE, 1822-23, class B, at 5, *in* 9 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1823-24).
136. For example, some of the Spanish judges at the court in Havana were prominent landowners and businessmen. See LUIS MARTINEZ-FERNÁNDEZ, *FIGHTING SLAVERY IN THE CARIBBEAN: THE LIFE AND TIMES OF A BRITISH FAMILY IN NINETEENTH-CENTURY HAVANA* 47 (1998).
137. See Letter from H.W. Macaulay, Comm'r at Sierra Leone, to Viscount Palmerston (Aug. 14, 1834), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 8, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (describing how the Lieutenant-Governor had replaced the British judge—who was on leave for health reasons—until the Lieutenant-Governor died, at which time he was replaced by the Colonial Secretary, who simultaneously became Acting Governor and Acting Commissary Judge); Letter from M.L. Melville, Comm'r at Sierra Leone, to the Earl of Aberdeen (Feb. 2, 1842), *in* CORRESPONDENCE WITH BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE, class A, at 10, *in* 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (recording the swearing in of the governor of the colony as acting commissioner following the death of the incumbent).
138. Anglo-Spanish Treaty of 1817, *supra* note 121, art. IX.

which is due between allied and friendly Nations.” To avoid insult, the search was to be conducted by officers of suitable rank.¹³⁹ If the ship was in violation of the treaty, the captor had authority to “detain and bring away such Vessels, in order that they may be brought to trial before the Tribunals established for this purpose.”¹⁴⁰

British naval vessels captured the vast majority of ships.¹⁴¹ In addition to the overall commitment of the Royal Navy to the antislavery patrol, individual officers had a financial incentive to capture slave ships since they were entitled to a share of the prize money.¹⁴² In addition, many captains of ships in the antislavery patrol were horrified by what they found aboard slave vessels and pursued their duty with moral zeal. As one British naval officer testified before Parliament of his experience on boarding a slave ship:

[A] great many of the slaves had confluent small-pox; the sick had been thrown down in the hold in one particular spot, and they appeared on looking down to be one living mass; you could hardly tell arms from legs, or one person from another, or what they were; there were men, women and children; it was the most horrible and disgusting heap that could be conceived.¹⁴³

Similarly, Capt. Joseph Denman—an officer who spent many years trying to influence the British government’s slave trade policies—explained that he had become interested in suppression of the trade fifteen years earlier, when as a young lieutenant he was placed in charge of a captured slave ship that had to be sailed first to Rio and then to Sierra Leone for trial: “I was . . . altogether 4 months on board of her, where I witnessed the most dreadful sufferings that

139. Regulation for the Mixed Commissions, *supra* note 127, art. V (“Instructions for the British and Spanish Ships of War employed to prevent the illicit Traffic in Slaves”).

140. *Id.* art. IX. One of the major changes later made to the treaties was an amendment of this clause to allow the detention of ships that did not have slaves onboard but were outfitted for the slave trade.

141. Bethell, *supra* note 3, at 83.

142. See LLOYD, *supra* note 23, at 83 (describing payments made to the crew of one “fast and successful” ship between 1839 and 1843 as including £2628 for the commander, £1359 for the flag officer, and more than £2000 shared among other crew members).

143. FIRST REPORT FROM THE SELECT COMMITTEE ON SLAVE TRADE, HOUSE OF COMMONS 102 (1848) (testimony of Cdr. Henry James Matson), reprinted in 4 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1847-48) [hereinafter FIRST COMMONS REPORT].

human beings can endure. . . . Those sufferings have given me the deepest interest in the subject”¹⁴⁴

In each case, after determining that the ship under search was indeed engaged in the illegal slave trade and fell within one of the treaties, the commander of the capturing ship would typically place a junior officer and a small prize crew onboard the captured ship to sail it into the nearest port where a commission sat.¹⁴⁵ Sometimes the captor would send its ship’s surgeon aboard the captured ship to try to provide medical treatment, or sick slaves might be taken aboard the captor ship to be treated and to relieve overcrowding.¹⁴⁶ If many of the slaves were too sick to make the voyage at all, the sickest would be landed at the nearest available port.¹⁴⁷

Almost invariably, some of the slaves died between the time of capture and the time of adjudication.¹⁴⁸ Once they arrived at the site of the court, the slaves

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144. SELECT COMMITTEE OF THE HOUSE OF LORDS TO CONSIDER THE BEST MEANS WHICH GREAT BRITAIN CAN ADOPT FOR THE FINAL EXTINCTION OF THE AFRICAN SLAVE TRADE 321 (1849) (testimony of Capt. Joseph Denman), *reprinted in* 6 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1850). Denman was also the son of the Lord Chief Justice, who was an influential abolitionist member of the House of Lords.
145. Regulations for the Guidance of the Commissions Appointed for Carrying Into Effect the Treaties for the Abolition of the Slave Trade 6 (1819) (on file with the British National Archives, F.O. 313/1) [hereinafter Commission Regulations] (“It is not absolutely necessary that the Affidavit should be made by the Commander of the capturing ship, the Officer in charge of the ship captured is equally competent thereto.”); *see also* Letter from the Earl of Aberdeen to Comm’rs at Havana (Sept. 18, 1828), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANIERO, AND SURINAM, RELATIVE TO THE SLAVE TRADE, class A, at 128, *in* 12 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1829-31) (instructing that the captain of the captor ship need not be present at the adjudication).
146. *See, e.g.*, Report of the Case of the Portuguese Barque “Maria da Gloria,” *enclosed in* Letter from Wm. Smith & H.W. Macaulay, Comm’rs at Sierra Leone, to Viscount Palmerston (Mar. 31, 1834), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANIERO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 32, 37, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1834) (describing the removal of sick Africans from a captured slave vessel and their treatment by a British ship’s surgeon). One British captain described in horrifying terms his capture of a ship with 560 slaves: “I had to remove the children on board of my own vessel; 200 of them,” who ranged in age “[f]rom a few days old and upwards; some of them had been born on board” and most were “suffering from dysentery.” FIRST COMMONS REPORT, *supra* note 143, at 156-57 (testimony of Cdr. Thomas Francis Birch).
147. *See, e.g.*, Anglo-Spanish Treaty of 1817, *supra* note 121, Annex, Instructions for the British and Spanish Ships of War Employed To Prevent the Illicit Traffic in Slaves, art. VI; *see also* Commission Regulations, *supra* note 145, at 5 (“Form of Certificate of the necessity of Disembarking Slaves from a Captured Vessel”).
148. *See, e.g.*, Return of Portuguese Vessels Adjudicated by the British and Portuguese Court of Mixed Commission, Established at Sierra Leone, Between the 30th Day of June and the 31st

would often be kept onboard the ship while the court decided the case, with often devastating consequences for the health of the slaves if the adjudication were prolonged for any reason. This provoked frequent concern on the part of the naval captains and the commissioners alike.¹⁴⁹ At Sierra Leone, the judges would often successfully petition the colonial Governor to allow the slaves to disembark.¹⁵⁰ Local governments in Havana and Rio, however, generally did not allow the slaves go ashore, viewing their presence as a security risk.¹⁵¹ Eventually, the British stationed special ships in the harbors of Havana and Rio

Day of December, 1838, *enclosed in* Letter from H.W. Macaulay & R. Doherty, Comm'rs at Sierra Leone, to John Backhouse (Dec. 31, 1838), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, AND RIO DE JANIERO, RELATING TO THE SLAVE TRADE, class A, at 93-94, *in* 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press. 1968) (1839) (noting that some slaves died on all ten ships brought in for adjudication, with death tolls ranging from two to thirty-one).

149. *See, e.g.*, Letter from G. Shee to Comm'rs at Sierra Leone (Dec. 9, 1830), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANIERO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 11, *in* 12 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1829-31) (relaying that the Admiralty Office had ordered captains to place a medical officer when possible onboard captured slave ships on their way to adjudication in Sierra Leone); Letter from Robert Hasketh & Frederick Grigg, Comm'rs at Rio, to Hamilton (Dec. 6, 1841), *in* CORRESPONDENCE WITH SPAIN, PORTUGAL, BRAZIL &C &C, RELATIVE TO THE SLAVE TRADE, class B, at 306, *in* 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (describing concern for expediting proceedings when a ship is captured with slaves onboard). For example, Cdr. Keith Stewart of HMS *Ringdove* sent one prize to Havana with a note imploring the court to remove the Africans from the ship immediately; most of the slaves were emaciated children between the ages of ten and fifteen, and Commander Stewart pronounced the ship "the most miserable craft I ever saw in the shape of a slaver." Letter from Capt. Keith Stewart to James Kennedy (Jan. 1, 1841), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 178, *in* 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842).
150. *See, e.g.*, Letter from William Hamilton to Comm'rs at Sierra Leone (Nov. 13, 1821), *in* FURTHER PAPERS RELATING TO THE SLAVE TRADE VIZ. CORRESPONDENCE WITH FOREIGN POWERS, AND WITH HIS MAJESTY'S COMMISSIONERS, 1821, 1822, at 72, *in* 64 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (advising commissioners to "request the assistance of the Governor of Sierra Leone, in all cases in which any delay in landing the slaves might be attended with fatal consequences to those suffering individuals").
151. Letter from George Villiers to Viscount Palmerston (Oct. 14, 1835), *in* FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class B, at 10, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (noting the opinion of the Spanish government that "the great number of liberated negroes at the Havana are considered to be dangerous to the tranquility of the slave population of Cuba").

to provide more humane housing for the slaves during the pendency of cases before the courts.¹⁵²

The treaties specified that cases should ordinarily be resolved in twenty days.¹⁵³ In reality, adjudication of cases took anywhere from a few days to several months, with the court at Sierra Leone typically working most efficiently.¹⁵⁴ The proceedings began with the capturing officer turning over the captured ship's papers along with an affidavit describing the circumstances of the capture.¹⁵⁵ The registrar would then administer a standard set of interrogatories to witnesses from both ships, recording a summary of their responses.¹⁵⁶ The lengthy list of questions ranged from the identity of the witness and how he came to serve on the captured ship, to questions about the ship's owners, its course during the current voyage, the circumstances of

152. See Letter from George Jackson & Frederick Grigg, Comm'rs at Rio, to Viscount Palmerston (Feb. 12, 1839), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, class A, at 144, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (acknowledging that a British vessel would be sent to Rio to house Africans from ships awaiting trial); Letter from J. Kennedy & Campbell J. Dalrymple, Comm'rs at Havana, to Viscount Palmerston (July 1, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM RELATING TO THE SLAVE TRADE, 1842, class A, at 229, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842) (describing captured slaves put on board HMS *Romney* in conjunction with commission trials).

153. See, e.g., Regulation for the Mixed Commissions, *supra* note 127.

154. See Letter from H.S. Fox to Viscount Palmerston (July 24, 1834), in CORRESPONDENCE WITH FOREIGN POWERS, 1835, class B, at 28, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (discussing negotiations with the Brazilian government about speeding up operation of the courts); Letter from George Jackson & Fred. Grigg, Comm'rs at Rio, to Viscount Palmerston (June 5, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM RELATING TO THE SLAVE TRADE, 1843, class A, at 333, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842) (discussing delays in adjudication, based on observance of Brazilian holidays); Letter from W. Fergusson & M.L. Melville, Comm'rs at Sierra Leone, to the Earl of Aberdeen (Jan. 8, 1842), in CORRESPONDENCE WITH BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE, 1842, class A, at 65, 68, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (noting that "in no one of the several Mixed Commissions has there been a more prompt adjudication of cases than in the Courts at Sierra Leone").

155. Commission Regulations, *supra* note 145, at 5.

156. See, e.g., Interrogatories for the Use of the British Commissioners, To Be Administered to Witnesses Belonging to the Vessel Taken (1819) (on file with the British National Archives, F.O. 313/1); Letter from W. Fergusson & M.L. Melville, Comm'rs at Sierra Leone, to the Earl of Aberdeen (Jan. 8, 1842), in CORRESPONDENCE WITH BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE, 1842, class A, at 65-68, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (describing a disagreement with new Brazilian judges about whether to continue the practice of having the registrar take the depositions).

capture, and whether any of the ship's papers were missing or destroyed.¹⁵⁷ The registrar would then turn over the file of evidence to the two commissary judges, who were not generally present at the initial examination of the witnesses.¹⁵⁸ "Proctors" (who were not always attorneys) representing the two parties would then argue the case. On occasion, the judges might ask to hear further evidence from one of the witnesses, or from an additional witness.

Many of the trials were quite summary in nature. For example, if a Brazilian ship was caught on the high seas with slaves onboard, the British and Brazilian judges would have little difficulty agreeing that it should be condemned.¹⁵⁹ Other cases presented more complex factual and legal issues. For example, in many cases the courts had to determine the true nationality of a ship. Quite often – and in violation of the law of nations – slave ships carried more than one flag and set of papers, with the hope of deploying whichever seemed most expedient to avoid seizure and condemnation. Thus, a slave ship might carry both a French and a Portuguese flag, hoisting the Portuguese flag

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157. In their use of written depositions rather than live testimony in front of the judges, the commissions' procedures were more similar to those of British admiralty courts than to those of ordinary common law courts. See Letter from W. Fergusson & M.L. Melville, Comm'rs at Sierra Leone, to the Earl of Aberdeen (Jan. 8, 1842), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, class A, at 65, 67, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (noting that the "[t]he intention of the parties who framed the Treaties and the 'Regulations' . . . being, as is understood, and indeed stated, in the latter document, to assimilate the practice of these Courts as nearly as possible to that of the High Court of Admiralty, the mode of taking examinations in use in that Court was adopted in the Mixed Commissions"). However, the courts declined to borrow other domestic judicial procedures that were deemed incompatible with the treaties, such as Spanish and Brazilian modes of appeal. See, e.g., Letter from George Jackson & Frederick Grigg, Comm'rs at Rio de Janeiro, to Viscount Palmerston (Jan. 22, 1839), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, 1839, class A, at 138, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (discussing a disagreement with Brazilian judges about the availability of "embargoes," a form of appeal allowed under local law, in cases heard by the commission); Letter from Marques Lisboa to Viscount Palmerston (Apr. 8, 1839), in CORRESPONDENCE WITH FOREIGN POWERS, 1838-39, class B, at 128, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (announcing the decision of the Brazilian government not to allow "embargoes" in Mixed Commission cases).
158. See Letter from W. Fergusson & M.L. Melville, Comm'rs at Sierra Leone, to the Earl of Aberdeen (Jan. 8, 1842), in CORRESPONDENCE WITH BRITISH COMMISSIONERS, 1842, class A, at 65, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843).
159. See, e.g., Letter from Alex Finley & Wm. Smith, Comm'rs at Sierra Leone, to the Earl of Aberdeen (May 4, 1830), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANIERO, AND SURINAM, RELATING TO THE SLAVE TRADE, 1830, class A, at 59-60, in 12 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1829-31) (reporting the agreement of British and Brazilian judges in the case of the *Emilia*).

when a French man-of-war appeared on the horizon (since no treaty authorized the French to search Portuguese ships) and the French flag when a British or Portuguese cruiser was spotted. In other cases, the ship's papers might seem irregular or forged, and the court would determine that the ship was for that reason not entitled to the protection of the flag it claimed. In so doing, the judges often drew upon the broader law of nations of the time period, invoking doctrines from admiralty courts that based a ship's entitlement to a particular nationality on its ownership and course of trade and not merely the papers it carried.¹⁶⁰ The courts' opinions were brief, but often included citations to precedents from the mixed courts or to the decisions of British vice admiralty courts. They were not published in separate law reports, though they did appear in annual printed reports to Parliament.

Particularly during the years when the coverage of the various treaties varied (for example, during the years when the Anglo-Spanish treaties were broader than the Anglo-Portuguese treaties), the determination of the ship's nationality was often dispositive of the case.¹⁶¹ For example, until 1842, trade

160. See Judgment Given in the Case of the Spanish Brig *Diligente* (Oct. 12, 1838), enclosed in Letter from H.W. Macaulay & R. Doherty to Viscount Palmerston (Oct. 20, 1838), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, 1838-39, class A, at 17-24, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (discussing case law); Letter from Viscount Palmerston to George Jackson & Frederick Grigg, Comm'rs at Rio (Oct. 8, 1834), in CORRESPONDENCE WITH BRITISH COMMISSIONERS, 1835, class A, at 147, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (noting that "it is a principle of the Law of Nations, that the national character of a merchant is to be taken from the place of his residence of his mercantile establishment, and not from the place of his birth," and instructing them to apply this rule in future cases); Letter from George Jackson & Fred. Grigg, Comm'rs, to Viscount Palmerston (Nov. 10, 1835), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, 1836, class A, at 309-10, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (reporting the agreement of the Brazilian government on this point).

161. See, e.g., Report of the Case of the Spanish Schooner "Opposição," enclosed in Letter from H.W. Macaulay & R. Doherty, Comm'rs at Sierra Leone, to Viscount Palmerston (Aug. 15, 1838), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, 1838-39, class A, at 6, 9, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (condemning as Spanish a ship with a Portuguese flag and papers that was equipped for the slave trade as Spanish, based on the principle "[t]hat the national character of a merchant is to be taken from the place of his residence, and of his mercantile establishment, and not from the place of his birth"); Report of the Case of the Brig *Diligente* (Oct. 12, 1838), enclosed in Letter from H.W. Macaulay & R. Doherty, Comm'rs at Sierra Leone, to Viscount Palmerston (Oct. 20, 1838), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, 1838-39, class A, at 13, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (condemning as Spanish a Portuguese-flagged ship); Report of the Case of the Schooner *Sirse*, enclosed in Letter from H.W. Macaulay & R. Doherty, Comm'rs at Sierra Leone, to Viscount Palmerston (Dec. 22, 1838), in CORRESPONDENCE WITH THE BRITISH

under the Portuguese flag was prohibited by treaty only in latitudes north of the equator, while Spanish trade was prohibited in all latitudes as of 1820.¹⁶² Similarly, the Spanish government agreed in 1835 to an amendment covering ships that were equipped for the slave trade but that had not yet taken any slaves on board, while the Portuguese treaty was not amended to include an “equipment clause” until 1842.¹⁶³ Given the discrepancies between the Portuguese and Spanish treaties, many trials turned on where precisely the ship had been sailing before it was caught and whether it was really Portuguese or Spanish.¹⁶⁴

The trials also became factually more complicated after the treaties were modified—first, to cover cases where there was evidence that slaves had been onboard earlier in the voyage,¹⁶⁵ and second, to cover ships that were equipped

COMMISSIONERS, 1838-39, class A, at 26, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (same, based on the course-of-trade test).

162. E.g., Letter from Wm. Smith & H.W. Macauley, Comm’rs at Sierra Leone, to Viscount Palmerston (Mar. 22, 1834), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, class A, at 31, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (noting that the Court was “reluctantly compelled” to restore the Portuguese ship, the *Maria da Gloria*, because it was captured south of the equator). Compare Anglo-Spanish Treaty of 1817, *supra* note 121, art. I, with Anglo-Portuguese Treaty of 1817, *supra* note 2, art. II.
163. See Treaty Between Great Britain and Portugal, for the Suppression of the Traffic in Slaves art. 5, July 30, 1842, 30 B.S.P. 527 [hereinafter Anglo-Portuguese Treaty of 1842]; Treaty Between Great Britain and Spain, for the Abolition of the Slave Trade art. X, June 28, 1835, 23 B.S.P. 343 [hereinafter Anglo-Spanish Treaty of 1835].
164. See, e.g., Letter from H.W. Macauley & R. Doherty, Comm’rs at Sierra Leone, to Viscount Palmerston (Dec. 22, 1838), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, 1838-39, class A, at 26, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (noting that “[o]f illegal equipment for the Slave Trade there could be no doubt: but this fact could only avail in the case of a Spanish vessel” and reporting that Commission found the *Sirse* to be Spanish based on its course of trade, notwithstanding its Portuguese flag and papers); Letter from M.L. Melville, Comm’r at Sierra Leone, to the Earl of Aberdeen (Dec. 31, 1841), in CORRESPONDENCE WITH BRITISH COMMISSIONERS, 1842, class A, at 29-32, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842) (reporting the cases of the *Recurso*, *San Paulo de Loando*, *Boa Uniao*, *Josephina*, *Erculos*, and *Paz*, all of which bore a Portuguese flag and papers but were found to be Spanish and condemned); Letter from M.L. Melville, Comm’r at Sierra Leone, to the Earl of Aberdeen (Dec. 31, 1841), in CORRESPONDENCE WITH BRITISH COMMISSIONERS, 1842, class A, at 60, 61, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (reporting the case of the *Bellona*, condemned and found to be Brazilian despite its Portuguese flag).
165. See Explanatory Article to the Treaty Between Great Britain and Spain for the Abolition of the Slave Trade of Sept. 23, 1817, adopted Dec. 10, 1822, 10 B.S.P. 87; Additional Articles to the Convention Between Great Britain and Portugal of July 28, 1817, adopted Mar. 15, 1823, 11 B.S.P. 23.

for the slave trade but that had not yet boarded their human cargo.¹⁶⁶ In the first set of cases, the judges would base their decision on the ship's papers, testimony of witnesses, the circumstances of capture, items found aboard the ship, and even the well-known stench of a ship that had recently carried hundreds of slaves.¹⁶⁷ In the "equipment clause" cases, the court would examine evidence such as the presence of manacles and chains or wood planks for a slave deck, or the fact that a ship was carrying much more food and water than necessary for its crew.¹⁶⁸ In some cases, the evidence of a ship's illegal mission was quite obvious, but in others it was less so, particularly as slave traders became more sophisticated.

In simple cases, the judges usually were unanimous.¹⁶⁹ When the judges disagreed and an arbitrator was drawn, the arbitrator often agreed with the

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166. See Anglo-Portuguese Treaty of 1842, *supra* note 163; Anglo-Spanish Treaty of 1835, *supra* note 163. Although the Anglo-Brazilian Treaty was not amended to include an equipment clause, it was reinterpreted by the judges to allow the condemnation of such ships. See, e.g., Return of Vessels Adjudicated by the British and Brazilian Court of Mixed Commission, Established at Sierra Leone, Between the 1st Day of July and the 31st Day of December, 1840, enclosed in Letter from H.W. Macauley & R. Doherty, Comm'rs at Sierra Leone, to Viscount Palmerston (Nov. 15, 1839), in CORRESPONDENCE WITH BRITISH COMMISSION RELATIVE TO THE SLAVE TRADE, class A, at 123, in 20 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press. 1969)(1841) (reporting several cases of condemnation of ships with no slaves onboard at the time of capture).
167. See, e.g., Report of the Case of the *Paquete do Sul*, enclosed in Letter from George Jackson & Fred. Grigg to Viscount Palmerston (Jan. 30, 1834), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, 1835, class A, at 133, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839).
168. See, e.g., Report of the Case of the Schooner *Sirse*, enclosed in Letter from H.W. Macauley & R. Doherty to Viscount Palmerston (Dec. 22, 1838), in CORRESPONDENCE WITH THE BRITISH COMMISSIONER, 1838-39, class A, at 26-32, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839).
169. See *supra* note 134 (noting that of twenty-eight cases decided with both judges present in the Anglo-Brazilian court at Sierra Leone, in eighteen cases the judges were unanimous while in ten they disagreed, with the British judge voting for condemnation and the Brazilian judge for acquittal in the cases where there was disagreement; in all ten of the cases the arbitrator voted with the judge from his nation). The judges often referred to the courts' unanimity in easy cases. See, e.g., Letter from George Jackson & Frederick Grigg, Comm'rs at Rio, to Viscount Palmerston (Jan. 15, 1839), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, class A, at 132, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) ("[T]he Brazilian Commissary Judge joined Her Majesty's Judge, without any difficulty, in this sentence [of condemnation.]"); Letter from George Jackson & Fred. Grigg, Comm'rs at Rio, to Viscount Palmerston (June 30, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM RELATING TO THE SLAVE TRADE, class A, at 344-45, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842) (noting that the judges were unanimous that a ship captured in a territorial creek was not within the court's jurisdiction).

judge from his own country,¹⁷⁰ though occasionally, the arbitrator sided with the judge of the other nationality.¹⁷¹ Many, though not all, of the non-British judges appear to have carried out their duties honestly, if not always with great zeal.¹⁷² When the British government complained to Brazil that its judge at Sierra Leone was associating with slave traders, for example, the Brazilian government responded promptly by removing him from office.¹⁷³ British officials praised one long-serving Spanish judge at Havana, though some later judges in Havana were men who owned large slave plantations.¹⁷⁴ The courts' decisions were final, and there was no system for appeals to a higher court.

The vast majority of cases resulted in condemnation of the ships, with the rates of condemnation highest in the courts at Sierra Leone and lowest in the Anglo-Portuguese courts at Rio and Loanda, Angola. At Sierra Leone, 484 ships were condemned, while twenty-nine were released. In Havana, forty-eight were condemned and seven were released, while at Rio twenty-five were condemned and fourteen were released, and at Loanda five were condemned and six were released. All five cases at Cape Town resulted in condemnation.¹⁷⁵ The greatest disagreement among the judges seems to have occurred in the Anglo-Brazilian courts at Sierra Leone and Rio where the British judges adopted a creative reinterpretation of the existing treaties to cover ships equipped for the slave trade but not yet loaded with slaves. Given that Brazil

170. See *supra* note 134.

171. See, e.g., Letter from George Jackson & Fred. Grigg, Comm'rs at Rio, to Viscount Palmerston (Oct. 31, 1840), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANIERO, AND SURINAM RELATING TO THE SLAVE TRADE, at 279, 281, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842) (reporting a case in which the British arbitrator sided with the Brazilian judge).

172. See, e.g., Letter from H.T. Kilbee, Comm'r at Havana, to George Canning, Sec'y (July 31, 1824), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, class A, at 68, in 10 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1825-26); see also Bethell, *supra* note 3, at 85-86.

173. Letter from W.G. Ouseley to Viscount Palmerston, (Feb. 25, 1839), in CORRESPONDENCE WITH FOREIGN POWERS RELATING TO THE SLAVE TRADE, class B, at 139, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (describing the removal of Joaquim Feliciano Gomez). The Portuguese judges at Loanda in 1844-45 were also notorious participants in the slave trade. ELTIS, *supra* note 10, at 114. Some British judges were also less than effective. One critic said of the British judges at Havana that one spent "his whole time" studying ornithology and the other was a "poor man . . . too simple to do good, and too innocent to do harm." MARTINEZ-FERNÁNDEZ, *supra* note 136, at 47. One British commissioner at Rio was also criticized for incompetence and possible corruption. BETHELL, *supra* note 5, at 201-02.

174. MARTINEZ-FERNÁNDEZ, *supra* note 136, at 47.

175. These numbers were calculated from the Revised Trans-Atlantic Slave Trade Database using the "FATE" variable.

had refused to ratify a treaty amendment to that effect,¹⁷⁶ the Brazilian judges probably had the better legal argument.

If the court held that a ship should be condemned, it would be auctioned off and the proceeds would be split between the two governments.¹⁷⁷ In later years, some ships were broken up and sold in pieces to avoid being redeployed in the slave trade by the persons who purchased them at auction.¹⁷⁸ Some of the money was allocated to the expenses of the courts, and a substantial portion of the rest was generally awarded as prize money to the captor.¹⁷⁹

The mixed courts themselves had no criminal jurisdiction over the crew of the slave vessel, but the crew would occasionally be sent to the courts of their own country for criminal trial.¹⁸⁰ In other cases, they fled, were let go in port,

176. BETHELL, *supra* note 5, at 194-98.

177. See, e.g., Regulation for the Mixed Commission, *supra* note 127, art. VII. The allocation of prize money to crews was an important way for the navy to increase the pay for naval officers without draining the national treasury.

178. See Bethell, *supra* note 3, at 88 n.33.

179. See LLOYD, *supra* note 23, at 83. The amount of prize money offered to British ships varied over the years. Other countries did not always offer prize money to their naval officers.

180. See Letter from Viscount Palmerston to Lord Howard de Walden (Feb. 14, 1839), in CORRESPONDENCE WITH FOREIGN POWERS, class B, at 42, 43, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (discussing the *Diligente*, which had been captured by the British and condemned at Sierra Leone, and whose crew had been sent to Lisbon to be tried under Portuguese law); Letter from the Earl of Aberdeen to Comm'rs at Rio (Sept. 21, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANIERO, AND SURINAM RELATING TO THE SLAVE TRADE, class A, at 355-56, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842) (discussing the acquittal by Brazilian criminal courts of crew members declared by the Mixed Commission to have been engaged in piracy). For example, in one letter the commissioners at Sierra Leone relate that Lord Palmerston had rejected their suggestion that slave crews be held in custody at Sierra Leone until they could be sent to their own countries for punishment, on the grounds that there was no legal authority for such detention. The commissioners reiterated their suggestion that punishment of slave crews would be likely to check the slave trade and that crews "at present are invariably thrown loose on the coast, and help to man many a vessel which otherwise would be unable to carry off her human cargo for want of hands." Letter from W. Fergusson & M.L. Melville, Comm'rs at Sierra Leone, to Viscount Palmerston (Sept. 23, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANIERO, AND SURINAM RELATING TO THE SLAVE TRADE, class A, at 31, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842). Later, the mixed courts were authorized to hold slave crews in custody until they could be transferred to national authorities for trial. See Letter from George Frere & Frederic R. Surtees, Comm'rs at Cape of Good Hope, to Viscount Palmerston (Oct. 31, 1846), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANIERO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 113, in 34 BRITISH PARLIAMENTARY

or on a few occasions were reportedly left stranded somewhere on the coast of Africa.¹⁸¹ The emancipated slaves would be given certificates of freedom, and their personal details (name, age, language, identifying marks) would be recorded in a logbook.¹⁸² If, on the other hand, the judges agreed that the ship had been wrongfully seized, they allowed it to continue on its voyage with its human cargo. The judges had the power to order the captor to pay compensation to the owner in such cases, though depending on the circumstances, they did not always do so.¹⁸³

While they were instructed to be mindful of their judicial character and apply the law neutrally and fairly,¹⁸⁴ the judges and arbitrators were not independent in the modern sense. The Foreign Office in London provided a great deal of guidance to the British judges in the field on how they should carry out their business. The Foreign Office provided regulations for the operation of the courts, including elaborate instructions on everything from the form of the captor's affidavit to the oaths for swearing in witnesses and the form for decisions.¹⁸⁵ Officials in London would provide detailed praise or criticism of particular aspects of the commissions' operations, from the speed

PAPERS (photo. reprint, Irish Univ. Press 1969) (1847-48) (acknowledging the opinion of British law officers that under the Anglo-Portuguese Treaty of 1842, *supra* note 163, art. XII, slave crews could be detained in custody by the Mixed Commission until they could be turned over to their own governments for trial); Letter from Ildefonso Leopoldo Bayard to Alfredo Duprat, Portuguese Comm'r (May 22, 1847), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 130, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1847-48) (instructing the Portuguese commissioner that slave crews should be sent to Loanda or Cape Verde and "delivered to the respective Governor-Generals, to be dealt with according to law").

181. See FIRST COMMONS REPORT, *supra* note 143, at 15-16 (testimony of Viscount Palmerston).
182. See REGISTRY OF SLAVES: SIERRA LEONE (on file with the British National Archives, F.O. 315/31) (original log books).
183. See, e.g., Letter from John Samo & Fred. Grigg, Comm'rs at Rio, to the Earl of Aberdeen (Sept. 23, 1842), in CORRESPONDENCE WITH BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE, class A, at 291-94, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (describing a case in which British and Brazilian judges disagreed about whether the claimant was entitled to indemnity).
184. See BETHELL, *supra* note 5, at 130 ("British commissioners were specifically instructed that in reaching a verdict they should never lose sight of their judicial character, and that they should 'uniformly endeavor to combine a fair and conscientious zeal for the prevention of the illegal traffic in slaves with the maintenance of the strictest justice towards the parties concerned.'" (quoting Letter from Viscount Castlereagh to Thomas Gregory (Feb. 19, 1819))).
185. See, e.g., Commission Regulations, *supra* note 145.

of their operations down to the color of the ink used in their correspondence.¹⁸⁶ On occasion, the Foreign Office would suggest that a particular decision involved an incorrect interpretation of the law and urge the judges not to repeat the mistake.¹⁸⁷ For their part, the judges would from time to time request the opinion of legal officials in London on a point of law.¹⁸⁸ In a similar

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186. See, e.g., Letter from Viscount Palmerston to Comm'rs at Rio (Mar. 22, 1839), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, AND RIO DE JANEIRO RELATING TO THE SLAVE TRADE, 1839, class A, at 136, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (requesting that the commissioners send more detailed information about every case, including "translation in full of the deposition made by each witness" and "copies or translations of every paper," "a statement of the argument which may have been given by each member of the Court," so that the government could "form a sure opinion upon the merits of each case respectively"); see also Letter from the Earl of Aberdeen to Comm'rs at Sierra Leone (Dec. 28, 1828), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM RELATIVE TO THE SLAVE TRADE, 1829, class A, at 19, in 12 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1829-31) (similar); Letter from the Foreign Office to Comm'rs at Sierra Leone (Dec. 6, 1837) (on file with the British National Archives, F.O. 315/4, at 573) ("I am directed by Viscount Palmerston to observe to you that your Dispatches and Reports should be copied in Black Ink, and I am to desire, that you will not give his Lordship occasion to make this remark again.").
187. See, e.g., Letter from George Lansing, Comm'r at Sierra Leone, to the Foreign Office (Sept. 25, 1822) (on file with the British National Archives, F.O. 315/1, at 241) (disapproving of the court's decision in the case of the Spanish schooner *Rosalía*); Letter from Viscount Palmerston to Comm'rs at Rio (Oct. 8, 1834), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, 1834, class A, at 147, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (stating that the commission was wrong to release the *Maria da Gloria* because, although it had a Portuguese flag and papers, it was owned by a merchant resident in Rio and "it is a principle of the Law of Nations, that the national character of a merchant is to be taken from the place of his residence and of his mercantile establishment, and not from the place of his birth," and instructing them to so rule in future cases).
188. See, e.g., Letter from George Canning, Sec'y, to Comm'rs at Sierra Leone (May 29, 1824), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANNAH, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, 1824-25, class A, at 27, in 10 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1825-26) (transmitting the opinion of the King's Advocate on what the commissioners ought to do in the case of the *Fabiana*); Letter from Viscount Palmerston to Comm'rs at Rio de Janeiro (Mar. 26, 1836), in CORRESPONDENCE WITH BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, 1835, class A, at 314, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36) (transmitting the opinion of the King's Advocate-General on issues in two cases); Letter from John Samo & Fred. Grigg, Comm'rs at Rio de Janeiro, to the Earl of Aberdeen (Sept. 20, 1842), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM RELATING TO THE SLAVE TRADE, 1842, class A, at 291,

manner, the non-British judges also took instructions from their own governments.¹⁸⁹

The courts were but one aspect of the highly coordinated British effort to suppress the slave trade. The British judges in Cuba might send the Foreign Office information about ships that had recently set sail for the African coast equipped for the slave trade, which that office would in turn forward to the commissioners in Sierra Leone.¹⁹⁰ Similarly, useful information received by the Foreign Office from the navy would be forwarded to the judges, and vice versa.¹⁹¹ Reports from the courts would be sent to British diplomats in various European capitals, and they would be instructed to bring difficulties with the courts to the attention of the partner governments.¹⁹² On some occasions, the commissioners communicated more or less directly with naval captains, providing information about the rules for captures or sharing information about slave vessels or notorious traders.¹⁹³

in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (asking for instructions).

189. See Bethell, *supra* note 3, at 87 (noting that the Brazilian commissioners “on instructions from their government” objected to the seizures of ships equipped for the slave trade but without slaves onboard).
190. See, e.g., Letter from Viscount Palmerston to Comm’rs at Havana (Aug. 11, 1841), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE, 1841, class A, at 217, *in* 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842) (“With reference to your Despatches of the 22nd of January and of the 15th of February last, reporting the state of the Slave Trade at the Havana . . . I herewith transmit to you, for your information, a Copy of a Communication which I have received from Her Majesty’s Commissioners at Sierra Leone, containing some Observations upon our Despatches above mentioned.”).
191. See, e.g., Letter from George Canning, Sec’y, to Comm’rs at Sierra Leone (Mar. 16, 1825), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANNAH, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, 1824-25, CLASS A, at 57, *in* 10 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1825-26) (transmitting “Two Dispatches from the Consul General at Rio de Janeiro, on the subject of the Brazilian Government regulations on the tonnage of slave” ships).
192. See, e.g., Letter from Viscount Palmerston to G.W.F. Villiers (Oct. 6, 1834), *in* CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1834, class B, at 12, *in* 14 BRITISH PARLIAMENTARY PAPERS (Irish Univ. Press 1968) (1835-36) (transmitting reports from the courts at Havana and Sierra Leone to a British diplomat in Madrid).
193. See, e.g., Letter from W.G. Ouseley to Capt. Herbert, R.N. (Jan. 24, 1839), *in* CORRESPONDENCE WITH SPAIN, PORTUGAL, AND BRAZIL, RELATIVE TO THE SLAVE TRADE, 1839, class B, at 130, *in* 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839) (communicating information, via the local British consul, from commissioners to captains about the interpretation of a treaty regarding captures of ships without slaves onboard).

Based on the volume of their correspondence on the topic, it appears that the slave trade consumed an enormous amount of the time and attention of the men who served as Foreign Secretary during the years of the suppression effort, notably Viscount Palmerston and the Earl of Aberdeen (both future Prime Ministers). The suppression of the slave trade was an issue in British relations with almost every country, and often proved a source of diplomatic tension.¹⁹⁴

B. The Courts in Operation: Impact and Limitations

1. Impact: Volume of Cases

The original courts created by the Anglo-Spanish, Anglo-Portuguese, and Anglo-Dutch treaties began operations in 1819. These courts sat in Sierra Leone, Havana, Rio de Janeiro, and Suriname. Over the years, new treaties added new courts. Brazil agreed to sign onto the treaty regime in 1826 in exchange for recognition of its independence by Britain.¹⁹⁵ Thus, an Anglo-Brazilian court was added to the three courts already in Sierra Leone and the court in Rio was transformed into an Anglo-Brazilian court.¹⁹⁶ Between 1839 and 1841, Chile, the Argentine Confederation, Uruguay, Bolivia, and Ecuador also agreed to participate in the mixed commission in Sierra Leone.¹⁹⁷ In 1842, a new Anglo-Portuguese treaty was signed and mixed courts were added in Luanda, Boa Vista, Spanish Town, and Cape Town.¹⁹⁸ Finally, in 1862 the United States—which had long resisted participation in the regime¹⁹⁹—agreed to the establishment of mixed courts in New York, Sierra Leone, and Cape Town.²⁰⁰

Of all the courts created by the treaties, the courts at Sierra Leone were by far the most active, hearing more than 500 cases in total. Two factors explain the Sierra Leone courts' preeminence. First, the British Royal Navy's antislavery patrol was most active in the areas off the west coast of Africa,

194. Generally see the correspondence between Britain and other nations, which runs to hundreds of pages a year in each of the annual sets of *British Parliamentary Papers* on the slave trade.

195. See Howard Hazen Wilson, *Some Principal Aspects of British Efforts To Crush the African Slave Trade, 1807-1929*, 44 AM. J. INT'L L. 505, 509 n.22 (1950).

196. See Bethell, *supra* note 3, at 82.

197. See *id.* at 83.

198. See *id.*

199. See *infra* text accompanying note 343.

200. See BETHELL, *supra* note 5, at 92.

where most of the slaves originated. Second, the commissions in Sierra Leone were strongly supported by the British colonial government there, while the courts in foreign ports often received only marginal support from the local government and faced outright hostility from the public.²⁰¹ The courts at Havana and Rio heard fifty and forty-four cases respectively, and the remaining courts received only a handful of cases.²⁰² The belated Anglo-American courts never heard any cases at all, although, as discussed below, that was more a measure of the effectiveness of the Anglo-American treaty than its weakness, since the slave trade was squelched in the immediate aftermath of the 1862 treaty.

The Sierra Leone courts led in terms of the number of slaves freed as well. British logbooks show that the Sierra Leone courts emancipated approximately 65,000 slaves between 1819 and 1846.²⁰³ The Havana courts freed some 10,000, and the Rio courts freed 3000.²⁰⁴ Because the courts eventually gained jurisdiction over ships equipped for the slave trade even if no slaves were actually onboard at the time of capture, an unknown number of other individuals were saved from slavery by the seizure off the African coast of ships that had not yet been loaded with their unfortunate human cargo. During the life of the commissions, at least 225 ships were seized and condemned without slaves onboard. Given that between 1830 and 1850, the average cargo is estimated to have been approximately 400 slaves per ship, that would represent another 90,000 individuals, though it is impossible without more sophisticated econometric analysis to estimate how many of those would actually have been boarded on the captured ships or how many ended up embarking on other vessels instead.

The courts were most active between 1819 and the mid-1840s.²⁰⁵ During their peak years of operation in the late 1830s and early 1840s, an average of one out of every five or six vessels known to have been engaged in the transatlantic

201. See, e.g., Letter from Henry T. Kilbee, Comm'r at Havana, to George Canning (Dec. 30, 1824), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, AT SIERRA LEONE, THE HAVANNAH, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, 1824-25, class A, at 140, in 10 BRITISH PARLIAMENTARY PAPERS (Irish Univ. Press 1968) (1825-26) (reporting that the emancipation of the slaves by the mixed commission "has excited considerable sensation among the inhabitants of this place" who had demanded that the local government invalidate the commission's verdict); see also Bethell, *supra* note 3, at 83-84.

202. See Bethell, *supra* note 3, at 84.

203. REGISTRY OF SLAVES: SIERRA LEONE, *supra* note 182.

204. See Bethell, *supra* note 3, at 89.

205. See *infra* Figure 1.

trade was brought for trial in the courts of mixed commission,²⁰⁶ with the highest annual percentage occurring in 1835, when some thirty-nine percent of known slave ship voyages departing that year ended up in the mixed courts.²⁰⁷ Both before and after the mixed courts' peak years of operations, the British also tried a significant number of captured slave vessels in domestic vice admiralty courts.

The following charts give a rough indication of the number of slave ship voyages that led to adjudications in the courts of mixed commission and vice admiralty courts. These charts are based on information from the annual reports of the British commissioners²⁰⁸ combined with data from the new online revised version of the Trans-Atlantic Slave Trade Database.²⁰⁹ The database contains information on close to 35,000 known slave-trading voyages, or more than eighty percent of all the estimated transatlantic slave-trading voyages that took place during the four centuries of the traffic. The data is even more complete for later years in which better records exist.

Two cautions must be given with respect to this data. First, voyages that ended up in adjudication—in either national or mixed courts—are likely overrepresented in the data, since court records were one of the sources used to compile the database. Second, certain nationalities of slave ships are likely overrepresented in the data because of differences in the quality and accessibility of historical records in different countries. Nevertheless, for the purposes of this Article, the quantitative information amply demonstrates possible trends and rough estimates of magnitude. More precise statistical analysis would involve complex methodological issues and is well beyond the scope of this Article.²¹⁰

206. The average percentage of known voyages of all fates that ended up in the mixed courts from 1830 to 1845 is 18.8 percent. These calculations from the Revised Trans-Atlantic Slave Trade Database were calculated using the year of departure variable (“YEARDEP”) for the year, and the variable describing the outcome of each voyage (“FATE”) to count ships adjudicated in mixed commissions as well as the total known voyages for each year.

207. These estimates are consistent with those of other scholars. See ELTIS, *supra* note 10, at 97–99 (calculating that one in five ships involved in the traffic were intercepted and condemned in either the mixed courts or in national courts); LLOYD, *supra* note 23, at 117 (estimating that one in four slaving vessels was captured).

208. These reports appear in the annual volumes of *British Foreign and State Papers* and the *British Parliamentary Papers: Slave Trade Series*. See *supra* note 2.

209. See Eltis, Slave Trade Database, *supra* note 73.

210. Such a study would require imputation of missing data about slave voyages, as well as information about a number of variables, including commodity prices, crop failures, weather, tariffs, free labor costs, elasticity of demand, and other factors in the interdependent markets for slaves and the commodities produced by plantation slave labor.

Figure 1.
PERCENTAGE OF KNOWN SLAVE TRADING VOYAGES ADJUDICATED IN MIXED COURTS

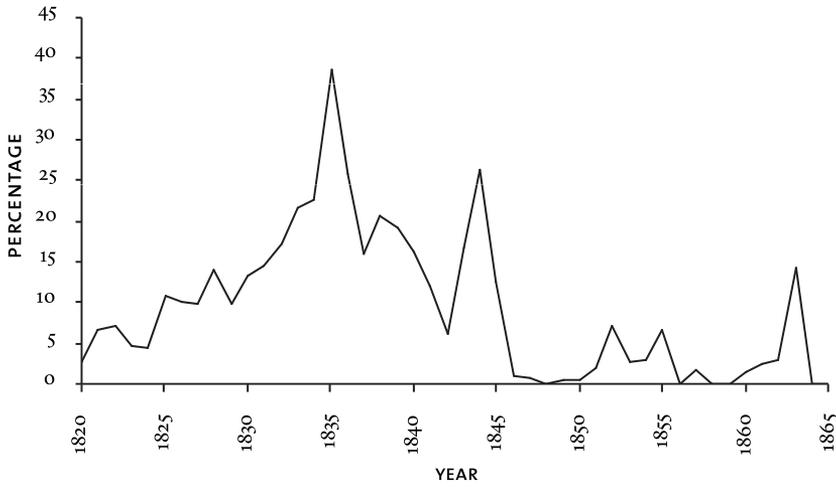
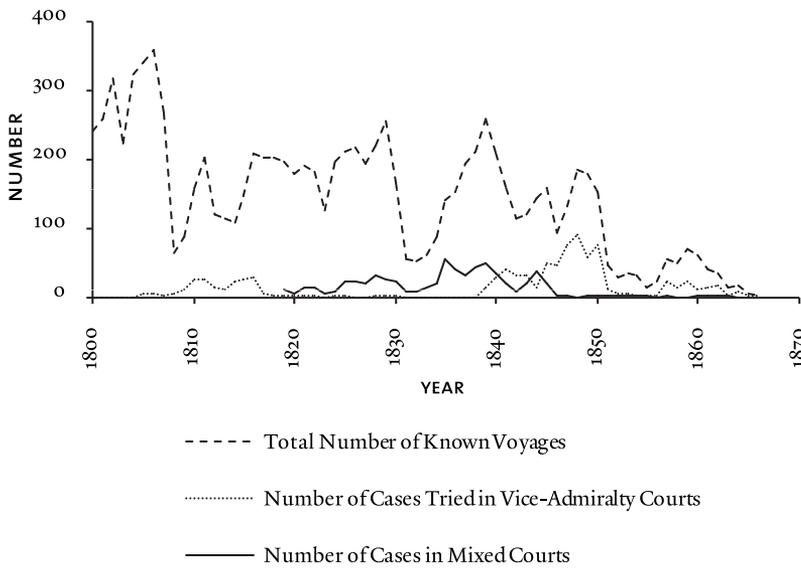


Figure 2.
NUMBER OF KNOWN SLAVE TRADING VOYAGES THAT ENDED IN ADJUDICATION



A few observations emerge from the available quantitative data. First, during the mixed courts' peak years of operation in the 1830s and 1840s, it

appears that they heard cases involving a significant percentage of the total transatlantic slave trade. Because voyages that ended in adjudication are overrepresented in the Slave Trade Database, the percentages in the above charts are likely to be overestimates. Nevertheless, the raw numbers and estimated percentage of cases suggest that the impact of the courts was nontrivial. Another general trend apparent from the data is that, beginning in 1839, the British shifted from use of the mixed courts back to the use of the domestic vice admiralty courts. This shift, precipitated by the reluctance of Portugal and then Brazil to continue participation in the treaty system, is discussed further below.

In addition to the quantitative data, first-hand accounts from those who actually participated in the treaties and court system provide evidence about its impact on the slave trade. For example, in the late 1840s and early 1850s, the British Parliament engaged in a contentious reexamination of the amount of energy and resources being devoted to suppression of the slave trade. Special committees were convened in both the House of Commons and the House of Lords; dozens of witnesses appeared, giving thousands of pages of testimony.²¹¹

Not surprisingly, the witnesses gave conflicting opinions. Some testified that suppression efforts had increased the cruelty of the traffic by inducing slavers to pack the slaves in more tightly, and that it would be better to relegalize and regulate the trade, while others argued that the trade had always been cruel and the only humane course was to stamp it out.²¹² Some witnesses and members of Parliament doubted whether the decades of suppression efforts had made any difference at all.²¹³ William Smith, who had served for several years between 1825 and 1834 as a judge on the mixed court in Sierra Leone, testified gloomily of the suppression effort “that it is a failure” and predicted that no system was ever likely to succeed “because the demand for

211. See REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS, APPOINTED TO CONSIDER THE BEST MEANS WHICH GREAT BRITAIN CAN ADOPT FOR THE FINAL EXTINCTION OF THE AFRICAN SLAVE TRADE, 1850, at 1, in 6 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1850) [hereinafter LORDS REPORT 1850]; REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS, APPOINTED TO CONSIDER THE BEST MEANS WHICH GREAT BRITAIN CAN ADOPT FOR THE FINAL EXTINCTION OF THE AFRICAN SLAVE TRADE, 1849, at 1, in 6 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1850) [hereinafter LORDS REPORT 1849].

212. See FIRST COMMONS REPORT, *supra* note 143, at 2-3 (testimony of Viscount Palmerston) (stating that suppression efforts had not increased the cruelty of the slave trade); *id.* at 23 (testimony of Joseph Denman) (stating that they had).

213. See *id.* at 95 (questions of William Hutt, Chairman of the Select Committee).

slaves will always create a supply.”²¹⁴ Commodore Charles Hotham – who had commanded the Africa Squadron from 1846 to 1849 but was criticized for his ineffectiveness – testified that the slave trade could not be suppressed by any means he knew and suggested that it would be more realistic to sign a new treaty with Brazil authorizing the trade for a fixed period of time.²¹⁵

On the other hand, as described below, many witnesses testified that the antislavery treaties and Britain’s attempts to enforce them had made a difference. Their views ultimately carried the day, when in March 1850, the House of Commons voted 232 to 154 to reject a motion that would have called for Britain to be “released from all the treaty engagements with foreign states and from maintaining armed vessels on the coast of Africa to suppress the traffic in slaves.”²¹⁶

In the months leading up to that critical vote, Foreign Secretary Palmerston, a devoted abolitionist during his many years in office, testified before Parliament that but for the suppression efforts, the slave trade would have “increased in a vast proportion” and cheap slaves would have been used to bring huge tracts of Brazilian land into cultivation.²¹⁷ Palmerston estimated that over a ten-year period, the number of slaves that might have been carried on ships captured without slaves on board was around 190,000.²¹⁸

In addition to the ships that were actually captured and condemned, the threat of capture made the trade more difficult and expensive, and sometimes

214. SECOND REPORT FROM THE SELECT COMMITTEE ON SLAVE TRADE, 1848, at 15 (testimony of William Smith), in 4 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1847-48) [hereinafter SECOND COMMONS REPORT]. Smith did believe that entering into treaties with local chiefs to increase legitimate commerce in Africa would reduce the supply of slaves. *Id.* at 18. He also believed that it would be necessary to keep some warships on the coast to enforce the treaties and protect legitimate commerce. *Id.* at 20.

215. LORDS REPORT 1849, *supra* note 211, at 128 (testimony of Commodore Charles Hotham); see also LLOYD, *supra* note 23, at 120-22. There appears to be some basis for the criticism of Hotham. When asked about his knowledge of Africa before taking up command of the squadron, he answered, “None whatever; I am almost ashamed to say that I had never even directed my attention to the subject . . .” LORDS REPORT 1849, *supra* note 211, at 110 (testimony of Commodore Charles Hotham). Moreover, once in command, he did not consult officers of longer experience on the African coast about the best way to carry out the suppression mission. Almost with pride, he stated that “[d]uring the time of my commanding the African station, I consulted no one who happened to be serving under my orders at the time” and that, in general, commodores did not seek the opinions of their inferior officers. *Id.* at 115-16.

216. LLOYD, *supra* note 23, at 112-13.

217. FIRST COMMONS REPORT, *supra* note 143, at 4 (testimony of Viscount Palmerston).

218. *Id.* at 10. This figure included ships condemned by British vice admiralty courts as well as the mixed commissions.

more inhumane, as slave traders were forced to take precautions to evade capture. A wide array of sources indicates that the price of slaves increased significantly during the years of the suppression effort.²¹⁹ At times, increased suppression activity also reportedly increased insurance costs, and at times made insurance unavailable.²²⁰ In addition, some underwriters began including clauses in their insurance policies exempting ships seized under the treaties from insurance.²²¹

Individual participants in the suppression effort also testified to its effects and its limitations. One witness, David Turnbull, was an ardent abolitionist who served somewhat controversially²²² as British consul at Havana from 1840 to 1842 and then as a judge on the mixed court in Jamaica. He testified that, although he believed the treaties should be revised to expand the power of the mixed courts, he felt that the existing system, even with its weaknesses, had reduced the trade.²²³

Another witness, Capt. Edward Butterfield, had served on the coast of Africa in command of the *Fantome*, the *Waterwitch*, and the *Brisk*—three of the fastest boats in the squadron—and had captured an astonishing forty vessels between 1840 and 1842. He testified that he was told by Portuguese merchants that he had captured at least three-fifths of the slave vessels attempting to sail from that portion of the coast, and he felt that the slave trade was much diminished by his frequent captures.²²⁴ He noted that the slaves onboard the last ship he captured had been kept in the barracoons for fourteen months because no slave ships were able to sail from that port during his blockade. In one case he boarded a legal merchant ship carrying slave traders back with their families to Rio because they had given up the trade as unprofitable.²²⁵

Capt. Christopher Wyvill, who had been stationed on the east coast of Africa, testified that the trade had dramatically fallen off there between 1844

219. See ELTIS, *supra* note 10, at 262.

220. See SECOND COMMONS REPORT, *supra* note 214, at 66 (testimony of Capt. George Manuel); *id.* at 99 (testimony of Thomas Berry Horsfall); *id.* at 162 (testimony of John Bramley Moore).

221. *Id.* at 99 (testimony of Thomas Berry Horsfall).

222. During his stay in Havana, Turnbull was reportedly involved with plans by free blacks for insurrection. ELTIS, *supra* note 10, at 118.

223. LORDS REPORT 1850, *supra* note 211, at 71 (testimony of David Turnbull) (“In the beginning of my residence in Cuba [the slave trade] was not on the increase; and I think that a great deal has been done in the way of prevention . . .”).

224. FIRST COMMONS REPORT, *supra* note 143, at 52-53 (testimony of Capt. Edward Harris Butterfield). Many of Butterfield’s prizes, however, were taken to the vice admiralty court in St. Helena. *Id.* at 57-58.

225. *Id.* at 58-59.

and 1846 because of a treaty with local chiefs, the new treaty with Portugal, and the presence of British cruisers.²²⁶ Likewise, Capt. Henry James Matson argued that the trade on the west coast had decreased a great deal following the adoption of the equipment clause with Spain in 1835. In response to skeptical questioning from members of Parliament about the basis for his assertion, Matson responded that he was relying on first-hand knowledge: "I think there are facts to prove the opinion. I was on the coast during the whole of that time, or very nearly so."²²⁷

In response to questioning about whether the possible additional suffering of slaves on the Middle Passage made the suppression effort a net negative from a humanitarian perspective, several witnesses asserted that any such negative had to be weighed against the enormous benefit in terms of individual lives saved from slavery.²²⁸ Such a view is reinforced by paging through the courts' logbooks of tens of thousands of freed slaves, with names, ages, and descriptions. These were real people, and their lives were made at least a little bit better because of the efforts to enforce the international treaties against the slave trade. In sheer human impact, no other international human rights court has directly affected so many individuals. Indeed, regardless of whether or not the mixed courts were "successful" in terms of their impact on the overall transatlantic slave trade, they were successful in their impact on the nearly 80,000 individuals who were granted their legal freedom by the courts.

Still, even the witnesses who supported continuation of the effort recognized that the slave trade had not been suppressed despite forty years of struggle and a vast expenditure of resources. These witnesses, along with more hostile witnesses, identified a number of weaknesses and limitations in the system.

2. *Limitation: Nonparticipation*

The first major weakness in the treaty regime was the lack of participation by two of the most significant naval powers of the time, France and the United States. France never agreed to the mixed courts at all. Although it signed a treaty with Britain agreeing to mutual search rights in 1831, the treaty provided

226. SECOND COMMONS REPORT, *supra* note 214, at 2 (testimony of Capt. Christopher Wyvill).

227. FIRST COMMONS REPORT, *supra* note 143, at 95 (testimony of Cdr. Henry James Matson).

228. *See id.* at 2-3 (testimony of Viscount Palmerston); *id.* at 23 (testimony of Capt. Joseph Denman).

that ships were to be tried in the courts of their own nation.²²⁹ The United States eventually joined the court system, but not until 1862.²³⁰

Though the absence of both France and the United States from the mixed courts regime for most of the courts' existence hindered their effectiveness, it did not prevent a substantial portion of the trade from being suppressed. By the 1830s, the importation of slaves into the United States and into French possessions in the Caribbean had been effectively squelched by domestic authorities, and the major remaining trade was to Cuba and Brazil.²³¹

Trade to Cuba and Brazil by slave traffickers using the French or American flag was intermittently a serious problem, though agreements with the United States and France that stopped short of participation in the mixed courts helped ameliorate the situation. In 1831, France and Britain concluded a treaty granting mutual rights of search, though it provided for captured ships to be turned over to their own governments for trial. With the adoption of this treaty and the prospect of capture by both British and French warships, the French flag was no longer particularly attractive to slave traders. After 1831, the number of ships sailing under the French flag was relatively insignificant. It remained so even after the right of mutual search was rescinded in 1845 due to domestic political pressure in France and replaced with a new treaty committing France to maintain a certain number of its own warships off the coast of Africa.²³²

As noted previously, the United States had agreed with Britain in the Treaty of Ghent in 1814 to use its best efforts to suppress the slave trade, but that treaty had no enforcement mechanism.²³³ In the 1820s, the United States rebuffed British efforts to sign a treaty similar to those signed with Spain, Portugal, and the Netherlands. President James Monroe, while ultimately in favor of some sort of anti-slave trade treaty, objected to the mixed courts as "incompatible" with the Constitution and to the right of mutual search for an

229. Even prior to the treaty, British crews did occasionally board French ships. See List of French Slave-Vessels Boarded by the British Squadron Employed on the Western Coast of Africa, Between the 1st of June and the 14th of December 1827, enclosed in Letter from the Earl of Dudley to Viscount Granville (Jan. 25, 1828), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class B, at 123-24, in 12 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1829-31) (listing twelve boardings).

230. See *infra* text accompanying notes 341-343.

231. See Eltis, *supra* note 52, at 136 tbl.V.

232. See *infra* Figure 3; see also Lawrence C. Jennings, *France, Great Britain, and the Repression of the Slave Trade, 1841-1845*, 10 FRENCH HIST. STUD. 101, 105, 123 (1977) (discussing France's suspension of the "right to search").

233. See Nelson, *supra* note 11, at 203-04.

offense that was “not piratical” as “repugnant to the feelings of the nation.”²³⁴ In Monroe’s view, there was a more suitable alternative. In 1820, the United States had by statute declared the slave trade to be piracy and subject to the death penalty.²³⁵ Under the law of nations, suspicion of piracy was grounds for search of a ship, whatever its flag. In 1824, President Monroe agreed to a treaty with the British that would have deemed the slave trade piracy and thereby triggered the right to mutual search, on the condition that slave traders be tried by the courts of their own country. The treaty foundered, however, when the Senate tried to attach conditions to which the British would not agree.²³⁶ Diplomatic efforts continued without success in the 1830s, when the United States was repeatedly invited to join the treaty with France and Britain, but declined to do so.²³⁷

Notwithstanding these facts, in the late 1830s and early 1840s, the mixed court at Sierra Leone actually condemned a number of American-flagged ships on the grounds that they could be treated as Spanish under the law of nations, a move that elicited surprisingly little reaction.²³⁸ Moreover, despite the inability of their governments to agree on a treaty, an informal agreement between the commander of the American naval squadron on the West Coast of Africa and the British commander in the region led to a period of joint patrol. Under the agreement, American ships that came upon a slave ship covered by

234. Letter from President James Monroe to the U.S. Senate—Slave Trade Convention with Gr. Brit. (May 21, 1824), in *THE POLITICAL WRITINGS OF JAMES MONROE* 328, 330 (James P. Lucier ed., 2001).

235. Act of May 15, 1820, ch. 113, 3 Stat. 600.

236. See BETTY FLADELAND, *MEN AND BROTHERS: ANGLO-AMERICAN ANTISLAVERY COOPERATION* 125-44 (1972).

237. Letter from Viscount Palmerston to Earl Granville (June 3, 1834), in *CORRESPONDENCE WITH FOREIGN POWERS RELATING TO THE SLAVE TRADE*, class B, at 52-53, in 14 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1968) (1835-36) (discussing negotiations with the United States on the treaty, including U.S. objection to a clause regarding searches on the coast of America, which the British and French then offered to remove); Letter from Sir Charles Vaughan to Viscount Palmerston (Aug. 28, 1834), in *CORRESPONDENCE WITH FOREIGN POWERS RELATING TO THE SLAVE TRADE*, class B, at 88, in 14 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1968) (1835-36) (reporting on negotiations).

238. See, e.g., *Return of Vessels Adjudicated by the British and Spanish Mixed Court of Justice, Established at Sierra Leone, Between July 1 and December 31, 1840*, enclosed in Letter from John Jeremie & Walter W. Lewis, Comm’rs at Sierra Leone, to John Backhouse (Dec. 31, 1840), in *CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM RELATING TO THE SLAVE TRADE*, class A, at 57-58, in 21 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1969) (1842) (noting the condemnation of the *Plant* and the *Clara* as Spanish ships, despite their flying of American colors).

one of the British treaties would hand it over to the nearest British ship, while a British vessel that found a slaver flying the American flag would deliver it to the closest American warship.²³⁹ During a brief period of confusion, British naval captains even brought captured American-flagged slave ships into American ports, where they were sometimes condemned by U.S. courts.²⁴⁰

This period of informal cooperation was short-lived. A combination of disease and lack of support on the home front hampered the American squadron in its patrols of the African coast.²⁴¹ The U.S. government eventually disavowed the informal agreement between the navies in 1841,²⁴² and U.S.

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239. See Agreement Between Cdr. William Tucker of HMS *Wolverene* and Lt. John S. Paine of the USS *Grampus* (Mar. 11, 1840), in CORRESPONDENCE WITH FOREIGN POWERS NOT PARTIES TO CONVENTIONS GIVING RIGHT OF SEARCH OF VESSELS SUSPECTED OF THE SLAVE TRADE, class D, at 76, 76-77, in 20 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1841); Letter from Viscount Palmerston to A. Stevenson (Aug. 5, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class D, at 255, 255-57, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842) (describing an agreement entered into between the British and American commanding officers off the coast of Africa).
240. See, e.g., United States v. Morris, 39 U.S. (14 Pet.) 464 (1840) (discussing an American criminal prosecution arising out of the capture of the *Butterfly* by HMS *Dolphin*); Letter from Consul James Buchanan to Viscount Palmerston (June 10, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class D, at 319, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842) (discussing the case of the *Butterfly*); Letter from the Earl of Aberdeen to Consul James Buchanan (Sept. 30, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class D, at 323, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842) (discussing American courts' condemnation of the *Butterfly* and the *Catherine*). In two notable cases in 1839—that of the *Eagle* and the *Clara*—the U.S. government refused to exercise jurisdiction over two American-flagged ships captured by the British and brought to New York, based on the conclusion of the American Attorney General that the ships were actually Spanish. The cases were then submitted to the mixed court at Sierra Leone, which issued orders of condemnation. See Letter from John Jeremie & Walter W. Lewis, Comm'rs at Sierra Leone, to Viscount Palmerston (Dec. 31, 1840), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 51-57, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842).
241. See Letter from Cdr. William Tucker to More O'Ferrall, HMS *Wolverene* (Mar. 16, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class D, at 246, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842) (reporting a meeting with the USS *Cyane*, and noting that "I still more and very deeply regret that the American men-of-war remain so very short a time on the coast" though he believed that "[t]he American men-of-war, I am convinced, have been of service on this coast, inasmuch as the knowledge of it has prevented many vessels from raising their flag" and citing examples).
242. See Letter from A. Stevenson to Viscount Palmerston (Aug. 9, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class D, at 258, in 21 BRITISH

courts began refusing to condemn ships captured by the British. Diplomatic protests by the United States about the boarding of American ships led to a crisis in U.S.-British relations, with the Americans claiming the policy was “alarming to national sovereignty and sensibility, and the friendly relations of the two countries.”²⁴³ After several months of tense correspondence,²⁴⁴ the government in London ordered British naval officers to be more deferential to American-flagged ships.²⁴⁵ In 1842, the Webster-Ashburton Treaty committed

PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842) (noting, in relation to the agreement between the British and American commanders to which Palmerston alluded, that he had no official information and “had no reason to suppose that such authority had been confided by the American Government to any of its naval officers”).

243. See, e.g., Letter from A. Stevenson to the Earl of Aberdeen (Sept. 10, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class D, at 263, 266, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842).
244. See, e.g., Letter from Viscount Palmerston to A. Stevenson (Aug. 5, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1842, class D, at 255, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842); Letter from A. Stevenson to Viscount Palmerston (Aug. 9, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1842, class D, at 258, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842); Letter from Viscount Palmerston to A. Stevenson (Aug. 27, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1842, class D, at 260, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842); Letter from A. Stevenson to the Earl of Aberdeen (Sept. 10, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1842, class D, at 263, 266, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842); Letter from the Earl of Aberdeen to A. Stevenson (Oct. 13, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1842, class D, at 267, 269, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842) (arguing that the “rights which have been mutually conceded to each other by the Governments of Great Britain and France, can scarcely be incompatible with the honour and independence of any State upon the face of the earth.”).
245. See Letter from Sir John Barrow to the Commanders in Chief and Senior Officers at the Cape of Good Hope, Coast of Africa, West Indies, and Brazils (Dec. 7, 1841), in CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1842, class D, at 279, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842) (ordering naval officers “neither to capture nor interfere with, nor even to visit United States’ vessels, whether they shall have slaves on board or not,” yet noting that “it is not intended to allow vessels of other nations to escape visit and examination by merely hoisting an United States flag” and suggesting that if there is reason to suspect a vessel is not truly American, a British ship would be justified in boarding it to examine its papers, but ordering immediate reports of all such boardings to be sent to London). In the Treaty of 1845, France reportedly agreed with Britain on the right of visit to verify the flag, and one navy captain argued before Parliament that, with France’s backing on this principle of the law of nations, British ships would be justified in boarding American-flagged slave ships on the inference that they were really Portuguese, Spanish, or Brazilian. FIRST COMMONS REPORT, *supra* note 143, at 23 (testimony of Capt. Joseph Denman).

the United States to maintaining an antislavery squadron on the African coast, but did not include a right of search or any provision for trial in mixed courts.²⁴⁶

Notwithstanding the delicate status of slavery in American politics and the nation's reluctance to enter into slavery-related treaties that it viewed as an infringement of its sovereignty or the freedom of the seas, at various times the U.S. government did engage in reasonably vigorous efforts to suppress the slave trade. Some 103 slave ships were captured by the U.S. Navy and brought for trial in U.S. courts between 1837 and 1862, most in the years after 1842. The fact that U.S. law classified the slave trade as piracy subject to the death penalty also deterred use of the U.S. flag. Criminal proceedings were brought against more than 100 individuals in U.S. courts, though relatively few of these cases resulted in convictions and the death penalty actually was imposed in only one case.²⁴⁷

At the same time, however, one notable weakness in American law was the fact that for many years it did not cover ships equipped for the slave trade but without slaves on board. Because of this loophole, it was reportedly a common practice for ships to sail into the African coast under the American flag (thereby evading capture by the British), and then change their colors to those of another nation once slaves were actually taken onboard (at which point there was some threat that, if captured by the Americans, they would be tried and punished).²⁴⁸

British officials involved in the slave trade suppression effort generally agreed that full participation in the treaty and mixed court system by the United States and France would have been advantageous, but many contemporaries did not view those countries' participation as indispensable. When a member of the House of Commons asked Lord Palmerston whether the consent of France and America to agree to mutual rights of search was essential to successful suppression of the trade, Palmerston answered, "My opinion is, that if the Spanish government, and if the government of Brazil, would honestly and effectually fulfill their treaty engagements . . . the slave trade would be practically extinct."²⁴⁹ France, Palmerston argued, was

246. See Webster-Ashburton Treaty, U.S.-Gr. Brit., Aug. 10, 1842, 8 Stat. 572.

247. HOWARD, *supra* note 57, at 202, 214-35.

248. See, e.g., Letter from Comm'rs at Sierra Leone to Viscount Palmerston (Jan. 24, 1842), in CORRESPONDENCE WITH BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE, 1842, class A, at 33, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842).

249. See FIRST COMMONS REPORT, *supra* note 143, at 8 (testimony of Viscount Palmerston); ARTHUR F. CORWIN, SPAIN AND THE ABOLITION OF SLAVERY IN CUBA, 1817-1886, at 96

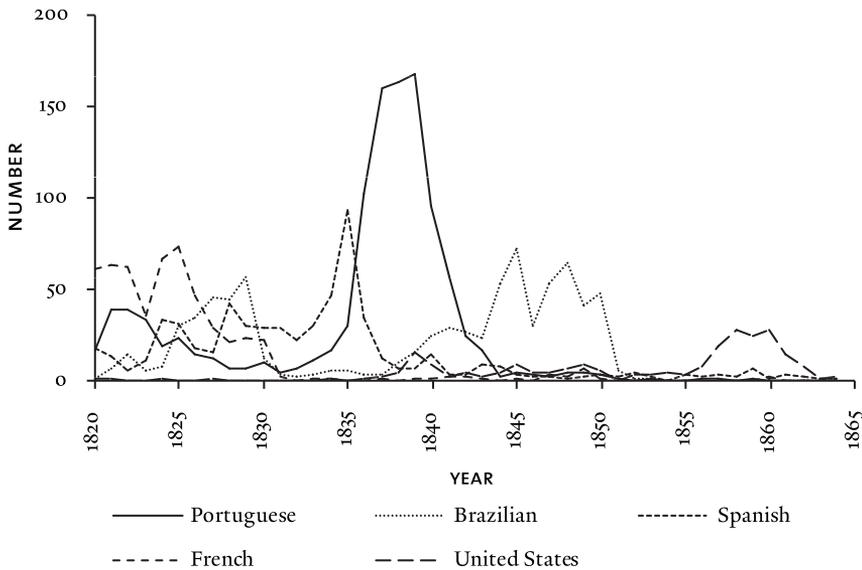
effectively enforcing the slave-trade ban against French-flagged ships.²⁵⁰ Treaties had been concluded with native chiefs in Africa that gave England and France the right to enforce the slave-trade ban in the chiefs' territories.²⁵¹ As for the United States, he contended, "I do not conceive that the mere refusal of the United States to concur in mutual right of search would, of itself, be sufficient to defeat the naval police if all other nations had united in the common league."²⁵² Even without the cooperation of the United States, the slave trade to Brazil and Cuba could be brought "to a very narrow limit indeed."²⁵³

Palmerston was certainly correct as to Brazil. As it happened, the traffic to Brazil was effectively suppressed by the Brazilian government itself (under pressure from the British) beginning in 1850, notwithstanding the absence of the United States from the mixed court regime until 1862. The available data on the usage of particular flags in the slave trade also suggests that claims about the heavy use of the French and American flags in the later years of the slave trade were somewhat exaggerated. Figure 3 below reflects the available data on the national registration of ships involved in the slave trade from 1815 to 1865.²⁵⁴

(1967); *see also* Letter from Rear-Admiral Campbell to Mr. Wood (Dec. 14, 1835), *in* CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1835, class B, at 40, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835) (noting that traffic is carried on "to a most extraordinary extent" by Spanish and Portuguese vessels).

250. FIRST COMMONS REPORT, *supra* note 143, at 6 (testimony of Viscount Palmerston); *see also*, e.g., Letter from Lord Stuart de Rothesay to Viscount Palmerston (Nov. 26, 1830), *in* CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1829-31, class B, at 165, *in* 12 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1829-31) (reporting criminal sentences against slave traders by the French court in Guadalupe).
251. FIRST COMMONS REPORT, *supra* note 143, at 17 (testimony of Viscount Palmerston).
252. *Id.* at 6.
253. *Id.* at 7. However, other witnesses, including Sir Charles Hotham, who had commanded the Africa Squadron, viewed the nonparticipation of the United States as a more significant problem. *Id.* (responding to Hotham's testimony).
254. Of course, data about the flag used are unavailable for many voyages. This Chart was compiled from the Revised Trans-Atlantic Slave Trade Database using the YEARDEP variable for the year of departure for the voyage and the NATIONAL variable for the country in which the ship was registered, if known.

Figure 3.
KNOWN VOYAGES BY NATIONALITY OF SHIP'S REGISTRATION



Notwithstanding the changes to the international legal regime that made these other flags less attractive, the French flag does not appear to have been a substantial part of the trade after 1830. Nor does the American flag appear to have accounted for a dominant portion of the traffic between 1830 and 1850, though it is difficult to say how commonly ships used the flag on the inbound portion of the voyage to Africa.²⁵⁵ During these years, the dominant preference of the slave traders under increasing pressure seems to have been to shift to no flag at all. Although a ship flying no flag could be boarded, from the slave traders' perspective, the advantage of this approach may have been to avoid susceptibility to criminal punishment under the law of their "home" country.²⁵⁶

As discussed more fully below, the participation of the United States in the mixed courts regime was more critical to the suppression of the slave trade to Cuba, which lies a mere ninety miles from Florida. After a sharp decline in the late 1840s, the trade to Cuba began to increase again in the 1850s. Unflagged and American flagged ships dominated this final period of the trade. In 1862, the United States finally ratified the treaty with Britain granting the right of

255. In addition, some ships carried multiple flags. Thus, the number of ships that carried American or French flags onboard may be seriously underrepresented in the database.

256. Van Niekerk, *supra* note 6, at 413.

mutual search and establishing mixed courts at New York, Sierra Leone, and Capetown.²⁵⁷

It is possible that even without the American treaty, the trade to Cuba could eventually have been suppressed by Cuban authorities acting against slave markets on shore in much the same way it was finally suppressed in Brazil. As it happened, however, the ratification of the Anglo-American treaty in 1862 appears to have been the catalyst for the final suppression of the trade to Cuba. Ratification of the treaty eliminated the final “safe” flag under which slavers could sail and triggered more active enforcement by Cuban authorities who began to see the end of the trade as inevitable. To put it somewhat differently, the Brazilian case shows that the participation of the United States may not have been a necessary part of the suppression of the slave trade. But the Cuban case shows that the participation of the United States in the treaty regime likely was sufficient to end the trade.

3. *Limitation: Other Loopholes*

Other loopholes in the treaties creating the courts also created serious impediments to their effectiveness. For example, one significant loophole was the exclusion from the courts’ jurisdiction of certain types of ships, such as ships that were traveling in some parts of the ocean or that did not actually have slaves onboard at the time of capture.

The case of the *Maria da Gloria* provides one good example of such loopholes in action. A British ship captured the *Maria da Gloria* with more than four hundred slaves on board, but the mixed court at Rio de Janeiro rejected the case on the grounds that the ship was Portuguese, not Brazilian. Transported back across the Atlantic by a prize crew, the mixed court at Sierra Leone reluctantly concluded that the ship was immune from condemnation because it was seized south of the equator, where the slave trade was arguably still permitted by the Portuguese treaty. The case had a profound impact on the captain of the British prize crew, Joseph Denman, who, as mentioned previously, became an ardent abolitionist because of his experiences onboard the *Maria da Gloria*.²⁵⁸ The case also left a strong impression on the judges at the Sierra Leone court. With some dismay, the British judges wrote to Viscount Palmerston:

257. *Id.* at 432. For the history of the negotiations behind the 1862 treaty, see A. Taylor Milne, *The Lyon-Seward Treaty of 1862*, 38 AM. HIST. REV. 511 (1933).

258. See FIRST COMMONS REPORT, *supra* note 143, at 32 (testimony of Capt. Joseph Denman).

Although it has been our duty as Judges to restore the “*Maria da Gloria*,” we cannot forbear expressing to your Lordship our deep regret on witnessing the sailing of that vessel with her cargo of unhappy beings, destined to another miserable voyage across the Atlantic.

As men, our feelings have been greatly distressed.²⁵⁹

The judges expressed their hope that the case would enable the British government to conclude a new, more effective treaty with Portugal that covered traffic sailing in all latitudes.²⁶⁰

In addition to the exclusion of Portuguese ships sailing south of the equator, the other significant initial loophole in the treaties was the lack of authority to condemn ships that were equipped for the slave trade but that had not yet taken slaves onboard. The Netherlands had readily agreed to such a clause, but since the Dutch flag was not used much in the trade after 1817, this was not a significant development. The British judges at Sierra Leone repeatedly urged their government to negotiate for an equipment clause with Spain and Portugal and viewed such a clause as vital to the courts’ success.²⁶¹ Although Spain resisted for several years,²⁶² it finally agreed in principle to a

259. Letter from W.M. Smith & H.W. Macaulay, Comm’rs at Sierra Leone, to Viscount Palmerston (Apr. 9, 1834), in *CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE*, class A, at 45-46, in 14 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1968) (1835-36). In this case, the British commissioners sat alone, due to the vacancy of the Portuguese seats on the commission. Letter from Viscount Palmerston to Lord Howard de Walden (Oct. 7, 1834), in *CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE*, class B, at 18, in 14 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1968) (1835-36).

260. Letter from W.M. Smith & H.W. Macaulay, Comm’rs at Sierra Leone, to Viscount Palmerston (Apr. 9, 1834), in *CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE*, class A, at 45-46, in 14 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1968) (1835-36).

261. Letter from W.M. Smith & Edward W. H. Schenbey, Comm’rs at Sierra Leone, to Viscount Palmerston (Jan. 6, 1834), in *CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE*, class A, at 1, in 14 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1968) (1835-36).

262. See Letter from the Earl of Aberdeen to Comm’rs at Havana (Apr. 24, 1830), in *CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE*, class A, at 91, in 12 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1968) (1829-30) (reporting Spain’s refusal of a proposed equipment clause).

revision of the treaty in September 1834,²⁶³ and the treaty was signed on June 28, 1835,²⁶⁴ although news of it had still not reached the Spanish officials in Havana by January 10, 1836.²⁶⁵ As Figure 3 above suggests, after the equipment clause was adopted, traffic under the Spanish flag decreased noticeably.

Despite strong encouragement from the British, Portugal would not agree to a new treaty including an equipment clause, and this reluctance proved a serious barrier to suppression efforts.²⁶⁶ As Figure 3 indicates, the adoption of the Spanish equipment clause in 1835 coincided with a remarkable uptick in the trade under the Portuguese flag. Though the trade as a whole was increasing during these years and other factors may have played a role in the increasing use of the Portuguese flag, the trend is noticeably correlated with, if not verifiably caused by, the change in the Spanish treaty. Trade under the Portuguese flag only decreased when, in 1839, Britain attempted to close the loopholes by unilaterally seizing Portuguese ships under a creative reinterpretation of the 1817 treaty. In response, in 1842, Portugal finally agreed to a new, comprehensive treaty.

The equipment clause loophole in the Brazilian treaty was closed not by treaty amendment but by judicial initiative. Although the Brazilian legislature had failed to ratify the equipment clause amendment, in 1839, the Anglo-Portuguese courts in both Rio de Janeiro and Sierra Leone independently began condemning ships equipped for the slave trade under an innovative reinterpretation of the existing treaties. Although the Brazilian judges objected to this reinterpretation, the practice soon became settled and a large number of Brazilian ships were condemned simply for being equipped for the slave trade, occasionally with the concurrence of a Brazilian judge but more often with the

263. Letter from George Villiers to Viscount Palmerston (Sept. 9, 1834), *in* CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class B, at 11, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36).

264. Letter from George Villiers to Viscount Palmerston (June 28, 1835), *in* CORRESPONDENCE WITH THE FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class B, at 8, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835).

265. Letter from W.S. Macleay & Edward W.H. Schenbey, Comm'rs at Havana, to Viscount Palmerston (Jan. 10, 1836), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 212, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36).

266. *See* Letter from Viscount Palmerston to the Baron de Moncorvo (Apr. 30, 1836), *in* CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class B, at 46-54, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36); Letter from Viscount Palmerston to Lord Howard de Walden (Apr. 20, 1839), *in* CORRESPONDENCE WITH FOREIGN POWERS RELATING TO THE SLAVE TRADE, class B, at 71, *in* 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839).

toss of the coin choosing the British arbitrator to break the tie if the British and Brazilian judges disagreed.²⁶⁷

Some participants in the system believed that the courts would have been more effective if, in addition to closing the loopholes in the substantive coverage of the treaties, the courts were granted additional powers, including the ability to punish criminally slave ship crews and owners and the ability to declare slaves found on plantations in Cuba and Brazil free unless it could be proven that they had not been imported illegally.²⁶⁸ While perhaps desirable, these additional powers were not within the realm of diplomatic plausibility. In the later years of the courts' operation, however, the governments agreed that the courts at least had the power to detain captured slave crew members until they could be turned over to their own nation for criminal prosecution.²⁶⁹

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267. See BETHELL, *supra* note 5, at 166-79; see also Letter from H.W. Macaulay & R. Doherty, Comm'rs at Sierra Leone, to Viscount Palmerston (Sept. 2, 1839), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE, 1839-40, class A, at 111-12, in 18 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839-40) (enclosing a "Report of the Case of the Brig *Emprehendedor*"); Letter from George Jackson & Frederick Grigg, Comm'rs at Rio, to Viscount Palmerston (Sept. 23, 1839), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS RELATING TO THE SLAVE TRADE, class A, at 258, in 18 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1839-40) (enclosing a report on the case of the *Maria Carlota*).
268. For the suggestion about jurisdiction over slaves on land, see LORDS REPORT 1850, *supra* note 211, at 71 (testimony of David Turnbull). For suggestions of criminal punishment, either in national courts or in mixed courts, see, for example, FIRST COMMONS REPORT, *supra* note 143, at 5 (testimony of Viscount Palmerston); *id.* at 34-35 (testimony of Capt. Joseph Denman); *id.* at 122 (testimony of John Carr, Chief Justice of Sierra Leone); and *id.* at 166 (testimony of Cdr. Thomas Francis Birch).
269. Compare Letter from W. Fergusson & M.L. Melville, Comm'rs at Sierra Leone, to Viscount Palmerston (Sept. 23, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 31, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842) (acknowledging Palmerston's instruction that there was no legal authority for the detention of crews), with Letter from Geo. Frere, Jr., & Frederic R. Surtees, Comm'rs at Cape of Good Hope, to Viscount Palmerston (Oct. 31, 1846), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 113, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1847-48) (acknowledging the opinion of British law officers that under Article XII of the Anglo-Portuguese Treaty of 1842, *supra* note 163, slave crews could be detained in custody by the mixed commission until they could be turned over to their own governments for trial), and Letter from Ildelfonso Leopoldo Bayard to Alfredo Duprat, Portuguese Comm'r (May 22, 1847), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS,

Rather than leading to more prosecutions, however, this practice may simply have increased the incentives for slavers to claim no nationality at all.

4. *Limitation: Reluctant Treaty Partners*

The most serious impediment to the success of the mixed court system was the reluctance of Spain, Portugal, and Brazil strictly to enforce the ban on the slave trade. This lack of cooperation was not principally manifested in the behavior of the mixed court judges from those countries, although these judges did sometimes vote to acquit, especially in the commission at Rio de Janeiro.²⁷⁰ To the contrary, on several occasions, the British judges actually spoke quite favorably of their colleagues. Upon the death of a Brazilian judge who had served for six uninterrupted years in Sierra Leone (during which time admittedly few cases were heard), the British commissioners wrote to London that “his public conduct was marked by a spirit of courtesy and conciliation towards his colleagues in office, with whom he at the same time lived privately on terms of intimacy and friendship.”²⁷¹

The British judges at Havana spoke of some of their Spanish colleagues in similarly favorable terms, in one early case noting “the most perfect unanimity prevailed during the whole of the proceedings; and that my Spanish colleagues continued to manifest the same zeal to uphold the dignity and authority of the Court, which I before stated they had displayed at the commencement.”²⁷²

Nor was the main problem outside pressure on the courts, though the mixed courts at Rio de Janeiro and Havana did sometimes face threats stemming from popular opposition to their work. For example, in Rio, one individual who had acted as a proctor for British captors in a number of cases

RELATING TO THE SLAVE TRADE, class A, at 130, *in* 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1847-48) (instructing the Portuguese commissioner that slave crews should be sent to Loanda or Cape Verde and “delivered to the Governor-Generals, to be dealt with according to law”).

270. See *supra* text accompanying notes 170-176 (discussing the rates of condemnation and acquittal in various courts).

271. Letter from Oct. Temple & H.W. Macauley, Comm’rs at Sierra Leone, to Viscount Palmerston (June 30, 1834), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 63, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36).

272. Letter from H.T. Kilbee, Comm’r at Havana, to George Canning, Sec’y (July 31, 1824), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANNAH, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 74, *in* 12 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1825-26).

was threatened that should he be involved in any more cases, he would be “waylaid and murdered.” As a result, the captors were left without “professional assistance” in prosecuting their cases because he had abandoned his work out of fear.²⁷³ Although these threats sometimes slowed the courts’ proceedings, local authorities took sufficient measures—albeit sometimes reluctantly—to protect the physical safety of the courts, and the threats do not appear to have seriously hampered their functioning.

In terms of lack of cooperation, the far more serious problem was the unwillingness of the Spanish, Portuguese, or Brazilian governments to engage in any meaningful enforcement of domestic laws against the slave trade by preventing the landing of slave ships, blocking the sale of imported slaves, or criminally prosecuting those involved. Viscount Palmerston, British naval officers, and British officials in the field all believed that the governments of Cuba and Brazil could end slave importations if they wanted to by taking these measures.²⁷⁴ It turned out that they were correct, for once each of these countries finally began enforcing its domestic laws, the slave trade was finally and successfully extinguished.²⁷⁵ Changes in attitudes that led to the enforcement of laws against the slave trade in Brazil and then later Cuba were essential to the final suppression of the trade.

When the treaties were first signed, it was not initially obvious how essential the cooperation of local officials in Cuba and Brazil would be to the successful suppression of the slave trade. By giving the British the power to search, seize, and condemn slave ships in international courts, the treaties seemed to embody strong international enforcement mechanisms. These powers were unprecedented at the time, and have been unmatched in human rights treaties and international courts created since then. But as robust as these powers were, and as much energy and expense as the British devoted to the effort, the oceans were vast, and the most vulnerable part of the slave trade system turned out to be the point of sale in the Americas. Much as modern efforts to interdict drugs on the high seas are unsuccessful when decoupled from effective enforcement on land, naval enforcement alone was unlikely to end the slave trade.

273. Letter from George Jackson & Frederick Grigg, Comm’rs at Rio, to Viscount Palmerston (Jan. 16, 1839), in *CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, AND RIO DE JANEIRO, RELATING TO THE SLAVE TRADE*, class A, at 135-36, in 17 *BRITISH PARLIAMENTARY PAPERS* (photo. reprint, Irish Univ. Press 1968) (1839).

274. See, e.g., *FIRST COMMONS REPORT*, *supra* note 143, at 161-62 (testimony of Cdr. Thomas Francis Birch).

275. See *infra* Section II.C.

The correspondence from British officials in Brazil and Cuba is filled with complaints about the supineness and outright corruption of local authorities, who turned the other way when slave ships landed and auctioned off their cargos. When the new Captain-General of Cuba assured the British diplomats in Havana that he was determined to enforce the antislavery treaties, Viscount Palmerston was skeptical:

No doubt can be entertained that he has a power of putting a stop to it if he will: if the Cuba Slave Trade has ceased, General Valdes will have proved himself sincere: if that trade still continues, he will have demonstrated that his professions are all as hollow and valueless as those of all his predecessors.²⁷⁶

For many years, port officials in Havana would clear for departure ships obviously equipped for the slave trade.²⁷⁷ The tolerance of local governments for the slave trade was so great that until very late in the game, slave traders who safely escaped British patrols on the high seas and reached the territorial waters of Cuba and Brazil engaged in only token efforts to conceal their illegal activities. In 1836—more than fifteen years after the Spanish treaty took effect—British officials were outraged but not surprised by the appearance in

276. Letter from Viscount Palmerston to Comm'rs at Havana (July 31, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 206, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842).

277. Letter from Walter W. Lewis & L. Hook, Comm'rs at Sierra Leone, to Viscount Palmerston (Apr. 10, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 78, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842). Palmerston was also upset by the case, writing to the British diplomats in Lisbon in regard to the *Maria da Gloria's* claim for damages against its captor that

[t]he Claimant was engaged in a proceeding that was in violation of the laws of God and man; it was undertaken in fraud, and defended by perjury; and he escaped the punishment due to his crime, not because he did not deserve to suffer it, but because he was found in a place, where, under the strict letter of the Treaty, he was not liable to be detained.

Letter from Viscount Palmerston to Lord Howard de Walden (Oct. 7, 1834), in Correspondence with Foreign Powers, Relating to the Slave Trade, class B, at 18, 19, in 14 British Parliamentary Papers (photo. reprint, Irish Univ. Press 1968) (1835-36); see also Letter from Viscount Palmerston to Comm'rs at Rio (Oct. 8, 1834), in Correspondence with the British Commissioners at Sierra Leone, the Havana, Rio de Janeiro, and Surinam, Relating to the Slave Trade, class A, at 147, in 14 British Parliamentary Papers (photo. reprint, Irish Univ. Press 1968) (1835-36) (stating that the commission misapplied the law to the facts in releasing the *Maria da Gloria*).

one Havana newspaper of an advertisement for the open sale of newly imported Africans.²⁷⁸

In response to nearly constant complaints from British diplomats, the other governments would engage in denials and token responses. For example, when the British commissioners at Havana reported that the Portuguese consul there was granting papers to slave vessels, the British complained to the Portuguese government in Lisbon, which revoked the consul's authority and declared documents furnished by him to be invalid.²⁷⁹ Yet such minimal, occasional efforts to sanction participants in the slave trade were little more than meaningless gestures. For many years, the other governments did not deploy significant numbers of their ships in suppression efforts even in their territorial waters.²⁸⁰ Their national courts often did not condemn ships obviously engaged in the slave trade.²⁸¹ Slave traders brought in for criminal trial were routinely acquitted.²⁸²

Another issue, as with modern international courts, was compliance with the courts' decisions. While there was no overt defiance of the judgments, the governments in Cuba and Brazil tolerated the virtual reenslavement of many of the Africans freed by the mixed courts. In the British colony at Sierra Leone, the slaves emancipated by the mixed courts fared no worse (though also no

278. Letter from George Villiers to Don Juan Alvarez y Mendizabal (Mar. 10, 1836), *enclosed in* Letter from Mr. Villiers to Viscount Palmerston (Mar. 12, 1836), *in* CORRESPONDENCE WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, 1836, class B, at 20-21, *in* 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36).

279. Letter from the Earl of Aberdeen to Comm'rs at Havana (Dec. 15, 1841), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AND WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class A, at 249, *in* 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842).

280. *See, e.g.*, Letter from Chris Edwd. Lefroy to the Earl of Dudley (Dec. 13, 1827), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 172, *in* 12 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1829-31) (discussing the lack of Dutch cruisers assigned to suppress the slave trade in Surinam).

281. *See, e.g.*, Letter from W.S. Macleay to the Earl of Aberdeen (Aug. 19, 1828), *in* CORRESPONDENCE WITH BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATIVE TO THE SLAVE TRADE, class A, at 147, *in* 12 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1829-31) (reporting the acquittal of a slave vessel by the Spanish Court of Admiralty in Havana).

282. *See, e.g.*, Letter from the Earl of Aberdeen to Comm'rs at Rio de Janeiro (Sept. 21, 1841), *in* CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AND WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class A, at 355-56, *in* 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842) (discussing the acquittal by Brazilian criminal courts of crew members declared by the mixed commission to have been engaged in piracy relating to the slave trade).

better) than the rest of the large population of free Africans. A few of the emancipated Africans were employed as messengers and clerks by the court,²⁸³ while the rest took their place as ordinary laborers in the colony. Thus, as long as they remained in British-controlled territory near Sierra Leone and were not recaptured by slave traders, the 65,000 Africans freed by the mixed courts at Sierra Leone actually received the benefit of their freedom.

The several thousand *emancipados* in Cuba and Brazil, however, were “virtually slaves” kept in repeated apprenticeships.²⁸⁴ In Brazil, the emancipated slaves were hired out as apprentices, many employed by the government itself.²⁸⁵ At first, it was reported that they were “well treated, and not overworked.”²⁸⁶ Eventually, it became clear that this was not the case, and the Brazilian government established a commission of inquiry in Rio to investigate allegations of mistreatment of *emancipados*.²⁸⁷

In Havana, a number of *emancipados* who had been effectively reenslaved in the hands of private individuals were forced to seek the help of the British government in obtaining their freedom.²⁸⁸ In one particularly poignant case, an African woman who had been emancipated by the mixed court was treated as a slave by the family to which she had been apprenticed and sent to a sugar plantation.²⁸⁹ When her young daughter (who was also legally a free person) was in danger of being sold, the mother hid the girl with family friends who

283. Letter from Comm’rs at Sierra Leone to Viscount Palmerston (Sept. 20, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AND WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class A, at 31, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1842).

284. FIRST COMMONS REPORT, *supra* note 143, at 16 (testimony of Viscount Palmerston).

285. Letter from Mr. Fox to Viscount Palmerston (Oct. 15, 1834), in CORRESPONDENCE WITH FOREIGN POWERS RELATING TO THE SLAVE TRADE, class B, at 34, in 14 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1835-36).

286. *Id.*

287. Letter from Comm’rs at Rio de Janeiro to Viscount Palmerston (July 7, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AND WITH FOREIGN POWERS, RELATING TO THE SLAVE TRADE, class A, at 354-55, in 21 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1842).

288. See, e.g., Letter from Mr. Turnbull to the Earl of Aberdeen (Dec. 24, 1841), in CORRESPONDENCE WITH SPAIN, PORTUGAL, BRAZIL, &C., &C., RELATIVE TO THE SLAVE TRADE, class B, at 85-86, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (describing the cases of “two individual emancipados, Gavino and Matilda, both of whom have been subjected to long periods of uncompensated compulsory servitude”).

289. Letter from Mr. Turnbull to the Earl of Aberdeen (Dec. 14, 1841), in CORRESPONDENCE WITH SPAIN, PORTUGAL, BRAZIL, &C., &C., RELATIVE TO THE SLAVE TRADE, class B, at 52-60, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843).

eventually brought her to the British consulate. The mother, along with the friends, was then thrown in prison for failing to reveal the girl's whereabouts. A tense series of exchanges between the British consul and the colonial government followed, with both the girl and her mother eventually getting certificates of freedom thanks to the British consul's intervention.²⁹⁰

In the face of these problems, the British eventually made arrangements for *emancipados* to be transported to British colonies,²⁹¹ though this led to sinister allegations that the British were hoping to benefit their colonies by taking African laborers away from Cuba and Brazil.

5. *Limitation: Faltering Domestic Support*

The occasional faltering in domestic support within Britain for the slave trade suppression effort also limited the courts' effectiveness. More than sixty years elapsed from the moment Britain banned the slave trade under its flag in 1807 until the trade as a whole was finally extinguished. Understandably, domestic political interest and support for the effort waxed and waned over the decades, and with it the resources and attention devoted to crafting the most effective policies for suppression. As noted previously, this simmering debate reached a crisis point when, from 1848 to 1850, Parliament engaged in almost continuous hearings and discussions about whether to stay the course in suppressing the slave trade or to abandon the system of treaties and courts backed with naval power.²⁹² One political faction, which included some abolitionists who opposed all use of military force because of their Quaker beliefs, wanted to withdraw the Africa Squadron from its antislavery patrol and even withdraw from the antislavery treaties.²⁹³ Another faction wanted the government to redouble its efforts at suppression of the trade.

290. *Id.* at 54-55.

291. See Letter from J. Kennedy & Campbell J. Dalrymple, Comm'rs at Havana, to Viscount Palmerston (Dec. 4, 1846), in CORRESPONDENCE WITH BRITISH COMMISSIONERS, class A, at 61, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1847-48) (discussing further removal of *emancipados* to Jamaica); see also Letter from Viscount Palmerston to Comm'rs at Havana (Mar. 15, 1841), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, THE HAVANA, RIO DE JANEIRO, AND SURINAM, RELATING TO THE SLAVE TRADE, class A, at 166, in 21 BRITISH PARLIAMENTARY PAPERS (photo reprint Irish Univ. Press 1969) (1842) (discussing the removal of *emancipados* to Jamaica); Letter from Mr. Stephen to Viscount Canning (Jan. 25, 1842), in CORRESPONDENCE WITH FOREIGN POWERS, class B, at 310, in 23 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1843) (discussing a plan to remove emancipated Africans from Rio).

292. See *supra* text accompanying note 211.

293. See generally FIRST COMMONS REPORT, *supra* note 143.

In addition, hard-learned lessons about which tactics were effective were sometimes lost due to changes in personnel in the British Foreign Office and the Admiralty, changes made both for simple administrative reasons and because not all officials were equally committed personally to the cause of abolition. When officials committed to abolition were replaced by officials who were less enthusiastic, treaty enforcement often became less effective.

The Gallinas expedition in 1840 is one prime example. The provocation for the expedition was the kidnapping of a free African woman and her infant, both of whom were British subjects at Sierra Leone. With the support of the British governor there, Captain Denman of HMS *Wanderer* went ashore at Gallinas to rescue the woman. Having done so, he induced the local chief to sign a treaty banning the slave trade, and enlisted the chief and his men in burning the Spanish slave traders' storehouses.²⁹⁴

When news of Captain Denman's endeavor spread, two other British captains then undertook similar actions elsewhere on the African coast. Initially, London reacted positively; the admiralty granted Denman a promotion, and Parliament gave him and his men a reward of £4000. Foreign Secretary Palmerston instructed that "[t]he course pursued by Captain Denman seems to be the best adapted for the attainment of the object in view" and encouraged other captains to follow his example.²⁹⁵ The initial reaction by the slave traders was dramatic as well. The slave trade in that region of the African coast dropped precipitously,²⁹⁶ and word of the incident quickly reached as far as Cuba, where slave traders viewed the new tactics as a serious threat to their livelihood.²⁹⁷

But a few months later, the Earl of Aberdeen replaced Viscount Palmerston as Foreign Secretary. Aberdeen was more conciliatory toward foreign powers and more legalistic, and he circulated a letter stating that the Queen's legal advisers believed such raids to be illegal under international law.²⁹⁸ News of Aberdeen's letter and the change in policy also reached the slavers quickly, and the trade resumed.²⁹⁹ New and inexperienced officers on the African coast

294. See Letter from Governor Doherty to John Russell (Dec. 7, 1840), in CORRESPONDENCE RELATIVE TO SLAVE TRADE AT THE GALLINAS (London, W. Clowes & Sons 1841), available at http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp-us&rft_dat=xri:hcpp:rec:1841-019917.

295. *Buron v. Denman*, (1848) 154 Eng. Rep. 450, 455-56 (Exch. Div.).

296. See FIRST COMMONS REPORT, *supra* note 143, at 32 (testimony of Capt. Joseph Denman).

297. See LORDS REPORT 1850, *supra* note 211, at 59-60 (testimony of David Turnbull).

298. See BETHELL, *supra* note 5, at 185.

299. See *id.*; see also FIRST COMMONS REPORT, *supra* note 143, at 84 (testimony of Cdr. Henry James Matson).

began engaging in safer, but less effective, distant offshore patrols.³⁰⁰ One of the Spanish slave traders whose slaves Denman had liberated and whose warehouse he had burned sued Denman in a British court for an astonishing £180,000. The court eventually ruled in Denman's favor, but not until 1848.³⁰¹ The Queen's advocate then issued another opinion stating that such raids of onshore barracoons were lawful when authorized by a treaty with the local chief, which Denman's raid had been. British captains in the African squadron then began entering into new treaties with local chiefs and pursuing such raids again, but several years had been wasted in the interim.³⁰²

C. From Crisis to Success: The Final Abolition of the Slave Trade

Even as the mixed court system reached its peak of effectiveness in terms of volume of cases in the late 1830s and early 1840s, the weaknesses in the system discussed in the preceding sections led the British government to augment, and then replace, the mixed court system with a combination of military force and domestic courts. The pressure brought to bear by this shift in strategy—along with other economic, political, and social changes—eventually led to changes in the domestic policies of Portugal and Brazil that culminated in the ultimate suppression of the slave trade under the domestic laws of those countries. But the final surviving branch of the transatlantic slave trade, the traffic to Cuba, was only extinguished once the British turned back to cooperative international legal action by concluding a treaty with the Americans.

300. Denman later testified that this strategy of destruction of barracoons and close blockade of ports of embarkation would have been much more effective than the strategy of more distant off-shore cruising pursued by the navy for many years. FIRST COMMONS REPORT, *supra* note 143, at 22 (testimony of Capt. Joseph Denman). Several other naval officers agreed. *See, e.g., id.* at 154 (testimony of Cdr. Thomas Francis Birch). On the other hand, some witnesses were skeptical. *See* LORDS REPORT 1849, *supra* note 211, at 114-17 (testimony of Commodore Charles Hotham); SECOND COMMONS REPORT, *supra* note 214, at 16 (testimony of William Smith).

301. This case, *Buron v. Denman*, (1848) 154 Eng. Rep. 450 (Exch. Div.), is famous in its own right in international law for establishing the “act of state” doctrine.

302. For a list of forty treaties entered into with local chiefs, see THIRD REPORT FROM THE SELECT COMMITTEE ON SLAVE TRADE, HOUSE OF COMMONS (1848), at 224-25, *reprinted in* 4 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1847-48) [hereinafter THIRD COMMONS REPORT].

1. Portugal

In the late 1830s, negotiations between Britain and Portugal for a broader, more comprehensive treaty failed.³⁰³ The Portuguese raised a number of objections to the proposed treaty, including its unlimited duration.³⁰⁴ In response, the British resorted to a creative reinterpretation of the 1817 Portuguese treaty. That treaty allowed the slave trade to continue only between Portuguese possessions south of the equator. After the independence of Brazil in 1826, Britain argued that Portugal had no colonies in the Americas, and thus, all trade under the Portuguese flag was illegal. Moreover, Portugal was in breach of its treaty obligations, and Britain was entitled to enforce those obligations by any means necessary.³⁰⁵

Viscount Palmerston recognized that this was a debatable legal argument, one Portugal was likely to view as an aggressive affront to its sovereignty. In a private letter to the British diplomat in Lisbon, Palmerston wrote that if Portugal responded by declaring war, “so much the better There are several of her colonies which would suit us remarkably well.”³⁰⁶ In another letter, he stated, “We consider Portugal as morally at war with us and if she does not take good care and look well ahead she will be physically at war with us also.”³⁰⁷

Thus, in 1839, the Parliament passed a statute popularly known as Palmerston’s Act³⁰⁸ that authorized the capture and condemnation of Portuguese slaving vessels in British vice admiralty courts rather than the mixed commissions. The bill was initially rejected in the House of Lords, where the Duke of Wellington and others argued that it would encroach on the powers of the executive by bringing the nation to the brink of war, not only with Portugal but with other maritime nations that were offended by Britain’s

303. See Letter from Lord Howard de Walden to Viscount Palmerston (Apr. 28, 1839), in 27 B.S.P. 588 (1856) (enclosing a list of twenty-five pieces of correspondence between Britain and Portugal between 1837 and 1839 on negotiations for a new treaty).

304. Letter from Viscount Palmerston to Lord Howard de Walden (Apr. 27, 1839), in CORRESPONDENCE WITH FOREIGN POWERS, class B, at 91, 91-100, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839).

305. Draft of a Note To Be Presented by Lord Howard de Walden to the Portuguese Government, enclosed in Letter from Viscount Palmerston to Lord Howard de Walden (Apr. 20, 1839), in CORRESPONDENCE WITH FOREIGN POWERS, class B, at 71, 78, in 17 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1839); see also Wilson, *supra* note 195, at 513.

306. BETHELL, *supra* note 5, at 155.

307. *Id.*

308. Palmerston’s Act, 1839, 2 & 3 Vict., c. 73 (Eng.).

aggressive efforts to police the oceans.³⁰⁹ Their constitutional objections were answered by having the Crown first issue orders to British officers to seize Portuguese ships (thereby preserving the executive's prerogative to make decisions that might lead to war) and then by having the Parliament pass legislation to protect those officers from possible lawsuits.³¹⁰

Portugal viewed Palmerston's Act as "a gross usurpation of power" and "a flagrant violation of international law," but did not go to war over it.³¹¹ For the next three years, Portuguese-flagged slave vessels were captured by British cruisers and condemned either in the mixed courts on the grounds that they were actually Spanish or Brazilian under the law of nations, or in the British vice admiralty courts under the Palmerston Act.³¹²

Portugal finally signed a new treaty in 1842 that both closed the loopholes in the earlier treaties and expanded the number of mixed commissions.³¹³ Under the new treaty, the mixed commissions finally had the power to keep slave crews in custody until they could be turned over to their own government for prosecution,³¹⁴ and the Portuguese government began in earnest to prosecute at least some of these cases.³¹⁵ Portuguese warships began seizing

309. BETHELL, *supra* note 5, at 161.

310. *Id.* at 162-63.

311. *Id.* at 164-65.

312. For examples of ships condemned as Spanish, see *supra* note 164.

313. See Anglo-Portuguese Treaty of 1842, *supra* note 163.

314. See Letter from George Frere, Jr., & Frederic R. Surtees, Comm'rs at Cape of Good Hope, to Viscount Palmerston (Oct. 31, 1846), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 113, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1847-48); Letter from Senhor Bayard to Alfredo Duprat, Portuguese Comm'r (May 22, 1847), enclosed in Letter from George Frere, Jr., & Frederic R. Surtees, Comm'rs at Cape of Good Hope, to Viscount Palmerston (Nov. 11, 1847), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 129, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1847-48).

315. Letter from George Jackson & Edmund Gabriel, Comm'rs at Loanda, to Viscount Palmerston (Apr. 30, 1847), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 169, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1847-48) (noting the Portuguese prosecutor's appeal of an acquittal to Lisbon and stating that "it furnishes proof of the sincerity of the authorities at Lisbon, and consequently holds out some hope that the

slavers off the coast of Africa in greater numbers, and prize courts in the Portuguese colonies began condemning those captured in coastal waters (over which the mixed commissions lacked jurisdiction).³¹⁶ By 1848, witnesses testified before Parliament that Portugal had been seriously engaged in suppression efforts for the past few years, though they disagreed on how universal or effective those efforts were.³¹⁷ Portugal's decision to crack down on the trade meant that slavers were less willing to fly the Portuguese flag, and the business of the Anglo-Portuguese mixed courts never reached significant levels again.³¹⁸ In effect, the Anglo-Portuguese courts were killed by their own success.

2. Brazil

A similar breakdown in relations between Britain and Brazil over the slave trade occurred in 1845 and proved fatal to the Anglo-Brazilian mixed courts. The treaty authorizing the Anglo-Brazilian courts arguably expired on March 13 of that year.³¹⁹ Brazilian officials, though not willing to defend the slave trade publicly, refused to renew the treaty and its provisions for the right of search and trials in mixed courts, insisting that Brazil would suppress the trade with its domestic laws.³²⁰

impunity on which slave-traffickers have hitherto confidently reckoned when brought before the ordinary tribunals, may no longer attend them").

316. See Letter from George Jackson & Edmund Gabriel, Comm'rs at Loanda, to Viscount Palmerston (Feb. 6, 1847), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 147, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1969) (1847-48) (describing the case of the *Flor de Campos*, taken by the Portuguese brigantine *Tamega*, and referring to the Lisbon Decree of 10 September 1846, which directed that "the same system should be followed with respect to vessels condemned by the Prize Court" as those in the mixed commissions).

317. FIRST COMMONS REPORT, *supra* note 143, at 21 (testimony of Capt. Joseph Denman); see also LORDS REPORT 1849, *supra* note 211, at 123 (testimony of Commodore Charles Hotham).

318. See *supra* Figure 3.

319. The Anglo-Portuguese Treaty of 1817, *supra* note 2, which was incorporated by the Convention Between Great Britain and Brazil, for the Abolition of the African Slave Trade, Nov. 23, 1826, 14 B.S.P. 609, only authorized the mixed courts for a period of fifteen years after abolition; since the Brazilian trade had been outlawed in 1830, the fifteen years expired in 1845. See Separate Article to Additional Convention Between Great Britain and Portugal, for the Prevention of Slave Trade, Sept. 11, 1817, 4 B.S.P. 115 (providing a fifteen-year expiration period after the complete abolition of the trade).

320. See BETHELL, *supra* note 5, at 247-53.

Britain once again resorted to creative treaty interpretation. There was no saving the mixed courts, since the Brazilians appeared to be correct about the expiration of the treaty authorizing them. But the British construed a separate Brazilian treaty, which had declared the slave trade to be piracy, to trigger the universal jurisdiction over piracy allowed by the law of nations and to authorize the condemnation of Brazilian-flagged slaving ships in British courts.³²¹ Once again, this was a somewhat debatable interpretation of international law. But in August 1845, Parliament passed Aberdeen's Act, which, like Palmerston's Act, authorized the capture and condemnation of Brazilian and unflagged vessels. In the next few years, the volume of cases heard in the British courts increased dramatically.³²² For example, of the thirty-three cases heard by the vice admiralty court at St. Helena in the first six months of 1848, nineteen were Brazilian, while the remainder had no papers.³²³

Aberdeen's Act was not well-received in Brazil. In 1848, a Brazilian citizen who was a former slave ship medical officer told the British Parliament that Brazilians viewed the British suppression effort as either "wild and impracticable," or an effort to "check the rising prosperity of Brazil."³²⁴ But like Portugal before it, Brazil was neither willing nor able to go to war with Britain over the issue.³²⁵

Despite Britain's aggressive use of vice admiralty courts against the Brazilian trade, the volume of the trade increased in the late 1840s. Ironically, the demand for slaves had been fueled by British free trade legislation that had removed tariffs on Brazilian sugar.³²⁶ The tension between the two countries reached a climax in 1850-51, when a handful of British ships began attacking slave vessels in Brazil's territorial waters and even its harbors.³²⁷ One of the British ships and a Brazilian fort even exchanged shots. It was a small display of force, but it was effective. Brazil could not afford to go to war with Britain (though it was also apparent that Britain, with its commercial ties to Brazil, was not eager for war either).

321. Convention Between Great Britain and Brazil, for the Abolition of the African Slave Trade art. 1, Nov. 23, 1826, 14 B.S.P. 609; Wilson, *supra* note 195, at 518.

322. See *supra* Figure 3.

323. THIRD COMMONS REPORT, *supra* note 302, at 226-29.

324. SECOND COMMONS REPORT, *supra* note 214, at 37 (testimony of Jose E. Cliffe, M.D.).

325. See BETHELL, *supra* note 5, at 281.

326. See, e.g., LORDS REPORT 1850, *supra* note 211, at 225 (testimony of Robert Hesketh).

327. BETHELL, *supra* note 5, at 325-41; LLOYD, *supra* note 23, at 142-47.

Moreover, in the preceding years, popular sentiment against the slave trade had grown in Brazil.³²⁸ The only face-saving option seemed to be for Brazil to put an end to the traffic itself. Thus, in September 1850, Brazil enacted new anti-slave trade legislation and began to enforce it. Once the Brazilian government began policing the landing and sale of slaves, the number of slaves imported into Brazil dropped precipitously, from more than thirty thousand in 1850 to five thousand in 1851 to none in 1853.³²⁹ One of the last known slave ships to arrive in Brazil, the schooner *Mary E. Smith*, which had been illegally outfitted in Boston, sailed in 1855. The crew could not find any place to land the 400 slaves onboard and began to run out of food and water. A Brazilian warship finally captured the unfortunate vessel. One American involved in the venture died in prison, and the Brazilian government punished other crew members.³³⁰ In this manner, the slave trade into Brazil was finally extinguished, though slavery itself was not abolished in Brazil until 1888.³³¹

3. *Spain, Cuba, and the United States*

Though relations between Spain and Britain were sometimes tense, they never broke down in the same way relations with Portugal and Brazil did. Instead, other factors led to the obsolescence of the Anglo-Spanish courts. The decline in the courts' cases began in the 1840s, when the new Captain-General of Cuba arrived in 1842 and began enforcing the laws against the slave trade, and the open markets for newly imported slaves in Havana were shut down.³³² In 1845, the Spanish government passed stricter legislation for punishing illegal slave traders.³³³ Following this new legislation, the court at Sierra Leone was directed to detain the captain and crew of Spanish ships until they could be carried to the Canary Islands for criminal trial by the Spanish government.³³⁴ The decline in slave imports to Cuba continued through the mid- to late-

328. BETHELL, *supra* note 5, at 313-15.

329. ELTIS, *supra* note 52, at 114-15 tbl.1.

330. HOWARD, *supra* note 57, at 47.

331. *Id.*

332. ELTIS, *supra* note 10, at 200.

333. See Letter from N.W. Macdonald & John Carr, Comm'rs at Sierra Leone, to Viscount Palmerston (Dec. 12, 1846), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 37, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1847-48).

334. *Id.*

1840s,³³⁵ and the British attributed this decline to stricter enforcement by the Cuban authorities.³³⁶ Enforcement actions had driven slave prices so high that, according to British officials in Havana, the trade was no longer profitable.³³⁷ From the 1840s onward, the slavers became reluctant to fly the Spanish flag, evading the mixed courts' jurisdiction by sailing under the American flag or under no flag at all; only a handful of cases came before the Anglo-Spanish courts after that.

In 1851, with the slave imports at a record low in both Brazil and Cuba, victory for the abolitionists seemed imminent. However, in the mid-1850s, the slave trade to Cuba began to increase once more. An increase in sugar prices led to increased demand for new slaves, even at the higher prices that prevailed because of enforcement of the 1845 Act. In addition, the colonial Cuban authorities had somewhat relaxed enforcement.³³⁸ Moreover, tense relations between Britain and the United States kept the British navy from engaging in the sort of aggressive action in Cuban waters that had triggered domestic suppression in Brazil.³³⁹ The United States continued to object strenuously to the search of its ships, and British mercantile interests supportive of free oceans were more sympathetic to these claims. In addition, Britain did not want to give the United States any excuse to annex Cuba. By 1860, the British were doing very little to suppress the slave trade to Cuba.³⁴⁰

On the eve of the American Civil War, anything related to the institution of slavery might have been expected to be a delicate issue in the United States. Ironically, however, by this time the illegality of the transatlantic slave trade was a rare point of agreement between the North and the South. Indeed, the constitution of the Confederate States of America adopted in March 1861 actually banned the slave trade.³⁴¹ In the spring of 1860, the United States sent its own warships to Cuba, where they reportedly conducted searches of

335. See Letter from J. Kennedy & Campbell J. Dalrymple, Comm'rs at Havana, to Viscount Palmerston (Jan. 7, 1847), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE, class A, at 69, in 34 BRITISH PARLIAMENTARY PAPERS (photo. reprint, Irish Univ. Press 1968) (1847-48) (noting that no slave vessels arrived or departed from Cuba).

336. See FIRST COMMONS REPORT, *supra* note 143, at 5 (testimony of Viscount Palmerston).

337. ELTIS, *supra* note 10, at 201.

338. *Id.* at 202.

339. HARRAL E. LANDRY, *Slavery and the Slave Trade in Atlantic Diplomacy, 1850-1861*, 27 J. S. HIST. 184 (1961).

340. *Id.* at 196, 201-03.

341. Const. of the Confederate States of America art. I, § 9, cl. 1 (1861).

suspected Spanish and French slave vessels despite America's lack of mutual search treaties with those countries. Later that year, President Buchanan stated in his message to Congress:

It is truly lamentable that Great Britain and the United States should be obliged to expend such a vast amount of blood and treasure for the suppression of the African slave trade, and this when the only portions of the civilized world where it is tolerated and encouraged are the Spanish islands of Cuba and Porto Rico.³⁴²

But it was not until civil war broke out in the United States that a final turn in policy helped set the stage for the ultimate suppression of the transatlantic slave trade. In March 1862, Secretary of State William Seward responded favorably to an approach by British diplomats eager to finally conclude an effective anti-slave trade treaty with the United States. The United States hoped to prevent Britain from intervening in the war on the side of the Confederacy and thus wanted to do what it could to foster goodwill in an otherwise tense relationship. Moreover, President Lincoln's administration viewed the extinction of the slave trade as a moral issue. Seward's one request was that the draft treaty appear to have come from the United States. The British readily agreed to the façade, manufacturing a fake correspondence to make it seem as if the proposal had come from the Americans. On April 25, 1862, the U.S. Senate unanimously ratified a treaty with Britain, which provided for mutual rights of search and the trial of slave ships in mixed courts.³⁴³

Other factors in Cuba—including changes in attitudes, the increased domestic enforcement of anti-slave trade laws, a decline in sugar prices and a concomitant drop in the value of slaves, and the perception that the institution of slavery itself might be doomed—also played a significant role in the final suppression of the Cuban slave trade in the 1860s.³⁴⁴ But the abolitionists in Britain viewed the conclusion of the Anglo-American courts treaty as the final nail in the coffin of the slave trade. As one historian noted, “Henry Brougham, last survivor of the original British abolitionist group of 1807,” spoke in the House of Lords about the new treaty, saying it was “in many respects the most

342. President James Buchanan, Speech to the Senate and House of Representatives (May 19, 1860), in 5 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, *supra* note 39, at 593, 595.

343. Milne, *supra* note 257, at 511-14.

344. ELTIS, *supra* note 10, at 218-22.

important event that had occurred during the period of his sixty years warfare against the African Slave Trade.”³⁴⁵

The Anglo-American mixed courts never actually heard any cases, but that was in large part because no slave ships were willing to use the American flag once the treaty was signed. The network of treaties, begun forty-five years earlier, was complete. Finally, no flag existed under which the traffic could continue with impunity. The transatlantic slave trade was dead.

III. INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL COURTS: RETHINKING THEIR ORIGINS AND FUTURE

Why have contemporary scholars of international law forgotten the antislavery courts? The standard account of the development of international human rights law begins in earnest with the post-World War II era, with the Nuremberg trials and the drafting of foundational international human rights instruments like the U.N. Charter, the Universal Declaration of Human Rights, and the Genocide Convention.³⁴⁶ Likewise, most accounts of the history of international courts and tribunals describe the Permanent Court of Arbitration established in 1899 and the Permanent Court of International Justice created in 1921 as the first permanent international adjudicatory bodies,³⁴⁷ and the International Military Tribunal at Nuremberg as the first international tribunal charged primarily with enforcing humanitarian norms.³⁴⁸ Earlier developments in human rights law or international adjudication—like the ad hoc arbitrations for settlement of war claims between the United States and Britain arising out of the Revolutionary and Civil Wars and the development of the humanitarian laws of war—are acknowledged, but generally receive only passing attention.

Indeed, as one scholar has noted, many historical accounts of human rights jump directly from the American and French Revolutions in the late eighteenth century to 1945.³⁴⁹ In so doing, these accounts attribute the sudden resurgence

345. Milne, *supra* note 257, at 514.

346. See *supra* note 8 and accompanying text.

347. See CASSESE, *supra* note 8, at 281-82; Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 9 (2005) (describing the Permanent Court of Arbitration in 1899 as one of “the first tentative steps towards the ideal of formal international adjudication”).

348. See CASSESE, *supra* note 8, at 454.

349. Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447, 447-48 (1992). For examples of this approach, see LYNN HUNT, *INVENTING HUMAN RIGHTS* 181, 196, 201-03 (2007), which argues that

of human rights ideology as “a reaction to the atrocities committed during the Second World War.”³⁵⁰ They assume that the idea of human rights was largely dormant and underwent little further intellectual development during most of the nineteenth and early twentieth centuries and that it arose almost out of nowhere in the immediate aftermath of World War II, at which point it took form in the international legal arena for the first time.³⁵¹ This discontinuous story is simply wrong. Scholars are just beginning to fill in the missing pieces of the pre-World War II history of international law as a mechanism for the protection of human rights, and the anti-slave trade movement is a central part of that missing picture.³⁵²

Full exploration of the intellectual and social links between the nineteenth-century abolition movements and the modern international human rights movement is beyond the scope of this Article, but evidence shows that some of those involved in the twentieth century development of international human rights law were aware of the role of international law and cooperation in the suppression of the slave trade in the previous century.

For example, at the founding convention of the United Nations in San Francisco in 1945, representatives of nongovernmental organizations (“NGOs”) were pivotal in pushing for references to human rights to be included in the U.N. Charter.³⁵³ The great powers that had crafted the Charter had not included any mention of human rights in the original draft. One of the nongovernmental representatives present at the convention was W.E.B. Du

nationalism, socialism, and communism led to the declining popularity of human rights until the aftermath of World War II, and JACK MAHONEY, *THE CHALLENGE OF HUMAN RIGHTS: ORIGIN, DEVELOPMENT, AND SIGNIFICANCE* 21-37 (2007), which skips from early-nineteenth-century philosophers to the aftermath of the Second World War, with a brief mention of Karl Marx’s criticism of rights as a reason for the “eclipse” of the appeal of human rights as a political concept in the late nineteenth and early twentieth centuries.

350. Burgers, *supra* note 349, at 448.

351. See HUNT, *supra* note 349, at 176 (“The long gap in the history of human rights, from their initial formulation in the American and French Revolutions to the United Nations’ Universal Declaration in 1948, has to give anyone pause. Rights did not disappear in either thought or action, but the discussions and decrees now transpired almost exclusively within specific national frameworks.”).

352. Burgers, *supra* note 349, at 449-64 (discussing nongovernmental organizations’ advocacy of international human rights standards as well as the League of Nations’ treatment of human rights issues in the 1920s and 1930s). PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS* (1998), is a magisterial overview of protection of human rights around the world that includes much pre-World War II history, but his book is not a legal history and does not specifically trace the intellectual and social origins of the use of international law as a mechanism for protecting human rights.

353. See CLARK M. EICHELBERGER, *ORGANIZING FOR PEACE: A PERSONAL HISTORY OF THE UNITED STATES* 269-73 (1977).

Bois, attending on behalf of the National Association for the Advancement of Colored People (NAACP).³⁵⁴ Du Bois had written his doctoral dissertation on the suppression of the slave trade,³⁵⁵ and through his attendance at several Pan-African Congresses in the early decades of the twentieth century he had coupled his work on behalf of African Americans with broader international efforts to promote human rights. Other NGOs active in the post-World War II period could likewise trace their genealogy to the nineteenth-century abolition campaign.³⁵⁶

The modern international human rights movement finds not only a sociological but an intellectual forbearer in the nineteenth-century debate over the use of international law, force, and diplomacy to promote human rights goals. Given the heavy focus by international human rights scholars on the novelty and innovations of post-World War II developments in human rights law, it is startling to find some of the very same debates about the legitimacy of international human rights-based interventions occurring almost a century earlier. During the debate over whether to abandon efforts to suppress the slave trade, for example, one member of the British parliament skeptically asked Palmerston whether suppression was in England's interest "apart from the interest of humanity." Palmerston argued that humanity was the main consideration, though there were others.³⁵⁷

"Assuming that it is simply from motives of humanity," the questioner continued, "do you think it a legitimate mode of disposing of the resources of this country?" Palmerston answered in the affirmative, calling it a "moral duty."³⁵⁸ The prescient questioner then took Palmerston's argument to the extreme: "Supposing one nation abolished the punishment of death, would it

354. See CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955*, at 38-43 (2003).

355. See DU BOIS, *supra* note 18.

356. For example, another NGO represented at the U.N. Convention was the National League of Women Voters. See DOROTHY B. ROBINS, *EXPERIMENT IN DEMOCRACY: THE STORY OF U.S. CITIZEN ORGANIZATIONS IN FORGING THE CHARTER OF THE UNITED NATIONS* 209 (1971). The National League of Women Voters was the offspring of the National American Woman Suffrage Organization, see League of Women Voters, Our History, http://www.lwv.org/AM/Template.cfm?Section=Our_History&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=36&ContentID=1501 (last visited Nov. 26, 2007), which was in turn a product of the merger of earlier women's suffrage organizations which had close ties to abolitionist organizations. See Judith Resnik, *Sisterhood, Slavery, and Sovereignty: Transnational Antislavery Work and Women's Rights Movements in the United States During the Twentieth Century*, in *WOMEN'S RIGHTS AND TRANSATLANTIC ANTISLAVERY IN THE ERA OF EMANCIPATION* 19, 22 (Kathryn Kish Sklar & James Brewster Stewart eds., 2007).

357. *FIRST COMMONS REPORT*, *supra* note 143, at 19 (testimony of Viscount Palmerston).

358. *Id.*

not be a legitimate effort of that government to interfere with other nations, which had not done so, to induce them to follow the example?" Palmerston stated that it would be legitimate for a nation to pursue that goal, "or any other measure tending to the interests of humanity," in the same way England had pursued the abolition of the slave trade.³⁵⁹ The antislavery movement was thus not only a precursor to the modern international human rights movement, but foresaw and justified that movement.

There does not appear to be a good explanation for the disappearance of the antislavery courts from the international law "canon." Perhaps the shameful complicity of so many nation-states in the institution of slavery makes this story less appealing than the Nuremberg narrative, which conveniently attributes responsibility for the Holocaust to a handful of individuals. The British abolitionist discourse contains embarrassing overtones of the "white man's burden," and the controversial history of colonialism extended for more than a hundred years after the abolition of slavery. For scholars in the United States, perhaps America's problematic (but eerily familiar) role as the reluctant outsider in the antislavery regime is less appealing than its starring turn at Nuremberg with Justice Jackson's eloquent speeches as chief prosecutor. Perhaps with so many of the records of the courts buried in handwritten archives their story was simply forgotten.

In any event, giving the antislavery courts and treaties the central place they deserve in the international human rights law narrative changes that narrative in important ways. Compared to the post-World War II, Nuremberg-centric story, an understanding of international human rights law that begins with the antislavery movement places a much greater emphasis on nonstate actors—both the slave traders who were the human rights violators and the civil society leaders of the abolitionist movements in various countries. While Nuremberg was concerned with individual criminal liability, it was focused on crimes committed at the behest of nation-states; indeed, crimes against humanity were only recognized at Nuremberg to the extent they were perpetrated in connection with the crime of aggressive war that was the principal basis for the court's jurisdiction.

Modern international courts like the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have likewise focused on crimes committed in armed conflict by individuals either affiliated with the state or groups with aspirations of statehood. As shown by the work of these modern courts, the paradigmatic international trial is still based on the Nuremberg model: individual leaders are charged with responsibility for acts

359. *Id.*

of mass slaughter and mistreatment of civilian populations in the context of warfare. Nuremberg is a powerful and important precedent, but it has a somewhat limiting effect on the scope of conduct that we imagine falls within the realm of international concern and redress.

Reviving the centrality of private transnational actors to the history of international human rights law's origins highlights the possibility of making international legal mechanisms a more central tool for addressing human rights violations by private actors today, such as nonstate terrorist organizations that commit war crimes and crimes against humanity, or individuals and businesses engaged in contemporary forms of forced labor trafficking. This would represent a dramatic shift in the focus of international human rights law and activism. Most debate about the International Criminal Court, for example, focuses on its role in preventing and punishing acts of state-sanctioned violence and the threat to state sovereignty posed by international prosecutions of national government officials.³⁶⁰ Comparatively little attention has been given to the possibility of using an international court to address terrorism by nonstate actors,³⁶¹ human trafficking, or the role of corporations in grave human rights abuses. Indeed, as Philip Alston points out, nonstate actors traditionally have been viewed as falling outside the direct application of international human rights law, which is binding only on states themselves.³⁶² And yet, the antislavery story told here suggests that one of the most suitable uses for international courts may be in combating illegal action by nonstate, transnational actors. Why not, for example, consider using an international court to address modern issues of slave labor and human trafficking with transnational dimensions?

The history of the antislavery treaties also underscores the potential for the dissemination of human rights ideology across national borders, both through networks of nonstate actors and through the mediating force of international law and international legal institutions. In the nineteenth century, Quakers on both sides of the Atlantic spread the ideology of antislavery beyond their sect; in the twenty-first century, secular NGOs in conjunction with evangelical

360. See, e.g., Posner & Yoo, *supra* note 347, at 69 (arguing that prosecutions “will inevitably raise questions about the legality of a decision by a state to use force and the legality of the tactics used by a state”).

361. Although there was some initial suggestion that the International Criminal Court should have jurisdiction over terrorism, this suggestion was discarded. See Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 14-15 (2003).

362. See Philip Alston, *The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS 3, 6 (Philip Alston ed., 2005).

Christians seek to influence foreign policy on human rights issues, such as genocide in the Sudan, sex trafficking, and the AIDS pandemic.³⁶³

Giving the antislavery courts their rightful place in the international human rights narrative also broadens the focus of that narrative beyond states' relationships with their own citizens to include the relationships between citizens of more developed and less developed countries. The principal conceptual innovation of Nuremberg and the postwar human rights regime was ostensibly to move international law beyond its preoccupation with state-to-state relations; the Nuremberg prosecutions pierced the veil of sovereignty and made a state's treatment of its own citizens a proper concern for international law.³⁶⁴ This was certainly an important development. But many of the most pressing contemporary human rights problems do not involve states' treatment of their citizens, but rather the obligations, if any, of citizens in wealthy countries to those in less developed countries.³⁶⁵ Forty-four percent of people in sub-Saharan Africa live on less than one dollar per day.³⁶⁶ Some 824 million people in the developing world live with chronic hunger.³⁶⁷ Roughly two million people in sub-Saharan Africa die of AIDS each year.³⁶⁸ And a half of a million children worldwide still die each year of the measles, even though vaccination against that disease is one of the most cost-effective public health measures.³⁶⁹

To be sure, few, if any of these problems are susceptible to resolution by international courts. But most will require some form of coordinated international action. To those who think that it is impossible that citizens of developed countries should ever care enough about people on the other side of

363. See Elisabeth Bumiller, *Evangelicals Sway White House on Human Rights Issues Abroad*, N.Y. TIMES, Oct. 26, 2003, at A1.

364. See LOUIS HENKIN ET AL., HUMAN RIGHTS 73 (1999) (stating that “[u]ntil the late 1930’s, the international political system, and international law, continued to maintain that how a state treated its own inhabitants was not a matter of legitimate international concern” and describing the Nuremberg Charter’s inclusion of “crimes against humanity” (emphasis omitted) as “the first formal assertion of an international law of human rights”).

365. See, e.g., Peter Singer, *What Should a Billionaire Give—and What Should You?*, N.Y. TIMES, Dec. 17, 2006, § 6 (Magazine), at 60; cf. Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022 (2007) (discussing contemporary debates over moral, ethical, and legal duties owed “to citizens of other countries who live far away and whose lives barely interact with ours”).

366. UNITED NATIONS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 4 (2006), available at <http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2006/MDGReport2006.pdf>.

367. *Id.* at 5.

368. *Id.* at 14.

369. *Id.* at 11.

the world to devote significant resources to these problems, the abolition of the slave trade stands as a stark counterexample. People did care. Nations did cooperate. And in the span of a human life, the transatlantic slave trade was extinguished.

In addition, close examination of the history of the abolition of the slave trade should cause international legal scholars to rethink the relationship between power, ideas, and international legal institutions. To the extent that the treaties against the slave trade and the mixed courts were effective, it was in no small part because Britain was willing to use its substantial economic and military power to support them. At the same time, the international legal regime gave Britain's use of its economic and military power a legitimacy that it would have otherwise lacked, and it amplified Britain's ability to influence other nations' conduct with regard to the slave trade. Once other nations had agreed in principle to the immorality of the slave trade, it was difficult for them to oppose overtly efforts to suppress that trade.

Moreover, Britain was able to project its momentary power at the end of the Napoleonic wars far into the future by creating permanent international legal mechanisms that operated for decades to come in support of its abolitionist agenda. In the immediate aftermath of the Napoleonic Wars in 1817, Britain perhaps had the military power to seize Portuguese and Spanish slave ships whether or not those nations agreed. But because of the treaties, Britain was able to continue to seize their ships twenty years later in 1837, an exercise of power it might not otherwise have been willing or able to carry out in the absence of the treaties. Over time, Britain was even able to persuade more powerful countries like France and the United States to join in the increasingly universal international legal regime against the slave trade, something that might not have been possible without the initial treaties. Moreover, even when Britain subsequently engaged in somewhat dubious unilateral actions against the slave trade, it was at least able to argue that those actions were justified under the spirit of the treaties, forestalling a more vigorous opposition from the affected countries.

The potential for a mutually beneficial and reinforcing relationship between state power and international law is missing from many contemporary theories. Most theories of international adjudication assume that because of the absence of world government, international courts are by definition powerless institutions with no "hard" enforcement powers, dependent instead on the negative reputational consequences that noncompliance with the courts' decisions might have.³⁷⁰ For proponents of international courts, this

370. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Posner & Yoo, *supra* note 347, at 14.

assumption leads to a tendency to discount the importance of state power and to focus instead on factors that magnify or reduce the reputational consequences of court decisions. For skeptics of international courts, this assumption leads to doubt about the efficacy of international adjudication. Both arguments are wrong, or at least incomplete. Both sides overlook the possibility that powerful individual states might have the incentive and ability to enforce the judgments of international courts, and that such actions might be perceived as more acceptable and legitimate by other states than would unilateral action by those same powerful nations.³⁷¹

The role of state power in supporting international courts does not appear to be entirely unique to the antislavery courts. Indeed, a similar lesson can be seen in the experience of the ICTY. After its creation by the U.N. Security Council, the ICTY indicted war criminals from the former Yugoslavia. The ICTY itself lacked enforcement power, but many of those war criminals were apprehended by NATO forces. Others, like Slobodan Milosevic, were handed over to the Tribunal in response to a combination of threats and bribes related to foreign aid.³⁷² Just as with the antislavery courts, the ICTY's success has been tied to the willingness of particular nations to use their economic and military power to support its legal work. In turn, the ICTY's legal mandate has given greater legitimacy to the involvement of NATO and the European Union over many years in what would otherwise be considered the domestic affairs of the Balkan countries.

Certainly, national governments' use of economic and military powers to buttress international court judgments would not be effective or plausible for all international dispute resolution bodies. Moreover, such actions might be highly troubling in some circumstances, especially to the extent that they undermined the equality of nations by amplifying differences in state power. There is a fine line between using power to support international institutions and abusing power through international institutions.

But fraught as it is, the relationship between international courts and economic and military enforcement powers is an area that deserves greater

371. Ironically, a similar point was made by Cdr. Henry James Matson of HMS *Waterwitch* in his testimony before the British Parliament in 1848. Matson explained that the local chiefs in Africa had entered into antislavery treaties with the British in 1841 and 1842 because they had abandoned hope of being able to carry on the trade when the barracoons were destroyed by British warships. "Then of what value is the treaty itself?" a puzzled member of parliament (clearly taking the realist view) asked Matson. "Because you can enforce it," Matson answered. FIRST COMMONS REPORT, *supra* note 143, at 85 (testimony of Cdr. Henry James Matson).

372. See generally JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL (2003).

study by international legal academics, and greater consideration by policymakers.

The history of the antislavery courts is not only a story of military and economic power, however, but also a story about the power of ideas. Those who are realistic about state power often underestimate the extent to which ideology can affect human behavior, and in turn the behavior of the nation-states made up of those very same humans. Britain's multidecade campaign against the slave trade demonstrates the fact that nations can be influenced by moral ideas as well as material self-interest.

Constructivist international relations scholars, among others, have highlighted the potential of transnational networks and international legal regimes for influencing state behavior by influencing state perceptions of self-interest. Abolitionism appears to have taken hold in Britain largely as a result of domestic social and political forces, but abolitionism's spread to so many countries around the world in a short period of time is less well-explained.³⁷³ A detailed analysis of the way in which the ideology of abolition took root in many disparate slave-holding societies requires in-depth study of social history that is beyond the scope of this Article. But the narrative recounted here at least suggests the possibility that it was no mere coincidence of social conditions in different countries or even transnational networks of nonstate actors that fostered the spread of abolitionist ideology. Instead, at least some small role was played by international treaties and international courts themselves.

Certainly, those who were most closely involved in the negotiation and enforcement of the antislavery treaties thought so. Palmerston, for example, argued that "the efforts of this country to engage other governments in cooperating for the suppression of the slave trade have very much tended to awaken a moral feeling in other countries upon that subject."³⁷⁴ When Britain bribed Spain, Portugal, and Brazil to sign the antislavery treaties, it is not clear that either elites or a majority of the population in each of these nations believed what the treaties said—that the traffic in slaves was unjust and inhumane.³⁷⁵ Yet by the time that the slave trade was finally suppressed some fifty years later, a Brazilian leader felt that "the whole of the civilised world"

373. For example, Kaufmann and Pape suggest that the British antislavery story does not support constructivist theories of international relations because British abolitionism was mainly a product of domestic religious and social movements, not of the influence of cosmopolitan networks. See Kaufmann & Pape, *supra* note 20. But they do not consider how it happened that the policy of abolition was eventually adopted by other countries, and whether transnational networks or international law played any role in that spread.

374. FIRST COMMONS REPORT, *supra* note 143, at 20 (testimony of Viscount Palmerston).

375. Anglo-Spanish Treaty of 1817, *supra* note 121, pmb1.

was convinced of its immorality.³⁷⁶ Changes in domestic attitudes were critical to the final suppression of the slave trade. The possibility that the universality of the antislavery treaty regime may have played some part in this shift in attitudes is at least worthy of further investigation.

In terms of academic theories of international law and relations, the slave trade abolition story presents something of a challenge to the major theoretical schools, with elements that support each theory, but also elements that they have difficulty explaining. Realists and neorealists will tend to focus on the material self-interest of Britain; the fact that weak countries like Spain, Portugal, and Brazil joined the treaties while powerful countries like the United States and France did not for many years; Britain's use of its hegemonic military and economic power to achieve its goals; and the coincidence of the suppression of the slave trade with the national self-interest of each country that abolished it. In the realists' view, international law is a mere epiphenomenal artifact of the underlying power dynamics—though realists have a hard time explaining why nations go to the trouble of creating international law if that is true.³⁷⁷ Those skeptical of the adequacy of the explanatory power of realism will point to the substantial evidence that Britain's actions harmed, rather than helped, its material position in the world; to the fact that the cash payments and other benefits given by Britain to Spain, Portugal, and Brazil likely did not begin to compensate them for the total economic costs of the abolition of the slave trade and then slavery itself; and to the reality that the coercion Britain actually brought to bear—for example, a few shots fired by ships in Brazilian territorial waters, with no real commitment to war—was trivial compared to the change in policy it elicited. Institutionalists will likely see the treaties and the court system they created as rational, utility-maximizing mechanisms for cooperation.³⁷⁸ In the absence of

376. KRASNER, *supra* note 20, at 108.

377. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 114-17 (2005) (discussing the abolition of slave trade, though not the antislavery courts, from a rational-choice perspective).

378. See Posner & Yoo, *supra* note 347, at 14-18 (arguing that international adjudication is possible when “states have a surplus to divide,” when “the present value of the payoffs from continued cooperation exceeds the short-term gains from cheating,” and when “states have imperfect information about whether an action is consistent with a treaty, and the tribunal can help bring that information to light”). Posner and Yoo argue that courts with “dependent” judges are more likely to be successful than those with “independent” judges. The fact that the judges on the mixed courts were not independent of their governments might initially seem to support Posner and Yoo's argument, but in fact the mixed courts do not fit neatly into the category of dependent tribunals based on the criteria that Posner and Yoo propose. The antislavery courts were permanent, rather than created for the duration of a dispute; states consented to them before particular disputes arose; the power to initiate

such mechanisms, even a state that wanted to abolish the slave trade would be tempted to defect in order to gain material advantage, but the regime created the opportunity for cooperation and thus mutual long-term gains for all participants.³⁷⁹ Liberal international relations theorists will be more interested in the evidence about how domestic politics and interest groups shaped British foreign policy. Constructivists, as I have noted, will be interested in the way in which state interests were constructed and reconstructed by their interactions.³⁸⁰ Postcolonialists might view the entire enterprise as a byproduct of European desire to establish economically viable colonies in Africa. And so forth.

There is some measure of truth in each of these theories, and yet each is necessarily reductionist. It is fashionable among legal academics to propound grand unified theories, and such theories have their value. Yet there remains a case to be made for thick descriptions of complex events and acknowledgement of the fact that no one theory can fully explain how and why something as dramatic as the global abolition of the slave trade and then of slavery itself occurred, let alone predict future changes in global society of a similar scale.³⁸¹

cases rested with individual naval officers seeking prize money; and each court was bilateral, but the network of treaties was multilateral. *See id.* at 26 & tbl.1. The mixed courts also do not fit neatly into the framework for international judicial effectiveness proposed by Anne-Marie Slaughter and Laurence Helfer. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005). They were not deeply embedded in national legal systems, like the modern European supranational courts, though there were some connections in both personnel and jurisprudence between the mixed courts and the British vice admiralty courts. *See id.* at 908. They did not exactly allow access by private citizens without the support of a government, but they did create incentives for individual naval captains to initiate cases. *See id.* In many respects, however, they do support Slaughter and Helfer's more general arguments about "constrained independence" of international tribunals. As in the modern courts Slaughter and Helfer examine, there were both political and structural constraints on the mixed courts' actions, such as relatively clear treaty provisions about what was prohibited. *See id.* at 945-46. Moreover, the discursive constraints of legal analysis appear to have been real, as demonstrated by the cases like the *Maria da Gloria*, *see* sources cited *supra* note 146, in which British judges voted for acquittal, or cases in which non-British judges easily voted for condemnation.

379. *Cf.* Guzman, *supra* note 370 (discussing a theory of international law that "explains compliance using a model of rational, self-interested states").
380. For a summary of the various schools and subschools of international relations theory, particularly as applied by international lawyers, see Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 476-86 (2005).
381. *See generally* Peter J. Katzenstein & Nobuo Okawara, *Japan, Asian-Pacific Security, and the Case for Analytical Eclecticism*, 26 INT'L SECURITY 153, 154 (2001) (arguing "against the privileging of parsimony that has become the hallmark of paradigmatic debates" and noting the advantages of "drawing selectively on different [theoretical] paradigms").

The history of the antislavery courts told purely through the lens of realism, neorealism, institutionalism, rational choice, institutional liberalism, constructivism, or any other “ism” would be an impoverished one, and so this Article does not claim that it entirely supports any one of these theories, or any novel grand unified theory of the author’s invention. But champions of existing theories do need to grapple with the complexities, and contradictions, presented by this history.

Beyond the realm of theory, one can find in the history of the abolition of the slave trade echoes of many contemporary debates in foreign policy, such as the efforts by some powerful countries to promote democracy and human rights in various societies around the world. Is it true, as Lord Castlereagh suggested, that “[m]orals were never well taught by the sword”?³⁸² Or is it only the sword that works? Or is it possible, as Palmerston argued, that a combination of military force, international law, and moral persuasion is most effective?

The very different circumstances of the world two centuries ago cannot give us answers to these questions but provide food for thought as we contemplate them today. Palmerston’s view suggests that instead of viewing international courts solely as a threat to their sovereignty and independence, powerful countries should consider the extent to which international courts can be a vital tool for adding legitimacy to their actions and entrenching norms they support. Why is it, for example, that the United States government perceives the International Criminal Court (ICC) primarily as a threat to its own independence rather than as a potentially valuable tool for advancing human rights, democracy, and the rule of law—goals that it has repeatedly characterized as the centerpiece of its current foreign policy? At a moment when U.S. military and economic power is at a peak (and a peak that seems unlikely to last forever as China’s 1.3 billion people and India’s 1.1 billion people move toward full economic development), the United States should consider projecting that power into the future by creating and supporting stable international legal institutions rather than fostering a world order based on power alone.

Finally, the history of the abolition of the slave trade suggests that the time horizon of many international legal scholars and practitioners is simply too short. Today, some observers of the International Criminal Court suggest that it is doomed to fail because the United States is not a participant. The same might have been said about the antislavery courts during the forty-five years

382. BETHELL, *supra* note 5, at 12.

before the United States finally joined the treaty regime.³⁸³ For many of the international courts that were greeted with such fanfare in the post-Cold War optimism of the 1990s, and that are now dismissed in the neorealist pessimism of the post-September 11 world, it may simply be too early to judge.

At the end of the day, the story of the abolition of the slave trade is a hopeful one for international law, for human rights, and for humanity. In 1762, Rousseau famously wrote, “Man was born free, and everywhere he is in chains.”³⁸⁴ A century later—after many statutes had been passed, many treaties had been signed, many cases had been adjudicated, several wars had been fought, and millions of minds had been changed on the morality of slavery and the slave trade—the chains were broken.

383. The analogy might seem not quite apt because the United States was not the global superpower in the 1800s that it is today. But though not yet a global hegemon, the United States *was* significant as a large slave-holding society with a significant commercial and military maritime presence. Nor is the ICC the equivalent of the antislavery courts without the British; the ICC does, after all, enjoy the support of more than one hundred countries, including the richest and most powerful countries in the European Union.

384. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 156 (Susan Dunn ed., Yale Univ. Press 2002) (1762).