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THE NINETEENTH CENTURY LAW OF THE SEA AND THE BRITISH ABOLITION OF THE SLAVE TRADE

BY JEAN ALLAIN*

It would be difficult to underestimate the relevance of the issue of the slave trade in nineteenth-century international relations. The move by Great Britain to suppress the slave trade was *the* issue with global implications during most of that century, as little else required the collective coordination of European States, newly-independent American States and other emerging "civilized nations". However, the process of establishing an international regime which sought to outlaw the slave trade reflected an international system lacking the tools of modern statecraft. In effect Great Britain was left to its own devices in seeking to achieve the suppression of the slave trade at sea. The limited contact between States meant that the establishment of law regarding the slave trade was a slow and awkward process which, though agreed to in principle at the Congress of Vienna in 1815, only emerged as a binding universal instrument at the Brussels Conference of 1890, and ultimately led to the suppression of both the slave trade and slavery with the League of Nations Convention to Suppress the Slave Trade and Slavery of 1926.[1]

The lack of a developed multilateral system during the nineteenth century, however, was not the determining factor in the slow pace by which the slave trade on the seas was outlawed. At the heart of the matter was States' understanding of the nature of the high seas. The challenge was not the slave trade *per se* but rather the conflict between the Grotian notion of freedom of the seas and the right to visit ships suspected of involvement in the slave trade. Over a period of eighty years, Great Britain proposed various understandings of the "right to visit"; first seeking to assimilate slavery to piracy, then arguing for the extension of the French notion of *droit de visite*, an indirect right to visit but not to *search* a ship as a way to suppress the slave trade. Other maritime Powers were originally unwilling to concede *any* right of visit in peace time and baulked at these innovative notions put forward by Great Britain. Yet, a diplomatic compromise was reached in 1890 that accepted the concept of a "right to visit", while limiting its application to a specific maritime zone

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[1] Slavery Convention, Geneva, 25 September 1926, 60 *LNTS* 255.

and to the type of ship used in the late nineteenth-century slave trade. For most of the century, then, the battle lines were drawn between Great Britain, which put forward an abolitionist agenda primed on the use of its superior naval forces and on the other hand, lesser maritime Powers including Brazil, France, Portugal and the United States of America, that sought to maintain freedom of commerce for their merchant fleets.

The Slave Trade During the Nineteenth Century

The legal history of the suppression of the slave trade in the nineteenth century revolves around the "Atlantic Slave Trade," where the most significant legal issues regarding the right to visit and the freedom of the seas manifested themselves. But the century started—and ended—with a focus on other slave trades. In 1815 the United States equipped and sent its first ever naval squadron to liberate American merchant seamen held for ransom by Algiers on the Barbary Coast. Previously, international agreements had existed requiring annual tributes from foreign States to ensure their nationals were not taken at sea, enslaved, and held for payment by pirates under the protection of North African States.[2] The expedition ended the practice by the Barbary States (Algiers, Tunis and Tripoli) of "white slavery" against United States sailors. The decisive blow to this enslavement of Europeans was delivered in 1816 by Great Britain which bombarded Algiers and destroyed its navy. The Royal Navy, assisted by a Dutch squadron, demanded and received a treaty which mandated "the abolition for ever of Christian Slavery".[3] Likewise, the British Commander-in-chief in the Mediterranean "extracted a promise from the Beys of Tunis and Tripoli that they would not, for the future, make slaves of prisoners of war, but would conform to the practice of European Nations".[4] Thus ended this type of enslavement in North Africa.

During the nineteenth century, Great Britain focused primarily on the Atlantic Slave Trade.[5] Although slavery had persisted for more than a thousand years as a continuous oriental trade; the Atlantic Slave Trade emerged as a new "species of slavery".[6] During the sixteenth century,

[2] For American actions see F Leiner, *The End of Barbary Terror: America's 1815 War against the Pirates of North Africa* (OUP, 2006).

[3] R Phillimore, *Commentaries upon International Law* (Butterworths, London, 1879), 320.

[4] Ibid, 319.

[5] Over the past thirty years, the Atlantic Slave Trade has been the subject of extensive study by historians. Since the 1960s the "academic study of slavery has, in effect, shifted from the margins of scholarly interest (even of respectability) to become the focus of innovative and imaginative work at the very core of modern historical scholarship" (J Walvin, *Questioning Slavery* (Routledge, London, 1997), vii). Further, "[w]hile the last three decades have seen a reinvigorated interest in almost all aspects of the transatlantic slave trade, legal historians have completely neglected it" (H Kern, "Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade" (2004) 6 *Journal of History of International Law* 223).

[6] R Blackburn, *The Overthrow of Colonial Slavery 1776–1848* (Verso, London, 1988), 7.

Portugal and Spain introduced plantations on vast tracts of land in the Americas and manned them with indentured Europeans and enslaved Native Americans.[7] However, for numerous reasons, including rapid economic growth in Europe and the introduction of alien diseases to the New World, African slaves "became the most desired labour force for Europeans to develop their American export industries",[8] which were based on labour-intensive plantations producing commodities such as sugar, coffee, rum, and tobacco.[9]

The Papal Bulls of Donation (specifically, the *Inter caetera* of 1493) and the Treaty of Tordesillas of 1494 established that Portugal and Spain had exclusive right to the undiscovered world, with a line drawn vertically through the Atlantic Ocean from the Arctic to the Antarctic, one thousand miles west of the Azores and Cape Verde Islands. While the Treaty gave Portugal its Brazilian foothold in South America, it excluded Spain from the African coast and direct access to slaves. As a result, Spain turned to granting *Assientos*—trade monopoly licences—to furnish slaves to its colonies.[10] The slave-trade *Assientos* were ultimately amalgamated into one *Assiento* and, by 1701 began to be granted to foreign States by way of treaty. The *Assiento* first went to France. As a result of the Treaty of Utrecht (1713), it was passed to Great Britain, and then, by way of the treaties of Aix-la-Chapelle (1748) and Madrid (1750) reverted back to Spain. However, by this time the *Assiento* was of limited relevance, as Spain and Portugal's maritime rivals had broken the monopolies on both sides of the line; colonies and forts had been established by "interlopers" (including the British, Brandenburgs, Danes, Dutch, French, Norwegians and Swedes) in the New World and in Africa. The ideology of "empire" had shifted and was now commerce-based.[11] It was within this new imperial paradigm that the Atlantic Slave Trade developed and flourished.

The Atlantic Slave Trade, which spanned from 1519 until 1867, formed part of a well-established international market connecting Africa, the Americas, Asia, and Europe.[12] In contrast to common perceptions that

[7] See P Manning, *Slavery and African Life: Occidental, Oriental, and African Slave Trades* (CUP, 1990), 30. Such plantations—primarily sugar estates—had previously proven successful in Spanish possessions off the African West Coast.

[8] Ibid, 21.

[9] See R Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery* (Norton, New York, 1994), 17–29; J Thornton, *Africa and Africans in the Making of the Atlantic World, 1400–1800* (CUP, 1999), 152–182. Of these commodities, sugar was by far the most relevant to issues of enslavement: "It is worth recalling, for instance, that some 70 per cent of *all* Africans imported into the Americas were destined, in the short term at least, to work in sugar". Walvin, above n 5, 32. Emphasis in the original.

[10] See G Scelle, "The Slave-Trade in the Spanish Colonies of America: The *Assiento*" (1910) 4 *AJIL* 617; G Scelle, *La traite négrière aux Indes de Castilles, contrats et traités d'assiento, étude de droit public et d'histoire diplomatique puisée aux sources originales et accompagnée de plusieurs documents inédits*,(Larose et Tenin, Paris, 1906).

[11] A Pagden, *Peoples and Empires* (Weidenfeld & Nicolson, London, 2001), 94.

[12] For the dates quoted see D Eltis, "The Volume and Structures of the Transatlantic Slave Trade: A Reassessment" (2001) 58 *William and Mary Quarterly* 17. With regard to the global market, see H Klein, *The Atlantic Slave Trade* (CUP, 1999), 101–102.

Europeans raided the African coast to gain slaves, early European traders actually tapped into a market which already existed. However, they facilitated the expansion of the slave trade by creating an ever-growing demand and by supporting the commercial and political ambitions of African elites. These ambitions were manifested through warfare which, while producing territorial gains,[13] created the main source of slaves for the Atlantic trade. Captured enemies were often forced to walk to the west coast of Africa. Survivors of the journey were offered for sale in places such as St. Louis (modern day Senegal), Elmina and Cape Coast (Ghana), most notoriously on the so-called "Slave Coast," in Ouidah (Benin), and, in greater numbers still, further south in Luanda (Angola).[14]

A decade-long project started in the late 1980s, conducted under the auspices of the W. E. B. Du Bois Institute of Harvard University, has gathered data on "perhaps 70 percent of all slaving voyages", providing much insight into the various elements of the trade.[15] During the period in which the Atlantic Slave Trade persisted, more than eleven million men, women, and children were forcefully enslaved and taken from Africa. Of these, approximately one and a half million did not reach the Americas, having died at sea during the so-called "Middle Passage".[16] Eltis notes that Great Britain and Portugal accounted for more than seventy percent of the Atlantic trade: "the Portuguese dominated before 1640 and after 1807, with the British displacing them in the intervening period".[17] In the New World, with the exception of "the meteoric rise and fall of St. Domingue,[18] the primary receiving regions were Brazil, the British Caribbean and, briefly, in the nineteenth century, Cuba".[19] Finally, Eltis notes that between "1660 and 1807, when the slave trade was at its height, the British and their dependencies carried every second slave that arrived in the Americas, a dominance that would no doubt have continued but for the politically inspired decision to abolish the trade".[20]

[13] E.g. the creation of the Ashanti and Dahomey Kingdoms in West Africa.

[14] See Thornton, above n 9, 125. Eltis notes that on "the African coast, West Central Africa [Angola] was an even more important source of slaves than the recent literature credits": Eltis, above n 12, 41. West Central Africa accounts for 44.2% of departures of all known slaves from Africa heading to the New World (4,887,500 individuals). See Eltis, Table II, 44.

[15] D Davis & R Forbes, "Foreword" (2001) 58 *William and Mary Quarterly* 7.

[16] See Eltis, above n 12. The dataset is found in D Eltis et al (eds) *The Trans-Atlantic Slave Trade: A Database on CD-ROM* (CUP, 1999).

[17] Eltis, above n 12, 20. Great Britain was responsible for 28.1% of the trade which amounts to 3,112,300 Africans transported (Portugal being responsible for 45.9%). See Eltis, above n 12, Table I, 43.

[18] *Viz*, modern-day Haïti, which gained its independence in 1804 as a result of a slave revolt. Davis writes: "The Haitian Revolution impinged in one way or another on the entire emancipation debate from the British parliamentary move in 1792 to outlaw the African slave trade to Brazil's final abolition of slavery ninety-six years later". D Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (OUP, 2006), 158. For a consideration of the revolt in St. Domingue and the emergence of an independent Haïti, see C L R James, *The Black Jacobins* (Secker and Warburg, London, 1938).

[19] See Eltis, above n 12, 41.

[20] Ibid.

The move by Great Britain to abolish the slave trade was inspired by economic, philanthropic, and populist considerations. Heuman notes that until "the 1940s there was a general consensus among historians about the abolition of slavery in the Empire" where it was "maintained that the British abolished slavery largely because of the strength of religious feelings and humanitarianism".[21] This view, however, is challenged by Eric Williams' 1944 *Capitalism and Slavery*, in which he asserts that slavery was abolished because it had become unprofitable, not because it had become morally wrong and unpalatable to the British. While this perspective has been largely rejected, it has not been completely displaced.[22] More recently, greater emphasis has been placed on the public pressure which moved Great Britain towards abolition of the slave trade, with the anti-slavery movement described by Walvin as "*the* most popular political issue in these years [1789–1838]".[23] Finally, the resistance of slaves themselves increased the costs of participating in the trade and placed New World European settlers in a heightened state of anxiety over their safety, especially after the slave revolt and revolution in St. Domingue.[24]

Although individuals had called for the end of slavery and the slave trade during the eighteenth century, these calls came primarily from individual intellectuals and minority religious sects (principally the Society of Friends) and were easily dismissed.[25] However, as the abolitionist movement grew in popularity, spurred on by the ideas of the American and French revolutions and the increases in literacy and leisure time brought about by the Industrial Revolution, it became a major factor in domestic politics. This was not due to the virtue of the cause *per se*, but because it "reflected the needs and values of the emerging capitalist order,"[26] and impelled successive British governments to make abolition a key part of their foreign policy. This policy permitted British administrations to maintain the moral high ground as against those States which continued to allow their ships to be involved in the slave trade. Great Britain, having lost its greatest colonial asset in 1783 as a result of the American Revolution, no longer needed to support the New

[21] G Heuman, "Slavery, The Slave Trade, and Abolition" in R Winks (ed) *Oxford History of the British Empire*, Vol 5 (Historiography) (OUP, 1999), 322.

[22] Ibid. Eric Williams would later become the Prime Minister of Trinidad and Tobago.

[23] Heuman, above n 21, 324. Emphasis in the original. See also C Brown, *Moral Capital: Foundations of British Abolitionism* (University of North Carolina Press, Chapel Hill, 2006).

[24] See D Richardson, "Shipboard Revolts, African Authority, and the Atlantic Slave Trade" (2001) 58 *William and Mary Quarterly* 69–92; in the British context, see M Craton, *Testing the Chains: Resistance to Slavery in the British West Indies* (Cornell University Press, London, 1982) and R Hart, *Slaves Who Abolished Slavery* (University of the West Indies, Mona, 2002).

[25] See, e.g., Ch 10 "Religious Sources of Antislavery Thought: Quakers and the Sectarian Tradition" in D Davis, *The Problem of Slavery in Western Culture* (Cornell University Press, New York, 1966), 291–332.

[26] See Heuman, putting forward David Brion Davis' view (above n 21), 324. For a similar co-opting by States of popular sentiment, consider the evolution of dispute settlement and the peace movements which transpired at the turn of the twentieth century: see J Allain, *A Century of International Adjudication: The Rule of Law and its Limits* (T M C Asser Press, The Hague, 2000), 6–35.

World's slave-based economy. Likewise the mercantile economy, which had been in existence since the late fifteenth century, was being replaced by a capitalist order, wherein Great Britain was best placed to prosper (and dominate) through the advocacy of free trade and supremacy of its Royal Navy.[27] Thus, Great Britain went from being the main slaving nation from 1640 to outlawing the trade in 1807 and becoming the leading proponent of its international abolition.

As Great Britain's campaign for the universal suppression of the slave trade at sea moved towards successful completion at the end of the nineteenth century, it brought in its wake the end of the Atlantic Slave Trade. The last recorded slave ship made its way across the Atlantic to Cuba in 1867; however, another slave trade, the "Oriental Slave Trade," persisted "virtually unnoticed" in east Africa.[28] This oriental trade was an older, more ingrained slave trade which existed for more than a millennium before it was suppressed in the late nineteenth and early twentieth century. The Oriental Slave Trade (as opposed to the western-oriented, capitalist-driven trade) generally enslaved two women for every man, for the purpose of work as domestic servants or concubines in north Africa and western Asia. This trade, like that of the Atlantic, focused on the enslavement of inhabitants of sub-Saharan Africa. The main means of transportation was not ocean-going caravels, but camel caravans crossing the North African desert and small dhows sailing the Indian Ocean, the Persian Gulf, and the Red Sea. It is estimated that this trade involved seven million slaves, of which three million were transported during the nineteenth century.[29]

The suppression of this trade was a rather low priority for Great Britain during the first half of the nineteenth century as, for instance, only two ships could be spared for east coast patrols during Napoleon's stay on St. Helena (1815–1821), and as late as 1854, the Royal Navy "had only three vessels to deploy between Delagoa Bay to Zanzibar, over 1300 miles of coastline".[30] It was only when the Atlantic Slave Trade ended and European States undertook to conquer the whole of the African continent that Great Britain showed any great zeal in promoting the suppression of the Oriental Slave Trade. However, by this time, the legal issues relating to the British wish to establish a right to visit to

[27] See D Davis, *The Problem of Slavery in the Age of Revolution 1770–1823* (Cornell University Press, New York, 1975), 351. See also C Lloyd, *The Navy and the Slave Trade: Suppression of African Slave Trade in the Nineteenth Century* (Cass, London, 1968), xi: "Throughout the nineteenth century the Navy was the chief instrument of preserving the *Pax Britannica*".

[28] J Walvin, *Black Ivory: Slavery in the British Empire* (Blackwell Publishers, Oxford, 2001), 267. Note that the Oriental Slave Trade is also referred to in the literature as the "Arab Trade" the "Islamic Trade" or "Sahara Trade".

[29] Ibid. See also R Austen, "The Mediterranean Islamic Slave Trade out of Africa: A Tentative Census" in P Manning (ed), *Slave Trades, 1500–1800; Globalization of Forced Labour* (Variorum, Aldershot, 1996), 1–36.

[30] See R Beachy, *The Slave Trade of Eastern Africa* (Collings, London, 1976), 20 where he continues: "and this number was reduced to none, when the *Dee* was laid up for refit, and the *Crecian* and *Dart* were recalled to the Cape".

suppress the slave trade at sea had been settled. The end of the Oriental Slave Trade then was a matter for the British squadrons, the 1890 Final Act of the Brussels Conference, and the International Maritime Bureau. The British naval presence on the east coast of Africa was limited by the means at its disposal until the 1870s. Further, with the abolition of the trade on the Barbary Coast and in Egypt, over the nineteenth century the Oriental Slave Trade had been funnelled into one primary outlet on the east coast of Africa, the island of Zanzibar (which, embarrassingly, was under British protection). The Sultan of Zanzibar had, in 1843, negotiated a treaty with Great Britain that allowed for the free passage of Arab dhows along the African and Arabian coast to Oman, thus excluding this traffic from visits to suppress the slave trade. It was only when dhows ventured outside the prescribed zone that they were susceptible to capture.[31]

In 1873, the "provisions of the existing Treaties having proved ineffectual for preventing the export of slaves from the territories of the Sultan of Zanzibar, Her Majesty the Queen and His Highness the Sultan above-named, agreed that from this date the export of slaves from the coast of the mainland of Africa, whether destined for transport from one part of the Sultan's dominions to another [re: Oman] or for conveyance to foreign parts, shall entirely cease". The 1873 Treaty further stipulated that "any vessel engaged in the transport or conveyance of slaves after this date shall be liable to seizure and condemnation" by the British Navy.[32] In all likelihood, the Treaty itself would not have been concluded but for the fact that the East African Squadron had blockaded Kilwa, the transit port to Zanzibar on mainland Africa, in early 1873. While Lloyd states that by 1883 the wholesale trade had ended, the issue of slave trading in the Indian Ocean, the Red Sea, and the Persian Gulf did persist, although on a much more limited scale and often under French flag.

Common Law Attempts to Outlaw the Slave Trade

Great Britain emerged from the Napoleonic Wars as an unrivalled maritime power. As a means of suppressing the slave trade, it sought to establish a right during peacetime from which all maritime States benefited in war: the right to visit foreign ships. While a belligerent right to visit ships was well established by the end of the Napoleonic Wars, it was limited to visiting neutral ships to ascertain whether they were in fact neutrals

[31] See Lloyd, above n 27, 234. An Arab dhow has been described by Captain, later Commander, Phillip Colomb as follows: "If a pear be sharpened at the thin end, and then cut in half longitudinally, two models will have been made resembling in all essential respects the ordinary slave dhow". See Beachy, above n 30, 68.

[32] Article 1, Treaty between Great Britain and Zanzibar for the Suppression of the Slave Trade, 5 June 1873, 63 *BFSP* 174.

or simply flying flags of convenience; and searching to ensure that no contraband material was on board.[33]

During the early nineteenth century a number of cases in Great Britain and the United States considered whether there existed a right to visit foreign ships on the high seas in times of peace so as to suppress the slave trade. While late-Napoleonic municipal judgments on both sides of the Atlantic were willing to admit a right to visit based largely on domestic law elevated to the international level by way of natural law,[34] by 1825 such pronouncements had been reversed by decisions which conformed to a growing trend of positivism as a means of interpreting international law.[35] The decisions of the British High Court of Admiralty and the United States Supreme Court highlighted the need to gain the consent of a sovereign State for foreign warships to visit its vessels in times of peace on the high seas, no matter the jurisdiction. Great Britain then turned to international relations to seek to develop a right to visit in peacetime.

International Jurisprudence admits no Common Law Right to Visit

During the Napoleonic Wars, the British Admiralty courts were willing, on the basis of a "natural law" right to visit, to condemn ships involved in the slave trade. Such judgments not only violated the rights of neutrals, they were at variance with general international law in seeking to detain foreign ships not in violation of international obligations but merely in breach of the flag ship's own municipal law. In *The Amedie* case of 1810, an American ship carrying one hundred and five slaves from Bonny (on the coast of modern-day Nigeria) to Matanzas in Cuba was condemned by the Vice-Admiralty Court of Tortola (British Virgin Islands) for having engaged in illegal trade. The Claimants failed on appeal. The Lords of Appeal in Prize Causes noted that, ordinarily, they could not be called upon to consider or apply a foreign State's municipal law.

> But by the alteration which has since taken places in our law, the question stands now upon very different grounds. We do now, and did at the time of this capture, take an interest in preventing that traffic in which this ship was engaged. The slave trade has since been totally abolished in this country, and our Legislature has declared the African slave trade is contrary to the principles of justice and humanity....
>
> [We] are now entitled to act according to our law and to hold that *prima facie* the trade is altogether illegal, and thus to throw on a claimant the whole burden of proof in order to shew that by the particular law of his own country he is entitled to carry on this traffic. As the case now stands, we think that no claimant can be heard in an application to a court of prize for the restoration of the

[33] See L-B Hautefeuille, *Des droits et devoirs des Nations neutres en temps de guerre maritime* (3 volumes) (Guillaume et Compagnie, Librairies, Paris, 1858).

[34] See A Rubin, *Ethics and Authority in International Law* (CUP, 1997).

[35] See A Nussbaum, *A Concise History of the Law of Nations* (Macmillan, New York, 1961), 232–234.

human beings he carried unjustly to another country for the purpose of disposing of them as slaves.[36]

Similarly, in *The Fortuna* in 1811, the High Court of Admiralty considered the case of an American ship which had been re-flagged as Portuguese and, having set out from the Spanish Atlantic island of Madeira, was shortly thereafter captured as prize by the Royal Navy. Lord Stowell noted the principle which had emerged from *The Amedie*:

> that any trade contrary to the general law of nations, although not tending to or accompanied with any infraction of the belligerent rights of that country, whose tribunals are called upon to consider it, may subject the vessel employed in that [the slave] trade to confiscation.[37]

Lord Stowell then turned to consider the nature of the ship to see whether it was, in fact, involved in the slave trade:

> The construction and furniture of the ship had all the accommodations necessary for the conduct of that trade, and of that trade only. She had platforms ready constructed; she had timbers fit for the construction of more; she had iron shackles and bolts, and running chains and collars—all adapted for the purposes of conveying slaves—and the quantity and species of provision and medicine which such purposes require.[38]

He condemned the foreign ship and its cargo as prize, not on the basis of an established treaty between Great Britain and Portugal but as being, in part, "repugnant to the law of nations, to justice and humanity".[39]

By 1813 however, Lord Stowell acknowledged that the Vice-Admiralty Court at Sierra Leone had gone too far in condemning the *Diana*, a Swedish ship carrying one hundred and twenty slaves from Cape Mount, Liberia, to St. Bartholomew (part of the Lesser Antilles) which had been seized by His Majesty's ship the *Crocodile* and taken to Sierra Leone. While the High Court of Admiralty was willing to award prize for ships involved in the slave trade where the flag-State had outlawed such activity in its municipal law, Lord Stowell was unwilling to do so where it was clear that the State had yet to outlaw the trade:

> The... sentence affirms, "that the slave trade, from motives of humanity, hath been abolished by most civilised nations, and is not at the present time legally authorised by any." This appears to me to be an assertion by no means sustainable. This Court is disposed to go as far in discountenancing this odious traffic as the law of nations and the principles recognised by English tribunals will warrant it in doing, but beyond these principles it does not feel itself at

[36] *The Amedie* (1810) 1 *Acton's Admiralty Reports* 240, 250–252. Note that Kern writes: "Yet the reasoning that British rights under international law could depend on the domestic legislation of other countries was hardly consistent with traditional interpretations of international law": see above n 5, 236.

[37] *The Fortuna* (1811) 1 *Dodson's Admiralty Reports* 81, 84. For a general discussion of these case and their relevance in international law to the issue of the slave trade, see W Lawrence, *Wheaton's Elements of International Law* (Stevens & Sons, Limited, London, 1857) and Phillimore, above n 3.

[38] *The Fortuna*, ibid, 90. [39] Ibid, 85.

liberty to travel: it cannot proceed on a sweeping anathema of this kind against property belonging to the subjects of foreign independent states. The position laid down in the sentence of the [Vice-Admiralty Court of Sierra Leone] that the slave trade is not authorised by any civilised state, is unfortunately by no means correct, the contrary being notoriously the fact, that it is tolerated by some of them.

This trade was at one time, we know, universally allowed by the different nations of Europe, and carried on by them to a greater or less extent, according to their respective necessities. Sweden, having but small colonial possessions, did not engage very deeply in the traffic, but she entered into it so far as her convenience required for the supply of her own colonies. The trade, which was generally allowed, has been since abolished by some particular countries; but I am yet to learn that Sweden has prohibited its subjects from engaging in the traffic, or that she has abstained from it either in act or declaration. Our own country, it is true, has taken a more correct view of the subject, and has decreed the abolition of the slave trade, as far as British subjects are concerned; but it claims no right of enforcing its prohibition against the subjects of those states which have not adopted the same opinion with respect to the injustice and immorality of the trade.[40]

The Diana, however, failed to address the fundamental issue raised in *The Amedie* and *The Fortuna*: the right to visit and capture foreign vessels suspected of involvement in the slave trade where no international treaty existed. These decisions were superseded by *The Le Louis* in 1817. In that case, a French ship was returning from Africa to Martinique when the Royal Navy attempted to board it on suspicion of involvement in the slave trade. The crew resisted and twelve British and three French sailors were killed. The ship was taken and brought to Sierra Leone where it was adjudged as prize for being outfitted for the slave trade. On appeal before the High Court of Admiralty, Lord Stowell considered whether there existed a right to visit foreign ships in times of peace—if not, the resistance by the crew would be lawful:

Upon the... question, whether the right of search exists in time of peace, I have to observe, that two principles of public law are generally recognised as fundamental. One is the perfect equality and entire independence of all distinct states. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour; and any advantage seized upon, that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate. The second is, that nations being equal, all have an equal right to the uninterrupted use of the un-appropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of... equality and independence, no one state, or any of its subjects has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high

[40] *The Diana* (1813) 1 *Dodson's Admiralty Reports* 95, 97–98.

seas, excepting that which the rights of war give to both belligerents against neutrals.

...

But at present, under the law, as now generally understood and practised, no nation can exercise a right of visitation and search upon the common and un-appropriated parts of the sea, save only on the belligerent claim.[41]

Lord Stowell held that although the aims of the British Navy were commendable, they were unlawful. If Great Britain wanted to continue with the suppression of the slave trade it would have to do so within the confines of international law:

To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful; is as little consonant to private morality as to public justice. Obtain the concurrence of other nations, if you can, by application, by remonstrance, by example, by every peaceable instrument which man can employ to attract the consent of man. But a nation is not justified in assuming rights that do not belong to her merely because she means to apply them to a laudable purpose; nor in setting out upon a moral crusade of converting other nations by acts of unlawful force. Nor is it to be argued, that because other nations approve the ultimate purpose, they must therefore submit to every measure which any one state or its subjects may inconsiderately adopt for its attainment.[42]

In 1817 the British admiralty courts settled that the suppression of the slave trade did not allow for a right to visit foreign ships on the high seas during time of peace, but it took a further eight years for this principle to emerge in the United States. Although the Federal Circuit Court of Massachusetts, in *The Jeune Eugenie* in 1822, relied heavily on domestic law to find the slave trade was "prohibited by universal law,"[43] this

[41] *The Le Louis* (1817) 2 *Dodson's Admiralty Reports* 210, 244–245.

[42] Ibid, 258–259. Despite having found that the British had illegally seized the *Le Louis*, Lord Stowell was unwilling to award damages, see 264.

[43] *The United States v. La Jeune Eugenie* (1822) 26 *Federal Case Reports* 832, 851. Although the Court held that it could indeed confiscate, it handed over the cargo to the French Consul so that it might be "dealt with according to his own sense of duty and right". The following passage emphasises the natural law approach of Justice Story and also vividly portrays the reality of the slave trade:

> It would be unbecoming in me here to assert, that the state of slavery cannot have a legitimate existence, or that it stands condemned by the unequivocal testimony of the law of nations. But this concession carries us but a very short distance towards the decision of this cause. It is not, as the learned counsel for the government have justly stated, on account of the simple fact, that the traffic necessarily involves the enslavement of human beings, that it stands reprehended by the present sense of nations; but that it necessarily carries with it a breach of all the moral duties, of all the maxims of justice, mercy and humanity, and of the admitted rights, which independent Christian nations now hold sacred in their intercourse with each other. What is the fact as to the ordinary, nay, necessary course, of this trade? It begins in corruption, and plunder, and kidnapping. It creates and stimulates unholy wars for the purpose of making captives. It desolates whole villages and provinces for the purpose of seizing the young, the feeble, the defenceless, and the innocent. It breaks down all the ties of parent, and children, and family, and country. It shuts up all sympathy for human suffering and sorrows. It manacles the inoffensive females and the starving infants. It forces the brave to untimely death in defence of their humble homes and firesides, or drives them to despair and self-immolation. It stirs up

decision was followed by the United States Supreme Court in 1825. *The Antelope* case involved the capture of a vessel on suspicion of involvement in piracy as it had been hovering off the coast of Florida for some time. When seized, it was discovered that the *Antelope* had been captured by Spanish privateers off the coast of Africa and was carrying more than two hundred and eighty slaves to be sold in Surinam. The case was brought by the Vice-Consuls of Portugal and Spain who sought restitution for the property they considered had been improperly seized by the American Government. Chief Justice Marshall took a decidedly positivist approach to interpreting the law regarding the slave trade and the notion of visitation:

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say, that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property.

In this commerce, thus sanctioned by universal assent, every nation has an equal right to engage. How is this right to be lost? Each may renounce it for its own people; but can this renunciation affect others?

No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a

the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted. This is but the beginning of the evils. Before the unhappy captives arrive at the destined market, where the traffic ends, one quarter part at least in the ordinary course of events perish in cold blood under the inhuman, or thoughtless treatment of their oppressors. Strong as these expressions may seem, and dark as is the colouring of this statement, it is short of the real calamities inflicted by this traffic. All the wars, that have desolated Africa for the last three centuries, have had their origin in the slave trade. The blood of thousands of her miserable children has stained her shores, or quenched the dying embers of her desolated towns, to glut the appetite of slave dealers. The ocean has received in its deep and silent bosom thousands more, who have perished from disease and want during their passage from their native homes to the foreign colonies. I speak not from vague rumours, or idle tales, but from authentic documents, and the known historical details of the traffic,—a traffic, that carries away at least 50,000 persons annually from their homes and their families, and breaks the hearts, and buries the hopes, and extinguishes the happiness of more than double that number. [...] "There is," as one of the greatest of modern statesmen has declared, "something of horror in it, that surpasses all the bounds of imagination." Mr. Pitt's speech on the slave trade, in 1792. It is of this traffic, thus carried on, and necessarily carried on, beginning in lawless wars, and rapine, and kidnapping, and ending in disease, and death, and slavery—it is of this traffic in the aggregate of its accumulated wrongs, that I would ask, if it be consistent with the law of nations?

ibid, 845–6.

law of nations; and this traffic remains lawful to those whose governments have not forbidden it.

...

If it be... repugnant to the law of nations... it is almost superfluous to say in this Court, that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The Courts of no country execute the penal laws of another; and the course of the American government on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors.

It follows, that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored.[44]

By 1825, therefore, international jurisprudence—at least of an Anglo-American variety—was settled. The principles which emerged were rooted in positive international law, where State consent was required to establish jurisdiction over its flagged ships. Early common law decisions sought to assert a natural law emphasis on the repugnance of the slave trade which, outlawed for the most part at the municipal level, granted States the *right* to suppress the trade in accordance with a flagged State's domestic laws.[45] From *The Le Louis* onwards, Great Britain could no longer use its own common law to justify suppressing the slave trade; this case made plain that visiting ships on the high seas for that purpose was against international law. Instead the British largely followed Lord Stowell's advice and sought: "the concurrence of other nations... by application, by remonstrance, by example, by every peaceable instrument which man can employ to attract the consent of man". When this failed, Great Britain, as we shall see, was not above using force and coercive means to achieve its ultimate objective of suppressing the slave trade through the establishment of a right to visit.

Early Attempts at Outlawing the Slave Trade

Following *The Le Louis*, it was clear that Great Britain was unable to rely on a common law prerogative to develop the means of suppressing the slave trade. Yet it had also been active at the international level prior to this judgment and had sought, as early as the settlement of the Napoleonic Wars, to establish a universal instrument which would allow for the suppression of the slave trade and provide for a reciprocal right of visit to ensure the end of the trade at sea. While Great Britain maintained this strategic foreign policy objective for seventy-five years, for tactical reasons it spent most of the intervening period establishing a web of

[44] *The Antelope* (1825), 23 *United States Supreme Court Reports* 66, 121–123.

[45] Rubin, above n 34, 110.

bilateral arrangements which were ultimately subsumed into the General Act of the 1890 Brussels Conference. Gradually Britain locked a growing number of States into its web of bilateral treaties and isolated those outside the system, moving closer towards its original goal: the universal outlawing of the slave trade.

In the lead up to the Congress of Vienna of 1814 the British Foreign Minister, Lord Castlereagh, gained the formal support of a defeated France for the end of the slave trade and for his endeavours to internationalise the issue at Vienna.[46] At the Congress itself, Great Britain proposed that the trade should be outlawed within a three-year period; that a permanent institution be established to supervise adherence to the treaty obligations; and that a reciprocal right of visit be established.[47] Yet French support was not forthcoming at Vienna where capitulation was no longer the order of the day. France and the Iberian States opposed the proposal, and Castlereagh was ultimately unable to gain a binding commitment regarding the abolition of the slave trade beyond a Declaration by the Powers which expressed the wish to "bring to an end a scourge which has for a long time desolated Africa, degraded Europe, and afflicted humanity". The Powers declared that they:

> consider the universal abolition of the trade in Negroes to be particularly worthy of their attention, being in conformity with the spirit of the times, and the general principles of our august Sovereigns, who are animated in their sincere desire to work towards the quickest and most effective of measures, by all means at their disposal, and to act, in the use of those means with all zealousness and perseverance which is required of such a grand and beautiful cause.[48]

This pious statement was qualified by a recognition that the Declaration would not prejudice the time it might take any State to conclude its involvement in the trade and that a "determination as to time when this commerce is to universally come to an end would be the object of negotiation as between the Powers".[49]

In the wake of the Congress of Vienna, Great Britain instituted a "formal and permanent conference" in London comprising ambassadors of the Great Powers. With a permanent secretariat, it was intended to represent "both a centre of information and a centre of action". However, although it held sixteen formal meetings between 1816 and 1819, it achieved very little beyond information gathering, as the other Powers remained suspicious of British attempts to promote its abolitionist agenda

[46] M T Barclay, "Le droit de visite, le traffic des esclaves et la Conférence antiesclavagiste de Bruxelles" (1890) 22 *Revue de droit international et de legislation comparé* 319–320.

[47] S Miers, *Britain and the Ending of the Slave Trade*, (Longman, London, 1975), 10–11.

[48] *Declaration des 8 Cours, relative à l'Abolition Universelle de la Traite des Nègres*, Vienna, 8 February 1815, 3 *BFSP* 972. The eight Powers were Austria, Britain, France, Prussia, Russia, Portugal, Spain and Sweden.

[49] Ibid.

at the expense of their right to freedom of the seas.[50] The recognition in the Vienna Declaration that the end of the slave trade would have to result from negotiations was picked up by Castlereagh at Aix-la-Chapelle in 1818 at the first meeting of the Concert of Europe.[51] The British Foreign Minister sought the creation of a right to visit and detain slave ships solely in the Atlantic Ocean north of the equator and the establishment of mixed commissions with the power to adjudicate claims; yet his appeals fell on deaf ears, as the other Powers were unwilling to curtail their freedom of the seas.[52]

At the Congress of Verona of 1822, Great Britain once again sought to achieve an international agreement. By the 1820s, all maritime Powers had abolished the trade domestically and a distinct possibility for success existed. However, the British grand design for a universal treaty outlawing the trade was again thwarted, not because of the principle, but because of a lack of consensus on the modalities to be used. At Verona, the new Foreign Minister, the Duke of Wellington, put forward a proposal to the Powers that included the renewal of the Declaration of Vienna of 1815 and the assimilation of slave trading with piracy.[53] The continental Powers were unwilling to agree to the regime proposed, and what emerged from Verona was not a mechanism to enforce the suppression of the slave trade, but a diplomatic willingness to move beyond the Declaration of 1815 by making the following "Resolution":

> That they invariably persisted in their principles and sentiments which these Sovereigns manifested in their Declaration of 8 February 1815—That they have never ceased, and will never cease to consider the commerce in Negroes—"a scourge which has for a long time desolated Africa, degraded Europe, and afflicted humanity", and that they are ready to contribute to everything which could assure and accelerate the complete and definite abolition of this commerce.[54]

This Resolution was the end product of earlier attempts by Great Britain to establish a universal instrument prohibiting the slave trade at the expense of the freedom of the seas. Yet the failure at Vienna in 1815, more than any other, resulted in a change of tactics by Great Britain in pursuing the creation of a universal instrument which allowed for a right to visit on the high seas. It is to this tactical adjustment which this study now turns.

[50] C K Webster, *The Foreign Policy of Castlereagh 1815–1822: Britain and the European Alliance* (G Bell, London, 1925), 457–459. For the Protocols of the London conferences see 6 *BFSP* 23, 25, 50–52.

[51] The Concert system was intended to allow European Powers to consider international issues, at intervals, during peacetime, as opposed to their former practice of solely meeting to settle the peace after war (eg Congress of Vienna). Four meetings took place in this manner: Aix-la-Chapelle (1818), Troppau (1820), Laibach (1821), and Verona (1822).

[52] Memorandum of the British Government, 27 October 1818, Castlereagh, 6 *BFSP* 59.

[53] Memorandum of the Duke of Wellington, 10 November 1822, 10 *BFSP* 95. The Five Powers in attendance at Verona were: Austria, Britain, France, Prussia, Russia.

[54] *Résolution relatives à l'Abolition de la Traite des Nègres*, Vienna, 28 November 1822, 10 *BFSP* 109–110.

THE BILATERAL OUTLAWING OF THE SLAVE TRADE

Thwarted in its multilateral attempts to outlaw the slave trade and in the face of the determination by its domestic courts that visitation of foreign ships on the high seas in peacetime had to be a consensual right, Great Britain turned to the establishment of bilateral treaties to outlaw the slave trade. The building of such a bilateral network, however, would prove ineffective if any maritime power remained outside the system. As noted abolitionist, the parliamentarian Thomas Fowell Buxton stated in 1837: "it will avail us little that ninety-nine doors are closed, if one remains open. To that outlet the whole slave trade of Africa will rush".[55] Great Britain persisted in building its network, and through an increasing number of bilateral treaties was able to isolate the few States outside the system, increasing the momentum towards a universally accepted *right* to visit. That it took until 1890 for a universal treaty to be established speaks to the opposition of a number of States, not to the slave trade *per se*, but to granting to Britain the right to visit their merchant ships.

France and the United States were most obstinate in their call to respect the absolute right (in peacetime) to free commerce upon the high seas. While Brazil, France, Portugal, and the United States each had distinct reasons for opposing the British initiative, they all saw in the British wish to suppress the slave trade an attempt to appropriate the policing of the seas and control maritime commerce. While Brazil and Portugal were persuaded by coercive means to join the system, France and the United States remained adamant in supporting freedom of the seas. Ultimately, France and the United States acceded to the British wish to suppress the slave trade, and Great Britain accepted a *limited* right to visit merchant ships of these two States.

Unable to forge a consensus to establish a universal treaty outlawing the slave trade during the Concert of Europe era, Great Britain ultimately entered into treaties with thirty-one States to suppress the slave trade at sea.[56] There was only one instance in which two States, neither of which was Great Britain, entered into an agreement to suppress the slave trade.[57] Bilateral agreements, as we shall see, evolved over time and were generally of two types: those that provided for a right to visit and those which contained "mutual obligation to maintain squadrons on the coast of Africa".[58]

[55] See W Mathieson, *Great Britain and the Slave Trade (1839–1865)* (Longman, Greens & Co, London, 1929) 38–39.

[56] These thirty-one States included, in chronological order of signature: Portugal, Denmark, France, Spain, Netherlands, Sweden, Buenos Aires, Colombia, Brazil, Mexico, Confederation of Peru, Bolivia, Hanseatic Cities, Tuscany, the two Sicilies, Chili, Venezuela, Uruguay, Haiti, Texas, Austria, Prussia, Russia, The United States of America, The Kings and Chiefs of Cape Mount (Africa), Equator, Muscat, Arabs of the Gulf, New Granada, Zanzibar, Egypt. See Phillimore, above n 3, 420–421. This does not include agreements with African leaders who were not considered "civilized nations".

[57] *Convention entre la France et la Suède*, Stockholm, 21 May 1836, 24 *BFSP* 556.

[58] Phillimore, above n 3, 422.

At the beginning of the eighteenth century Great Britain began to solicit agreements whereby other States renounced the slave trade. As early as 1810, Portugal bound itself to such a treaty of principle. Likewise in 1813, in exchange for the island of Guadeloupe, Sweden renounced the introduction of slaves into its colonies and prohibited Swedes from participating in the trade.[59] However, Great Britain realised that it was vital not only to seek agreement with all maritime powers, but that such agreements needed to include enforcement provisions to have any effect on the suppression of the trade. In other words, the right to visit was vital.

In 1817 and 1818, Great Britain concluded treaties with the Netherlands, Portugal, and Spain which went beyond declaratory statements outlawing the slave trade, introducing mechanisms which became the essence of these bilateral agreements over the next half-century. The 1818 Dutch treaty, in which Great Britain and the Netherlands confirmed a "mutual desire to adopt the most effectual measure for putting a stop to the carrying on of the Slave-trade by their respective Subjects, and for preventing their respective Flags from being made use of as a protection to this nefarious traffic,"[60] is exemplary. These early agreements permitted the navies of the contracting parties, under special instruction, to visit merchant ships of the other contracting party suspected of slave trading. If slaves were found on board, the ship was to be brought before mixed commissions to determine whether the ship and cargo were forfeited.[61]

Within a five year period, it was discovered these reciprocal visitation treaties were lacking: ships which did not have slaves on board could not be detained, yet there was a recognition that vessels "employed in the illegal Traffic, have unshipped their Slaves immediately prior to their being visited... [having] thus found means to evade forfeiture, and have been enabled to pursue their unlawful course with impunity, contrary to the true object and spirit of the Treaty".[62] As a result, a so-called "equipment clause" was introduced into subsequent treaties, which provided that a ship outfitted with certain materiel would be "considered as *primâ facie* evidence of her actual employment in the Slave Trade." Such equipment included open gratings on hatches, spare planks for the creation of a slave-deck, possession of "shackles, bolts or handcuffs," or an

[59] 3 *BFSP* 886.

[60] Treaty between His Britannic Majesty and His Majesty the King of The Netherlands, for preventing their Subjects from engaging in any Traffic in Slavery, The Hague, 4 May 1818, 5 *BFSP* 125.

[61] These treaties, as others that would follow, excluded the right to visit from European waters as well as the Mediterranean. The 1817 Portuguese treaty also excluded the right to visit south of the equator. See Article 2, Additional Convention between Great Britain and Portugal, for the prevention of the Slave Trade, London, 28 July 1817, 10 *BFSP* 88.

[62] See Article 1, Explanatory and Additional Articles to the 4th May, 1818, Treaty between Great Britain and The Netherlands, for the Prevention of the Traffic in Slaves, 31 December 1822, Brussels, 10 *BFSP* 132.

overabundance of water and food for needs of the crew on the planned voyage.[63]

Part of the bilateral regime established by Great Britain to suppress the slave trade was the establishment, between 1817 and 1871, of mixed commissions to adjudicate claims arising from the capture of ships suspected of involvement in the slave trade. These adjudicative organs consisted of judges appointed by the two parties: with no third-party involvement. Instead these mixed courts or more properly "mixed or joint commissions" consisted—at least in theory—of a judge and a commissioner of arbitration from each State party. The judges considered the legality of the capture and, failing agreement, lots were drawn to decide which commissioner would settle the case. As Bethell writes in his historical study of the mixed commissions: "[judges] usually—although by no means always—agreed with their senior partners on the commission, with the result that many ships captured without slaves on board were condemned or acquitted literally on the toss of a coin". He continued:

> In December 1841, for instance, two Brazilian vessels, the *Ermelinda* and the *Galianna*, almost identical cases in terms of their fittings, came before the Anglo-Brazilian commission in Sierra Leone, where the judges were unable to agree upon a verdict. In the first case the English arbitrator won the toss and the *Galianna* was condemned; in the second the Brazilian was successful and the *Ermelinda* was released.[64]

The early bilateral treaties allowed for the establishment of two mixed commissions, ordinarily one in West Africa, in the British Crown colony of Sierra Leone, the other in the New World. Thus, for instance, an Anglo-Portuguese mixed commission sat in Rio de Janeiro (later in Spanish Town, Jamaica); an Anglo-Spanish commission in Havana; an Anglo-Dutch commission in Surinam; an Anglo-American commission in New York; and an Anglo-Brazilian mixed commission in the newly independent capital of Brazil, Rio de Janeiro.[65]

The British were at an advantage with respect to these mixed commissions, as their naval squadrons effectively had a monopoly on captures and worked primarily off the coast of Africa.[66] As a result, most captures

[63] Further Additional Article to the 4th May, 1818, Treaty between Great Britain and The Netherlands, for the Prevention of the Traffic in Slaves , 25 January 1823, Brussels, 10 *BFSP* 559.

[64] L Bethell, "The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century" (1966) 7 *Journal of African History* 79, 87 [footnote omitted].

[65] Note that although Chile (1839), the Argentine Confederation (1839), Uruguay (1839), Bolivia (1840) and Ecuador (1841) ratified bilateral treaties with Great Britain allowing for mixed commissions, they "waived the right to establish mixed commissions in their own territory", instead allowing the mixed court in Sierra Leone—to which they did not appoint Commissioners—to adjudge captures: ibid, 83.

[66] Bethell notes that 95 percent of all vessels captured under the anti-slave treaties Britain had secured from Portugal, Spain, the Netherlands and Brazil were taken by ships of the Royal British Navy: ibid, 83. Bethell also gives a breakdown of the cases that were heard between 1819 and 1845: at Sierra Leone, 528; Havana, 50; Rio de Janeiro, 44; and Surinam, 1. As for cases dealt with in

were adjudicated in Freetown, Sierra Leone, where Great Britain already had a Vice-Admiralty Court whose officials also sat on the various Commissions. While the Brazilian, Dutch, Portuguese and Spanish Commissioners sat in waiting for one of their own nations' ships to be brought in by the British Royal Navy, the British representatives could handle cases involving slavers from the flagship of any State which had agreed to jurisdiction under a bilateral treaty. Sierra Leone was "a notorious white man's grave," and non-British parties which had agreed to mixed commissions in Freetown had difficulty staffing them. The Anglo-Dutch Mixed Commission is a case in point. In line with the Treaty of 1818, the Netherlands appointed a judge and commissioner in 1819. When the judge left in 1820, he was never replaced; the commissioner remained until 1828, acting sometimes as judge sometimes as commissioner. From 1828 onwards "the Anglo-Dutch mixed courts functioned without a Dutch representative until the court was dissolved in 1871".[67]

It is estimated that the various mixed commissions involved in suppressing the slave trade were "responsible for the condemnation of over 620 slave vessels and the liberation of nearly 80000 slaves". 528 vessels appeared before the Freetown commissions, of which 501 "were condemned and nearly 65000 slaves liberated".[68] However as a result of a change in British policy in 1845, only a further seven cases were heard in Sierra Leone before the mixed commissions finally closed in 1871. The Palmerston Act, enacted in 1839, mandated, *inter alia*, that ships "not entitled to claim the protection of the flag of any state" be brought before Vice-Admiralty courts. Cases were henceforth increasingly brought, not before what were, in effect, the exclusively British manned "mixed" commissions, but instead to the British Vice-Admiralty Courts of Sierra Leone, St Helena, or Cape Town. Likewise in South Africa, after 1845, only eight cases were brought before the Cape Town mixed commissions, and only three resulted in condemnation.[69] As a result, where slave traders were in actuality in command of a flag ship of a State which sought to take action, not only against the ship, but also against the captain and crew, it was wise for the sailors to quickly "lose" their papers and flag,

Freetown, the Anglo-Spanish Commission heard 241, the Anglo-Portuguese Commission: 155, Anglo-Brazilian Commission: 111, and the Anglo-Netherlands Commission: 21: ibid, 84.

[67] P Emmer, *The Dutch in the Atlantic Economy, 1580–1880: Trade, Slavery and Emancipation* (Ashgate, Aldershot, 1998), 181. According to Bethell: "British officials in the so-called 'mixed' commissions frequently found themselves sitting alone. Each of the three [Dutch, Portuguese, Spanish] commissions at Sierra Leone started out in 1819 with a full complement of officials, but during the next few years all foreign commissioners left, not to return." Bethell, ibid, 87.

[68] 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 (Part 2)" (2004) 37(2) *The Comparative and International Journal of Southern Africa* 200.

[69] 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 (Part 3)", (2004) 37(3) *The Comparative and International Journal of Southern Africa* 405.

and thus take command of a "stateless" ship; when captured, they fell under the jurisdiction of the Vice-Admiralty courts where only the vessels and cargo faced judicial sanction.[70]

While eighty thousand slaves were liberated as a result of the pronouncements of the mixed commissions, these numbers paled in the face of the continuing trade which, during the first half of the nineteenth century, resulted in the transportation of more than three million slaves to the New World. Yet, the British bilateral regime did have a deterrent effect on the Atlantic Slave Trade as the number of known slaves transported to the Western Hemisphere dropped by one-fifth in comparison to the latter half of the eighteenth century.[71] Eltis, having considered supply and demand, estimates that as a result of the actions of the British Navy, two hundred and thirteen thousand Africans were spared enslavement after 1830.[72] Despite this reduction in the number of slaves transported, the weaknesses in the bilateral system persisted. The total abolishment of the slave trade required that all maritime States join the British system, as slave traders used false flags and forged papers to avoid visit and capture. Slave ships were not above "acquiring" a new nationality at sea:

> During the chase the captain of the *La Fortunée* had been standing on the bow of his ship with two tin boxes in his hand. As soon as the man-of-war had shown the Union Jack, the captain had dropped one of these boxes into the sea. The ship was captured and the remaining box contained only French papers.[73]

In an attempt to complete its bilateral system, during the late 1830s early 1840s, Britain signed a number of such agreements with newly independent Latin American States.[74] However, this did not complete the system, as four States held out, limiting the effectiveness of the British bilateral system for the suppression of the slave trade.

The Recalcitrant States: Completing the Bilateral Regime

For diverse reasons Brazil, France, Portugal, and the United States of America were unwilling to involve themselves in the bilateral treaty regime constructed by Great Britain to suppress the slave trade.[75] While Brazil and Portugal simply needed some "nudging" by the British Navy to join the existing system, France and the United States were not so

[70] 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 (Part 1)" (2004) 37(1) *The Comparative and International Journal of Southern Africa* 35.

[71] Eltis, above n 12, Table 1, 43.

[72] Davis, *Inhuman Bondage*, above n 18, 244.

[73] Emmer, above n 67, 182.

[74] Buenos Ayres (1839), Chile (1839), Venezuela (1839), Uruguay (1840), Bolivia (1840), Texas (1840), Equador (1841), Mexico (1841), and later, New Grenada (re: Colombia; 1851).

[75] Lloyd, above n 27, x.

easily moved. With international law on their side and as "Powers" in their own right, they remained adamant that the freedom of the seas should be respected and that, in the absence of a conventional agreement, a legal right of visitation only existed in times of war. It was only when the domestic situation in both States began to favour abolition that they were willing to seriously discuss the suppression of the slave trade. While France conceded a right to visit for a period of time, it reverted to its former position and ultimately accepted a bilateral arrangement whereby joint naval squadrons patrolled the African Coast. For the United States, a war-time measure by the Northern Union during the American Civil War ultimately allowed it to become party to a bilateral treaty similar to the Anglo-French treaty. Thus, one by one, these four States became part of the web of bilateral treaties which Great Britain had been establishing since 1817. Only then, when all maritime powers had agreed to effective means to suppress the slave trade at sea was it possible to look to developing a universal instrument.

(1) France

British abolitionist tendencies were viewed in France with great suspicion. As Daget noted, it was thought the "envied rival was using ostensibly humanitarian means to further its ambitions for political, commercial and indeed military hegemony".[76] France was hesitant to join the British bilateral system, instead dispatching warships to the West African coast where, from 1817 to 1831, they seized 65 suspected slavers and condemned 51 of a known total of 482 French slavers.[77] Great Britain simply bided its time, witnessing the rise and fall of the Bourbon Dynasty, and in the aftermath of the 1830 July Revolution found a French government with abolitionist leanings willing to sign a visitation treaty. Yet the treaties of 1831 and 1833 were very restrictive and detailed in laying down procedures for visit. They were to apply in specific maritime zones off West Africa and surrounding the islands of Cuba, Madagascar and Puerto Rico and mandated that jurisdiction over seized ships fell to the flag State's judiciary; thus no mixed commissions were attached to these agreements.[78] Further, these treaties were opened to accession, an option which was later taken up by Denmark, Haïti, the Hanseatic League (i.e.: Bremen, Gdansk, Hamburg, and Rostock), Sardinia, the Kingdom of the Two Sicilies, and Tuscany. While the acceding States would remain bound by their agreements with Great Britain, France would not.

[76] S Daget, "France, Suppression of the Illegal Trade, and England, 1817–1850" in D Eltis and J Walvin (eds), *The Abolition of the Atlantic Slave Trade: Origins and Effects in Europe, Africa, and the Americas* (University of Wisconsin Press, London, 1981), 194.

[77] Ibid, 200.

[78] For the Treaty of 1831, see *Convention between Great Britain and France, for the more effective suppression of the Traffic in Slaves*, Paris, 30 November 1831, 18 *BFSP* 641; for the Treaty of 1833, see *Supplementary Convention between His Majesty and the King of the French, for the more effectual Suppression of the Traffic in Slaves*, Paris, 22 March 1833, 20 *BFSP* 286.

The mutual right of visitation agreed to by France in the 1831 and 1833 Treaties proved to be contentious, and its application became embroiled in the traditional British-French rivalry which was so much a part of that era. The seizing of two French ships by the Royal Navy in particular—the *Sénégambie* and the *Marabout*—was a rallying point for anti-British sentiment in France.[79] Thus, when Great Britain gained the European Powers' agreement on a multilateral convention, succeeding where it had failed in Vienna in 1815, France acted as the spoiler. In 1841, Austria, France, Great Britain, Prussia, and Russia signed a treaty which assimilated the slave trade at sea with piracy. The United States was the first to make this connection, equating slaving to piracy in its domestic legislation in 1820. Great Britain had also managed to include such a provision as early as 1826 in an agreement with Brazil. The appearance of this provision in the multilateral convention among the European Powers indicated that Great Britain was very close to achieving its foreign policy objective of an established right to visit in international law. The assimilation of slaving to piracy meant that ships involved in the trade would have no right to avail themselves of the protection of any State's flag and as such, could be visited by ships of all States; to use modern terminology, universal jurisdiction was established.[80] The 1841 Convention required domestic courts to assume jurisdiction over seizures; it also provided a right to visit in an expanded rectangular maritime zone which included the east coast of the New World from modern day Florida westward to India, extending southward to a parallel line established just south of Buenos Aires and extending east into the India Ocean.[81] Yet the signing of the 1841 Quintuple Treaty "stirred up a veritable hornets nest in France",[82] in part, for practical reasons—Austria, Prussia, and Russia being land Powers, the provisions only truly applied to France, for geopolitical reasons as Great Britain had recently imposed its will in Egypt and Syria at the expense of France, and also as a result of the actions of the American Ambassador in Paris. The Ambassador, General Lewis Cass, fearing that the United States would be isolated and forced to give up its freedom of the seas, produced an anonymous pamphlet, which "excited violent agitation against" the Treaty.[83] In the end, the 1841 Treaty was not ratified by France, though it did come into

[79] S Daget, *La répression de lat traite des Noirs au XIXe sicècle: L'action des croisières français sur les côtes occidentales de l'Afrique (1817–1850)* (Éditions Karthala, Paris, 1997), 472–475 and 481–486. Daget also considers the historic rivalry as a means of explaining the lack of cooperation proffered by France: "On ne collabore pas avec des Anglais. Parce que cela offre le plaisir de leur compliquer la vie", 599.

[80] See "'Quasi-Piracy': The Fight Against the Slave Trade" in W Grewe, *The Epochs of International Law* (Walter de Gruyter & Co, New York, 2000), 554–569; Rubin, above n 34, 82–137.

[81] Article 2, *Treaty between Great Britain, Austria, France, Prussia, and Russia, for the suppression of the African Slave Trade*, London, 20 December 1841, 30 *BFSP* 273. For a pictorial representation of the zone, see Grewe, ibid, 559.

[82] Miers, above n 47, 17. See also H de Montardy, *La Traite et le Droit International* (V. Giard & E. Brière Paris, 1899), 87–88.

[83] Mathieson, above n 55, 67. See also Lawrence, above n 37, 188.

force for the other four parties, and was later acceded to by Belgium (1848) and Germany (1879).[84]

In 1845, France and Great Britain concluded a ten-year treaty which suspended the treaties of 1831 and 1833 (as between the two parties only), and ended the mutual right to visit to suppress the slave trade. Instead the parties agreed that, in order that their flags "may not, contrary to the law of nations and the laws in force in the 2 countries, be usurped, to cover the Slave Trade, and in order to provide for a more effectual suppression of that traffic", each would station a twenty-six ship naval squadron off the west coast of Africa.[85] These squadrons were to work in concert, within a specific maritime zone, to suppress the trade "jointly or separately, as may be deemed most expedient" but could only visit ships to ascertain if they had a right to fly the *Tricolore* or the Red Ensign on the basis of Instructions which each had communicated to the other party.[86] While these Instructions were modified over time, the original Instructions for the Senior Officers of Her Majesty's Ships and Vessels of 1845 made plain that "[y]ou are not to capture, visit, or in any way interfere with vessels of France," but at the same time "Great Britain, will not allow vessels of other nations to escape visit and examination by merely hoisting a French flag".[87] Thus, the British Instructions continued:

> Accordingly, when from intelligence, which the officer commanding Her Majesty's cruiser may have received, or from the manoeuvres of the vessels, or other sufficient cause, he may have reason to believe that the vessel does not belong to the nation indicated by her colours, he is, if the state of the weather will admit of it, to go a-head of the suspected vessel, after communicating his intention by hailing, and to drop a boat on board of her to ascertain her nationality, without causing her detention.

In seeking to determine the nationality of a ship,

> the officer who boards the stranger is to be instructed merely in the first instance to satisfy himself by the vessel's papers, or other proof, of her nationality; and if she proved really to be a vessel of the nation designated by her colours, and one which he is not authorized to search, he is to lose no time in quitting her, offering to note on the papers of the vessel the cause of his having suspected her nationality, as well as the number of minutes the vessel was detained.

If the ship proved to be flying fraudulent colours the commander of the man-of-war was to "deal with her as he would have been authorized and required to do had she not hoisted a false flag".[88] That is, either as a stateless ship, or on the basis of one of the bilateral treaties which Great Britain had negotiated.

[84] Miers, above n 47, 17.

[85] Article 1, Convention between Great Britain and France, for the Suppression of the Traffic in Slaves, London, 29 May 1845, 33 *BFSP* 4.

[86] Ibid, Article 7.

[87] Ibid, "Annex referred to in Article VII", 14.

[88] Ibid, 14.

The Instructions of 1845 were replaced in 1859. These new Instructions, of which the French and British were mirror versions (like all such Instructions), were much more thorough. The Instructions first set down the principle that by "virtue of the immunity of national flags, no merchant-vessel navigating the high seas is subject to any foreign jurisdiction. A vessel of war cannot therefore visit, detain, arrest, or seize (except under Treaty) any merchant-vessel not recognized as belonging to her own nation." The Instructions went on to state that if a ship failed to hoist its flag, that a "first warning may be given her by firing a blank gun, and should this have no result, a second gun warning may be given her by means of a shotted gun, to be levelled in such a manner as not to [strike] her".[89] If a ship did hoist its flag, it was to be understood that the "man-of-war has no right to exercise the least control over her", unless the nationality could be "seriously called into question". On this basis, after hailing the ship and declaring its intentions, a cruiser could send an officer aboard with the understanding that only an examination of papers would be undertaken: "All inquiry into the nature of the cargo; or the commercial operations of the said ships; in a word, on any other subject save that of their nationality; all search, all visit, are absolutely forbidden".[90] In other words, the right to visit had been narrowed, and separated from the right to *search*.

The final set of modified Instructions, issued in 1867, mirrored the above provisions of the 1859 Instructions, but were more focused, allowing an officer to request only specified papers on board a ship suspected of flying a fraudulent flag. If a ship was deemed to be flying such a flag, the warship then escorted it to the nearest port where a representative of the flag State could determine whether it had a right to fly the flag in question.[91] The 1859 Instructions were crucial to the relationship between France and Great Britain where the suppression of slave trade at sea was concerned, as these Instructions remained in force beyond the nineteenth century, as we shall see.

(2) Portugal and Brazil

As previously noted, Portugal entered into agreements with Great Britain to end the slave trade in principle in 1810 and also to establish the means of doing so (ie creation of a right to visit and the mixed commissions) in 1817. The Convention of 1817 included a Separate Article which later caused much friction between the parties. As an afterthought to the 1817 Convention, a time limit of fifteen years was imposed; establishing that, short of a further agreement, in 1832 Portugal would effectively opt-out

[89] Instructions issued to Commanders of French Ships of War in the "Correspondence respecting the Visit of American Vessels by British Cruisers", *British Sessional Papers*, Vol 34, 1857–1858, 427.

[90] Ibid, 428.

[91] "Instructions as to Vessels under the French Flag", *Documents relatives à la Répression de la Traite des Esclaves publiés en execution des Articles LXXXI et suivants de l'Act Général de Bruxelles*, 1892, 272–274.

of the bilateral system Great Britain was building.[92] Under the terms of the 1817 Convention, in conjunction with an earlier 1815 Treaty, Portugal was allowed to carry on with its slave trade south of the equator provided the traffic was destined for the "actual Dominions of the Crown of Portugal".[93] With the independence of Brazil in 1825, Great Britain considered that the Portuguese trade would come to an end but, because of internal strife in Lisbon, it was not until 1834 that a stable government emerged which could negotiate a new agreement. However, even a government with abolitionist leanings in Lisbon could not concede the end of the trade for fear of losing Angola and Mozambique which benefited from the trade. As Miers writes: "With a weak navy and an empty treasury Portugal was in no position to force the issue. [Palmerston, the Foreign Secretary] tried in vain to negotiate a new treaty and finally took the radical step of having Britain simply assume by Act of Parliament the right to arrest and try Portuguese slavers.... Portugal deeply resented this gross infringement of her sovereignty."[94]

The 1839 Palmerston Act created the legal fiction that Portuguese ships involved in the slave trade should be treated as though they were British, and thus susceptible to capture and trial by British courts.[95] Disregarding the advice proffered by Lord Stowell in *The Le Louis* regarding use of force and acting against international law in seeking an end to the slave trade, Great Britain declared it open season on Portuguese maritime commerce in an attempt to end the Portuguese slave trade. In the leading British international law text of the latter half of the nineteenth century, Phillimore did not truly engage with the issue, stating: "This Act has been vehemently attacked as a violation of International Law; it must of course be considered with reference to the previous Treaties, upon which its authority is found."[96] Indeed, Lord Palmerston sought to justify his actions in Parliament on the grounds that Portugal had not faithfully carried out its previous treaty obligations and was unwilling to come to an agreement on a new treaty. "The conclusion", Palmerston said "which Great Britain draws from hence, is, that she is entitled and compelled to have recourse to her own means, in order to accomplish results which she has a right to obtain."[97] Wilson, acknowledging that Great Britain "contended that her action was distinctly authorized by the terms of existing engagements," declared, having considered the

[92] *Article Separe*, Additional Convention between Great Britain and Portugal, for the prevention of Slave Trade, London, 11 September 1817, 4 *BFSP* 115–116.

[93] Article 2, 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, Vienna, 22 January 1815, 2 *BFSP* 352.

[94] Miers, above n 47, 24.

[95] Act for the Suppression of the Slave Trade, 24 August 1839 (2 & 3 Vict. c. 73), 27 *BFSP* 849.

[96] Phillimore, above n 3, 413.

[97] Enclosure to a Letter from Viscount Palmerston to Lord Howard de Walden, 20 April 1839, 27 *BFSP* 565.

evidence presented by the Foreign Secretary, that "[h]is case at least manifested a care for legality."[98]

Despite the challenge the Palmerston Act posed to established international law, in its quest to abolish the slave trade, in 1845 Great Britain introduced the so-called "Aberdeen Act" aimed at the Brazilian trade. Great Britain's willingness to recognise the independence of Brazil was predicated on a number of conditions, including signature of a treaty which mirrored the Anglo-Portuguese agreement of 1817. In 1845, Brazil invoked the termination of that Treaty of 1826 "without making any alternative suggestions", and Lord Aberdeen then successfully advocated an "Act authorizing the Government to take action against suspected vessels sailing under Brazilian flag on the basis of the 1826 treaty".[99] Aberdeen contended that, as the Treaty of 1826 had assimilated the slave trade with piracy and had established the complete abolition of the Brazilian trade within three years; it granted jurisdiction to British admiralty courts over any vessels engaged in the Brazilian slave-trade.[100] In 1850 Palmerston, who had regained his position as Foreign Secretary, on the basis of the Aberdeen Act, ordered the Royal Navy into the territorial waters and ports of Brazil, where it captured, burned, and sank a number of slave traders.[101]

The Palmerston and Aberdeen Acts, it must be said, had their intended effects. For its part, Portugal agreed to a new treaty with Great Britain in 1842.[102] Brazil by contrast was forced to accept the British interpretation of the 1826 Treaty, which ultimately moved Brazil to put an end to its slave trade through domestic legislation and patrolling its waters. Lord Palmerston was delighted with the Brazilian outcome, noting that "naval operations on the Brazilian coast... had apparently accomplished in a few weeks what diplomatic notes and treaty negotiations had failed to achieve over a period of many years".[103]

Great Britain through gunboat diplomacy was able to achieve the near completion of its bilateral web of treaties aimed at universal suppression of the slave trade. However, there remained one maritime Power outside the bilateral regime. As William Law Mathieson explained in considering the effects of the 1839 and 1845 Acts on slave traders: when they were challenged, they "either hoisted American colours or threw overboard both flag and papers".[104]

[98] H Wilson, "Some Principal Aspects of British Efforts to Crush The African Slave Trade, 1807–1929", (1950) 44 *AJIL* 505, 513–514.

[99] J H W Verzijl, *International Law in Historical Perspective: Nationality and Other Matters Relating to Individuals*, Part V (A Sijthoff, Leyden, 1972), 257.

[100] L Bethell, *The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807–1869*, (CUP, 1970) 263–65. See also An Act of the British Parliament to amend an Act, intitled as an Act to carry into execution a Convention between His Majesty and the Emperor of Brazil, for the Regulation and final Abolition of the African Slave Trade, 8 August 1845 (8 & 9 Vict. c. 122), 34 *BFSP* 1216.

[101] Bethell, ibid, 329–30, 355.

[102] Treaty Between Great Britain and Portugal, for the Suppression of the Traffic in Slaves, Lisbon, 3 July 1842, 30 *BFSP* 527.

[103] Bethell, above n 100, 344.

[104] Mathieson, above n 55, 74.

(3) United States of America

Just as the three recalcitrant States before it, the United States of America saw ulterior motives in British attempts to abolish the slave trade. In 1895, US Ambassador Eugene Schuyler, a career diplomat, wrote that "the real reason" for attempting to end the slave trade "was fairly well concealed under the mask of philanthropy". The Americans further objected to British attempts to gain the right to visit which they consider had been abused during the Napoleonic Wars. Schuyler points to calls by the colonial agent of Trinidad in the British House of Commons in 1810 for the "effectual" as opposed to "nominal" abolition of the slave trade to counter the advantage of the continued flow of slaves to Spanish possessions which "in its effects [was] ruinous to the British colonies.... He appealed to the British Parliament on the part of our own planters, and trusted that effectual steps would yet be taken for remedying so serious an evil" (i.e. unfair trade; not the slave trade).[105] The second reason which Schuyler gives, while also relating to commerce, deals with British attempts at hegemony over the oceans:

> British statesmen soon began to see that, through the right of visitation and search which had been accorded by the treaties with several powers, it might be easy, under the pretext of putting down the slave-trade, to obtain the police of the sea, which once having been granted and made the rule of international law, it would be difficult to take away from them; and this would secure the preponderance of the British navy.[106]

The United States had a further reason for not wanting to cooperate with British attempts to suppress the trade at sea: impressment. As Soulsby wrote in his study focusing on the right to visit and the slave trade in Anglo-American relations:

> Great Britain was the traditional upholder of belligerent rights at sea; she had emerged from the wars the greatest naval power in the world, and in any concerted measures against the slave trade her navy would inevitably take a leading part. Hence it was not remarkable that her European neighbors were not enthusiastic over proposals which promised to strengthen her existing maritime supremacy. Still more serious was the opposition of the United States, which had protested in the war of 1812 against an abuse, as it was considered, of the belligerent right of search—the impressment of seamen....[107]

For the United States, after the War of 1812, the issue of visitation became visceral. It had gone to war against Britain in part because the Royal Navy,

[105] E Schuyler, *American Diplomacy and the Furtherance of Commerce* (Charles Scribner's Sons, New York, 1895), 236–37; H Soulsby, "The Right of Search and the Slave Trade in Anglo-American Relations 1814–1862", *John Hopkins University Studies in Historical and Political Science Collection*, Series 51(2), 1933, 121 at 134.

[106] Schuyler, ibid, 239. See also W Beach Lawrence, *Visitation and Search; or, An Historical Sketch of the British Claim to Exercise a Maritime Police over the Vessels of All Nations, in Peace as well as War, with An Inquiry into the Expediency of Terminating the Eight Article of the Ashburton Treaty* (Little, Brown & Co, Boston, 1858), 16. Lawrence was the editor of *Wheaton's Elements of International Law*, the leading American international law text of the era.

[107] Soulsby, above n 105, 8.

during the Napoleonic Wars, had impressed sailors who were American citizens under the pretext of a belligerent right to visit neutral ships to check for contraband.[108] Although, the United States President, James Madison, cited Great Britain's support of a new Indian War and the use of "a secret agent to subvert the Union," his main reason for war was the conduct of the British Navy. The United States took issue with the violation of its territorial waters by the Royal Navy, the establishment of "illegal blockades," and importantly, in the eyes of the general public, the impressing of American seamen which, during the period of 1803–1812, was estimated to be in the range of six thousand American citizens.[109] To what extent this issue touched a raw nerve with the United States is made plain by the conversation in the early 1820s between Stratford Canning, the British Ambassador in Washington and John Quincy Adams, the US Secretary of State: "Canning had inquired if he could conceive of a more atrocious evil than the slave trade, to which Adams replied; 'Yes; admitting the right of search by foreign officers of our vessels upon the sea in time of peace; for that would be making slaves of ourselves'."[110] Although Article 10 of the Treaty of Ghent, which settled the War of 1812, made the following declaration, it made no mention regarding either the issues of visitation or impressment:

> Whereas the Traffic in Slaves is irreconcilable with the principles of humanity and Justice, and whereas both His Majesty and the United States are desirous of continuing their efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavours to accomplish so desirable an object.[111]

In 1818 John Quincy Adams laid out the United States' objections to allowing British ships the right to visit American merchant vessels in time of peace as being directly related to its wartime abuse of its status as a neutral during the Napoleonic Wars:

> The United States have never disputed the belligerent right of search as required and universally practised conformably to the laws of nations. They have disputed the right of belligerents under *color* of the right of search for contraband, to seize and carry away *men*, at the discretion of the boarding officers, without trial and without appeal; men, not as contraband of war, or belonging to the enemy, but as the subjects, real or pretended, of the belligerent himself, and to

[108] In 1821, US Secretary of State John Quincy Adams noted that "the United States had very recently issued from a war with Great Britain, principally waged in resistance to a practice of searching neutral merchant vessels for men in time of war, exercised by Great Britain, as the United States deem, in violation of the law of nations". See J Bassett Moore, *A Digest of International Law*, Vol. 2 (Govt Print Office, Washington, 1906), 919.

[109] D Hickey, *The War of 1812: A Forgotten Conflict* (University of Illinois, Urbana,1989), 18–24. More specifically, see J Fulton Zimmerman, *Impressment of American Seamen* (Columbia University Press, New York, 1925).

[110] Soulsby, above n 105, 18.

[111] Article 10, Treaty of Peace and Amity between His Britannic Majesty and the United States of America, 4 December 1814, 24 December 1814, Ghent, 2 *BFSP* 364.

be used by him against the enemy. It is the fundamental abuse of the right of search, for the purpose never recognised or admitted by the laws of nations, purposes in their practical operation of the greatest oppression and most crying injustice, that them against assenting to the extension in time of peace of a right of search which experience has shown to be liable to such gross perversion in time of war.[112]

Adams made it plain, in instructions to his Ambassador in London, that the possibility of entering into a treaty regarding the suppression of the slave trade with Great Britain was, for the foreseeable future, impossible:

That the admission of a right in the officers of foreign ships-of-war to enter and search the vessels of the United States in time of peace, under any circumstances whatever, would meet with universal repugnance in the public opinion of this country; that there would be no prospect of a ratification, by advice and consent of the Senate, to any stipulations of that nature; that the search by foreign officers, even in time of war is so obnoxious to the feelings and recollections of this country, that nothing could reconcile them to the extension of it, however qualified or restricted, to a time of peace.[113]

However, by 1821, Adams proposed a course to Stratford Canning which ultimately broke the impasse between the two States and led to the signing of a treaty in 1824:

The expedient proposal on the part of the United States of keeping cruisers of their own constantly upon the coast where the traffic is carried on, with instructions to cooperate by good offices and by the mutual communications of information with the cruisers of other powers stationed and instructed to the attainment of the same end, appears in its own nature as well as to experience so far as it has abided that test, better adapted to the suppression of the traffic than that of the British Government, which makes the officers of one nation the executors of the laws of another.[114]

In 1820, the United States House of Representatives declared that trading in African slaves by American citizens should be assimilated to the concept of piracy and made punishable by death. Although the slave trade was never accepted as piracy in international law, this link found its way into the proposed 1824 Anglo-American Treaty.[115] The draft Convention allowed the cruisers of each States to visit and search each other's vessels "on the coasts of Africa, of America, and of West Indies".[116] It stipulated that the captain and crew were to proceed against seized vessels and crews "as Pirates involved in the African Slave Trade" and try them

[112] Soulsby, above n 105. Emphasis in the original.

[113] Ibid. [114] Moore, above n 108, 921.

[115] Moore writes that the declaration was meant "to enable the United States to join in the movement then on foot to assimilate the slave trade to piracy, both in the measure of its punishment and the method of its repression. This movement, however, did not succeed, owing to the opposition to opening the way to the establishment of the practice of visitation and search in time of peace". ibid, 922.

[116] Article 1, Convention with Great Britain, 12 *BFSP* 839.

in the courts of either State.[117] The Convention, however, did not come into force as the United States Congress, while accepting the Convention in general terms, sought to amend it by inserting a provision allowing for denunciation of the treaty on six months notice, and by deleting the word "America" from the above noted phrase. The latter provision was "deemed insuperable" to Great Britain which then declared that it was unable to ratify the Convention as modified by the United States.[118] In 1834, the same stumbling block appeared as Great Britain sought to convince the United States to accede to the French treaties of 1831 and 1833. The United States President declined to bring the question before the legislature, as the British Ambassador in Washington had made plain "that the right of search would be extended to the coasts of the United States".[119]

Although the American Ambassador to Paris was successful in preventing France from consenting to the 1841 Quintuple Treaty, the United States, by this time, found itself isolated by the growing number of British bilateral treaties. As a means of deflecting this mounting pressure, the United States agreed, in the 1842 Webster-Ashburton Treaty, to maintain a naval presence of the coast of Africa to suppress the trade, it being understood that "the said squadrons [are] to be independent of each other".[120] United States President John Tyler noted that the provisions removed "all pretext on the part of others for violating the immunities of the American flag upon the seas, as they exist and are defined by the law of nations".[121] Great Britain, having abandoned its attempt to assimilate the slave trade with piracy, changed tack and sought to emphasise the innovation developed in the Quintuple Treaty: the separation of the right to visit from the right to search foreign ships on the high seas, in peacetime, to suppress the slave trade. Great Britain sought to advocate that while there did not exist a right to search ships on the high seas, there did exist a right to approach and visit a ship to inquire, through an inspection of its papers, whether a ship's nationality corresponded to the flag it flew. As the United States and France remained the only two States not party to the British bilateral treaty regime, it was logical that slave ships would gravitate towards flying their flags to avoid capture. By advocating this new understanding of the concept of the "right to visit", Great Britain hoped to close the loophole and include all States in its bilateral treaty regime. Thus, the British Foreign Secretary took issue with the United States President's address and noted that the right to visit had not been part of the discussion leading to the Webster-Ashburton Treaty, nor had

[117] Article 7, ibid, 842.

[118] Moore, above n 108, 926.

[119] Ibid, 927.

[120] Article 8, Treaty between Great Britain and The United States, to settle and define the Boundaries between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the final Suppression of the African Slave Trade; and for the giving up of Criminals, fugitive from Justice, in certain Cases, Washington, 9 August 1842, 30 *BFSP* 365.

[121] Moore, above n 108, 931.

any concession on the issue been made by Great Britain. Aberdeen went on to say:

The President may be assured, that Great Britain will always respect the just claims of The United States. We make no pretension to interfere in any manner whatever, either by detention, visit, or search, with vessels of The United States, known or believed to be such. But we still maintain, and will exercise, when necessary, our right to ascertain the genuineness of any flag which a suspected vessel may bear.[122]

Sir Robert Phillimore, "one of the most ardent champions" of this new right of visit advocated by Great Britain[123] noted that:

The question of the *Right to Visit* has been a matter of sore contention between Great Britain and the North American United States; the latter refuse to distinguish it from the *Right to Search*, which, they justly say, is an exclusively *belligerent* Right. The British Government, on the other hand, denies the identity of the two Rights, and claims merely to ascertain the nationality of ships hosting, under suspicious circumstances, the flag of the United States, alleging that when once that nationality is ascertained to be that of the United States, they immediately release whatever be her cargo or destination, the vessel; and that it is manifest, that if the mere hoisting of a particular ensign is to supersede all inquiry, the Slave Trade may be carried out with impunity.[124]

The Secretary of State Daniel Webster addressed the issue in a letter to the British Ambassador in Washington, stating that the Government of the United States:

maintains that there is no such well-known and acknowledged, or indeed, any broad and genuine difference between what has been usually called visit, and what has been usually called search; that the right to visit, to be effectual, must come in the end to include search; and thus to exercise, in peace an authority which the law of nations only allows in time of war. If such a well-known distinction exists, where are the proofs of it? What writers of authority on the public law, what adjudications in Courts of Admiralty, what public Treaties recognize it? No such recognition has presented itself to the Government of The United States; but, on the contrary, it understands that public writers, courts of law, and solemn treaties have for 2 centuries, used the word, 'visit' and 'search' in the same manner.[125]

The Secretary of State questioned the approach of the British, noting that the Foreign Secretary had indicated that in exercising its right, if errors were committed, prompt reparations would be forthcoming. Webster indicates the apparent flaw in such an argument as the "general rule of law certainly is, that in the proper and prudent exercise of our

[122] The Earl of Aberdeen to Mr. Fox [United States Ambassador to the Court of St. James], 18 January 1843, 32 *BFSP* 444.

[123] L Gessner, *Le Droit des Neutres sur mer* (Stilke et van Muyden, Berlin, 1865), 287.

[124] R Phillimore, *Commentaries upon International Law* (W Benning, London, 1854), 326. Emphasis in the original.

[125] Mr Webster to Mr Evertt, 28 March 1843, 32 *BFSP* 466.

own rights, no one is answerable for undersigned injuries." As such, the British approach to the right to visit "implies, at least in its general interpretation, the commission of some wrongful act."[126] Webster concluded by noting:

> On the whole, the Government of The United States, while it has not conceded a mutual right to visit or search, as has been done by the parties to the Quintuple Treaty of December 1841, does not admit that by the law and practice of nations, there is any such thing as a right to visit, distinguished, by well known rules and definition, for the right of search.[127]

Although the United States dispatched a squadron to the African coast in 1843, the British Instructions to its Naval Officers issued in 1844 were almost verbatim those cited earlier with reference to France, that is: "it is no part of their duty to capture or visit, or in any way interfere with vessels of the United States, whether those vessels shall have Slaves on board or not". But, that, "most, assuredly, Great Britain, never will allow vessels of other nations to escape visit and examination by merely hoisting an United States' Flag".[128] In essence a stalemate ensued and the United States was left to challenge by diplomatic means the continuing visits by British warships to inquire whether ships flying the Stars and Stripes were authorised to do so. This diplomatic impasse became acute in 1858, the year following the appointment of General Lewis Cass—who it will be recalled caused France to decline to ratify the 1841 Quintuple Treaty—as United States Secretary of State; and as a result of the Royal Navy's actions off the coast of Cuba, where the slave trade persisted. As Schuyler wrote, noting that Cass had brought to the attention of the United States legislature incidents of British boarding of American ships in the Caribbean which, in turn, had prompted the United States Congress to approve the dispatch of a naval force to protect its maritime commerce in the region: "This looked very much like war."[129] Secretary of State Cass, despite his apparent belligerence, opened a diplomatic window to allow for a compromise: if Great Britain renounced the notion of a *right* to visit to ascertain the propriety of hoisted American flags, the United States would admit that Great Britain could, in suspicious circumstances, visit ships flying American colours to ascertain their right to do so:

> The immunity of their merchant-vessels depends upon the rights of The United States, as one of the independent Powers of the world, and not upon

[126] Ibid, 467. [127] Ibid, 470.

[128] British Instructions for the Senior Officers of Her Majesty's Ships and Vessels on the West Coast of Africa, with respect to the Treaty with the United States of America, signed at Washington, 9 August, 1842, *Instructions for the Guidance of Her Majesty's Naval Officers employed in the Suppression of the Slave Trade*, 1844, 16–17. In 1858, the British Commodore of the African Squadron pointed to the fact that the American flag was being used to harbour slave ships, as he "complained to the Admiralty of 'the shameful prostitution of the American flag, for under that ensign alone is the Slave Trade now conducted'". See Lloyd, above n 27, 56.

[129] Schuyler, above n 105, 261.

the purposes or motives of the foreign officers by whom it is violated. A merchant-vessel upon the high seas is protected by her national character. He who forcibly enters her, does so upon his own responsibility. Undoubtedly, if a vessel assumes a national character to which she is not entitled, and is sailing under false colours, she cannot be protected by the assumption of a nationality to which she has not claimed. As the identity of a person must be determined by the officer bearing a process of his arrest, and determined at the risk of such officer, so must the national identity of a vessel be determined, at a like hazard to him who, doubting the flag she displays, search her to ascertain her true character. There, no doubt, may be circumstances which would go far to modify the complaints a nation would have a right to make for such a violation of its sovereignty.

Cass then provided his diplomatic concession:

If the boarding office had just grounds for suspicion, and deported himself with propriety in the performance of his task, doing no injury and peaceably retiring when satisfied of his error, no nation would make such an act the subject of serious reclamation. It is one thing to do a deed avowedly illegal, and excuse it by the attending circumstances; and it is another and quite different thing to claim a right of action and the right also of determining when, and how, and to what extent, it shall be exercised. And this is no barren distinction, so far as the interest of this country is involved, but it is closely connected with an object dear to the American people—the freedom of their citizens upon the great highway of the world.[130]

In response the British Foreign Secretary, the Earl of Malmesbury, made known through his Ambassador in Washington that Great Britain was willing to concede the point: "Her Majesty's Government recognize as sound those principles of international law which have been laid down by General Cass in his note." The Foreign Secretary stated that "Her Majesty's Government agree entirely in this view of the case, and the question therefore becomes one solely of discretion on the part of acting officers". As a result, it was proposed that as the burden of the question fell to each officer's discretion which "is one extremely dangerous to entrust, and onerous to bear...,"[131] the parties should negotiate suitable instruction to be give to their naval commanders. In the meantime, however, Great Britain,

anxious to remove all possible repetition of the acts which appear to have caused so much excitement in the United States, and which might, if repeated at this moment be detriment to the good relations of the two countries, have set further orders to the officers commanding the Cuban squadron to discontinue the search of any vessels of the United States until some agreement, in the sense I have pointed out shall be made.[132]

[130] General Cass to Lord Napier, 10 April 1858, 50 *BFSP* 715. Also see General Cass to Mr Dallas, 23 February 1859, 49 *BFSP* 1121.

[131] Earl of Malmesbury to Lord Napier, 11 June 1858, 50 *BFSP* 738 and 739.

[132] Ibid, 740.

The American Ambassador in London was informed that the "President desires you would express to Lord Malmesbury his gratification at this satisfactory termination of the controversy which has given so much trouble to our respective Governments, concerning the claim of a right in behalf of a British cruiser in time of peace to search or visit American merchant vessels upon the ocean."[133] Having settled its differences with the United States, Great Britain sought to close the loophole which allowed slave ships to avoid British capture by hoisting either the American or French flag. The negotiation of Instructions with France, which might then be adopted by the United States, would ensure that no ship, in suspicious situations, could avoid being visited to ascertain the propriety of the flag flown. These negotiations, started in February 1859, were concluded successfully in May of that same year.[134]

The United States, in the throes of a civil war that centred on slavery, shifted policy. In 1863, the United States of America (i.e: the Northern Union of States) concluded a bilateral treaty with Great Britain to suppress the slave trade to gain British support for its conflict with the Southern Confederacy.[135] The attempted equation of the slave trade with piracy, at the core of the 1824 draft Convention, was dropped from the 1863 agreement. Much like the 1845 Anglo-French Convention, the 1863 Anglo-American Treaty required each State to dispatch a naval squadron to the West African coast. However, unlike France, the United States agreed to patrol a differently demarcated maritime zone, one which ran contiguous to the African coast to a distance of two hundred miles. The United States further agreed to the establishment of mixed commissions, though these never heard a case and were superseded by a 1870 agreement that transferred jurisdiction to each State's respective domestic courts.[136]

By negotiation and coercion Great Britain had, by the mid-1860s, created bilaterally what it had failed to achieve multilaterally during the early eighteen hundreds. The four recalcitrant States had, one by one, been integrated into the British regime of slave trade suppression. By the time the United States had agreed to a bilateral treaty however, the tide had clearly shifted in favour of abolition. According to Klein, the 1860s was a turning point as "the pressure that led to the abolition of the trade now shifted to attacking the institution of slavery itself".[137] The forced migration of enslaved African labours was supplanted throughout the Western Hemisphere in the late nineteenth century by European free labour in what was to be the "great age of immigration,"[138] and more

[133] General Cass to Mr Dallas, 30 June 1858, 50 *BFSP* 747 and 748.

[134] General Cass to Count de Sartiges, 12 May 1859, 50 *BFSP* 796.

[135] Soulsby, above n 105, 174.

[136] Treaty between Great Britain and the United States, for the Suppression of the African Slave Trade, 7 April 1862, Washington, 52 *BFSP* 50.

[137] Klein, above n 12, 202.

[138] Ibid. David Brion Davis goes further, pointing out that "there can be no doubt that black slave labour was essential in creating and developing the 'original' New World that began by the 1840s to attract so many millions of European immigrants". See *Inhuman Bondage* (above n 18), 80.

importantly, by large numbers of indentured labourers from Asia—primarily from China and India—who took up employment side by side with newly freed slaves.

In essence, therefore, Great Britain had achieved the primary element of its objective by the 1870s: it had managed to totally abolish the Atlantic Slave Trade. For all the fears expressed by the four recalcitrant States, Great Britain had persisted in moving forward its abolitionist agenda when British hegemony over maritime commerce was no longer at issue, when the policing of the seas had become a concern of the past and when New World slave products no longer challenged British goods. While, throughout the nineteenth century, the suppression of the slave trade remained aligned with Britain's strategic imperial interests, it remained true that within Britain, there persisted popular and philanthropic support for the ending of slavery and the slave trade. This required, for much of the nineteenth century, the British Foreign Office to continuously push for completion of its bilateral network of treaties to suppress the slave trade.

While Great Britain had managed to end the Atlantic Slave Trade, its attention now shifted to the east coast of Africa where the Oriental Slave Trade came into play. As a result of the persistence in fighting the slave trade and slavery, Great Britain finally gained in 1890 what it had failed to achieved nearly eighty years previously: a universal right, established by treaty and accepted as international law, to visit ships on the high seas to suppress the slave trade.

The Universal Outlawing of the Slave Trade

In their quest for what historians termed the "Second European Empires", the ideology used to justify usurpation of land shifted once more.[139] Having colonised the New World, European Powers embarked on a civilizing mission. That mission would descend into an all-out "scramble" for Africa by the 1880s. While much of the colonization of the New World had taken place under the banner of "Gold, Glory and God", the British missionary, David Livingstone, made it known throughout Europe that in Africa "slave raiding and trading were devastating large areas, and his appeal to bring Christianity, commerce, and civilization to the heart of the continent" did not fall on deaf ears.[140] A recurring theme throughout much of this period was the European demand to end the slave trade, not only at sea, but on land on the African Continent. Thus, in the latter part of the nineteenth century, as Africa was opened to the pursuit of Empire, European States concluded treaties with local African elite mandating the

[139] For 'Second European Empires' see A Pagden, *Lords of all the World; Ideologies of Empire in Spain, Britain and France c.1500–c.1800* (Yale University Press, New Haven, 1995), 2.

[140] S Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (Altiamira Press, Walnut Creek, 2003), 20.

suppression of the slave trade. Great Britain became party to more than a hundred such agreements "which eventually covered the whole coast from which slaves were exported".[141] During this period, it was clear that the suppression of slavery and the slave trade had become part of the discourse of international relations and, though it had been championed by Great Britain, other States with holdings in Africa—France, Germany, Italy, and Portugal (and the private Congolese State awarded to King Leopold of Belgium in 1885)—were agreeable to its inclusion on the agenda of international conferences and in international instruments.

When a dispute arose over an Anglo-Portuguese treaty regarding control of the mouth of the Congo River in 1884, the German Chancellor, Otto von Bismarck, proposed an international conference to settle the question. The Berlin Conference, which ultimately provided for the free navigation of the Congo and, more generally, a framework for the effective occupation of the African coast, also found on its agenda a British proposal which called for universal jurisdiction to be established over the slave trade.[142] The proposal was in the form of a declaration that the slave trade was "a crime against the Law of Nations". The draft Declaration read in part that: "The Slave Trade is henceforth a crime prohibited by the Law of Nations, and cognizable by the tribunals of all civilized nations whatever the nationality of the accused."[143] This proposal, however, did not find favour with the fifteen States gathering in Berlin as they were unwilling to commit to a pronouncement which they considered to raise unforeseeable consequences. Instead they accepted a general declaration that the slave trade was indeed prohibited by international law. The Declaration Relative to the Slave Trade, which emerged from the 1885 General Act of the Conference of Berlin, reads:

> Seeing the trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations, which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights

[141] Miers, above n 47, 46. Treaties were concluded by Great Britain with the following regions of Africa up to the 1889–1890 Brussels Conference: *Central Africa*: Gando, Sokoto; *East Africa*: Brava (Somalia), Comoro, Eesa Somal, Habr-Awal, Habr-Gerhajis, Habr-Toljaala, Mohilla, Soomalees (*sic*), Tajowra, Warsangali, Zaila; but primarily from *West Africa*: Abbeokuta, Abo-den-Arfo, Aboh, Acassa, Adaffie, Adinnar Cooma, Afflowhoo, Aghwey, Angiana, Badagry, Baddiboo, Bagroo River, Batanga, Bereira, Biafra, Bimbia, Biombo, Blockouse, Bonney, Boom River, Bulola, Bussama, Cabenda, Cagnabac, Calabar, Cameroons, Camma, Cantalicunda, Cape Lopez, Cape Mount, Cartabar, Chacoonda, Congo, Cumbo, Dahomey, Dalu Mahdoo, Dobacconda, Drewin, Egarra, Epe, Fouricaria, Gallinas, Garraway River, Goom Corkway, Grand Bereby, Grand Lahou, Grand Popoe, Grand Sesters, Ivroy Bay, Joboo, Jack Jaques, Joug River, Kambia, Kinsembo, Kittam, Lagos, Little Booton, Little Popoe, Lucalla, Macbatee, Malghea, Malimba, Manna, Monney, Maricaryah, Naloes, New Calabar, New Cestos, Nyanibantang, Okeodan, Old Town (Old Calabar), Omitska, Otanda, Pocrah, Porto Novo, Qua Plantations, Nio Nunez, Pongas, Ro-Woolah, St. Andrew, St. Antonio, Samo, Samoah, Sherbro, Small Scarcies River, Sugury, Soombia, Zanga Tanga. See *British and Foreign State Papers*, General Index, Volumes 64 and 80.

[142] See H Wesseling, *Divide and Rule: The Partition of Africa 1880–1914* (Praeger, Westport, 1996), 113–119.

[143] Miers, above n 47, 171–72.

or influence in the territories forming the Conventional basin of the Congo declare that these territories may not serve as a market or means of transit for the trade in slaves, or whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it.[144]

Great Britain was satisfied with the outcome of the Berlin Conference and saw little reason to push States further with regard to the suppression of the slave trade, though the trade on the east coast of Africa, in places such as Zanzibar and Pemba, was starting to raise difficulties with other European Powers. It was at this point, shortly after the end of Berlin Conference, that an ally to the anti-slavery cause emerged from the most unlikely of sources, in the Roman Catholic Archbishop of Algiers, Cardinal Lavigerie. In what can only be termed a "one-man crusade", Lavigerie gained the support of the Pope, and moved to establish a number of anti-slavery societies throughout Europe and aroused public sentiment by describing the horrors of the slave trade on the African continent. The long established British and Foreign Anti-Slavery Society noted that in the "Summer of 1888 the eloquent orations of Cardinal Lavigerie created an extraordinary impression on the Continent". Likewise his visit to London "aroused some of the dormant enthusiasm of the people of England, and a Resolution, unanimously passed at the meeting was forwarded to the Foreign Minister which suggested that a Conference of the Powers might be convened".[145] Such a conference, Miers notes, was "infinitely more practical and less hazardous" than Lavigerie's other proposal, which was to establish a religio-military order modelled on the Templers or the Knights of Malta to take the battle to Africa in a crusade to suppress the trade.[146]

Lord Salisbury, the then British Foreign Minister, saw the suggested conference as a means of addressing the awkward situation which had developed as a result of slave trading emanating from Zanzibar, a sultanate under the protection of Great Britain. At the request of Germany, Great Britain, along with Italy, had agreed to blockade Zanzibar to "restore the Sultan's authority and prevent the export of slaves and the import of arms [used by slave raiders]".[147] While the blockade was effective, it "highlighted the need for an international treaty against the slave

[144] Article 9, *General Act of the Conference of Berlin, relative to the Development of Trade and Civilization in Africa; the free navigation of the River Congo, Niger, etc.; the Suppression of the Slave Trade by Sea and Land; the occupation of Territory on the African Coast, etc.* 26 February 1885. Sir E Hertslet, *The Map of Africa by Treaty*, Vol. 2 (Routledge, London, 1967), 474.

[145] British and Foreign Anti-Slavery Society, *The Slave-Trade Conference at Brussels and the British and Foreign Anti-Slavery Society*, 1890, 6.

[146] "Sur les anciens orders religieux-militaires et la possibilité d'une association du même gendre pour l'abolition de l'esclavage, dans les contrées Barbares de l'Afrique" in Cardinal Lavigerie, *Documents sur la Foundation de l'oeuvre Antiescalvagiste* (Belin et fils, St Cloud, 1889), 712–15.

[147] Miers, above n 47, 211.

trade".[148] Thus, using the momentum created by Lavigerie, Salisbury requested his ambassador in Brussels, Lord Vivian, to sound out the possibility that King Leopold host an international conference to deal with the slave trade. On 18 November 1889, the seventeen invited States met in Belgium to inaugurate the Brussels Conference to discuss the end of the slave trade by land and sea.[149]

The 1889–1890 Brussels Conference

While the General Act of the Brussels Conference dealt with the suppression of the African slave trade on land in countries of destination, it also established an arms agreement and restricted the traffic in spirits. However, the suppression of the slave trade at sea, it was said, was the "most awaited and most delicate point"[150] to be considered; it was, in fact, the point upon which the Conference hinged.[151] Vivian, having been named plenipotentiary, spelled out the British position on the second day of the Conference:

> The Congresses of Vienna and Verona had established the general principles; the Berlin Conference recognized and applied these principles to the territory forming the conventional basin of the Congo. The Powers, therefore, had formally accepted these principles, and the object of this Conference, such as Her Majesty's Government understands it, is to establish efficient measures to put into practice these principles and to substitute individual action for collective action.

Vivian then turned to the suppression of the slave trade at sea, calling for a universal instrument to encompass the established bilateral regime for the suppression of the slave trade:

> It is the opinion of Her Majesty's Government that the suppression of the maritime trade is the object upon which the efforts of this Conference should be primarily focused .... It may be possible, perhaps, to come to a unanimous international understanding, which, while respecting the right and interests of the Powers not yet linked by the Treaties, to incorporate and even amplify the provisions of the existing Treaties, which it might well be substituted for.[152]

The British delegation took the initiative and presented a proposal which called for the creation of a *cordon sanitaire* around "the most dreadful

[148] Ibid, 219.

[149] The following States attended the 1889–1890 Brussels Conference: Austria, Belgium, Congo Free State, Denmark, France, Germany, Great Britain, Italy, The Netherlands, Persia, Portugal, Russia, Spain, Sweden and Norway, Turkey, the United States of America, and Zanzibar.

[150] de Montardy, above n 82, 141.

[151] H Queneuil, *La Conférence de Bruxelles et ses Résultats* (Larose et Tenin, Paris, 1907), 132.

[152] Protocol 2, Protocoles de Séances Plénieres de la Conférence de Bruxelles, 19 November 1889, *Actes de la Conférence de Bruxelles (1889–1890)*, (Hayez, Brussels, 1890), 21 and 22. All direct quotations which have been taken from French language sources have been translated by the Author.

pest which has ever gnawed on humanity".[153] Within this zone, which would extend south from Port Suez on both coasts of the Red Sea and into the Persian Gulf and follow the African coast southwards, extending to the far extremities of Mozambique, the British proposal called for the right to detain "vessels directly or indirectly suspected of trafficking in Slaves" both in internal and international waters with a view toward bringing them to be judged before mixed tribunals.[154] Yet, as the British and Foreign Anti-Slavery Society related to its readers, where the right to visitation was at issue, the "French have more or less taken the place of the Americans in this curious controversy".[155] The age-old Anglo-French rivalry was once again rearing its head, this time directly linked to the African colonial ambitions of the Powers; anti-British sentiment in France remained high—and *vice versa*—throughout this period (from 1881 and the 'Easter Question' to Fashoda in 1891).[156] The Anti-Slavery Society of France foreshadowed French resistance to the right to visit at Brussels, (and later in Paris) in 1888, stating that "we believe it is utterly impossible to obtain the consent of Parliamentary and public opinion in France, to the right for English cruisers to search French boats sailing under the national flag".[157] In a Declaration made on 20 December 1889, the French representatives in Brussels stated categorically that if the right to visit was placed on the agenda, they were not authorized to participate in such discussions. Acknowledging that the British proposal had not mentioned a right to visit *per se*, the French plenipotentiaries indicated they were willing to discuss the issue of the suppression of the slave trade at sea and put forward a general sketch of a forthcoming proposal, with the understanding that they would produce a more substantial version in the new year. This French diplomatic declaration pointed to the 1867 Anglo-French Instructions and noted that it would submit a proposal which would provide, *inter alia*, for the verification of the nationality of a boat sailing in the zone "contaminated by the exercising of the trade".[158]

The French counter-proposal was made on 20 January 1890. It provided for a zone enlarged to include the west coast of Africa, and laid down the principle that ships in the zone could only be searched by their own navies, with an exception where the right to fly a flag was in question. The counter-proposal, having laid down the manner in which a ship could be visited, then explained that fraudulent ships would be brought to a port where an international tribunal would be located.

[153] Annex 2, Protocol 10, "Project présenté par les Plénipotentiaries de la Grande-Bretagne", 28 November 1889, *Actes de la Conférence de Bruxelles (1889–1890)* (Hayez, Brussels, 1890), 149.

[154] Ibid, p. 150.

[155] British and Foreign Anti-Slavery Society, *The Slave-Trade Conference at Brussels and the British and Foreign Anti-Slavery Society*, 1890, 27.

[156] See, generally, Wesseling, above n 142.

[157] British and Foreign Anti-Slavery Society, above n 155, 20.

[158] Annex 3, Protocol 10, "Déclaration des Plénipotentiaires de France", 20 December 1889, *Actes de la Conférence de Bruxelles (1889–1890)* (Hayez, Brussels, 1890), 153.

The supposed flag state's Consul would then undertake an investigation. If there was a difference of opinion between the Captain of the cruiser and the Consul, the international tribunal would consider the case. While the status of the seized ship would be considered by this mixed tribunal, its Captain and crew were to be tried by their respective municipal systems. Finally, the French counter-proposal called for the creation of an international bureau which would act as a registry for ships in the zone.[159]

On 6 February 1890, the British Delegation responded to the French counter-proposal in a positive manner, saying that it "merited serious attention" and "could probably serve as the basis for effective preventative measures which would receive general applicability in the zone where the trade is taking place".[160] However, it noted with regret that the French Government would not accept "under any circumstances, the reciprocal right to monitor sailing ships in the trade zone". For its part the British Delegation refused to discuss "proposals which derogated, in any way, from the treaties to which the Queen is party, or the rights which flow from them". The Declaration said that Her Majesty's Government wanted to go as far as possible to reach an understanding with all Powers, and thus was willing to concede that the "right to visit established in the existing treaties be limited to the zone determined [during the Conference], and to limit the exercise of this right to ships of less than 500 tons [ie tantamount to 'native' African vessels], as long as this final condition, related to the dimensions of vessels, be submitted to revision if experience shows that a change was necessary." The Declaration went on to say that Great Britain "could not make these great concessions if the Conference, for its part, did not consent to adopt the strict regulations suggested in the French Counter-proposal, with a look to preventing, within the limits of the zone, the usurpation or abuse of flags of all the signatory States".[161] The British Declaration conceded that it probably made sense to drop the idea of an international tribunal as its bilateral network already had an established network of mixed commissions attached to it. Finally, the Declaration expressed itself in favour of an international bureau as proposed by France.

The Parties having made plain their positions, it was left to eminent international lawyer, Fyodor de Martens—best known today for penning the so-called "Martens Clause"—to step into the breach, though hesitantly, to mediate a solution. Martens benefited from the fact that, as a Russian plenipotentiary, he was seen as a disinterested party where

[159] Annex 4, Protocol 10, "Project de Traité et projet de Règlement présentés par les Pléinpotentiaires de France" *Actes de la Conférence de Bruxelles (1889–1890)* (Hayez, Brussels, 1890), 154.

[160] Annex 5, Protocol 10, "Déclaration des Plénipotentiaires de la Grande-Bretagne", 6 February 1890, *Actes de la Conférence de Bruxelles (1889–1890)* (Hayez, Brussels, 1890), 159.

[161] Ibid, 160.

issues of slavery in Africa and the slave trade at sea were concerned.[162] Martens prepared a report and draft articles which later were "entered into the General Act without major modification".[163] In his Report, Martens stated that the more he studied the British and French proposals, the "more I became convinced that there did not exist between them any fundamental contradictions."[164] He acknowledged Great Britain's century worth of experience in suppressing the slave trade at sea; but believed that the conditions in which the trade persisted had changed. The trade was now exclusively taking place in East Africa, by means of indigenous boats, in a region where nearly the entirety of the coast was either under the sovereignty or the protection of European Powers. There was a real possibility for the Powers to work collectively on land and at sea to end the slave trade. With this in mind, Martens laid out draft articles that would become part of the General Act, which took into consideration the various components of the British and French proposals.[165] A contemporary French jurist, Henry Queneuil, wrote of Martens' mediation work: "thus the different principles found themselves reconciled without having compromised the efficacy of the repression of the slave trade by sea. At the same time, a latent and disquieting conflict between France and Great Britain which had existed for fifty years was put to rest".[166]

The provisions regarding the Repression of the Slave Trade at Sea are contained in Chapter III of the General Act of the Brussels Conference relative to the African Slave Trade, signed on 2 July 1890.

The General Act defined a maritime zone which centred on the high seas contiguous to the East Coast of Africa and included both the Red Sea and the Persian Gulf. It acknowledged a right to visit, search, and detain, in established treaties and that these treaties remained in force "in so far as they are not modified by the present General Act".[167] The two major British concessions were also included, namely that the States agreed that all such rights to visit could only transpire in the newly established maritime zone, and only with respect to "vessels of less than 500 tons burthen."[168]

[162] For consideration of the 'Martens Clause' see Antonio Cassese, "Martens Clause Half a Loaf or Simply Pie in the Sky?" (2000) 11 *European Journal of International Law* 187–216.

[163] Queneuil, above n 151, 136.

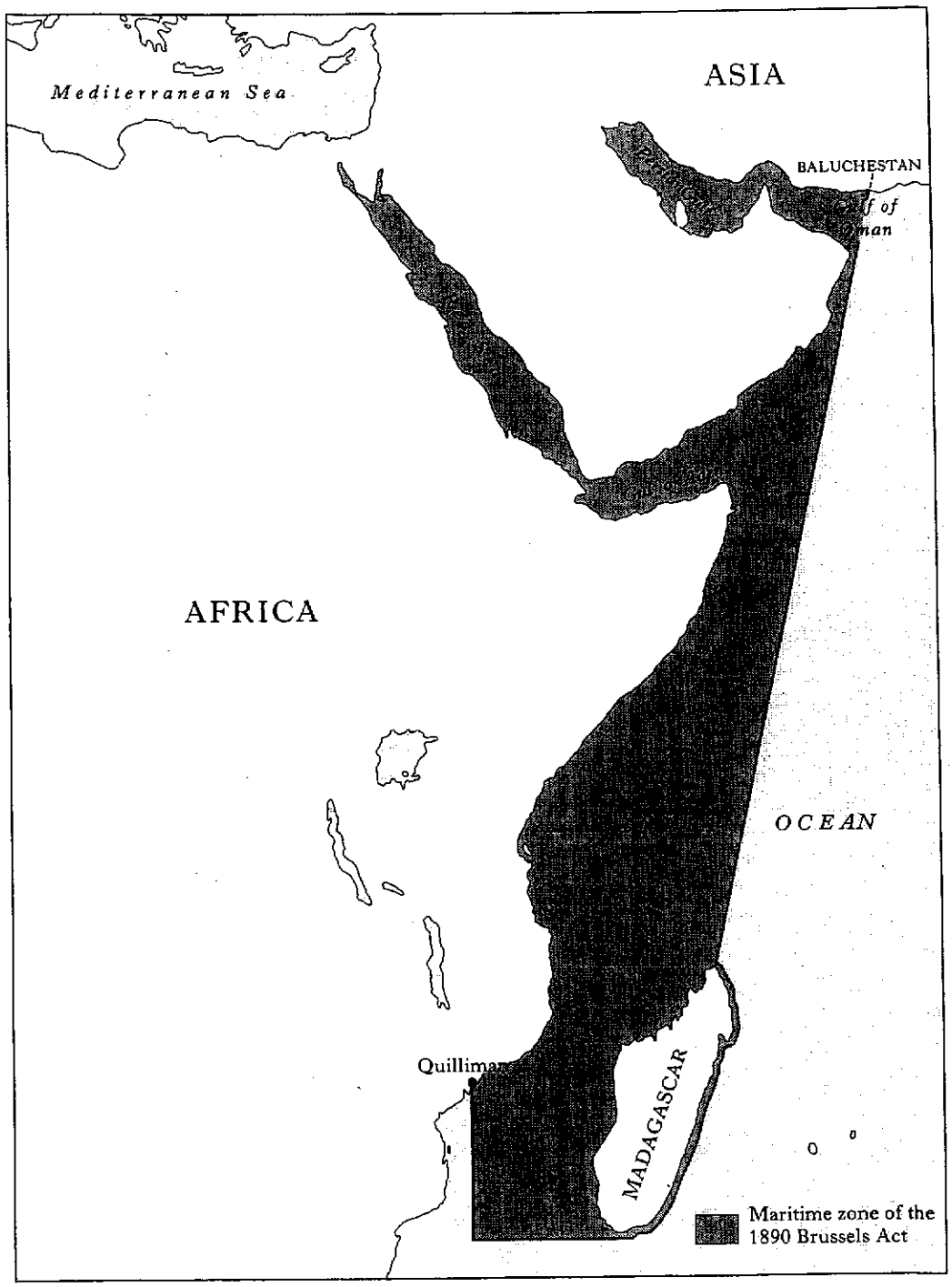
[164] Annex 7, Protocol 10, "Rapport de M. de Martens, second Plénipotentiaire de Russie, sur les projets précédents", 17 February 1890, *Actes de la Conférence de Bruxelles (1889–1890)* (Hayez, Brussels, 1890), 169.

[165] See Annex 6, Protocol 10, "Projet de Traité et project de Règlement codifiant les projets précédents et présentés par les Plénipotentiaires de Russie", 17 February 1890, *Actes de la Conférence de Bruxelles (1889–1890)* (Hayez, Brussels, 1890), 169.

[166] Queneuil, above n 151, 148.

[167] Article 24, General Act of the Brussels Conference relative to the African Slave Trade, 2 July 1890; Hertslet, above n 144, 499.

[168] Ibid, Articles 21–23.


Mediterranean Sea
ASIA
BALUCHESTAN
AFRICA
OCEAN
MADAGASCAR
Maritime zone of the
1890 Brussels Act

Article 42 introduced the modified regime for visits under the General Act, allowing for visits to suppress the slave trade and to verify the propriety of the use of the flag:

> When the officers in command of vessels of war of any of the Signatory Powers have reason to believe that a vessel of less than 500 tons burthen, found in the above-mentioned zone, is engaged in the Slave Trade, or is guilty of the fraudulent use of a flag, they may proceed to the verification of the ship's papers.

Article 46 stipulated:

> If, in carrying out the supervision provided for in the preceding Articles, the officer in command of the cruiser is convinced that an Act of Slave Trade has been committed on board during the passage, or that irrefutable proofs exist against the captain, or fitter-out, to justify a charge of fraudulent use of the flag, or fraud, or the participation in the Slave Trade, he shall take the detained vessel to the nearest port of the zone where there is a competent authority to the Power whose flag has been used.

In such circumstances, a Consul or the commander of a man-of-war of the same nationality as the suspected ship could be considered the competent authority to examine and determine the status of the seized vessel. Martens emphasised that having dropped the proposal for an international tribunal, it was essential to have a means to settle disputes which might arise between the flag state and these involved in the capture: a compromissory clause was inserted which envisioned the possible appointment of an arbitration panel.[169]

Beyond the provisions regarding right to visit, Article 27 of the 1890 General Act, a provision which remains, *mutatis mutandis*, operative under the 1982 Law of the Sea Convention provides: "Any slave who may have taken refugee on board a ship of war flying the flag of one of the Signatory Powers, shall be immediately and definitively freed." Finally, an International Bureau was to be established in Zanzibar—the first inter-governmental entity to be situated on the African continent—to gather information, including the registration of vessels, but more generally, to "centralize all documents and information of a nature to facilitate the repression of the Slave Trade in the maritime zone".[170]

On the basis of the 1890 General Act, it looked like the "latent and disquieting conflict"[171] had been put to rest. Yet, as Miers writes, an

[169] Ibid, Article 54. The mixed commissions which had, by the 1870s, become solely British affairs were subsumed into the domestic jurisdiction. For Great Britain this meant either the relevant Supreme Court of the Colony or an Admiralty Court. See *Documents relatives à la Répression de la Traite des Esclaves publiés en execution des Articles LXXXI et suivants de l'Act Général de Bruxelles*; 1892, 260.

[170] Ibid, Article 77. For the work of the International Bureau in Zanzibar see: *Documents relatives à la Répression de la Traite des Esclaves publiés en execution des Articles LXXXI et suivants de l'Act Général de Bruxelles*; from 1892 to 1913 under the heading "*Bureau international maritime de Zanzibar*".

[171] See Queneuil, above n 151, 148.

"unforeseen and serious difficulty"[172] arose as the French Ambassador in Brussels wrote to the Belgian Foreign Minister:

I have the honour to confirm to your Excellency the information which I gave *viva voce* yesterday to Baron Lambermont [the President of the Conference]; after a prolonged discussion occupying the sitting of the 24th and 25th of last month, the French Chamber of Deputies decided to suspend the authorization to ratify the General Act [...]. His Majesty's Government must be aware of the part which the Cabinet had taken in this grave debate, and it was certainly been from no want of effort on their part that the conclusion was not entirely different. Your Excellency is further aware that the consideration which weighed with the Chamber were derived from the nature of the measures to be taken for the repression of the traffic at sea.[173]

The Institute of International Law came on side in 1891 declaring that the General Act did not reinstitute an expansive right to visit and that the Act addressed the concerns of France; expressing its hope that all States which had been present in Brussels would ratify the Act.[174] The issue of French ratification remained unresolved until 2 January 1892 when France deposited its instrument of ratification, with the following reservation:

His Excellency [the French ambassador to Belgian] declared that the President of the Republic, in his ratification of the General Act of Brussels, has provisionally reserved, for an ulterior understanding, Articles XXI, XXII, and XXIII, and Articles XLII to LXI.[175]

In essence, France agreed to the General Act but excluded the application of the provisions relating to visitation. The content of Articles 21, 22, and 23 was discussed above. Articles 42 to 61 set out the modalities of the regime of visitation within the General Act. The phrase "provisionally reserved, for an ulterior understanding" was interesting, as the French legislature had determined France would be "governed by the stipulations and arrangements now in force", that is to say, the 1867 Naval Instructions. France further modified its reservation when Belgium, as depositor of the General Act, noted that obligations stemming from Articles 30 to 41, regarding the authorisation of native vessels to fly a State's flag, were only applicable in the zone established by Articles 21 to which France had entered a reservation. France declared that its east coast possessions would form part of that regime, noting that it "will be spontaneously applied by the Government of the Republic

[172] Miers, above n 47, 293.

[173] See "France", Protocol of a Meeting held at the Foreign Office at Brussels, respecting the Ratification of the General Act of the Brussels Conference, 2 July 1891, Hertslet, above n 144, 521–22.

[174] Institut de Droit International, "Voeu motive de l'Institut tendant à la ratification intégrale de l'Act general de Bruxelles", *Annuaire de l'Institut de Droit International*, Vol. 11, 1889–1892, 269.

[175] See "France", Protocol of a Meeting held at Brussels, in the Foreign Office, respecting the Exchange of Ratification of the General Act of the Brussels Conference, 2 January 1892, Hertslet, above n 144, 524–25.

in the territory of Obock [Djibouti], and, according to necessity in the Island of Madagascar and the Comoros."[176] The French reservation was accepted by the other Parties and the General Act came into force on 2 April 1892.[177]

Miers, writing about the French reservation, stated that the "solution was unusual in diplomatic history and left France in a privileged position".[178] In reality, as De Montardy noted, it left France disadvantaged: "Only France refused to cooperate with the rest of Europe in its *oeuvre* of civilisation and humanity; and only it was to undertake the policing of ships flying its own colours, while the other State Parties provided mutual assistance: a regrettable situation, as the slavers would tend to cover their operations with the French flag which was less energetically policed".[179] Miers concluded that little had been lost because the French "government agreed to abide by the regulations of 1867 and to put into operation the new rules for the issue of French colours".[180] Queneuil also echoed these sentiments, stating that the differences between the General Act and the 1867 Instructions were not great.[181] However, the limited French acceptance of the 1890 General Act provided at least one means by which slave traders could avoid visits by hoisting the French flag; although that practice was effectively ceased by the Permanent Court of Arbitration in the *Muscat Dhows* case (1905).

In that case, the panel considered whether the status of subjects of the Sultan of Muscat who had been granted the status of *protégé* by France in 1844, and thus benefited from the protection of France and, on the seas, the French flag, was limited by the obligations undertaken by France as a result of the 1890 Brussels Act. The issuance of papers authorising dhows to fly French flags had meant that those "native vessels" had been "commonly employed in the slave trade".[182] In the Award, the arbitrators pointed to Article 32 of the 1890 General Act which set out the conditions under which native vessels were granted authority to fly a flag. This included owners or outfitters "furnishing proof that they enjoy a good reputation, and especially that they have never been condemned for acts of slave trade".[183] The Court determined that after France had ratified the Brussels Act (1892), it was not permitted to "authorize vessels belonging to subjects of His Highness the Sultan of Muscat to fly

[176] Ibid.

[177] Beyond the parties which negotiated in Brussels (see n 147 and accompanying text), all of which ratified the General Act, the following States acceded to the instrument: Ethiopia, Liberia, Persia and the Orange Free State. See Hertslet, above n 144, 488.

[178] Miers, above n 47, 293.

[179] Montardy, above n 82, 159–160.

[180] Miers, above n 47, 293. For the 1867 Instructions see *Documents relatives à la Répression de la Traite* (n 91 above).

[181] Queneuil, above n 151, 189.

[182] Syllabus, "The Muscat Dhows Case between France and Great Britain", James Brown Scott (ed), *The Hague Court Reports*, 1916, 93.

[183] Article 32, General Act of the Brussels Conference relative to the African Slave Trade, 2 July 1890, Hertslet, above n 144, 500.

the French flag, except on conditions that their owners or fitters-out had established that they had been considered and treated by France as her *protégés* before the year 1863. It further determined, with regard to another question, that the "authorization to fly the French flag can not be transmitted or transferred to any other person or other dhow, even if belonging to the same owner".[184] Subjects of Muscat might well benefit from the protection of the French flag, but only during their lifetime or that of their precious dhow. Considering the life expectancy in early twentieth century Muscat and that of "native vessels", the Permanent Court of Arbitration had, at the behest of Great Britain, sounded the death-knell of the slave trade at sea.

Conclusion

While debate concerning the motives of Great Britain in its attempt to suppress the slave trade remains lively today, it cannot be disputed that Great Britain did, in fact, lead and shoulder most of the responsibility in ending the slave trade and slavery itself. Over the past thirty years, historians have busied themselves uncovering the means and modalities of the Atlantic trade which persisted for nearly three and a half centuries. We know much more today about the slave trade and the manner in which it was undertaken and historians can in no way dispute the centrality of Great Britain to its abolition. Abolition was a lengthy process which required Britain to persist with its foreign policy objective for seventy-five years. When it became evident suppression of the trade could not be achieved through common law pronouncements or agreement on a universal instrument during the era of the Concert of Europe, British foreign policy took a tactical shift towards building a bilateral regime of instruments outlawing the slave trade. Brazil and Portugal were unable to resist muscular interventions by the Royal Navy and joined the burgeoning web of bilateral treaties; France and the United States could not be cajoled so easily.

Despite French reservations regarding visitation under the 1890 General Act, the slave trade was, by this time, clearly in its last throes. Through its bilateral network, Great Britain had managed to abolish the Atlantic Slave Trade by 1867. The limited possessions of France in the zone where the slave trade persisted and its lack of willingness to ascribe to the right to visit established by the Brussels Act slowed the momentum towards complete suppression of the slave trade at sea. As the *Muscat Dhows* case indicates, loopholes persisted in which slavers could find protection of a flag to carry on the trade. However, such instances were very limited in nature and scope. In essence, the bilateral web of treaties

[184] *The Muscat Dhows*, Award of 8 August 1905, James Brown Scott (ed), *The Hague Court Reports*, 1916, 99–100.

created by Great Britain in the first half of the nineteenth century had not only ended the Atlantic Slave Trade, but also made it near impossible, legally and politically, for any State to allow its citizens—or for that matter, those under its protection—to continue with the slave trade. It was only in 1890 that Britain finally achieved a right to visit to suppress the slave trade. British ambition to establish a right to visit, despite its overwhelming dominance of the seas during much of the nineteenth century, was ultimately limited for nearly seven decades, not by the moral lassitude of other States, but by the international law imperative to respect the Grotian notion of the freedom of the seas.