ADRIANE SANCTIS DE BRITO

Seeking capture, resisting seizure: legal battles under the Anglo-Brazilian treaty for the suppression of slave trade (1826-1845)

Doctoral thesis
Supervisor: Professor Dr. Samuel Rodrigues Barbosa

UNIVERSITY OF SÃO PAULO
FACULTY OF LAW
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Doctoral thesis submitted to the graduate program on law at the Faculty of Law at the University of São Paulo, in partial fulfilment of the requirements for the doctoral degree in the field of Philosophy and Legal Theory, under the supervision of Professor Samuel Rodrigues Barbosa.

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To contain political subjectivism, nineteenth and twentieth century jurists put their faith invariably on logic and texts, history and power to find a secure, objective foothold. Each attempt led to disappointment. One's use of logic depended on what political axioms were inserted as the premises. Texts, facts and history were capable of being interpreted in the most variable ways. In making his or her interpretations, the jurist was always forced to rely on conceptual matrices which could no longer be defended by texts, facts, or histories to which they provided meaning. They were, and are, arenas of political struggle.

KOSKENNIEMI, Martti. **The Politics of International Law**. Oxford: Hart, 2011, p. 62.

SANCTIS DE BRITO, Adriane. Seeking capture, resisting seizure: legal battles under the Anglo-Brazilian treaty for the suppression of slave trade (1826-1845). 2018. 279p. Doctoral thesis – Faculty of Law, University of Sao Paulo, Sao Paulo, 2018.

The suppression of slave trade was an international-scale project undertaken by Britain during the nineteenth century. The execution of this project is usually depicted as a humanitarian crusade which relied on the power of British diplomacy in politics and of the British navy over the seas. Recently successful in the Napoleonic Wars, the mighty British Navy would now be sent to a new mission; yet the "navy's work" would have the support of a different kind of weapons, constructed with familiar legal material and supplemented with the capacity of mobilizing states in peacetime: triple-formula treaties. Those treaties provided for a set of rights and duties connected to visitation, capture and adjudication of vessels suspected of slave trade. They constituted mechanisms of enforcement to the provisions of slave-trade abolition through a legal use of force. Such utmost formula for enforcement was accepted by key states from the nineteenth-century slave trade. Brazil was one of them. By then, Brazil was tied to a paradox that reflected on its debut in international law. It had to affirm its recent independence by conserving the ties with the Portuguese political and legal past with Britain. As a slavery-based state, Brazil acquiesced to the Anglo-Brazilian Treaty for the suppression of slave trade (1826) while seeking recognition to its separation from the Portuguese Crown. Following the legal structure that had been brought from warfare prize law, the triple-formula brought criteria to evaluate the legality of visitation to suspected vessels and their eventual capture. Accordingly, the central points discussed in the legal spheres of the triple-formula interpretation concerned the limits of the use of force against foreign ships; even when they did benefit slave trade abolition, they were not fought as humanitarian legal grounds. While the triple formula of the

treaty was in motion (up to 1845), the core battles of legal interpretation dealt with adjudication proceedings, criteria of nationality and jurisdiction. In those battles, Britain constantly pushed for the expansion of its legal use of force in balance with the conservation of its implementation system. Brazil acted to limit such use of force while maintaining cooperation. The process of constant reconstruction of such legal meanings culminated in interpretative extensions under British unilateral dominance; procedural law and bureaucratic hurdles; and a deeper specialization of the triple formula in relation to prize law and the general law of nations. Examining the triple formula in motion brings yet an important aspect to a fuller understanding of the Brazilian role in obstructing abolition. Brazil did not simply reject the treaty regime, as it might seem judging by its failure to implement an effective slave-trade proscription. When it came to the triple formula, Brazil actively engaged in implementing the terms under the treaty because this was a way of limiting Britain's use of force; to resist capture was both resisting abolition and the loss of autonomy. All in all, despite conserving some inequality of power from its starting point, the triple-formula regime created a field of contestation where both parties transformed and created their power conditions using the language of law.

Keywords: slave trade abolition, prize law, mixed commissions, Anglo-Brazilian Treaty of 1826, use of force

SANCTIS DE BRITO, Adriane. Buscando a captura, resistindo à apreensão: batalhas jurídicas sob o tratado anglo-brasileiro para a supressão do tráfico de escravos (1826-1845). 2018. 279p. Doutorado – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2018.

A supressão do tráfico de escravos foi um projeto de escala internacional empreendido pela Grã-Bretanha no século XIX. A execução desse projeto é normalmente descrita como uma cruzada humanitária baseada no poder da diplomacia britânica na arena política e de sua marinha pelos oceanos. Depois do sucesso recente nas Guerras Napoleônicas, a sua poderosa frota seria empregada em uma nova missão; agora o seu trabalho iria se apoiar em um tipo diferente de armamento, construído com um material já familiar e capaz de mobilizar estados em tempos de paz: tratados de tripla fórmula. Esses tratados previam um conjunto de direitos e deveres ligados à visita, captura e adjudicação de embarcações suspeitas, para colocar em prática a proibição do tráfico de escravos. Alguns dos principais estados envolvidos no comércio de escravos à época aderiram à formula britânica. O Brasil foi um deles. Naquele momento, o país vivia um paradoxo que se refletiu na sua forma de entrada no direito internacional: teve de afirmar sua recente independência através da conservação dos laços com o passado jurídico-político entre Portugal e Grã-Bretanha. Apesar de ser um estado de economia escravagista, o Brasil assinou o tratado de 1826 para a supressão do tráfico de escravos enquanto buscava o reconhecimento de sua separação da coroa portuguesa. Seguindo a estrutura jurídica trazida do direito de presas de guerra, a tripla fórmula impunha testes de legalidade sobre a visita a embarcações e sobre sua eventual captura. Assim, os conflitos de interpretação sobre as disposições correspondentes no tratado diziam respeito aos limites do uso da força sobre os navios em vez de se focarem nos fundamentos humanitários da abolição do tráfico de escravos. No período de vigência da tripla fórmula (até 1845), essas batalhas interpretativas abordaram principalmente regras processuais,

critérios de nacionalidade e competência jurisdicional. Nessas batalhas, a Grã-Bretanha ao mesmo tempo forçava a expansão das possibilidades legais do uso da força e protegia seu sistema de implementação. O Brasil agia para limitar o uso da força pela Grã-Bretanha enquanto mantinha cooperação. A constante renovação de significados culminou em extensões interpretativas sob domínio unilateral britânico, em entraves procedimentais e burocráticos para restringir a aplicação do tratado e em uma autodefinição bem mais precisa da tripla fórmula em relação ao direito de presas e ao direito internacional geral. Examinar a tripla fórmula em movimento pode também alterar nossa percepção sobre o papel brasileiro na obstrução da abolição. Quando olhamos especificamente para a implementação da tripla fórmula, percebemos que o Brasil não rejeitou simplesmente o tratado, como se apreende da sua falha em promover uma abolição efetiva. Na verdade, o país se engajou ativamente na implementação das disposições de tripla fórmula do tratado, justamente porque essa era uma forma de limitar o uso da força pela Grã-Bretanha. Disputar as capturas era tanto uma forma de resistir à abolição quanto de resistir à perda de autonomia. Em geral, para além de conservar as desigualdades de ponto de partida, o regime da tripla fórmula criou um campo de disputas em que suas partes transformaram e criaram suas condições de poder usando a linguagem do direito internacional.

Palavras-chave: abolição do tráfico de escravos, direito de presas, comissões mistas, tratado Anglo-Brasileiro de 1826, uso da força

SANCTIS DE BRITO, Adriane. In dem Versuch des Einfangs, in dem Widerstand gegen Beschlagnahme: Rechtsstreitigkeiten unter dem anglo-brasilianischen Vertrag zur Unterdrückung des Sklavenhandels (1826-1845). 2018. 279S. Dissertation – Juristische Fakultät, Universität von Sao Paulo, Sao Paulo, 2018.

Die Unterdrückung des Sklavenhandels war ein Projekt auf internationaler Ebene, das im 19. Jahrhundert von Großbritannien unternommen wurde. Die Verwirklichung dieses Projekts wird üblicherweise als ein humanitärer Kreuzzug beschrieben, der sich auf der Macht der britischen Diplomatie in der politischen Arena sowie der Macht ihrer Marine auf den Meeren basiert. Nach dem letzten Erfolg in den Napoleonischen Kriegen sollte die mächtige Marine in einer neuen Mission eingesetzt werden; jetzt sollten die Bemühungen auf eine andere Art von Waffen zurückgreifen, die aus einem bereits vertrauten Material bestanden und in Friedenszeiten Staaten mobilisieren konnten: die Dreifachformel-Verträge. Diese Verträge schrieben eine Reihe von Rechten und Pflichten im Zusammenhang mit der Untersuchung, dem Einfang und der gerichtlichen Zuerkennung verdächtiger Schiffe vor, um das Verbot des Sklavenhandels durchzusetzen. Einige der wichtigsten Staaten, die zu dieser Zeit am Sklavenhandel beteiligt waren, hielten sich an die britische Formel. Brasilien war einer von ihnen. Damals erlebte Brasilien ein Paradox, das sich in seiner Form des Beitritts zum internationalen Recht widerspiegelte: Brasilien musste seine jüngste Unabhängigkeit durch die Aufrechterhaltung der Verbindungen zur juristisch-politischen Vergangenheit zwischen Portugal und Großbritannien bestätigen. Obwohl Brasilien ein Sklavenstaat war, unterzeichnete er den Vertrag von 1826 zur Unterdrückung des Sklavenhandels, während er die Anerkennung seiner Trennung von der portugiesischen Krone erstrebte. In Anlehnung an die rechtliche Struktur des Kriegsbeuterechts schrieb die Dreifachformel Legalitätstests für die Untersuchung von Schiffen und deren eventuellen Einfang vor. Die Auslegungskonflikte über die entsprechenden Vorschriften des Vertrages betrafen die Grenzen der Gewaltanwendung auf Schiffen, statt auf die humanitären Gründe für die Abschaffung des Sklavenhandels zu

fokussieren. Während der Gültigkeitsdauer der Dreifachformel (bis 1845) ging es bei diesen Interpretationsstreitigkeiten hauptsächlich um Verfahrensregeln, Staatsangehörigkeitskriterien und Zuständigkeitsbereiche. In diesen Streitigkeiten erzwang Großbritannien gleichzeitig die Ausweitung der legalen Möglichkeiten der Gewaltanwendung und schützte sein Umsetzungssystem. Brasilien handelte dabei, sowohl um den Einsatz von Gewalt durch Großbritannien zu begrenzen als auch um die Kooperation beizubehalten. Die ständige Erneuerung der Bedeutungen gipfelte in interpretativen Erweiterungen unter britischer unilateraler Herrschaft, in prozeduralen und bürokratischen Hindernissen für die Einschränkung der Anwendung des Vertrags und in einer viel präziseren Selbstdefinition der Dreifachformel in Bezug auf das Beuterecht und das allgemeine Völkerrecht. Die Untersuchung der Dreifachformel in Bewegung könnte auch unsere Wahrnehmung der brasilianischen Rolle bei der Verhinderung der Abschaffung verändern. Wenn man sich konkret mit der Umsetzung der Dreifachformel befasst, erkennt man, dass Brasilien den Vertrag nicht einfach abgelehnt hat, wie man es durch sein Versagen bei der Förderung einer effektiven Abschaffung der Sklaverei versteht. In der Tat hat Brasilien sich aktiv an der Umsetzung der Vorschriften des Vertrages beteiligt, gerade weil dies eine Möglichkeit war, die Gewaltanwendung Großbritanniens zu beschränken. Die Bekämpfung der Einfänge war sowohl eine Weise, der Abschaffung Widerstand zu leisten, als auch dem Verlust der Autonomie zu widerstehen. Trotz der Beibehaltung der Ungleichheiten beim Ausgangspunkt erschuf alles in allem das Dreifachformel-Regime ein Feld der Streitigkeiten, in dem seine Teile ihre Machtverhältnisse unter Verwendung der Sprache des Völkerrechts wandelten und erzeugten.

Schlüsselwörter: Unterdrückung des Sklavenhandels, Beuterecht, gemischte Kommissionen, anglo-brasilianischer Vertrag von 1826; Gewaltanwendung

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ABBREVIATIONS

Aberdeen Act of 1845 – An Act to amend an Act, intituled 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. (Statutes 8th and 9th Victoria, cap. 122).

Act for the Abolition of Slave Trade of 1807 – An Act for the Abolition of Slave Trade, 25th March 1807 (47° Georgii III, Sess. 1, cap. 36).

Act of 1831 – Lei de 7 de novembro de 1831

Act of 1843 - An Act for the more effectual Suppression of the Slave Trade, 24 August 1843 (6th and the 7th Victoria, cap. 98)

Act of Abolition of Slave Trade of 1818 – Act of the British Parliament "to explain and amend an Act passed in the 51st Year of His Majesty's Reign, for rendering more effectual an Act made in the 47th Year of His Majesty's Reign, for the Abolition of the Slave-trade" 10th June 1818. (58 Geo. III, Cap.98).

Act of Brussels Conference of 1890 - General Act of the Brussels Conference relative to the African slave trade, signed at Brussels, July 2, 1890.

Additional Articles of 1823 – Additional Articles between Great Britain and Portugal. Signed at Lisbon, 15 March 1823.

Alvará of 1818 –Alvará of 26 January 1818, João VI, Rei de Portugal (1767-1826).

Anglo-Brazilian Treaty of 1826 – Convention between His Majesty and the Emperor of Brazil, for the abolition of the African Slave Trade. Signed at Rio de Janeiro, 23 November 1826.

Anglo-Portuguese Treaty of 1810 – Treaty of Friendship and Alliance between His Britanic Majesty and His Royal Highness the Prince Regent of Portugal. Signed at Rio de Janeiro, the 19 February, 1810.

Anglo-Portuguese Treaty of 1815 – Treaty between Great Britain and Portugal. Signed at Vienna, the 22 January 1815.

Anglo-Portuguese Treaty of 1817 – Additional Convention to the Treaty of the 22 January 1815, between His Britannic Majesty and His Most Faithful Majesty, for the purpose of preventing their Subjects from engaging in any illicit Traffic in Slaves. Signed at London, the 28th July, 1817.

BDLB – Biblioteca Digital Luso-Brasileira

BFSP – British Foreign State Papers

BPR – British Parliamentary Reports

Britain – United Kingdom of Great Britain and Ireland

CE - Conselho de Estado Brasileiro

CLI - Coleção das Leis do Império, Câmara dos Deputados, Brasil.

CPGS – Collection of Public General Statutes, Great Britain.

Consolidation Act of 1824 – An Act to amend and consolidate the Laws relating to the Abolition of the Slave Trade, 24 June, 1824 (5th of Geo. IV cap. 113)

Declaration of Vienna of 1815 – Declaration of the Eight Courts (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden) relative to the Universal Abolition of the Slave Trade, signed at Vienna, 8 February 1815

HCPP, Class A – House of Commons Parliamentary Papers: Correspondence with the British Commissioners relating to slave trade

HCPP, Class B – House of Commons Parliamentary Papers: Correspondence with Foreign Powers relating to the Slave Trade.

Instructions of 1844 – General Instructions for Commanders of Her Majesty's Ships and Vessels employed in the Suppression of the Slave Trade, presented to both Houses of Parliament, by Command of Her Majesty, July, 1844. London, Printed by T.H.Harrison, St. Martin's Lake, 1844.

Instructions to the Treaty of 1817 – Instructions intended for the British and Portuguese Ships of War employed to prevent the illicit Traffic in Slaves. Annexed to the Additional Convention to the Treaty of the 22nd January, 1815, between His Britannic Majesty and His Most Faithful Majesty, for the purpose of preventing their Subjects from engaging in any illicit Traffic in Slaves. Signed at London, the 28th July, 1817.

Memoranda of 1819 – Memoranda for the Guidance of the Commissions, 1819.

MRE – Relatório do Ministério das Relações Exteriores apresentado à Assembleia Geral Legislativa Brasileira

OHT – Oxford Historical Treaties database.

Palmerston Act – An Act for the Suppression of Slave Trade, 24th August, 1839. (Statutes of 2nd and 3rd Victoria, cap. 73).

Paris Peace Treaty of 1814 – Definitive Treaty of Peace and Amity between Austria, Great Britain, Portugal, Prussia, Russia and Sweden, and France, signed at Paris, 30 May 1814 »

Regulations for the Mixed Commissions of 1817 – Regulations for the Mixed Commissions, which are to reside on the Coast of Africa, in the Brazils and at London. Annexed to the Additional Convention to the Treaty of the 22nd January, 1815, between His Britannic Majesty and His Most Faithful Majesty, for the purpose of preventing their Subjects from engaging in any illicit Traffic in Slaves. Signed at London, the 28th July, 1817.

Repealing Act of 1842 – An act to repeal so much of an "Act of the Second and Third Years of Her Majesty, for Suppression of the Slave Trade, as relates to Portuguese Vessels", 12 August 1842 (Statutes 5th and 6th Victoria, cap. 114).

Separate Article of 1817 – Separate article to the Convention to the Treaty of the 22nd January, 1815, between His Britannic Majesty and His Most Faithful Majesty, for the purpose of preventing their Subjects from engaging in any illicit Traffic in Slaves. Signed in London, 11 September 1817.

Treaty of Brazilian Independence of 1825 – Tratado de Paz, e Alliança entre o Sr. Pedro I Imperador do Brasil e D. João VI Rei de Portugal

INTRODUCTION

> *"Suppression was a gigantic combined operation. Foreign Secretaries who negotiated the treaties, and the ambassadors and consuls who carried out the ceaseless battle against diplomatic evasiveness, spent a great part of their time in striving to set the Navy free to do its work." (WARD, 1969, p. 116)*

When the *Act for the Abolition of Slave Trade of 1807* passed in parliament, Great Britain was not the only state to abolish the previously widely accepted and fomented traffic. Denmark had abolished slave trade in 1803 and the United States would have a similar prohibition in 1808. Yet it was Britain that would come to be known as the bastion of international slave trade suppression in numerous celebratory historical accounts. How was Great Britain different?

Britain expanded its domestic abolition into an international policy[2]. Ward's account, quoted above, is a revealing example of many exalted readings of the British quest. He portrays a complex operation, involving diplomatic representatives working hard in the backstage to design and enforce treaties, all directed at letting the navy "free" to do its "work". British seamen would be responsible for the main act, that of spotting, stopping, capturing, and bringing to adjudication vessels suspected of being engaged in slave trade. After all, that was the way Britain knew of fighting and winning: over the seas, using its incomparable navy.

There is no shortage of studies on the motivation behind Britain's undertaking of the international effort to abolish slave trade. Along the years, there have been explanations aggregating elements of moral,

[2] See NELSON, Bernard H, The Slave Trade as a Factor in British Foreign Policy 1815-1862, **The Journal of Negro History**, vol. 27, no. 2, pp. 192–19, 1942.

religious, and economic grounds.[3] It is of course likely, and those accounts are evidence of it, that all those factors played a role, and that each one of those elements might have had different weight after the moment Britain adopted slave trade abolition as a state policy and throughout the nineteenth century, when changes in context certainly affected immediate motivations.

The British government was definitely influenced, from the start, by pressures from antislavery groups.[4] Their representatives argued the case for abolition in parliament in moral grounds to secure the 1807 Act.[5] By then, Britain had lost the colonial asset of the United States, and that was possibly a factor as well, as it would no longer benefit directly from

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[3] Among the most cited contributions to this debate are COUPLAND, Reginald, **The British Anti-Slavery Movement**, London: Oxford University, 1933; WILLIAMS, Eric, **Capitalism & Slavery**, Chapel Hill: University of North Carolina, 1944; TEMPERLEY, Howard, **British antislavery, 1833-1870**, London: Longman, 1972; ELTIS, David, **Economic Growth and the Ending of the Transatlantic Slave Trade**, Oxford: Oxford University, 1987; DRESCHER, Seymor, **Econocide - British Slavery in the Era of Abolition**, Chapel Hill: University of North Carolina, 2010; BLACKBURN, Robin, **The Overthrow of Colonial Slavery, 1776-1848**, London: Verso, 1988; DAVIS, David Brion, **Inhuman bondage: the rise and fall of slavery in the New World**, Oxford: Oxford University, 2006.. For an account of the four-stage literature on abolitionism – (1)personal accounts of the nineteenth century portraying "slavery as a holy war", (2) a notion of secular progress by historians as Coupland, (3) William's anti-imperialist economic approach, (4) an abolitionist viewpoint recovery as in Davis –, see STAUFFER, John, **Abolition and Antislavery**, Oxford: Oxford University, 2012.. Especially insightful on showing the combination of different social, religious and economic factors involved in the movement of anti-slavery in Britain, beyond a line of explanation solely relying on the emergence of capitalism, see DRESCHER, Seymor, **Capitalism and Antislavery: British Mobilization in Comparative Perspective**, New York: Oxford University, 1987.

[4] See TEMPERLEY, Howard, **British Anti-Slavery 1833-1870**, London: Longman, 1976.

[5] Jean Allain. Slavery in International Law: of human exploitation and trafficking, 2013, p. 59. Ward argues that an important sign of the absence of a contemporaneous perception of economic interests in keeping the slave trade was the fact that the abolitionist case in Parliament was argued in moral grounds, even though "when Napoleon's continental blockade prevented Europe from exporting sugar to Europe, the economists had some reason for not conducting a vehement counter-campaign against Clarkson and Wilberforce". According to Ward, in that moment the French blockades of British commerce added up to the crisis of the United States independence (and refusal to continue the colonial exchanges with Britain) and of the decline of production of the British West Indies against the rise of slave-labour based sugar production in places like Brazil. WARD, Willian Ernest Frank. **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**. London: George Allen and Unwin, 1969, p. 19-20}.

a slavery-based economy. Britain had also abolished slave trade not just internally, but also in its colonies, so it would also have the incentive of offsetting the advantages from slavery-based economies enjoyed by its international competitors.[6] And while it is of course difficult to make a determination on to what extent this was perceived at the time, it might be said slavery abolition was also an important part in the prospect of greater changes to the global economic order, as "the mercantile economy" was "in the midst of being replaced by a capitalist order, wherein the United Kingdom was best placed to prosper (and dominate) through its advocacy of free trade and the supremacy of its Royal Navy."[7].

Discussing predominant reasons behind the British quest is not the aim of this study, nor is delving into the libraries written on the history of slave trade and its abolition. This thesis intends to make a contribution to the discussion about the *means* used in the project of slave trade suppression, specifically the *legal* means.

Ward's account quoted above — a description of the complex British quest against slave trade executed by navy men and diplomats — leaves a central element in the dark . The "freedom" enjoyed by the British navy was created and maintained by diplomats who were busy translating its "work" — in effect an expression of force and might of the British fleet — into *rights* held by Great Britain against other states (or, by extension, foreign citizens and their property). While a powerful tool in that history, international law remains overshadowed by narratives of

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[6] This point is widely shared; see e.g. VAN NIEKERK, J P. 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). **The Comparative and International Law Journal of Southern Africa**, vol. 37, no. 1, pp. 1–40, 2004 p. 6; KLOSE, Fabian. Humanitäre Intervention und internationale Gerichtsbarkeit. **Militaergeschichtliche Zeitschrift**, vol. 72, no. 1, pp. 1–22, 2013, p. 4.

[7] ALLAIN, Jean. **Slavery in international law – of human exploitation and trafficking**. Leiden: Martinus Nijhoff, 2012, p. 59.

how "[t]he Slave Trade was […] suppressed by the twin weapon of *diplomatic pressure* and *exercise of naval power*"[8].

This thesis was conceived as a modest contribution to a broader understanding of the constitutive role of international law to power in the field of the history of slave trade abolition. In this quest, I will understand international law in a broad sense as "[a law] with the *capacity to regulate relations between states as well as between states, peoples, and other international actors*, but […] also recognized as a *language of government* in certain contexts, as a *buddle of techniques*"[9].

Law is not everywhere all the time[10]; to some relations and in certain points of history, it may be less relevant. This is not the case for the quest for slave trade abolition, however. Lauren Benton and Lisa Ford's research recently placed slave trade suppression in one of the many fronts of the British "rage for order" in the nineteenth century.[11] They brought law to light among complex accounts of the history of British empire and made sense of a set of initiatives of legal change by which Britain dictated the terms of various kinds of relations further away than the formal boundaries of its dominions.[12] In that governance arrangement, both diplomatic pressure and naval power relied on international law to

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[8] LLOYD, Christopher. **The Navy and the Slave Trade**. New York: Routledge, 2016, p. x,, emphasis added.

[9] CRAWFORD, James; KOSKENNIEMI, Martti. **Introduction**. In: The Cambridge companion to international law. Cambridge & New York: Cambridge, 2012, p. 2 (emphasis added).

[10] MCHUGH-RUSSEL, Liam. Getting the constitutive power of law wrong. Legal form: a forum for Marxist analysis of law, 31 March 2018. Available at: https://legalform.blog/2018/03/31/getting-the-constitutive-power-of-law-wrong-liam-mchugh-russell/

[11] See BENTON; FORD, **Rage for Order - The British Empire and the origins of International Law 1800-1850**.. Lauren Benton had other relevant publications in the field of global legal history and slave trade history; see e.g. BENTON, Lauren, **Law and Colonial Cultures: Legal Regimes in World History, 1400-1900**, Cambridge: Cambridge University, 2002; BENTON, Lauren, Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism, **Comparative Studies in Society and History**, vol. 47, pp. 700–724, 2005.

[12] BENTON; FORD, **Rage for Order - The British Empire and the origins of International Law 1800-1850** chapter 1..

help push their goals; treaties for the suppression of slave trade —and the interpretation developed about them by Britain—were in the centre of the British maritime imperial control.[13]

In the last years, the abolition of slave trade has been gaining more pages in historical accounts of international law. In all fairness, some of the work on the global history of slave trade or slavery abolition showed special interest on legal structures and brought important contributions to the international legal history.[14] Yet works *centred* on the role of international law in the process of slave trade suppression have been revealing new perspectives of a so-widely explored part of history.

Holger Lutz Kern published a brief account of the British strategic use of international law, among other available means, to implement the project of slave trade abolition. He highlighted the transformation of the main legal foundations of the British policy, coming from a unilateral extension of belligerent rights to the quest of British representatives for getting other states to the consent to a new set of rights applicable to peacetime.[15] In a similar approach, Janine Voigt reconstructed the development in multilateral conferences among European countries towards slave trade abolition in international law.[16] Jean Allain also contributed to the history of the conferences, also

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[13] BENTON; FORD, **Rage for Order - The British Empire and the origins of International Law 1800-1850** chapter 1..

[14] See especially: BLACKBURN, Robin. **The American crucible - Slavery, Emancipation and Human Rights**. London: Verso, 2011; BOIS, DU, William Edward Burghardt, **The Suppression of the African Slave Trade to the United States of America 1638-1870**, New York: Longmans Green and Co, 1904.

[15] KERN, Holger Lutz. Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade. **Journal of the History of International Law**, no. 6, pp. 233–258, 2004.

[16] VOIGT, Janine. **Die Abschaffung des transatlantischen europäischen Sklavenhandels im Völkerrecht**. Zürich: Schulthess, 2000.

focusing on the European and US interpretations of the laws against slave trade in the 19th century.[17]

Other publications continued the line of research inaugurated with Leslie Bethell's seminal work on mixed commissions — special tribunals created to adjudicate on ships captured for being suspected to be engaged in slave trade.[18] Among them, a much-debated book written by Jenny Martinez looks to slave trade suppression in search of "missing pieces" of the human rights history. Her point is that mixed commissions can be considered the first international human rights courts.[19] Emily Haslam finds important lessons to criminal law in mixed commissions' practice.[20]

Besides human rights and criminal law, other authors have been studying slave trade suppression in the context of humanitarian interventions. Maeve Ryan looks to the nineteenth-century quest against slave trade as a historical example of the burdens of carrying out a humanitarian action.[21] Fabian Klose proposes a new understanding for the genealogy of interventions by placing the efforts to supress slave trade as its first case.[22]

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[17] ALLAIN, Jean. **Slavery in international law – of human exploitation and trafficking**. Leiden: Martinus Nijhoff, 2012.; ALLAIN, Jean. **The Law and Slavery**. Leiden: Brill Nijhoff, 2015.

[18]BETHELL, Leslie. The Independence of Brazil and the Abolition of the Brazilian Slave Trade: Anglo-Brazilian Relations, 1822-1826. **Journal of Latin American Studies**, vol. 1, no. 2, pp. 115–147, 1969.

[19] MARTINEZ, Jenny S. **The Slave Trade and the Origins of International Human Rights Law**. Oxford: Oxford University, 2012. p. 6}.

[20] HASLAM, Emily. International Criminal Law and Legal Memories of Abolition: Intervention, Mixed Commission Courts and "Emancipation." **Journal of the History of International Law**, no. 18, pp. 420–447, 2016.

[21] RYAN, Maeve, The price of legitimacy in humanitarian intervention: Britian, the right of search, and the abolition of the West African slave trade, 1807-1867, *in*: **Humanitarian Intervention**, Cambridge: Cambridge University Press, 2011.

[22] KLOSE, Fabian. Enforcing abolition: the entanglement of civil society action, humanitarian norm-setting, and military intervention. *In*: KLOSE, Fabian (Ed.). **The Emergence of**

Apart from the differences in the objectives of each one of those studies, all of them have something in common. Their narratives talk about treaties and broad legal policies, which are informative in that by them we are able to conceive broad, colourful pictures of international law in that period of history. Yet, I argue, there is value in zooming in to those colourful images and looking at the grey areas, in between the pixels. That is a more fitting way of gaining true understanding of how international law *worked* to regulate *relations*, as a *language* or *a bundle of techniques*. Changing the scale allows for the observation of the exchanges, tensions and interpretations emerging from the common ground of law.

There is still another reason for my proposal. All those studies, when they are observing general moves in the policies against slave trade, either assume the British position — Martinez and Ryan openly declare to be writing for the sake of states undertaking "moral stands"— or focus on the British efforts as a methodological choice — works as Kern's and Benton'& Ford's actually aim at understanding British policies only. The result are stories which portray foreign parties (to the British) either as recalcitrant to the humanitarian goals of the British pushes or resistant to abuses of British pushes legitimized by those goals.

Consulting those works, the reader is left mesmerized by the British work as a flag-barer or an empire augmenting its dominions. She is also left in doubt by how the other parties could have affected those plans the author describes. Yet every history of humanitarian accomplishment or even empires are jointly constructed: "The external world is no passive receptacle of imperial influences but plays the centre's

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Humanitarian Intervention Ideas and Practice from the Nineteenth Century to the Present. Cambridge: Cambridge University, 2016.; KLOSE, Fabian. Humanitäre Intervention und internationale Gerichtsbarkeit. **Militaergeschichtliche Zeitschrift**, vol. 72, no. 1, pp. 1–22, 2013.

factions against each other using imperial favour or opposition to advance its agendas."[23].

This thesis will seek to offer understanding on the dynamics of international law in the slave-trade suppression, deliberately avoiding telling stories about heroes and villains, and focusing on the employment of international law in view of each party's immediate projects. Through their *battles* of legal interpretation, we may start to make sense of the role of the legal technique as a power mobilizer. The approach will turn to revealing concepts and legal fictions as "highly condensed forms of rhetorical material that allow often highly controversial political and philosophical propositions to be passed on as part of legal routine"[24]. This will be a critical analysis that intends to recover that process and reanimate "the political potential embedded in legal fictions".[25]

This approach is particularly valuable for creating counter-narratives to the usual perspective through which international law is thought and its history is told. It is not a matter of "adding more and more histories" to international law as to make it "truly comprehensive"[26]. Instead, by looking at the dynamics of the "constant work of imagining and reimagining" that is the employment of legal interpretations, it reveals how their employers "used power through the various mechanisms they have".[27] This helps the differences conserved in legal

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[23] KOSKENNIEMI, Martti. History of International law: Dealing with Eurocentrism. Rechtsgeschichte-Legal History, 2011. p. 162-163

[24] ORFORD, Anne. Meaning and Understanding in International Law and Intellectual History. Conference on History, Politics, Law: Thinking Through the International, University of Cambridge, 16 May 2016. Available at: http://www.lpil.org/media/. (51:00).

[25] ORFORD, Anne. Meaning and Understanding in International Law and Intellectual History.

[26] This point is made by VEÇOSO, Fabia Fernandes Carvalho, Book Review - Mestizo International Law, **Journal of the History of International Law**, pp. 125–131, 2018, p. 128..

[27] KOSKENNIEMI, Martti. 2nd section, "History and Historiography of International law". Conference "Rethinking and renewing the study of international law in/from/about Latin America", 26 September 2017.

structures and concepts come to the surface[28], and also highlights the capacity of change and empowerment through law.[29]

Global accounts of slave trade abolition which *centre* in international law usually contain two stories in their narratives. The first one is about the British quest to establish treaties with other powers, where France and the United States mainly oppose British attempts to secure consent for rights of visit and capture; Spain and Portugal resist at first but later acquiesce to giving maritime police power to Britain in exchange of financial gain; among the European conferences, other states, one by one, are convinced by Britain to cooperate with slave trade abolition. The sequence is cut. A second scene shows last-resort measures Britain applies against the states that refused to implement treaties; the Palmerston Act gives Britain the power to act against Portuguese slave traders beyond treaty limitations; the Aberdeen Act does the same but against Brazilian slave traders.

Anglo–Brazilian relations do indeed have a central role in the overall history slave trade suppression of the nineteenth century, as Brazil was the main destination of captured Africans in the Americas and one of the last to effectively abolish transatlantic slave trade. This notwithstanding, the case of Brazil in legal accounts is usually mentioned in three ways. First, as the target of the Aberdeen Act, a widely-known formal start of harsher British measures in policing the seas for definitive slave trade abolition. Second, as a cause for the previous point, Brazil is mentioned as a recalcitrant state to the British moral pushes towards slave trade suppression, or as a state that insisted with pointless resistance to the imperial power of Britain to dictate the new rules. Third, Brazil is

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[28] ANGHIE, Antony. **Imperialism, Sovereignty and the Making of International Law**. Cambridge: Cambridge University, 2005.

[29] LORCA, Arnulf Becker. Universal International Law: Nineteenth-Century: Histories of Imposition and Appropriation. **Harvard International Law Journal**, vol. 51, no. 2, pp. 1–78, 2010.

mentioned because of the provision of the treatment of slave trade as piracy in the Anglo-Brazilian treaty which would be employed to legitimise (once again) the Aberdeen Act.

This thesis will look into the *Anglo–Brazilian legal battles as a discrete contribution in the better understanding of how the British and Brazilians employed international law in the matter of slave trade abolition*. Given the previously mentioned inclination of other works to consider Anglo–Brazilian relations just from 1845 (Aberdeen Act) onwards, I intend to make a contribution to start filling the gap in the preceding period with this thesis.

The *timeframe* of 1826 to 1845 covers the period from the signature of the Anglo-Brazilian Treaty for the suppression of slave trade to the expiration of most of its clauses in 1845. During that period, at least two sets of "battles" occurred between the parties of that treaty over its provisions. One of them dealt with the implementation of the clause of proscription of slave trade and its impact to the treatment of Africans liberated through the treaty's enforcement system against slave trade. While it is arguably the most relevant set of battles, considering the main point of slave trade abolition, that will not be the focus of this work.[30]

This thesis will focus on the second set of battles that occurred under the Anglo–Brazilian Treaty for the suppression of slave trade. They comprised a series of disputes around the mechanisms provided by the treaty to enforce the (partial or total, in different points of time) proscription of slave trade. Combined, they constituted a set of rights in a triple formula for visitation, capture and adjudication of vessels suspected to be engaged on slave trade. By looking at the events from 1826 to 1845,

[30] A very rich and probably exhaustive contribution has been made to this set of battles in the recent book by Beatriz Mamigonian. MAMIGONIAN, Beatriz G. **Africanos livres: a abolição do tráfico de escravos no Brasil**. São Paulo: Companhia das Letras, 2017.

we will examine the total life of the triple formula of the Brazilian treaty, from its conception to its death.

I aim at employing historical description of those legal interpretative battles to reveal the political importance of rules that by a first sight might be perceived as mere means of objective execution of proceedings.[31] To that end, I start from the results of broader historical studies to reconstruct the concepts and directions that marked the Anglo–Brazilian treaty among the British quest of treaty-making. I also explore primary sources to supplement that information and to allow a reconstruction of the interpretative exchanges which constituted each of the battles. Such battles were made apparent from the very reading of the archives, informed by the interest in the uses of international law, and stood out as the main questions around which different tensions could be aggregated.

Among the primary sources I relied on, there are the diplomatic correspondence between British and Portuguese foreign secretaries and their *chargés d'affaires*; correspondence between Brazilian and British foreign secretaries and their *chargés d'affaires*; reports of the cases and proceedings before Anglo–Brazilian mixed commissions; reports of the British Law Office and of the Brazilian Council of State.[32]

The choice of consulting those sources was informed by a first selection through the literature on Anglo–Brazilian relations of the period

[31] ORFORD, Anne, In Praise of Description, **Leiden Journal of International Law**, vol. 25, no. 03, pp. 609–625, 2012.

[32] In quoting primary sources, I have retained their original spelling and punctuation. Whenever a document was already presented in both Portuguese and English official translations, the English version was chosen to be quoted or to be informed as source. Whenever the official documents were only available in Portuguese, I translated them to English myself (that is the case of Brazilian domestic legislation and the Brazilian Foreign Office reports). When talking about mixed commissions, I adopted the most frequent denominations found in primary sources. That is why the Anglo-Brazilian commissions will be referred to as the *Rio mixed commission* and the *Sierra Leone mixed commission* (instead of Freetown mixed commission or other uses).

combined with a first look into the diplomatic correspondence and the British Law Office reports. From those starting points, I followed the trail of each set of battles into the other sources, whenever the other actor's manifestations seemed relevant for the contingencies. Sometimes battles occurred through correspondence between the Foreign Offices or diplomatic representatives, other times in mixed commissions, and other still involved many exchanges between different *loci* of interpretation through years of resignification.

This thesis will certainly *not* exhaust the legal disputes under the Anglo–Brazilian Treaty of 1826. Together, the set of battles intends to reveal how the spheres of implementation of the treaty created a series of interpretations and reinterpretations once they were put in motion. My intention is not to map all discussions that happened around the treaty, but rather to show the diversity of appropriation and innovations by both Brazilian and British interpretations. When put together in the context of the treaty, the battles serve to highlight the inequality instated by the regime and reveal, in between legal interpretations, the difference of power in the extent and strength of argumentation.

Chapter 1 explores the first steps of the British mobilization of international law towards slave trade suppression. In doing so, it shows the point of choosing treaties to formalise abolition and mechanisms for its enforcement. Lastly, the type of the Anglo–Brazilian treaty is placed among other results of the British treaty-making, as well as its main feature: the triple formula.

Chapter 2 addresses the functions and meanings of each of the elements of the triple formula (visitation, capture and adjudication). It begins with an interpretative discussion of the limits of the right of visit and search which reveals the stakes involved in the visitation of ships suspected of slave trade. Next, I present a complex set of regulations involved in the implementation of the visitation and capture of ships: what

did the seamen of the nineteenth-century had to take into account when executing the first two steps of the triple formula? Then, I focus on the third step of the triple formula and the regulations for the mixed commissions: How were they composed? How were they supposed to work? Finally, what was the point of mixed commissions in the triple formula treaty regimes?

Chapter 3 deals with the Brazilian perspective of entering the network of British treaties for the suppression of slave trade. How did Brazilian independence first impact the international regulation against the slave trade? How was the transition from the Anglo–Portuguese treaty regime to the Anglo–Brazilian one? How did the acquiescence to the treaty interact with the Brazilian projects by then? Lastly, in general, what did that triple formula comprise to the Anglo-Brazilian relations?

Chapter 4 presents the Anglo–Brazilian battles of interpretation as a way of the state-parties to find opportunities in the constant resignification of the treaty provisions. Six set of battles expose the way Brazilians and British made use of the rules on the conditions and procedure of capture, on liability to pay indemnities; on the mixed commissions proceedings, and on the very extinction of the triple formula.

In the conclusion, I will reconsider the main findings of this research and return to the recent literature on slave trade abolition and international law to evaluate the contributions of the thesis to the field's research agenda.

CHAPTER I — WEAPONISING TREATIES: A BRITISH QUEST AGAINST SLAVE TRADE

> *To be cognizant of the Treaties entered into between Great Britain and other States, is to be apprized of all that have been concluded upon this subject; to know their contents is to be acquainted with the international history of the abolition of the Slave Trade (PHILLIMORE, 1854, p. 251)*

In his 1854 textbook, Robert Phillimore —one of the most prominent British international lawyers— proudly proclaimed that British treaties were "all that have been concluded upon this subject; to know their contents is to be acquainted with the international history of the abolition of the Slave Trade".[33] Anyone acquainted with some of the history of slave trade suppression would be sceptical about the centrality of those treaties, and of their practical benefits, given that Britain already had its powerful navy to do the job. A lawyer, on the other hand — and maybe regardless of what is said about gunboat diplomacy—, would probably be curious to understand the engineering of those treaties and the legal policy behind them. In case legal tools were needed for the policy of slave-trade suppression, why choose treaties? What did the treaties aim? Which were the rights and obligations provided by them? How did the clauses were conceived to function for the intended goals?

Those are the first questions that are moving this study as well. To understand those treaties as a *legal technique*, we will begin the search for answers in the complex legal context of the British international policy of slave-trade suppression. We will start by looking at the ways international law was mobilized by Britain to employ its war-strengthened navy to that new kind of fight that was about to begin after

[33] PHILLIMORE, Robert Joseph, **Commentaries upon International Law**, Philadelphia: T.&J. W. Johnson, 1854. p. 251

the Napoleonic Wars ended. We will see that, at first, the navy's job relied on well-known legal grounds of warfare. Peacetime pushed the boundaries of legality in that practice, and a race to create new foundations in international law started. The choice to "go legal" through treaties was probably informed by a tendency of the period *and* the nature of the rights on which the British "work" depended.

The treaty-making in the nineteenth-century style, through multilateral conferences, would not work out for decades. Britain found a way through bilateral treaties to maintain its position of dominance over the seas as a maritime police force against slave trade. Lastly, we will explore the conventions that emerged from the British international quest of treaty-making and we will also make our first incursions on their materials and general design.

A. "SETTING THE NAVY FREE TO DO ITS WORK" IN WAR AND IN PEACE

Prize law, neutrality and the flags

After its domestic turn against slave trade in 1807, Britain would also start an international policy for suppressing the traffic. For that, Britain profited from its established wartime prerogatives during the last few years of the Napoleonic Wars (1803-1815). Under the laws of war, British ships could not only conduct visits in foreign enemy ships but also in neutral states vessels[34]. The *right of visit* was then well established among the *belligerent* rights of war. It enabled a party in a conflict to inspect a ship's papers and cargo in order to determine its status

[34] See KERN, Holger Lutz, Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade, **Journal of the History of International Law**, no. 6, pp. 233–258, 2004; VAN NIEKERK, J P, 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), **The Comparative and International Law Journal of Southern Africa**, vol. 37, no. 1, pp. 1–40, 2004.

according to its nationality — that is, whether it was neutral or inimical to the inspector — and whether the vessel was engaged in any breach of law.[35]

Neutrals –those states not engaged in the war — would breach the laws of *neutrality* if they were transporting *contraband*, "certain goods which are destined to one of the conflict parties and which are susceptible to belligerent use".[36] Beyond general practice, the grounds for which items could be legally seized were usually found in treaties and unilateral proclamations.[37]When such a breach was found, the ship could be detained and brought before *prize courts* to be declared *good prize* of war[38].

Both the words "*prize*" in English and "*prise*" in French derive from the Latin verb *prehendere* which means "to seize"[39]. Being declared as *good prize* meant a capture (of a ship or its goods) was performed under legality, in accordance with the body of law which balanced the interests of neutrals — preserving commerce through the freedom of navigation — and belligerents — to capture enemy ships or contraband.

Under *prize law*, the body of law that regulated those relations, the transfer of property belonging to *belligerents* was performed

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[35] SCHALLER, Christian. Contraband. **Max Planck Encyclopedia of Public International Law**, 2015.

[36] SCHALLER, Christian. Contraband. **Max Planck Encyclopedia of Public International Law**, 2015. See also HALL, William Edward, **A Treatise on International Law**, 3. ed. Oxford: Claredon Press, 1890, p. 724; BELLO, Andrés, **Principios de derecho de gentes**, Lima: Casa de Calleja, Ojea y Compañía, 1844, pp. 328-332.

[37] NEFF, Stephen C, **The rights and duties of neutrals: a general history**, Manchester: Manchester University, 2000, p. 64.

[38] KRASKA, James, Prize Law, *in*: **Max Planck Encyclopedia of Public International Law**, 2009.

[39] KRASKA, James, Prize Law, pp. 1–7.

by the mere act of capture[40]. For the transfer of *neutrals'* property, in contrast, the practice required a finding by a court (the captor sovereign's or its allies' court) that the cargo constituted contraband.[41] In the centre of the case were always the vessel and its cargo (*in rem* proceedings).[42] The requirement of adjudication was intended to protect neutrals' goods from being mistaken for enemy prize, or deliberately abused by the captor, thus preventing uncontrolled pillage.[43]

Neutrality had been a rough compromise between the peacetime legal regime, at one side, and the wartime rights held by belligerents, at the other.[44] The regulation of neutrality had emerged as a practical necessity so as to spare trade from the implications of war, which would entangle trade partners in a complicated web of allies and enemies. The law of neutrality was "the law regulating the coexistence of war and peace"[45]; considering some states neutral allowed for the preservation of liberal ideals of free trade[46].

Since the Seven Years War (1756-1763), belligerents would use neutrals to trade on their behalf so as not to lose their share in the market. This was in contradiction with the previous prohibition that neutrals could not engage in different types of trade from the ones they did in peacetime[47]. On the one hand, neutral states gained importance in the Atlantic commerce; on the other, Britain intended to protect its naval

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[40] BELLO, Andrés, **Principios de derecho de gentes**, Lima: Casa de Calleja, Ojea y Compañía, 1844, p. 240.

[41] BELLO, **Principios de derecho de gentes**, p. 228.

[42] BELLO, **Principios de derecho de gentes**, p. 231.

[43] BELLO, **Principios de derecho de gentes**, p. 228.

[44] HALL, William Edward, **A Treatise on International Law**, 3. ed. Oxford: Claredon Press, 1890, p. 76.

[45] NEFF, **The rights and duties of neutrals: a general history**, p. 1

[46] HALL, **A Treatise on International Law**, p. 75.

[47] BENTON, Lauren, Abolition and Imperial Law, 1790–1820, **The Journal of Imperial and Commonwealth History**, vol. 39, no. 3, pp. 355–374, 2011, p. 357.

advantages. As a result, bilateral treaties would vary in either allowing the seizure of such goods by captors or protecting the goods against captures.

The exact terms of neutrality had been strongly disputed by the turn of the eighteenth to the nineteenth century. Bonapart's protection of the neutrals (which he would praise as "respect for the flags") was part of his known attempt to thrive over Britain by "conquering the sea by the land"[48]. The French approach — present in both French doctrine and diplomatic interpretation of the *liberté des mers* —, promoted the principle of "free ships, free goods" or "immunity of the private property at sea", which called for protection of neutral ships to take absolute precedence over belligerent rights.[49]

During war, Britain moved against the absolute protection of neutral vessels. As for tactics of implementation, Britain employed the belligerent right of blockade of ports under Bonapart's command.[50] In those blockades of enemy harbours, capture would occur in case of passage attempts.[51] Britain also insisted in visiting neutral vessels and seizing enemy property even carried by neutral ships. The British approach aggregated allies throughout the years[52]; Russia, Prussia, Austria, the Two Sicilies, and Portugal abandoned the principle of "free ships, free goods"; the United States, Denmark and Sweden adhered to

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[48] PIGGOT, Francis, **The Freedom of the Seas - historically treated**, London: Oxford University, 1919, pp. 83-84.

[49] PIGGOT, **The Freedom of the Seas - historically treated**, pp. 81-86.

[50] BOURGUIGNON, Henry J, **Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828**, Cambridge: Cambridge University, 2004, p. 120.

[51] See, e.g, KERN, Holger Lutz, Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade, **Journal of the History of International Law**, no. 6, pp. 233–258, 2004; MARTINEZ, Jenny S, **The Slave Trade and the Origins of International Human Rights Law**, Oxford: Oxford University, 2012.

[52] "The effect of the British and French policies in combination was to force neutrals to make a choice between trading with France and trading with Britain" NEFF, **The rights and duties of neutrals: a general history**, p. 83.

the seizure of enemy goods in any circumstances in the last years of the eighteenth century.[53]

Those practices formed a set of divergent approaches to neutrality by European states, extended until the beginning of the nineteenth century[54]. As the changes in the treaty regime increased, prize court judges relied heavily on proofs of nationality in order to determine the rights of belligerents and neutrals, among which were the right of visit, search and seizure of goods. This analytical framework made British prize courts fit to new interpretations of belligerent rights as to extend them to slave traders.

Britain started employing the possibility of visiting and searching ships for its policy of suppression still during the Napoleonic Wars. The British navy had the perfect explanation in implementing the *Act of 1807* which made slave trade illegal for British nationals: it was searching for *British* slavers who adopted foreign flags as a disguise to escape apprehension provided by the Act[55]. Yet, as we will see below, further steps of the British policy of abolishing slave trade would be explicitly extended to foreign neutral ships. The British prize courts would apply the familiar criterion of nationality to include in their reasoning the very lawfulness of slave trade under the law of foreign states.

Change in case law

The literature on the history of slave trade suppression usually presents British prize courts' case law within discussions on the radical differences among its most relevant cases during and after the

[53] PIGGOT, **The Freedom of the Seas - historically treated**, pp. 87-89.

[54] BENTON, Abolition and Imperial Law, 1790–1820, p. 360.

[55] VAN NIEKERK, British, Portuguese, and American judges in Adderley Street, p. 7.

Napoleonic Wars: *Amedie* (1810) and *Fortuna* (1811), *Diana* (1813) and *Louis* (1817).

All four cases were named after the vessels captured by the British navy, as usually happened with prises brought before courts. Two of them were ultimately declared good prize. Decided in 1810, the case of *Amedie* dealt with, a North-American ship — thus a neutral ship subject to visitation to be inspected for contraband— was captured by the British Navy while carrying slaves to the British enemy's colony of Cuba, after Spain had been invaded by Napoleon's troops and delegated its administration to his brother. Fortuna was also found to be a US citizen's property in 1811, even though it was sailing under a Portuguese flag when captured trafficking slaves. In both cases, the capture of the vessel was considered legal and the vessels were considered good prize on the grounds that the claimants did not have the right to claim the restitution of their property, either of the ship or the slaves, due to the proscription of slave trade under the US law.

The other two cases were ultimately declared as bad prize. *Diana* was a Swedish vessel apprehended after British officers found slaves on board during visitation. In contrast with the first two cases, *Diana* was ultimately considered bad prize in 1813, given the claimant's evidence of endorsement by the Swedish government for the transportation of slaves and failure of the captor to prove the proscription of slave trade under the Swedish legislation. In the final decision about *Louis* in 1817, a British court also reverted a prior decision condemning the ship. Although the French-flagged vessel had been captured for its engagement in slave trade, openly against the French law which proscribed such practice, the seizure of such vessel violated the law of nations for effecting rights of foreigners.

Looking at the meaning of such cases, Niekerk contrasts the *Amedie* (1810) and *Fortuna* (1811) with *Louis* (1817). The author draws

on those cases to show that the unilateral course into which British courts embarked in the first two cases was revisited in the latter, when they "began to doubt and reconsider the spin they (and the abolitionists) had put on the slave trade in customary international law".[56]

Jean Allain has another approach. He adds one more case to the analysis to show a difference between the *Amedie* (1810) and *Fortuna* (1811), on one side, and *Diana* (1813) and *Louis* (1817), on the other. By contrasting the cases, he identifies a movement towards a more positivistic approach (identifiable both in British and in US case law).[57]

I have a different reading of those cases. *Diana* (1813) and *Louis* (1817) might well reflect the then-ascending trend of positivism in legal interpretation, as argued by Allain. And Niekerk points to an important difference on the approach between *Louis* (1817), and *Amedie* (1810) and *Fortuna* (1811). Yet neither of those approaches do justice to the reasoning of the cases and the justification they offer for the actual central change they reflect.

Beyond the fact they have been referenced in literature as exemplary of the British case law, those four cases are a special set for at least two reasons. First, they addressed very similar legal questions, all concerning the legality of visits and captures. Second, besides the first of them —which is referenced in the second one—, the same judge delivered all their final decisions. That judge was Sir William Scott, later known as Lord Stowell, the most important authority in British prize law.[58]

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[56] VAN NIEKERK, British, Portuguese, and American judges in Adderley Street, pp. 7-11.

[57] In the US, such change showed in the comparison of the *Jeune Eugenie* case with *The Antelope*. The former relied on domestic law to indicate a prohibition of slave trade by universal law in the Federal Circuit of Massachusetts in 1822. The latter, according to the US Supreme Court's ruling of 1825 (ALLAIN, Jean, **The Law and Slavery**, Leiden: Brill Nijhoff, 2015, p. 54.)

[58] We can have a sense of the British admiration of Lord Stowell's in a statement by Robert Phillimore, one of the most renowned British writers on international law of the 19th century, who referred to Stowell as the number one of distinguished civilians (PHILLIMORE,

As we saw above, the case of *Amedie* dealt with a US vessel captured while carrying slaves to Cuba, then a colony of a British enemy; after it was condemned in the Vice-Admiralty Court of Tortola (Virgin Islands), an appeal was brought before the *Lords of Appeals in Prize Causes* in 1810. The main rationale in *Amedie*'s final decision was that, given that the British parliament had abolished slave trade in British dominions as "contrary to the principles of justice and humanity", a right had emerged to Britain of assuming its illegality. Based on those grounds, the British navy was entitled to capture foreign vessels and bring them to the British prize courts. Unless proof was submitted before the prize court that the trade was legal under the law of the flag state, no right of property could be claimed and therefore no right of restitution would follow.[59]

In the *Fortuna* case that point is restated, again in the same context of establishing the rights of capture. The vessel *Fortuna* was seized in the end of a slave trade journey, flying Portuguese colours. In 1811, it was condemned by the High Court of Admiralty. In the decision, William Scott explained the context in which he understood the case was located, after the previous paradigmatic decision in the *Amedie*. He stated that prize law looked "primarily to violations of belligerent rights as grounds of confiscation in vessels not actually belonging to the enemy, [but] *it has extended itself a good deal beyond considerations of that description only*" (emphasis added). He proceeded explaining two of those considerations: first, a violation of British law could be grounds to condemn a British vessel — as a principle incorporated in the British prize law along twenty years; second, as per *Amedie*, an apparent violation of the law of nations (as interpreted by the British parliament) enabled confiscation and put upon the other parties the burden of proof that in the

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Commentaries upon International Law p. xxii.). On Robert Phillimore's relevance for the doctrine of the 19th-century Britain, see GAURIER, Dominique, **Gaurier, D. Histoire du droit international: De l'Antiquité à la création de l'ONU**, Rennes: Presses Universitaires de Rennes, 2005 (second part – chapter 1).

[59] *The Amedie*, 165 English Reports. 1240, 1810, p. 1241.

flag state the trade was actually legal. Therefore, this new principle of British prize law was based on the idea that slave trade was considered "a trade which this country, since its own abandonment of it, has deemed repugnant to the law of nations, to justice and humanity"; its consequence was the *shifting of burden of proof*. In the case of *Fortuna,* as in *Amedie*, condemnation followed the failure to produce such proof.[60]

In Allain's account, those two cases relied on natural law, linked to the breach of national law, to condemn foreign slave trade ships. That is not wrong. We saw that they did hold slave trade as *prima facie* illegal thus making the capture of suspected foreign vessels legal. Yet, the author sees a positivist tendency in the next case, but he relies on a difference that is not actually there.

In the *Diana* case*,* we find exactly the same interpretation about the British prize law and the burden of proof about slave trade as in *Amedie* and *Fortuna*. *Diana* was a Swedish vessel sailing from Liberia to the Lesser Antilles, captured with slaves on board and brought to the Vice-Admiralty Court at Sierra Leone, whose sentence was reversed by the High Court of Admiralty in 1813. The only distinction in *Diana* in relation to the other cases mentioned above was that the very same principle led to the reversing of a sentence of condemnation. According to Scott, sufficient proof had been produced that the Swedish vessel was legally trading slaves under the state-issued passport to do so. William Scott offered a clear justification for the reversal: "The Lords of Appeal [in *Amedie*] did not mean to set themselves up as legislators for the whole world, or to presume in any manner to set themselves up as legislators for the whole world", so British could not go beyond the *burden of proof* in dealing with slave trade by foreign state nationals.[61] That statement

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[60] *The Fortuna*, 165 English Reports 1240, 1811, p. 1241.

[61] *The Diana*, 165 English Reports 1245, 1813, p. 1247. One could interpret that there was a difference in the proof accepted as enough evidence of the trade's legality. Yet, that point would require further research about the contemporaneous usual grounds of proof.

confirmed exactly the same reasoning that we saw in *Amedie* and *Fortuna.* The decision in *Diana* did not *explicitly* mention the construal on the domestic law and natural law which changed the burden of proof. Yet, the change of the burden of proof was there, to ground the reversal in the condemnation of ship.

The actual change in case law is expressed in *Louis*. The French vessel under that name was brought to the Vice-Admiralty Court at Sierra Leone after an attempt of capture for suspicion of slave trade and following resistance from its crew. The High Court of Admiralty decision of 1817 reversed the previous condemnation of the ship, that is, it reversed the decree that had declared it a good prize.

The first difference is noticeable already in the main focus of its analysis. The decision on the appeal of the *Louis* case focused in the right of visit and search rather than on the legality of capture as in the other cases mentioned above. The main point was "no nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, *save only on the belligerent claim*".[62] That is why it had to focus on the right of visit instead of proceeding directly to an analysis of the right of capture: "*if [there is] no right of visit* and search, then [there is] *no ulterior right of seizing and bringing in, and proceeding to adjudication*".[63]

William Scott acknowledged the right of visit and search was fully recognised in the practice of states, founded in "the necessities of self-defence, in preventing the enemy from being supplied with the instruments of war, and from having his means of annoyance augmented by the advantages of maritime commerce". [64] In times of war, enemies

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[62] *Le Louis*, 165 English Reports 1464, 1817, p. 1475-1476.

[63] *Le Louis*, 165 English Reports 1464, 1817, p. 1475.

[64] *Le Louis*, 165 English Reports 1464, 1817, p. 1475.

had a right of visitation and search against neutrals for "an enquiry whether they are employed in the service of his enemy"; in case of "an enquiry wrongfully pursued", the neutral party was entitled to "compensation in costs and damages". [65]

In the opposite spectrum, considering whether a right of search existed in *time of peace*, Sir W. Scott asserts that, in the absence of the necessities and the practice that allowed for a right of visit and search in war, two principles had to be observed: first, "the equality and entire independence of all distinct states"; second, "*all nations being equal, all have an equal right to the uninterrupted use of the appropriated parts of the ocean for their navigation*".[66] Most importantly, he emphasised *freedom of navigation did not have any exception*[67] *in times of peace* as it happened with the "interruption of navigation (…) which the rights of war give to both belligerents against neutrals".[68]

Sir W. Scott noticed the difficulties in the British pursuit of total and global abolition of slave trade in face of such restraints of peacetime: it could not be attainable "without a general and sincere concurrence of all the maritime states. (…) But the difficulty of the attainment will not legalise measures that are otherwise illegal".[69] *The solution was in consent through treaties*: "So long as the treaties do exist, and their obligations are sincerely and reciprocally respected, the exercise of a right, which *pro tanto* converts a state of peace into a state of war, may be conducted as *not to excite just irritation*".[70]

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[65] *Le Louis*, 165 English Reports 1464, 1817, p. 1475.

[66] *Le Louis*, 165 English Reports 1464, 1817` 1475.

[67] The only other possibility was piracy, as we will explore later in this chapter.

[68] *Le Louis*, 165 English Reports 1464, 1817, p. 1475.

[69] *Le Louis*, 165 English Reports 1464, 1817, p. 1479.

[70] *Le Louis*, 165 English Reports 1464, 1817, p. 1480.

The Louis case (1817) thus marked *the transition from interpreting the "navy's work" for the suppression of slave trade during war to interpreting it in peacetime.* That was the central change that occurred among the cases. Allain's statement that the case showed a tendency of positivism may be true. Yet we would be remiss to ignore that the choice of centrally relying on treaties (instead of a different construal under natural law, for instance) emerged in the wake of a gap found on an entirely different legal framework that had to be applied once the wars ended.

Accordingly, Scott's argumentation shows the practical problem of the regime change as a way of differentiating the previous cases from *Louis.* It thus did not represent an overturning of previous case law, as suggested by Niekerk, but rather a reinforcement of the same tests applied before. The Napoleonic Wars had come to an end, so contrasting with the previous wartime cases which had been resolved by appealing to the rights of belligerents and neutrals during wartime, ruling on *Louis* required Scott to consider what else could respond to an implicit first question of which law should be applied; a new interpretation should be developed from scratch.

The decision in *Louis* was consistent with a new line of action in British international policy that had started some years prior. In 1813, British Foreign Secretary Viscount Castlereagh had modified the instructions to British cruisers about the interpretation given to treaties stablished with Portugal and Spain, removing restrictions to the protection of the flags[71] and offering indemnities related to the (implicitly

[71] An interesting point is, in 1810, a pamphlet produced by the African Institution served as the guidelines for the Royal Navy, which contained made-up qualifications beyond the ship's flag (as the nationality of crew or the place where the ship had been built) for a vessel to be qualified as Portuguese. KERN, Holger Lutz, Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade, **Journal of the History of International Law**, no. 6, pp. 233–258, 2004, p. 237-238.

considered illegal) captures, to be paid to both states.[72] In 1816, the King's Advocate was explicit in saying that the right of visit had ended with the war[73] and Britain was already seriously engaged in treaty-making to secure the continuity of the Royal Navy operation against slave trade.

Louis would be quoted in Parliament and Law Office's reports throughout the century to support the understanding that neither the declaration of slave trade abolition nor the promise to carry it out offered sufficient legal grounds to interfere in foreign vessels. From that point on, the British diplomacy acted according to the understanding that the key to slave trade abolition was investing in treaty-making to overcome those limitations.[74]

B. THE WAYS OF TREATY-MAKING

Time for treaties

From the beginning to the end of the nineteenth century, treaty-making "went from being something that happened perhaps twice a month, to something that happened about every other day".[75] A good way for us to see the impact of that trend is by putting it side to side with the mushrooming treaty-making that started in the late twentieth century – a reason for well-known anxiety for the dangers of fragmenting

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[72] KERN, Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade, p. 238.

[73] KERN, Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade, p. 240.

[74] 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), p. 15; See also WILSON, Howard Hazen, Some principal aspects of British efforts to crush the African slave trade, 1807-1929, **The American Journal of International Law**, vol. 44, no. 3, pp. 505–526, 1950.

[75] KEENE, Edward, The Treaty-Making Revolution of the Nineteenth Century, **The International History Review**, vol. 34, no. 3, pp. 475–500, 2012, p. 478.

international law[76]. While in the last boom of treaties the growth was roughly six-fold — even though starting from a much higher quantity of treaty-making—, the number of treaties made per year increased almost seven-fold during the 1800s.[77]

While in seventeenth or eighteenth century the rate had been stable or declining, in the 1790s an upward trend emerged, perhaps related to warfare coalitions.[78] A dramatic increase in treaty-making in the 1810s might be explained by the short duration of the treaties celebrated in the previous decades.[79] Further, the formal inclusion of new states to the international society and the process of industrialization (with increasing inter-state commerce and communication) may have impacted treaty-making by then.[80]

Wilhelm Grewe broadly linked that trend of treaty-making with a positivistic codification push of the nineteenth century.[81] In his reading, an inclination to codify international law appeared both in the international conferences and in some doctrinal works in the form of a will of creating international legislation[82]. That is a fair overview of the phenomenon, but we should be careful not to overstate the role this played in the second decade of the nineteenth century, when the history of treaty-making for the suppression of slave trade begins.

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[76] See e.g. KOSKENNIEMI, Martti; LEINO, Päivi, Fragmentation of International Law? Postmodern anxieties., **Leiden Journal of International Law**, vol. 15, pp. 553–579, 2002; ILC, **Fragmentation of International Law: difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission**, Geneva: United Nations, 2006; PROST, Mario, **The Concept of Unity in Public International Law**, Oxford: Hart, 2012.

[77] KEENE, The Treaty-Making Revolution of the Nineteenth Century, p. 478.

[78] KEENE, The Treaty-Making Revolution of the Nineteenth Century, p. 479.

[79] KEENE, The Treaty-Making Revolution of the Nineteenth Century, p. 478.

[80] KEENE, The Treaty-Making Revolution of the Nineteenth Century, p. 479.

[81] GREWE, Wilhelm G, **The Epochs of International Law**, Berlin: Walter de Gruyter, 2000.

[82] GREWE, **The Epochs of International Law**, pp. 512-513.

It might be that in the beginning of the century there was already a trend for obtaining consent ("reciprocity of will") from other states, either expressed in treaties or tacitly found in custom. It is not so clear, though, that there was already a movement towards basing *all* international law in the consent of states, as argued by Grewe. For that reason, we should consider the context of the boom of treaties while also trying to identify other elements that might have contributed for the choice of using treaties against slave trade.

In much a more specific analysis, Edward Keene examines the phenomenon of British treaty-making in the very case of slave trade suppression, responding to the question of "Why were the British so interested in treaty-making in the first place?"[83]. There was something about positivism that led to treaty-making, Keene suggests. It coincided with the years of development of legal positivism, alongside elements of a remaining naturalist doctrine, and it was implicated by the process of achieving its civilization-based full form in the second half of the century.[84] Although this information confirms the application of the phenomenon Grewe was talking about to the case of slave trade suppression, it is not particularly illuminating of the specific point in time we are focusing as the starting point to the British quest. Regarding the push towards civilization, we should bear in mind that, although the Declaration of Vienna of 1815 about the abolition of slave trade was one of the first documents to use the identification of states as 'civilized'[85], only in the second half of the nineteenth century that notion would hold

[83] KEENE, Edward, A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century, **International Organization**, vol. 61, no. 02, pp. 281–30, 2007, p. 315.

[84] KEENE, A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century, pp. 315-319.

[85] OBREGÓN, Liliana, The Civilized and the Uncivilized, *in*:, Oxford: Oxford University Press, 2012, p. 5.

sway over the policy against slave trade[86]. Corroborating this is that colonialist discourse expressly grounded on the 'duty to civilize' was only to be found in the Act of the Berlin Conference of 1885.[87]

A different aspect can point to an explanatory hypothesis for the choice of treaties in the case of slave trade suppression. A look into the century's doctrine reveals not only jurists, but also philosophers, theologians and members of state bureaucracy were writing about what constituted international law, or why international law was not law at all. Only by the last third of the century international law was consolidated as a professionalised discipline, when international lawyers created institutional *loci* where they would share their '*ésprit d'internationalité'* in a much more integrated scenario.[88]

During the nineteenth century, even though international law was a fundamental part of diplomatic practice — which constituted the core of international precedents, alongside domestic case law—, the doctrinal development and understanding of its cannons was quite diverse. Theories about international law as distinct from natural law only grew in number at the time international law appeared as an autonomous discipline in multiplying textbooks and translations.[89] Fundamentally, international lawyers (who applied, taught and theorized international law) did not just strongly disagree in their methods of interpretation or overall conception of international law; they did not share the most basic

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[86] Erpelding shows a change in the British anti-slavery policy which combined the 'duty to civilize' with economic exploitations of the African continent by the last quarter of the century. See ERPELDING, Michel, **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)**, Institut Universitaire Varenne, 2017 (part 1).

[87] OBREGÓN, The Civilized and the Uncivilized, p. 8.

[88] KOSKENNIEMI, Martti, The legacy of the nineteenth century, pp. 1–13, 2016.

[89] NUZZO, Luigi; VEC, Milos, The Birth of International Law as a Legal Discipline in the 19th Century, *in*: VEC, Milos; NUZZO, Luigi (Eds.), **Constructing International Law - The Birth of a Discipline**, Frankfurt: Vittorio Klosterman, 2012, pp. 1–8.

criteria of source-identification[90]. The resulting production was a mixture of natural and positive law, seen in the different listings of sources, in the preponderance of one of them in particular fields, and even various conceptions about principles.[91] Out of this complex scenario, Miloš Vec identified one tendency: separating the legal normativity of international law from other kinds, which accompanied an increased "sum of positive explicit legal rules among states".[92]

If there was something about positivism related to the choice of utilizing treaties as the chosen legal technology for the slave trade suppression, it might have been related to a practical preference for formalism in the ascertainment of legal rules.[93] Treaties may have been considered a good way to bypass or at least counter the upheavals resulting from different approaches to law, with corresponding divergent methodologies and conflicting interests in the implementation of its programmes.

This is especially true in a scenario where the legality of slave trade was prone to strong disagreements. The law under which its *proscription* should be understood depended on the value given to domestic law, natural law and the law of nations. This also applied to the *means for implementation* of the slave trade suppression, in the form of

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[90] On the complex variation of sources-listing and the legal significance given to commonly identified sources, see VEC, Milos, Sources of international law in the nineteenth century european tradition: the myth of positivism, *in*: BESSON, Samantha; DASPREMONT, Jean (Eds.), **The Oxford Handbook of the Sources of International Law**, Oxford: Oxford, 2017. About principles, see VEC, Milos, Principles in 19th century International Law doctrine, *in*: NUZZO, Luigi; VEC, Milos (Eds.), **Constructing International Law - The Birth of a Discipline**, Frankfurt: Oxford, 2012, pp. 209–228.

[91] VEC, Sources of international law in the nineteenth century European tradition: the myth of positivism; See also VEC, Principles in 19th century International Law doctrine.

[92] VEC, Sources of international law in the nineteenth century european tradition: the myth of positivism, p. 141.

[93] Although formalism is usually present in legal positivism, using a metonymy to identify the former by the name of the later may be misleading. See D'ASPREMONT, Jean, **Formalism and the Sources of International Law**, Oxford: Oxford University, 2011, pp. 25-27.

rights and duties. We have seen an example of this in the unfolding of British prize courts case law from wartime onto peacetime. Establishing treaties was ultimately a form of controlling the interpretative construction about the "work" of the British Navy. It was a way of avoiding any of the two worst scenarios anticipated by Scott in *Louis:* British acts being seen as acts of aggression — potentially culminating in other wars— or opening the door to new exceptions to the freedom of the seas — frustrating the most interested party in keeping both its maritime dominance and commerce.

Multilateral conferences

Treaty-making in the nineteenth century was characterized by "a tendency of multilateralism, the conclusion of law-making treaties, the allotment of new fields of international cooperation, the institutionalizations".[94] In practice, 19th-century international law was heavily based on state sovereignty, and much of the jurisprudential development occurred around international conferences and congresses, where specialized studies would be conducted and treaties would be formalized as results in the form of legal rules.[95]

In those exchanges, customary law sometimes showed influence by natural law, especially when identified as the "conscience of humanity".[96] That mixture is present in the Paris Peace Treaty of 1814, whose additional articles between France and Great Britain included a provision where "…with respect to a description of traffic repugnant to the principles of natural justice and of the enlightened age in which we

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[94] VEC, Sources of international law in the nineteenth century european tradition: the myth of positivism, p. 142.

[95] MÄLKSOO, Lauri, Sources of International Law in the 19th Century European Tradition: Insights From Practice and Theory, *in*: BESSON, Samantha; DASPREMONT, Jean (Eds.), **The Oxford Handbook of the Sources of International Law**, Oxford: Oxford University, 2017.

[96] MÄLKSOO, Sources of International Law in The 19th Century European Tradition: Insights From Practice and Theory.

live", France committed itself to end slave trade in its dominions in the course of five years. Under the treaty, the French monarch was also bound "to unite all his efforts to those of His Britannic Majesty, at the approaching Congress, to induce all the Powers of Christendom to decree the abolition of the Slave Trade so that the said Trade shall cease universally". [97]

They were anticipating negotiations in the Congress of Vienna, which happened as provided in the Paris Peace Treaty of 1814 agreed by France, Austria, Prussia, Russia and Britain.[98] According to Henry Wheaton, it was in the negotiations between Britain and France after the Peace of 1814 that the right of visit was expressly put forward as the only effective way of abolishing slave trade.[99] The Congress of Vienna would offer a chance for British Foreign Secretary Castlereagh, backed by British abolitionists pressure[100], to advance in treaty-making for that end.

Following the method of proceedings of the Paris conference, in the Congress of Vienna the main powers worked towards bilateral consensus, from which they would seek more encompassing agreements — for it was seen rather as a forum for the great powers than a conference *per se*.[101]

Abolition of slave trade was not one of the main items in the agenda of reordering Europe; even so, Castlereagh made sure the topic

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[97] *Paris Peace Treaty of 1814*, additional articles between France and Great Britain, Article 1.

[98] *Paris Peace Treaty of 1814*, Article 32.

[99] WHEATON, Henry; CALVO, Cárlos, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, Besanzon: José Jacquin, 1861, p. 264.

[100] VOIGT, Janine, **Die Abschaffung des transatlantischen europäischen Sklavenhandels im Völkerrecht**, Zürich: Schulthess, 2000, p. 35.

[101]VOIGT, **Die Abschaffung des transatlantischen europäischen Sklavenhandels im Völkerrecht**, p. 32.

did not disappear in negotiations. The Congress of Vienna finally produced the first multilateral document on slave trade. By the declaration of 8 February 1815, Austria, Britain, France, Prussia, Russia, Portugal, Spain and Sweden denounced slave trade as "repugnant to the principles of humanity and universal morality", which, as such, should be suppressed by civilized countries as soon as possible.[102] A multilateral treaty did not pass mainly on account of states resistance to measures harmful to their sovereignty.[103] Although the importance of the declaration as recognised by international law literature varies[104], concluding a declaration by then meant at least formalizing humanitarian values into the law of the nations[105] , with the support of all participating members of the Congress[106]. The declaration would be many times recalled in further negotiations towards universal suppression.

The topic of the right of visit came back with a failed British proposal at the London conference (1817-1818). British representatives put forward the idea that maritime states should establish an international naval police force to detain vessels suspected of slave trade; otherwise, the authority of capture would rely only on their respective flag states.[107] In their meeting in Aachen of 1818, the great powers rejected once again a variation of that proposal, of a mutual right of visit and search. The

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[102] *Declaration of Vienna of 1815*.

[103] VOIGT, **Die Abschaffung des transatlantischen europäischen Sklavenhandels im Völkerrecht**, pp. 32-33.

[104] VOIGT, **Die Abschaffung des transatlantischen europäischen Sklavenhandels im Völkerrecht**, p. 34. See also MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p.33 et seq..

[105] VOIGT, **Die Abschaffung des transatlantischen europäischen Sklavenhandels im Völkerrecht**, p. 33.

[106] KLOSE, Fabian, Enforcing abolition: the entanglement of civil socity action, humanitarian norm-setting, and military intervention, *in*: KLOSE, Fabian (Ed.), **The Emergence of Humanitarian Intervention Ideas and Practice from the Nineteenth Century to the Present**, Cambridge: Cambridge, 2016, p. 107.

[107] KERN, Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade, p. 244.

rejection was attributed mainly to the prospect of misuse and harm to sovereignty rights[108]. Alternative proposals to the ones favoured by Britain help us understand the concerns of other powers. The perceived lack of balance in the power of policing and adjudication emerged both in the French idea of creating an international police force and in the Russian suggestion of a multilateral institution, comprising a maritime force and a judicial body to rule on criminal offenses arising from slave trade, all in accordance with a common international legislation.[109]

The British quest to create a right of visit through multilateral conferences would culminate in the Brussels Conference of 1890, when slave trade was declared to be proscribed under international law and a right of visit and search provided for achieving that goal[110]. Yet the right of visit and search under the Brussels Act was much more restricted than any definition we would imagine to be the more effective against slave trade: under "Repression of the Slave Trade by Sea", the parties of the Conference "between whom there are special Conventions for the suppression of the Slave Trade" agreed to restrict the right to visit, search and detention to *specific* ships inside a *specified* maritime zone.[111]

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[108] KLOSE, Enforcing abolition: the entanglement of civil socity action, humanitarian norm-setting, and military intervention, pp. 116-177.

[109] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, pp. 268-269.; MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p.44.

[110] Allain points out to the difference between the expressions "droit des gens" and "droit international. In the Berlin Conference of 1885 slave trade was said to be prohibited under *jus gentium*, which can be interpreted as under the domestic laws of European states; while in the Brussels Conference of 1890, the proscription was said to be under international law. ALLAIN, Jean, **Slavery in international law – of human exploitation and trafficking**, Leiden: Martinus Nijhoff, 2012, pp. 72-73.

[111] *Act of Brussels Conference of 1890,* Chapter 3.

The piracy alternative

Britain's strategy for the Congress of Verona of 1822 had been to push forward the idea, as it had done in the previous conference at Aachen (1818), that slave trade should be declared piracy by individual States.[112] How would piracy help the British efforts? The assimilation of slave trade to piracy would bypass the obstacle of the prohibition of interference with foreign vessels during peacetime. That prohibition, as we have seen in *Louis*, was the reason why a right of visit should be provided by treaty. Pirate vessels, however, could not claim the protection of any national flag. That meant they "could be visited with impunity by ships of all States – in other words, to use modern terminology, universal jurisdiction would be established".[113] If Britain succeeded in its piracy proposal, it would have no need of establishing the right of visit and search (and, by extension, the right of capture and the right of adjudication) specific to anti-slave trade.

As mentioned by Lloyd, who seems to favour this strategy himself, treating slave trade as piracy from the start would have been much simpler than establishing treaties with recalcitrant states.[114] After all, independently of any treaties, piracy was considered the sole exception for the freedom of the seas, which prohibited interference of

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[112] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, p. 271; MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p.45..

[113] About that provision, see ALLAIN, **Slavery in international law – of human exploitation and trafficking**, p. 68.

[114] Lloyd quotes Surgeon Cmdr. Baikie in 1854: "Instead of puzzling questions about nationalities and national flags, and ship's papers and clearances, let every such vessel be looked upon as piratical, and without inquiring for the birthplace of the master, let him be treated as a pirate captain". Lloyd completes: "But the ridiculous pride of every civilised nation prevented such a simple solution. Considerations of national prestige were regarded as more important than the traffic in human flash". LLOYD, Christopher, **The Navy and the Slave Trade**, New York: Routledge, 2016, p. 60.

foreign ships to one another.[115] In *Louis*, for instance, the respondent insisted in presenting the ship as engaged in piracy. As Stowell defined in his decision, "with professed pirates there is no state of peace. They are the enemies of every country, and at all times; and therefore are universally subject to the *extreme rights of war*".[116]

Yet, when answering whether slave trade could be considered piracy, Sir W. Scott defended it could not. Slave trade was "not the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately", but (in his view) a trade that, albeit unfortunate, presented no harm to other countries. [117] He also argued the act of slave traders was not "against the will of the Governments and the course of their laws", but […] not only recognised but invited by the institutions and administrations of those barbarous communities." [118] So slave trade did not contradict the will of governments or their laws and did not endanger the freedom of the seas as piratical practices would. Thus, concluded William Scott, "no lawyer […] could be found hardy enough to maintain, that an indictment for piracy could be supported by the mere evidence of a trading in slaves"[119].

Considering slave trade as piracy in the absence of treaties providing for such treatment would be out of question when the British treaty-making in peacetime began. After it was considered piracy in British domestic legislation in 1818[120], however, such classification entered the range of Britain's attempts to get the consent of foreign states.

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[115] ERPELDING, **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)**, p. 65.

[116] *Le Louis*, 165 English Reports 1464, 1817, p. 1475.

[117] *Le Louis*, 165 English Reports 1464, 1817, p. 1476.

[118] *Le Louis*, 165 English Reports 1464, 1817, p. 1476.

[119] *Le Louis*, 165 English Reports 1464, 1817, p. 1477.

[120] *Act of Abolition of Slave Trade of 1818*.

If provided by treaty, piracy could well be used to achieve the same results as provisions for the right of visit and search.

The treatment of slave trade as piracy would only enter a multilateral agreement in 1841, in the Convention established the multilateral obligation to Austria, Prussia, Russia and the United Kingdom.[121] Alongside multilateral conferences a series of bilateral treaties were nevertheless being signed by Britain. Some of them inscribed in their language the opportunity that piracy represented to enforce the proscription of slave trade. None of those treaties, however, substituted the right of visit for the treatment of slave trade as piracy. Both provisions came together. There would be only one exception: under the *Anglo-Brazilian Treaty of 1826*, Britain would endorse a treatment of slave trade as piracy after the expiration of the treaty provisions giving the British the rights of visit and search. We will explore this later.[122] Now we should look at the overall production in British treaty-making and the place of the said bilateral treaties.

C. A NETWORK OF BILATERAL TREATIES

Overall production

Facing resistance to pass both a proscription of slave trade and a right of visit at the 19th-century European conferences, Britain resorted to a "tactical adjustment[123]. Combined with shades-of-grey measures, such as negotiations, gunboat diplomacy, and plain blackmail, Britain sought the consent of foreign states to establish bilateral treaties.

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[121] As mentioned by ALLAIN, **Slavery in international law – of human exploitation and trafficking**, p. 68.

[122] See chapter 5.

[123] The phrase is Jean Allain's: ALLAIN, **Slavery in international law – of human exploitation and trafficking**, p. 63.

The first bilateral treaties to deal with slave trade suppression provided for simple promises of employing measures to be taken against slave trade or for declarations of abolition with deadlines — nothing about the right of visit and search. Similarly to the Paris Peace Treaty of 1814, treaties signed before the conclusion of that first multilateral agreement had a broader focus and just one or a few articles dealing with slave trade. Examples of bilateral treaties in this category were the Treaty between Britain and Portugal of 1810, the Treaty between Britain and Sweden of 1813 and the Treaty of Ghent with the United States in 1814.[124]

In the subsequent years new bilateral treaties went beyond consent to slave trade abolition, containing rights and duties linked to mechanisms of enforcement.[125] As we have seen, the right of visit and search was already present in the Congress of Vienna negotiations and it became a central element of the British pushes towards slave trade suppression agreements. The first treaty to contain both the right of visit and other enforcement steps emerged from the Vienna negotiations: the Treaty between Britain and Portugal of 1817. As an addition to the slave trade abolition clause of a previous treaty (1815), the 1817 Treaty brought a general *triple formula* combination that reminded of the rights and duties of the warfare regime.

Remember that during the Napoleonic Wars, vessels could be visited, captured and adjudicated by belligerents. The peacetime triple formula inscribed in the Portuguese treaty meant: (1) a mutual right to visit and search vessels; (2) a right to detain suspected vessels; (3) the adjudication of captured vessels — not by domestic courts applying

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[124] A list of bilateral treaties signed by Britain is provided in the Appendix.

[125] This expression, "enforcement mechanisms" is used by Jenny Martinez to show the separation, in treaties, of the "statement of principle against slave trade" and a series of tools for its implementation. MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p.28.

international law, as occurred in prize courts, but by *mixed commissions*, established in each party's dominions and composed by members of both nationalities.[126] The formula of that treaty would become the model of the ideal rights to secure a maximum of effectiveness to slave trade suppression in the first half of the nineteenth century.

From that point on, the number of anti-slave trade bilateral treaties mushroomed. Other 44 treaties were signed from 1817 to 1845, with at least 25 different parties[127]. Those numbers include both treaties with parties considered by then as "civilised" and "non-civilised"[128]. The latter count for seven of the total, as the list covers only the very beginning of the British policy in abolishing slave trade in Africa. They were treaties with African native chiefs, who committed themselves not to permit slave exports[129]. From the middle of the century on, the British policing of the African continent would go way beyond the West Coast: in the second half of the nineteenth century, the focus of the British policy would shift to the so called "oriental slave trade". Before that, British diplomacy aimed at abolition of the trade destined to the Americas, notwithstanding the ongoing slavery and trade in sub-Saharan Africa (with three million enslaved only in the 19th century) transported through the north-African desert, Indian Ocean, the Persian Golf and the Red Sea.[130]

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[126] We will explore mixed commissions in detail in the next Chapter.

[127] See the complete list in the Appendix.

[128] Treaties with parties considered non-civilized were established with the leader personally (usually referred by British as 'chief'), but for this purpose I considered as treaties related to the same party the treaties stablished with different leaderships in the same locality. For a deep analysis of the treaties as a British policy among others towards its imperial domination of Africa, see VAN HULLE, Inge, **Britain, West Africa and the formation of imperial international law (1807-1885)**, University of Leuven, 2016.

[129] See LLOYD, **The Navy and the Slave Trade**, pp. 59-60.

[130] ALLAIN, Jean. **Slavery in international law – of human exploitation and trafficking**, p. 61.

Thirteen of the anti-slavery treaties signed until 1845 were concluded with new American states[131], among which were recently-independent countries as Brazil. As we will discuss later, the "inclusion" of the American states in the "family of the civilized" accounted for an "expansion" in the reach of international law. [132] Even though Spain and Portugal, for instance, had already signed treaties with Britain containing provisions covering those territories as part of their dominions, the change of circumstances of Latin-American states independence called for new treaties with the recognised new independent States, which were largely based on the previous agreements.

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[131] Convention between Brazil and Great Britain for the Abolition of the African Slave Trade, signed at Rio de Janeiro, 23 November 1826; Slave Trade Treaty between Chile and Great Britain, signed at Santiago, 19 January 1839; Slave Trade Treaty between Great Britain and Venezuela, signed at Caracas, 15 March 1839; Treaty between the Argentinian Republic and Great Britain for the Abolition of the Slave Trade, signed at Buenos Aires, 24 May 1839; Slave Trade Treaty between Great Britain and Uruguay, signed at Montevideo, 13 July 1839; Slave Trade Convention between Great Britain and Haiti, signed at Port-au-Prince, 23 December 1839; Slave Trade Treaty between France and Haiti, signed at Port-au-Prince, 29 August 1840; Slave Trade Treaty between Bolivia and Great Britain, signed at Sucre, 25 September 1840; Treaty between Great Britain and Texas for the Suppression of the African Slave Trade, signed at London, 16 November 1840; Slave Trade Treaty between Great Britain and Mexico, signed at Mexico City, 24 February 1841; Slave Trade Treaty between Ecuador and Great Britain, signed at Quito, 24 May 1841; Additional and Explanatory Convention for the Abolition of the Slave Trade between Chile and Great Britain, signed at Santiago, 7 August 1841; Declaration between Great Britain and Texas, supplemental to the Slave Trade Treaty, signed at Washington, 16 February 1844.

[132] As we will see in the following Chapters, the notion of reception of Latin-Americans into the family of civilized nations by Europeans can be affirmed only by the 19th century European perspective of a formal listing of nations considered as 'civilized', but does not correspond to the actual historical change in international law promoted by both Europeans and semi-peripheral lawyers who were rethinking its terms. LORCA, Arnulf Becker, Universal International Law: Nineteenth-Century: Histories of Imposition and Appropriation, **Harvard International Law Journal**, vol. 51, no. 2, pp. 1–78, 2010.

The British system and variation in treaties

Two other elements help us understand those numbers in the context of the British treaty-making against slave trade. First, although Britain pushed for a "most effective" formula containing all three elements of enforcement (visitation, capture, adjudication), different levels of resistance led to variances in the bilateral treaties with "civilised" nations. Second, suppression regimes were altered along the way to adapt to implementation challenges, leading to special additional clauses to the triple formula.

States as Spain (1817 and 1835 treaties), Portugal (1817 and 1842) and Brazil (1826), albeit recalcitrant at first, acquiesced to the whole triple formula[133], entering what we can call the *British system*[134]. In that category also were the British treaties with Netherlands (1818), Chile (1839), the Argentine Confederation (1839), Uruguay (1839), Bolivia (1840), Ecuador (1841) and the United States (1862).[135] Within the category, there was a variation in relation to the mixed commissions in the Chile, the Argentine Confederation, Uruguay, Bolivia and Ecuador cases. Those states ratified triple-formula treaties but rejected having commissions in their territories and did not appoint commissioners to the commissions in Sierra Leone.[136] The US treaty of 1862 was also a slightly different case. It was a result of the change in US policy in face of the slave-related civil war that came after years of resistance from the United States to acquiesce to the triple formula. It provided for a a mutual right

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[133] ERPELDING, **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)**, p. 90.

[134] Denomination by Erpelding: **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)** footnote 443.

[135] ERPELDING, **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)**, footnote 443.; ALLAIN, **The Law and Slavery**, pp. 85-86.

[136] BETHELL, Leslie, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century, **The Journal of African History**, vol. 7, no. 01, pp. 79–93, 1966, p. 83.

of visit and search in a particular maritime zone and the establishment of mixed commissions which never heard any case before jurisdiction was transferred back to state's domestic courts with the treaty of 1870.[137]

Another kind of treaty emerged from the resistance led by France and by the United States to consent to the right of visit and to the adjudication by mixed commissions. From 1817 to 1831, France did not ratify any treaties with Britain, notwithstanding the promise contained in the Treaty of Vienna, under the allegations of concerns with its sovereignty and potential violation of domestic law. A similar opposition by the United States to any mutual right of visit and search had reasons dating years back when the US accused Britain of impressing North-American seamen (that is, forcing them to serve in the British navy) during a visit. The War of 1812 —which the US maintained was triggered by abuses by the British navy— ceased with the Treaty of Ghent, containing a promise by both parties to mobilize against slave trade, without any mention of rights of visitation.[138] During a long period of refusal to join any agreements with such provisions, and having nevertheless assumed a duty to abolish of slave trade in the Treaty of Vienna and in the Treaty of Ghent, both countries employed visitation, capture and adjudication by their own vessels and domestic laws[139]. Britain would reach new treaties with the United States and France in 1842 and 1845, respectively. They would provide for *a joint cruising system*[140], without a mutual right of search in the terms of the *British system*. A very restrictive right of visit was explicitly present in the treaty with France. By then, however, Britain interpreted that a restricted right

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[137] ALLAIN, **The Law and Slavery**, pp. 85-86.

[138] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, pp. 248-249; ALLAIN, **The Law and Slavery**, pp. 77-78.

[139] ERPELDING, **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)**, p. 92.

[140] KEENE, A Case Study of the Construction of International Hierarchy.

of visit was existent independently of any provision by treaty.[141] Thus, the same restrictive right was deemed to be applied in the relations with the US, albeit absent of their treaty. Both naval practice and diplomatic statements caused great controversy on the exact limits of visitation in the absence of any right of visit and search provision during peacetime.[142]

A third type of treaty can be discerned in the Anglo-French treaties of 1831 and 1833, a *domestic adjudication system*[143]. They provided for a mutual right of visit and search restricted to certain maritime zones, while adjudication was reserved to the flag state's jurisdiction. Later, Denmark, Haiti, the Hanseatic League, Sardinia, the Kingdom of the Two Scillies, and Tuscany, all acceded to such treaties. As we have seen, the multilateral treaty of 1841, which equated slave trade with piracy, would also established that type of mutual right of visit and the adjudication by domestic courts of each state.

Other elements were also introduced to the above-mentioned enforcement mechanisms. New treaties and additional articles were celebrated with parties which already had previous treaties, not only because of the change in circumstances and in power relations, but also by the pressure to respond to demands uncovered with experience. Those were translated into two types of special clauses beyond the basic provisions of visitation, capture and adjudication: the *equipment clause* and the *breakup clause.*

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[141] That point will be explored in chapter 2.

[142] See ALLAIN, **The Law and Slavery**, p. 73 and p. 81-85. We will explore the difference between the "simple" right of visit and the right of visit and search in the next chapter.

[143] My intention was to highlight the difference between this system and the other that emerged at the point when France accepts a subtler type of right of visit than the one in the British system, as already mentioned. This classification does not follow Erpelding's, who identifies a 'Franco-British system' (ERPELDING, **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)**, p. 92.)

Very early in the anti-slave trade "work" of the Royal Navy, the Foreign Office started receiving statements from captains telling how hard it was to capture ships right in the moment they had slaves on board. Seamen had to spend days waiting along the coast until vessels visibly equipped for transporting slaves would embark them. Most of the time, ships would be simply lost out of sight. The British navy also believed that infection by African diseases occurred after nightfall, so the best was to avoid the coasts in the evening — exactly when most of slave trade vessels were embarked.[144] Adding to those problems, cases of slave traders who threw captured people overboard to avoid the seizure of the vessel were spreading.[145]

In this scenario, the provision to which the Dutch had acquiesced in 1823 seemed the best way of improving the effectivity of captures. The so-called *equipment clause* allowed capture whenever sufficient evidence of slave trading purposes was found, waving the need to inspect if there were actual enslaved people on board. The clause included a list of indicia that showed a vessel had been fitted out for trafficking. In case any one of them was present in the captured ship, it could be lawfully captured and condemned as a vessel engaged in slave trade, unless proof was produced to the contrary. The list went from too large quantities of provisions to adaptations in the design of the ship or the presence of particular utensils for immobilization.[146] This clause

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[144] WARD, Willian Ernest Frank, **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**, London: George Allen and Unwin, 1969, pp. 47-48.

[145] WARD, Willian Ernest Frank, **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**, London: George Allen and Unwin, 1969, p. 97.

[146] From the version to which the Dutch acquiesced in 1823 to the Treaty between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade, signed at London, 20 December 1841 only a 10th element was added to the equipment clause: "1st. Hatches with open gratings, instead of close hatches which are usual in merchant-vessels. 2ndly. Divisions or bulk heads, in the hold or on deck, in greater number than are necessary for vessels engaged in lawful trade. 3rdly. Spare plank fitted for being laid down as a second or slave-deck. 4thly. Shackles, bolts, or handcuffs. 5thly. A larger quantity of water, in casks or in tanks, than is requisite for the consumption of the crew of such merchant-vessel. 6thly. An extraordinary number of water-

would be accepted by Spain in 1835 and Portugal in 1842.[147] It was also included in the Treaty between Austria, Great Britain, Prussia and Russia of 1845.

Another clause emerged from a practical problem of the day-to-day effort of slave trade suppression. Captured vessels condemned in mixed commissions were usually auctioned for market price, the proceeds of which were reverted to the states involved in the suppression mechanisms, to cover basic costs of staff and structure. From Royal Navy's reports, the British Foreign Office became aware many of those vessels were being reacquired by slave traders, who would reemploy them in traffic due to their special design and equipment. [148] Instead of reselling the vessels to private parties, the *breakup clause* directed the authorities to dismantle the ship. Such a clause was accepted by France in 1833, Spain in 1835 and Portugal in 1823.

The breakup clause and the equipment clause were integrated to the already varied production of treaties, joining the political accommodations as another factor of treaty-making complexity. That

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casks, or of other receptacles for holding liquid; unless the master shall produce a certificate from the Custom House at the place from which he cleared outwards, stating that sufficient security had been given by the owners of such vessel, that such extra number of casks or of other receptacles, should only be used to hold palm oil, or for other purposes of lawful commerce. 7thly. A greater quantity of mess-tubs or kids, than are the requisite for the use of the crew of such merchant-vessel. 8thly. A boiler, or other cooking apparatus, of an unusual size, and larger, or capable of being made larger, than requisite for the use of the crew of such merchant-vessel; or more than one boiler, of other cooking apparatus, of the ordinary size. 9thly. An extraordinary quantity of rice, of the flour of Brazil manioc, or cassada, commonly called farina, or of maize, or of Indian corn, or of any other article of food whatever, beyond the probable wants of the crew; unless such quantity of rice, farina, maize, Indian corn, or any other article of food, should be entered on the manifest, as forming part of the trading cargo of the vessel. 10thly. A quantity of mats or matting, greater than is necessary for the use of such merchant-vessel, unless such mats or matting be entered on the manifest, as forming part of the cargo." BFSP. v. 30 1841/1842, p. 277-280

[147] WARD, Willian Ernest Frank, **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**, London: George Allen and Unwin, 1969, pp. 47-48.

[148] WARD, **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**, p. 97.

messy network of norms, albeit intricate to manage, served Britain as a tool of peaceful interference. Along the years, the British technologies of governance were developed as "promiscuous in its borrowings and haphazard in its instantiation".[149]

Among the variety of the slave-suppression systems, the *British system* of the triple formula stands out as the regime which would provide the basis for the British "work" to continue during peacetime. Our next step is to understand what the triple formula comprised as an enforcement mechanism. We already understood the material and the design with which the triple formula treaties were made; now it is time to enter into the specifics. How were those weapons supposed to function?

[149] BENTON, Lauren; FORD, Lisa, **Rage for Order - The British Empire and the origins of International Law 1800-1850**, Cambridge: Harvard University, 2016, p. 6.

CHAPTER II — TRIPLE FORMULA'S TEETH: THE POWER TO VISIT, CAPTURE AND ADJUDICATE SHIPS

> *"The two High Contracting Powers, for the more complete attainment of their object, namely, the prevention of all illicit traffic in Slaves, on the part of their respective subjects, mutually consent, that the ships of war of their Royal navies which shall be provided, may* ***visit*** *such merchant vessels of the two nations, as may be suspected, upon reasonable grounds, of having slaves on board, acquired by an illicit traffic, and, (in the event only of their actually finding slaves on board,) may* ***detain*** *and bring away such vessels, in order that they may be* ***brought to trial*** *before […] two mixed Commissions, formed of an equal number of individuals of the two nations, named for this purpose by their respective Sovereigns."* [150]

Treaty-making offered the leeway Britain needed to establish the continuity of basic rights exercised in the "navy's work" during warfare. Yet reading the sole inscription of the triple formula into treaties —as in the quote above— does not suffice for understanding the meaning of each of its three steps. As in Robert Phillimore's statement that treaties contained the whole story about the suppression of slave trade ("To be cognizant of the Treaties (…) is to be acquainted with the international history of the abolition of the Slave Trade")[151], their details are also omitted or just partially explored in historical accounts of the British treaty-making. Each of the elements of the triple formula grew

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[150] *OHT*, *Anglo-Portuguese Treaty of 1817*, Article V and VIII, emphasis added.

[151] PHILLIMORE, **Commentaries upon International Law**, p. 251.

into much more complex meanings than the language of the treaties that created them in a new version for peacetime.

As we have seen in the previous chapter, the right of visit was in the core of concerns caused by that transition from warfare. Under the laws of war, belligerents had a right to stop and board neutral ships for verification, and eventually to capture and bring them before prize courts. There was a point when the British prize law allowed for a capture based on the suspicion of slave trade, whose condemnation would depend on both proof of the practice of slave trade and proof of the proscription of the traffic by the flag State. With the end of Napoleonic Wars, *Louis* brought the parameters that the British diplomacy seemed to be already acting upon: during peacetime, the right of visit could only exist by consent. Treaties should be established with foreign states if Britain desired to continue the use of this course of action against slave trade. As we will see, the strong resistance to transplanting rights of war to peacetime that occurred in the multilateral conferences would not simply stop once they were guaranteed by treaties towards signatory states. The meaning of the right of visit in peacetime was constructed not only during its implementation, but beyond it, in a constant reinforcement of its limits. That was not without a reason: we have seen that even William Scott recognized that the reach of the right of visit concerned the general maritime governance.

After exploring the right of visit in detail, our next step will be to focus on the very practical directives for the implementation of all the three elements of the formula. Now they comprised not only rules to ground the "navy's work", but "mixed commissions' work" as well. Implementing the network of slave-trade treaties could not be compared to the implementation of multilateral agreements or general international law. It was much more complex. The variances in the provisions from treaty to treaty amounted to complications in determining under which law was each case. Is this vessel to be visited? Is this vessel to be

searched? Is this ship to be captured for what was found on board? Is this ship to be judged by this court? Are this ship and its cargo to be considered good prize? Are the people captured to be freed? Those were the main questions the concerned actors had to answer in each step of the mechanism constructed by the triple formula.

The answers were not to be simply found in the agreements. Normative production did not stop with treaties themselves, their additional articles or annexed instructions. It multiplied into British administrative regulation, interlaced with professional expertise and complemented by practical adjustments. People whose job was to implement those treaties probably had a quite hard time coping with all their bureaucratic details.

I will take that complexity seriously to examine the whole normative structures created by extension, from institutions and their working methods to interpretation parameters. The objective is to grasp, as far as possible, how the three elements of the formula (the right to visit, capture and adjudication) directed the implementation of slave trade suppression. After all, what was the law that people had to deal with? By looking a bit closer, we can see in which ways the triple formula empowered Britain. At the same time, as any system of rights and obligations, we will notice that Britain was limited by the triple formula as well. By the end of the day, how were navy men supposed to apply the right of visit and capture? How were the mixed commissions supposed to work? By answering those questions, we can have a deeper understanding of the potential of the elements of the triple formula as a legal technology.

A. THE RIGHT OF VISIT (AND SEARCH)

"Decoupled" visitation

The British diplomatic run to establish treaties was met with great resistance of the United States and France concerning the first step

of the triple formula, as I mentioned before. From that resistance emerged a prolific discussion on the contents of the right of visit *in treaties* and, surprisingly enough —if we bear in mind the *Louis* doctrine—, *in the absence of treaties* in peacetime. Looking at that debate on what the right of visit *was not*, we can have a better understanding of what it *was*.

Any random sample of slave trade treaties or of the British correspondence with foreign powers gives the impression that the terms "right of visit", "visitation", "right of visit and search" and "right of search" meant the same thing. They were typically used interchangeably to designate the entitlement of a state, embodied in their seamen, to stop and board other states' ships for verification. Yet in the process of treaty-making two deviations from that idea came up.

One of them was an out-of-the-ordinary provision in the in 1845 Treaty concluded between Britain and France. The treaty separated the notions of visit and search by stating a different purpose for that right. While, for instance, the 1817 Anglo-Portuguese Treaty — a standard triple-formula treaty — provided for a mutual right to visit ships whenever there was *reasonable ground of suspicion of having slaves on board*[152], the 1845 Anglo-French Treaty provided for a mutual right of visit whenever there was a *reasonable suspicion that the vessel was fraudulently carrying its flag*.[153] The objective of the right of visit was quite more restrictive in the French treaty, as it was just intended for the verification of nationality. The more restrictive limits of the Anglo-French regime of 1845 did not provide for the right of capture or adjudication that would otherwise follow from the right of visit in the triple formula.

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[152] *OHT*, *Anglo-Portuguese Treaty of 1817*, Article V.

[153] *OHT*, *Anglo-French Treaty of 1845*, Article 8.

Following persistent diplomatic tensions around the right of visit, in 1859 the Instructions to the navies on how to implement the 1845 Treaty brought quite clear rules of limitation to the right of visit. In the case of non-visibility of the flag, two warnings should be given, and, if necessary, a man would be sent onboard with the strict aim of *examining the ship's papers*.[154] Such restriction would be narrowed even further in the 1867 instructions, just *certain papers* could be requested. This provision would persist as an exception to the regulation established in the Brussels Conference in 1890[155] — France was so reluctant to accept a right of visit by then, it refused to participate in the 1890 Brussels Conference negotiation unless other members yielded to its reservations on visitation[156].

By the comparison of that restrictive reading of the provision with a common triple-formula provision, the broad character of the visitation to which the parties were usually entitled becomes clearer. The triple formula right of visitation meant, once a ship was stopped by, for instance, the British navy —as in the majority of cases —, British officers could board the vessel and look for any proof leading to the presence of slaves on board — in the ship's papers, at the vessel's hold, at any of its corners. In case the triple formula treaty had an equipment clause, that search could be even more detailed, as the officers could be looking for anything like disproportional quantities of provisions or hidden shackles.

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[154] ALLAIN, **Slavery in international law – of human exploitation and trafficking**, p. 71.

[155] ALLAIN, **Slavery in international law – of human exploitation and trafficking**, p. 71; ERPELDING, **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)**, p. 93.

[156] ALLAIN, **Slavery in international law – of human exploitation and trafficking**, p. 73.

In the absence of a treaty

The Anglo-French Treaty, which "decoupled" the right of visit from the right of search[157] was just one out of two deviations that happened to the right of search along the years. The other one, somewhat entangled with the first, was a change in the British interpretation of the very existence of a right of visit in the absence of a treaty.

As we have seen, the US resistance to British claims of visitation was connected to violations significant enough to trigger the War of 1812. Although the Peace Treaty of 1814 would put an end to the conflict, the treaty remained silent about maritime matters.[158] In the following years, the United States offered various points for refusing the right of visit and its accompanying arrangements of the triple formula. Among them, there was the fact that the United States did not have colonies, and this could undermine reciprocity —usually, mixed tribunals should be established in the colonies of both parties. US representatives also claimed that, under domestic law, it would not be possible to prosecute mixed commissions' foreign judges in case of corruption. Another considerable problem was that the federal arrangement allowed each state to decide upon abolition. Finally, and most importantly, the damages caused by the abuse of visitation in the previous years were too fresh in the memory of US nationals for them to accept the terms of the right to visitation.[159]

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[157] ALLAIN, **Slavery in international law – of human exploitation and trafficking**, p. 71.

[158] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, p. 249.

[159] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, pp. 267-268. Jenny Martinez shows that many of the US justifications not to accept the right of visit were actually secondary, and a cover-up for the main problem, that the US had with memories of impressment of cargo and seamen from the previous decades. MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, chapter 3.

In an exchange of diplomatic correspondence of 1841, Lord Aberdeen presented the British new approach to the right of visit — it differed considerably from what was then established practice. The *right of visit and search* — as in the right of visit and search from the triple formula treaties —was separated from a *right of visit to make a determination on the nationality of a ship.*[160] The latter, Aberdeen maintained, was not dependant on treaties. Such new interpretation prompted a prolific doctrinal discussion, opposing British and US coeval lawyers in the dispute about the limits of the right of visit.[161]

The US reaction to the new British interpretation was to point out such a distinction was not to be found anywhere in treaties, court opinions or doctrinal writings. Rather, the right of visit had been understood as the right of visit *and* search. Nothing had changed in the original arrangement of the visitation brought from warfare; it did not limit itself to ascertaining whether a vessel was entitled to hoist its flag. Under law, it aimed at the overall legality of the ship and its voyage, including an evaluation of the nature of trading goods.[162] In practice, there would be no discernible distinction between the right of visit in those terms and the right of search anyway. The right of visitation stripped of the ability to search to inspect the ship, its cargo and its papers would be just a pointless interruption of the ship's voyage.[163]

The discussion among diplomats and lawyers went on for some years. Faced with the growing numbers of slave trade vessels

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[160] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, p. 299.

[161] About the significance of that discussion, see CALVO, Cárlos, **Derecho internacional teórico y práctico de Europa y América**, Paris: D'Amyot, 1868 v. 1./p. 54; v. 2/p. 357.

[162] CALVO, **Derecho internacional teórico y práctico de Europa y América** v.2/p.357.

[163] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, p. 299.

hoisting the United States flag to escape capture[164], the British kept their position that the right of visit and search could be separated. They insisted on the argument that the right to visit corresponded to the simplest verification of nationality identified by the flag of the ship, and that such a right was broadly recognised then. Robert Phillimore, the most important British publicist of the 19th century[165], argued in his textbook that the right of visit, in its detached version, should be read as it has been formalized in the Anglo-French Treaty of 1845.[166] Phillimore indicated that the experience with slave trade and with piracy had taught that they often came together. This way, they endangered the "tranquillity of the seas" and the "safety of all flags".[167] In order to avoid abuses, the presumption of the flag for evidence of its nationality should not "be considered as sufficient to forbid in all cases the proceeding to the verification thereof". That meant the visiting officer was not entitled to proceed any search, but only to check "by the vessel's papers or other proof", that the flag was justly hoisted. [168]

The divergence in interpretation of the right of visit did not come to an end when the United States signed a treaty with Britain in 1842.[169] The treaty provided only for a joint cruising. In subsequent diplomatic correspondences, British representatives claimed that the treaty did not mean a renunciation of the British right of visit to verify nationality. The US response was that no right of visit and search (inseparable and particular to wartime) was granted to Britain; therefore, any vessel was entitled to resist to it, and any British attempts to visit

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[164] See Figure 1 in chapter 4.

[165] See GAURIER, **Gaurier, D. Histoire du droit international: De l'Antiquité à la création de l'ONU**.

[166] PHILLIMORE, **Commentaries upon International Law**, p. 250.

[167] *OHT*, *Anglo-French Treaty of 1845*, Article 8.

[168] PHILLIMORE, **Commentaries upon International Law**, p. 250.

[169] As we have seen in the previous chapter, the United States would accept the triple formula regime in the Treaty of 1862 amidst a shift of policy connected to the Civil War.

could be seen as offensive.[170] The United States declared that its intention in signing the 1842 Treaty was just to impede piracy under the US flag and that was the sole point of cooperating with Britain in policing against that practice.[171]

Cárlos Calvo, a renowned 19th-century internationalist based in Argentina, provided a summary in his textbook of various doctrinal positions by contemporaneous international lawyers of British, German, French and US origins. They were all against the British position on the separation of visit and search.[172] Their main line of argumentation was that the right of visit derived from a state of war; that during peacetime, the visitation would be an act of policing sovereignties, thus incompatible with the independence of nations[173]. Calvo himself joined the opposition, stating he did not find any legal justification to support the right of visitation during peacetime.

The overall resistance to the British push for a right of visit in the absence of treaties reveals the stakes involved in transplanting a right of visit to peacetime. It legitimated the use of force that in fact limited sovereignties' rights. This was a scenario anticipated by Scott's opinion in *Louis*, where he remarked of the right of visit: "[n]o such right has ever been claimed, *nor can it be exercised without the oppression of interrupting and harassing the real and lawful navigation of other countries*". [174] In Jean Allain's words, "[a]t the heart of the matter was

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[170] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, pp. 312-314.

[171] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, p. 314.

[172] CALVO, **Derecho internacional teórico y práctico de Europa y América** v.2/p. 358.

[173] CALVO, **Derecho internacional teórico y práctico de Europa y América** v.2/p. 362-363. The general Portuguese position also concurred in that understanding; see e.g. LOBO, Antonio da Rosa Gama, **Principios de Direito Internacional**, Lisboa: Imprensa Nacional, 1865, pp. 107-116.

[174] *Le Louis*, 165 English Reports 1464, 1817, p. 1478.

States' understanding of the nature of the high seas", that is, the meaning of the notion of freedom of the seas in relation to the right to visit suspected vessels.[175] But it did not stop there.

The relevance of such change as linked to international law is explicit in the view of Henry Wheaton, one of the most prominent US international lawyers of the nineteenth century. For him, the right of visit was a *type of use of force* which only justified itself by necessity, as it (although in a limited way) *extended the harms of war to innocent parties*.[176] That perspective was not that much of a novelty for those familiarized with *Louis*. Yet his view was even more critical. He contended that, once the right of visit was given by treaties, "a new system would be commenced for the *dominion of the sea*, which might eventually, especially, by the abuses to which it might lead, *confound all distinctions of time and circumstances, of peace and of war, and of rights applicable to each state*".[177]

Once the right of visit was a right recognised under international law during peacetime through treaties, a threat emerged of inverting the system of the freedom of the seas to a system of controlled navigation. The right of visit had the power to change the very basis of the maritime governance. Through the façade of a "mutual right", states

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[175] Jean Allain is one of the few authors to highlight the centrality of the right of visit and search in the uses of international law in the process of abolishing slave trade. Yet, he does not consider the contradictions between the notion of freedom of the seas and such right among the British interests themselves in the international order, as appeared in the *Le Louis*. His analysis highlights the States agenda in international relations rather than legal interpretation at this point: "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." ALLAIN, **The Law and Slavery**, p. 46.

[176] WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, p. 290.

[177] WHEATON, Henry, **History of the Law of Nations in Europe and America**, New York: Gould, Banks & Co, 1845, p. 652.

which had accepted the triple formula accepted to hand in to Britain part of their sovereign rights of using force against their citizens and their property. At first, if not consented, visitation could be considered as an act of aggression. Yet when suspicious vessels from states outside of the triple-formula regime became the legal exception, the balance of power could be compromised.

Accounting for the equilibrium between actors might be currently regarded by some as a matter of political strategy rather than of legal interpretation. It was common, though, in the nineteenth century, to find those who did not separate them in two analytical spheres; the balance of power would be generally regarded as political (and not legal) just by the end of the nineteenth century.[178] By discussing the right of visit, those authors were not doing more of international law then they were doing diplomacy; international law was a central tool to diplomatic relations and treated as a power-enabler and creator.

Now that we have reviewed the effect of the power of visiting ships to both the parties of triple formula treaties and those resisting to it, we can have a better understanding of the meaning of the right to visit by then. To understand the meaning the rights of capture and adjudication, we will focus in the two moments when the implementation of the triple-formula mechanism was designed to occur: in the decision of capture by the navy and in the adjudication by the mixed commissions.

B. SPOTTING, VISITING AND CAPTURING SHIPS

The captor's position

In the British quest to abolish slave trade, the identification of suspicious vessels and the decision of visiting or capturing them were

[178] See VEC, Milos, De-Juridifying "Balance of Power" - A Principle in the 19th Century International Legal Doctrine, **European Society of International Law - Tallin Research Forum**, pp. 1–16, 2011.

in the very job description of the men of the British navy. It is not a coincidence that members of British crews were the responsible for writing a number of significant testimonies about slave trade atrocities. Out of all groups mobilised against slave trade, they were the only ones who necessarily had a concrete and personal contact with the people captured to serve as slaves, aside from slave traders themselves.[179]

The eagerness of the British navy to capture suspected slave trade ships was probably fomented by a combination of many elements. Besides a drive resulting from intense personal experiences — having seen with their bare eyes so inhuman situations[180]—, British navy captains and their crew could be also acting upon religious beliefs[181] or the then-rising humanitarian sentimentalism[182].

They could also have been enticed by the prospect of increasing their earnings, or securing subsistence at least. During the first half of the century, officers paychecks comprised income from "headmoney paid", "tonnage bounty paid" and "proceeds from sale of ships".[183] At first, bounties for the capture, paid to officers and crew

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[179] See e.g. See e.g. MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p. 70; WILLS, Mary, A 'most miserable business': naval officer's experiences of slave-trade suppression, *in*: BURROUGHS, Robert; HUZZEY, Richard (Eds.), **The suppression of the Atlantic slave trade: British policies, practices and representations of naval coercion**, Manchester: Manchester University, 2015, pp. 73–94.

[180] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p. 199(note 21); 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), p. 38 et seq.

[181] About the evangelical sentiment in the Navy and its linkages to the abolitionist movement, see WILLS, A 'most miserable business': naval officer's experiences of slave-trade suppression, pp. 81-82.

[182] MOYN, Samuel, **Human rights and the uses of history**, London: Verso, 2017(chapter 3).

[183] LLOYD, **The Navy and the Slave Trade**, pp. 81-82.

(according to their ranks)[184], were calculated based on the number and attributes of liberated people, according to fixed amounts depending on the number of men, women or children set free — this was "headmoney". Those rates were considerably reduced throughout the years.[185] With an increase adoption of the equipment clauses, which enabled captures of ships only equipped to transport slaves, an incentive had to be created for that kind of capture, measured in relation to the tonnage of the ship, as no headmoney could be expected.[186] Under the "proceeds", captors were also entitled to part of the earnings in case of condemnation and sale of the captured vessels and goods.[187]

British navy officers allocated in slave-trade suppression duties depended on the adjudication of their captures to earn their living, because neither of the three types of payment would be due before the sentence that considered them good prize. And it often required more than a sentence for them to be paid: under British Law, captors claiming benefits by way of bounties or shares of the proceedings could appeal to the High Court of Admiralty against either Vice-Admiralty Courts sentences or Mixed Commissions decrees.[188] Getting their payment often involved bureaucracy and even corruption, as naval officers had to hire

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[184] WILLS, A 'most miserable business': naval officer's experiences of slave-trade suppression, p. 78.

[185] The Act of 1807 provided for £60 for every man; £30 for every woman and £10 for every child; in the *Consolidation Act of 1824*, the reward was cut to £10 to any women, men or child (Articles LXVIII, LXIX); In 1830, it reached a value of £5 per person alive. Further reductions were due as to hospital funds and the Crown's moiety. (LLOYD, **The Navy and the Slave Trade**, pp. 79-80.).

[186] The captors would receive part of the value due to the Queen's moiety and a value of £4 per ton, in case of no captured people on board – yet, the remaining disparities to the headmoney value appeared as an incentive to wait for embankment before capture (LLOYD, **The Navy and the Slave Trade**, pp. 81-82.).

[187] LLOYD, **The Navy and the Slave Trade**, pp. 79-80.

[188] *Act of 1824*, Article LXXI.

high-charging agents to obtain their bounties from the Admiralty paymasters[189].

An interesting fact was that at least some navy men thought slave traders were paid more than the suppression force[190]. In a way, British navy members experienced the same life on the seas as the slave traders they chased. They all shared the fear of attacks by pirates, dreadful working conditions, threats of rebellions, and the risk of mortality by diseases, thirst or starvation.[191]

Aside from those adversities and the usual dangers of a maritime occupation in the nineteenth century[192], British officers also had to be very careful in their day-to-day professional decisions. The duty of visiting and capturing ships was entrusted on them, and it did not come without a burden. Visitation and seizure, especially unlawful ones, could lead to *violent resistance* or *diplomatic tensions*. They could also *damage their earnings and careers*.

The same slave trade suppression laws which the navy men were expected to enforce also provided for their liability for illegal captures. The commanders were "*held answerable*, not only for their own conduct, but for that of their men".[193] The British regulation established *personal liability* of seizers for paying any awards arbitrated on account of unlawful detention.[194] Usually, the British government would make a

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[189] WARD, **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**, pp. 102-103.

[190] WILLS, A 'most miserable business': naval officer's experiences of slave-trade suppression, p. 77.

[191] On the day-to-day life of slave trade crews, see RODRIGUES, Jaime, **De costa a costa**, São Paulo: Companhia das Letras, 2005(chapters 5 and 6).

[192] See WILLS, A 'most miserable business': naval officer's experiences of slave-trade suppression.

[193] *Instructions of 1844, Section 1st, Article 8.*

[194] *Instructions of 1844, Section 3rd, Article 8. The Act of 1824*, Article XXXV, provided: "captors, seizors, or prosecutors in any such cause as aforesaid to pay, out of their own proper

contribution or foot the bill,[195] which was not without reason, as treaties provided for liability of the British state in addition to the personal liability of the captor. Even so, literature focused on the maritime dynamics and slave trade suppression recounts situations where officers declared to be acting by caution, after balancing, on the one hand, their duty and interest in capturing vessels, and, on the other, the risk that such capture could be declared illegal afterwards.[196]

Practical directives

Now imagine you are a British officer in those circumstances, having to deal with the perils of life in the seas and perform your duty under the risks it entailed. You are in charge of the first step in the triple-formula machine; you are required to interpret the law and to produce documents to move all that institutional apparatus forward.

Clearly, you would need some kind of practical directives about how to proceed. Each of the treaties for suppression was accompanied by corresponding instructions, directed to the ships tasked with implementation.[197] We can have a notion of the generally applicable

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monies, such sums in the nature of costs and damages as the said court shall decree, when it shall appear to such court that the capture, seizure, or prosecution, or the appeal thereon on the behalf of the captor, seizor, or prosecutor, shall not be justified by the circumstances of the case".

[195] SHAIKH, Farida, Judicial diplomacy: British Officials and the Mixed Commission Courts, *in*: **Slavery, Diplomacy and Empire: Britain and the Suppression of the Slave Trade, 1807-1975**, London: Sussex Academic Press, 2012, p. 48.

[196] An interesting example is brought by Lloyd: "When, in 1826, Commodore Bullen captured a Brazilian brigantine, he found papers on board authorising her to embark 550 slaves. On the strength of this he sent her in to Sierra Leone, though he realised there was little hope of condemnation, on account of the clause in the treaty stipulating that "ships on board of which no slaves shall be found shall not be detained under any pretence whatever". He writes that he be detained under any pretence whatever." He writes that he is blockading seven more Brazilians at Whydah, but dare not seize them until the previous vessel has been tried as a test case, "owing to the immense personal risk I should incur". LLOYD, **The Navy and the Slave Trade**, p. 71.

[197] See e.g. the *Instructions intended for the British and Portugueze Ships of War employed to prevent the illicit Traffic in Slaves*, attached to the *Anglo-Portuguese Treaty of 1817,* in the Appendix.

instructions with the *Memoranda for the guidance of Commissions* of 1819. Inspired in British prize court practice[198], it was the first official document to combine general instructions with further practical guidance. After it was finished, the British Foreign Secretary sent copies of the document to the British admiralty and to foreign powers, so they could also pass on those functional guidelines to their representatives. [199]

If you were a British seaman, you would know that neither visitation nor detention should take place in the port, roadstead or "within *cannon-shot* of the batteries on shore" of the parties, except for the African Coast placed North of Equator.[200] You would be familiar with the cannon-shot standard, a system of measurement commonly applied to establish "that portion of the sea which washes the coast of an independent state" or "the extent to which territorial property and jurisdiction may be extended"[201]. The rule of a cannon-shot was the historical consolidation of a *just mode of appropriation of the seas*, as the exercise of control over the belt of water along the coast was considered essential for the security of citizens and their property upon land[202]. A *cannon-shot* was equivalent to a marine league or approximately 3 miles. It had been originally established due the range of a gun to reach people or property on shore. As such, that standard would be questioned in face of technological changes; writing in the 1890s, Hall takes note of the uncertainty about such measure emerging from the increase of artillery

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[198] We will explore this document further when accounting for mixed commissions.

[199] *BFSP*, v.8, 1820-1821 p. 210-211.

[200] See Articles II and III the *Instructions* attached to the *Anglo-Portuguese Treaty of 1817* in the Appendix. Emphasis added. A similar instruction could be found in the *Instructions of 1844,* Section 1st, Article 5, indicating Search of vessels within the jurisdiction of "any foreign civilized State" was absolutely forbidden unless by permission of local authorities.

[201] PHILLIMORE, **Commentaries upon International Law**, pp. 178-179. Maritime territorial rights could also be extended in special circumstances, as arms of the sea, gulfs, bays etc. Boundaries of such jurisdiction could also be affected by treaties (PHILLIMORE, **Commentaries upon International Law**, pp. 179-180.).

[202] HALL, **A Treatise on International Law**, p. 151.

power.[203]

By the time the *Memoranda* was prepared, the sole case of legal capture concerned vessels with slaves actually on board, as provided in the Anglo-Spanish, Anglo-Portuguese and Anglo-Dutch treaties.[204] Due to the exceptions to the prohibition of slave trade South of Equator, in both Portuguese and Spanish treaties, the only circumstance that allowed capture in that portion of the seas was in the case of *chase* starting north of Equator.[205] Additionally, if the capture happened *south of Equator*, an exception was triggered regarding the *burden of proof*: you, as the captor, would have to provide the proof of illegality of the voyage, as opposed to the general rule that it was for the captured to submit proof of its legality.[206]

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[203] HALL, **A Treatise on International Law**, pp. 150-152. Yet, the right of innocent passage was guaranteed to foreign ships but vessels of war. HALL, **A Treatise on International Law**, p. 157. Hall's A Treatise on International Law was one of the most significant works of the 19th century. See ANGHIE, Antony, **Imperialism, Sovereignty and the Making of International Law**, Cambridge: Cambridge University, 2005, p. 39(footnote 12).

[204] See Article I of the *Instructions* attached to the *Anglo-Portuguese Treaty of 1817* in the Appendix.

[205] According to *OHT*, Article IV of the *Instructions* attached to the *Anglo-Portuguese Treaty of 1817*, "No Portugueze merchantman or slave-ship shall, on any pretence whatever, be detained, which shall be found any where near the land, or on the high seas, *south of Equator*, unless after a chase that shall have commenced north of the Equator".

[206] *BFSP*, v. 8, 1820-*1821*, p. 27. See also *OHT,* Article V of the *Instructions* attached to the *Anglo-Portuguese Treaty of 1817*: "Portugueze vessels furnished with a regular passport, having slaves on board, shipped at those parts of the coast of Africa where the trade is permitted to Portugueze subjects, and which shall afterwards be found north of the Equator, shall not be detained by the ships of war of the two nations, though furnished with the present instructions, provided the same can account for their course, either in conformity with the practice of the Portugueze navigation, by steering some degree to the northward, in the search of fair winds, or for other legitimate causes, such as the dangers of the sea duly proved; or lastly, in the case of their passengers proving that they were bound for a Portugueze port not within the continent of Africa, Provided always, that, with regard to all slave-ships detained to the north of the Equator, the proof of the legality of the voyage is to be furnished by the vessel so detained. On the other hand, with respect to slave-ships detained to the south of the Equator, in conformity with the stipulation of the preceding Article the proof of the illegality of the voyage is to be exhibited by the captor.

In the future, you would receive further information on the circumstances a suspected ship should be visited and captured. Many more flags would be included in the network of treaties and in your job tasks in consequence. Some of those treaties would entitle you to capture ships without slaves on board, whenever other signs of prior occupation by slaves or even equipment for their transportation was present.[207]

According to the *Memoranda of 1819,* visitation and search should be carried "in the most mild manner" by an officer of the rank of lieutenant or higher rank.[208] Once detained, the suspected vessel should *be carried to the nearest mixed commission*. Yet, as the captor, beyond visiting, searching, detaining a suspected vessel and bringing it to the nearest mixed commission, you would also have to produce some documents. To make the captor's job easier —and certainly in the interest of standardisation—, the *Memoranda* of 1819 included various forms in its appendix. They were a set of standard texts with blank spaces for minimal information to be inserted.

The *Form of Declaration of the state of the Vessel at the time of Capture* contained blank spaces for you to fill the date of the detention, the name of your vessel and of the captured ship, its colours, number of guns, pounders, the name of its commander, origin and

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It is in like manner stipulated, that the number of slaves found on board a slave-ship by the cruizers, even should the number not agree with that contained in their passport, shall not be a sufficient reason to justify the detention of the ship; but the captain and the proprietor shall be denounced in the Portugueze Tribunals in the Brazils, in order to their being punished according to the laws of the country."

[207] The latter corresponds to the provisions of standard equipment clauses and the former corresponds to the clause ratified by Portugal in 1823 about the right of capturing vessels that knowingly received slaves on board in a previous point on the same voyage. See chapter 1 and 3.

[208] *BFSP,* v. 8, 1820-*1821*, p. 26. See also *OHT*, Article VII of the *Instructions* attached to the *Anglo-Portuguese Treaty of 1817*: "Whenever a ship of war shall meet a merchant vessel liable to be searched, it shall be done in the most mild manner, and with every attention which is due between allied and friendly nations; and in no case shall the search be made by an officer holding a rank inferior to that of Lieutenant in the Navy."

destination of the voyage, details of the crew, passengers, and whether slaves were found on board. In case there were slaves on board, a table indicated you should write down the number of slaves in different lines and columns, depending on how many of them were men, women, boys or girls, healthy or sick. At the end, you would have to undersign to the state of the ship (seaworthy or not?) and list the provisions it carried (enough water or other provisions for the crew *and* slaves until destination?), among other details. The point of filling a form was registering the original state of the ship and eventual changes that may have taken place during capture —objects thrown overboard, for instance, in attempt of destroying documents.[209]

As the capturer, you should also produce a document to give to the captain of the captured vessel. It would state basic information about the capture and testify to the ship's papers you had seized in the act of detention. All in accordance with the *Form of Certificate to be given to the Master of a Vessel captured*.[210]

During the voyage to the mixed commission, it could happen that you, as the captor, would have to disembark slaves, for

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[209] *BFSP,* v. 8, *1820-1821*, p. 28-29.

[210] *BFSP,* v. 8, *1820-1821*, p. 29. See also *OHT*, Article VIII of the *Instructions* attached to the *Anglo-Portuguese Treaty of 1817*: "The ships of war which may detain the slave-ships, in pursuance of the principles laid down in the present instructions, shall leave on board all the cargo of negros untouched, as well as the captain and a part, at least, of the crew of the above-mentioned slave-ship: the captain shall exhibit the state in which he found the detained ship, and the changes which may have taken place in it: he shall deliver to the captain of the slave-ship a signed certificate of the papers seized on board the said vessel, as well as of the number of slaves found on board at the moment of detention.

The negroes shall not be disembarked till after the vessels which contain them shall be arrived at the place where the legality of the capture is to be tried by one of the two mixt Commissions, in order that, in the event of their not being adjudged legal prize, the loss of the proprietors may be more easily repaired. If, however, urgent motives, deduced from the length of the voyage, the state of health of the Negroes, or other causes, required that they should be disembarked entirely, or in part, before the vessels could arrive at the place of residence of one of the said Commissions, the Commander of the capturing ship may take on himself the responsibility of such disembarkation, provided that the necessity be stated in a certificate in proper form."

example in the case of insufficient provisions.[211] The *Memoranda* of 1819 supplied you with a *Form of the Certificate of the necessity of disembarking Slaves from a captured Vessel* to register general information about the captured vessel, the slaves on board, where and why they had to be disembarked.[212]

Some years later into the British project of suppression, in 1844, another publication would be issued to help British officers to take decisions over the seas. The *Instructions for the Guidance of Her Majesty's Naval Officers Employed in the Suppression of Slave Trade* unified for the first time all existing documents of which any British Navy officer should be aware. Captain Hon. Joseph Denman (a famous officer of the West African Squadron) prepared the compilation, even though his name did not appear in the Admiralty's official publication.[213] The captain's intent was to fill the gap, especially in junior officers' training, on the international rules they should act upon. The lack of that knowledge could prove to be expensive: "the officer could be sued for illegal seizure; even worse, he might create an international incident which would jeopardise the successful outcome of negotiations taking place between Britain and other powers"[214].

More than twenty years had passed since the *Memoranda of 1819* and the situation, treaty-wise, was very different. The *Instructions of 1844* reflected those changes. Its 556 pages were divided in eight sections—in contrast with the 24 pages of the 1819 Memoranda. The first section contained *General Instructions for Commanders of Her Majesty's Ships and Vessels employed in the Suppression of the Slave Trade.* The other seven sections were dedicated to particular circumstances of the

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[211] This example was given in the form itself. See *OHT*, Article VIII of the *Instructions* attached to the *Anglo-Portuguese Treaty of 1817*, *supra*.

[212] *BFSP,* v. 8*, 1820-1821*, p. 29-30.

[213] LLOYD, **The Navy and the Slave Trade**, p. 39.

[214] LLOYD, **The Navy and the Slave Trade**, p.39.

capturer or the potential captured vessel: (1) British vessels stationed in the Coast of Africa; (2) British vessels in British waters, on the high seas, or within foreign jurisdiction, and foreign vessels in British waters; (3) suspected vessels not justly entitled to claim the protection of the flag of any state; (4) vessels suspected of hoisting a flag to which they are not legally entitled; (5) vessels in the system of joint cruising; (6) British vessels on the African stations negotiating with chiefs of Africa; (7) British vessels acting in execution of treaties (containing instructions for each of set of treaties with 27 nations).

The first Article of the *Instructions of 1844* reminded you, as British capturer, that "although the Slave Trade has been denounced by all the civilized world as repugnant to every principle of justice and humanity", you should be mindful that your country claims no rights against foreign ships engaged in slave trade "excepting such as the Law of Nations warrants, or as she possesses by virtue of special Treaties and Conventions with particular States"[215]. To perform your duty accordingly and determine if there was a "reasonable ground of suspicion" for a vessel to be seized, you should consider, in that order: (1) the part of the Instructions related to the particular description of his circumstances; (2) treaties, conventions, and laws; (3) instructions pertaining to slave trade (those indicated in the compilation and those received from the Foreign Office through correspondence).

As a general rule, the *Instructions* advised, you should only perform a visit "in virtue of special authority under treaty" or in case you, as the commander, had "reason to believe, that the vessel has no right or title to claim the protection of the flag she bears". [216] In the second hypothesis, a visit was allowed whenever there was "sufficient cause to believe" that (1) the vessel was British property; (2) the vessel actually

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[215] *Instructions of 1844 ,* Section 1st, Article 1.

[216] *Instructions, 1844*, Section 1st, Article 4.

belonged to a State with which Britain had established a right of search by treaty; or (3) the vessel was not entitled to justly claim the protection of any flag.[217]

That last possibility was greatly different from the other ones. Cases of (1)*British vessels or foreign vessels* in *British waters* concerned the application of *British law*[218]; (2)cases of *foreign vessels* in the *high seas* concerned the application of *treaties*; the so-called (3)"*vessels not justly entitled to claim the protection of any flag*" concerned the application of *British laws* even if the captured vessels were *foreign* —in this case, they should be sent to adjudication in the High Court of Admiralty (in Britain) or in Courts of Vice-Admiralty (in British colonies).

As a British navy officer, how would you identify such "vessels not justly entitled to claim the protection of any flag"? The answer could be found in two Acts: the *Palmerston Act of 1839* and the *Repealing Act of 1842*. Under the language of the *Palmerston Act*, you could detain, seize or capture vessels engaged in slave trade or equipped therefor in any one out of three circumstances: when the vessel hoisted a *Portuguese flag*; when you had *reasons to believe the vessel was Portuguese or British*; or when the *vessel's crew was unable to prove it belonged to other nationality*. In 1842, the application of *Palmerston Act* to Portuguese vessels was removed.[219] Yet your job as captor probably changed significantly after 1839 for good.

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[217] *Instructions, 1844,* Section 5st, Article 1.

[218] Only British vessels or foreign vessels in British waters would be governed by the *Consolidation Act of 1824* and the *Act of 1843*.

[219] As we will see in the following chapters, the *Palmerston Act of 1839* was a domestic law measure taken by Britain to pursue slave traders using the Portuguese flag in a period when the Portuguese government failed to consent to any treaty with Britain to establish triple formula arrangements.

Before the *Palmerston Act*, you were entitled to exercise the right of your state against vessels under the British flag or the colours of state-parties to treaties with Britain. Visiting or capturing vessels with different flags would rely on *your* claim they were actually of other *nationality*. After the *Palmerston Act*, once you had at least a *suspicion* as provided by the act, it was for your opponent, the captured, to prove they actually belonged to a nationality other than British or Portuguese (until 1842). Therefore, besides the general rule of burden of proof on the general engagement in slave trade, there was an extra incentive for you to capture suspected ships of uncertain nationality that would be much riskier to seize before 1839.

Now imagine that, for any of the circumstances mentioned above, you are convinced that a visit is warranted, at least to ascertain the real nationality of a ship. According to the *Instructions*, you should signal your intentions, use a boat carrying a British flag to came to the vessel, board the vessel with another member of the crew to serve as witness, inspect the papers, and eventually make "courteous inquiries", as to avoid the necessity of a search. [220]

In that point, you should carefully remember of the contents of the treaty you were supposed to be implementing; as we have seen, the treaty with France of 1845, for instance, provided for a very limited right of visit and no right of search. In case either the law or the information collected led you to think you were *not* entitled to proceed to a search and capture, you should leave the ship to its original course.[221] Otherwise, and if a search was deemed necessary to establish the conditions for seizure,

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[220] *Instructions of 1844, Section 1st, p. 2.*

[221] *Instructions of 1844, Section 5st, Article 3-6.*

removing people from the ship was prohibited.[222] Coercive measures should not be applied without necessity[223].

In case you did find elements for seizure, any items that had been moved or removed should be replaced, for the vessel to reverted to its original state[224] Also, before leaving the vessel, you should ask whether the master of the visited vessel desired that you entered the visitation in the ship's log book[225] and whether he had any complaint about the way the search had been conducted, which should be written down. You should then apply remedies in accordance with circumstances.[226] Once you returned to the British vessel, the visitation proceedings should be written in the log and undersigned; a copy of the statement should then be sent to the Admiralty.[227]

In case enough evidence was found to seize the visited vessel, you should (1) notify the master about the decision to detain the vessel; (2) search for all papers and documents on board; (3) all papers and documents found should be taken and listed, describing which ones were voluntarily handed to the officer, which were found aboard, and, in case any of them were destroyed, a description of the facts should be added and a person cognizant of them should be sent on board to the court of adjudication; [228] (4) take note of the valuables and items of cargo on board[229]; (5) send at least two members of the capturer's crew to testify before the court of adjudication[230]; (6) provide the officer in charge of the

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[222] *Instructions of 1844, Section 1st, Article 14.*

[223] *Instructions of 1844, Section 1st, Article 9.*

[224] *Instructions of 1844, Section 1st, Article 11-12.*

[225] *Instructions of 1844, Section 1st, Article 17*

[226] *Instructions of 1844, Section 1st, Article 16*

[227] *Instructions of 1844, Section 1st, Article 18.*

[228] *Instructions of 1844, Section 1st, Article 19.*

[229] *Instructions of 1844, Section 1st, Article 20, 25.*

[230] *Instructions of 1844, Section 1st, Article 22.*

vessel the necessary instructions and supply for the voyage until the place of the court of adjudication[231].

On how you should treat slaves on board, the *Instructions* indicated that "every effort is to be made to alleviate their sufferings and improve their condition", promoting cleanness, ventilation and their "confidence in the Crown's men".[232] The landing of slaves or transfer to other vessels, as the *Forms* of 1819 indicated could happen, should be measures only of "absolute necessity". Of course, a "certificate of all circumstances" related thereto should be written and presented in court.[233]

After you arrived at the mixed commissions or admiralty courts' location, the people who had been captured as slaves would have to be kept onboard unless the local authorities authorized disembarkation.[234] In Sierra Leone the permission was usually granted; the same was not true in Rio de Janeiro and Cuba.[235] Some of the slaves would be eventually heard about the time and circumstances of their capture, but most of times written and oral reports, alongside the testimony of some members of both vessels, were deemed as sufficient for the mixed court to reach a decision whether yours was a bad or a good prize. Depending of the case, you would either deal with personal liability or use the court's decree to claim your payment; then you would resume your position and hope for good prizes to come.

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[231] *Instructions of 1844, Section 1st, Article 23.*

[232] *Instructions of 1844, Section 1st, Article 26.*

[233] *Instructions of 1844, Section 1st, Article 27.*

[234] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, pp. 72-73

[235] Havana did not allow the disembarkation, alleging security risks, as well as Rio. MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, pp. 73.

C. JUDGING THE SHIPS IN THE DOCK

Work and protocols

Between 1819 and 1871, mixed commissions — also referred as *mixed courts of justice*[236] —were installed in Freetown (Sierra Leone), Luanda (Angola), the Cape of Good Hope (South Africa), Boa Vista (Cape Verde Islands), Rio de Janeiro (Brazil), Paramaribo (Suriname), Havana (Cuba), Spanish Town (Jamaica), and New York (United States).[237] Together, mixed commissions condemned (and seized) more than 600 ships and released approximately 80,000 slaves. [238]

The commissions were called "mixed" for being composed of *two commissary judges* and *two commissioners of arbitration* of each signatory state. Commissioners were usually established in pairs, one in the British and other in the foreign state's dominions. Each commission also had a secretary or registrar named by the country where the commission was to reside. Mixed commissions' personnel were usually recruited from the diplomatic circles of their countries and did *not necessarily* have legal background.[239]

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[236] See MARTINEZ, Jenny S, Antislavery Courts and the Dawn of International Human Rights Law, **The Yale Law Journal**, vol. 117, no. 4, pp. 550–93, 2008, p. 552(footnote 2).

[237] BETHELL, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century, p. 83. As already mentioned, recently-independent Chile, Argentine Confederation, Uruguay, Bolivia and Ecuador ratified triple-formula treaties, but renounced to commissions in their territories and did not appoint commissioners to the respective Sierra Leone commissions.

[238] BETHELL, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century, p. 79. Of the estimated 86.012 Africans that were liberated by mixed commissions, 65.859 were liberated in the mixed commissions of Sierra Leone. The other only two commissions to liberate Africans were the commission in Havana (14.216) and in Rio de Janeiro (6.528). ELTIS, David, The significance of Africans who escaped from transatlantic slave ships in the nineteenth century, **História Questões Debates**, no. 52, pp. 13–39, 2010.

[239] That is the only assertion to be found in literature about commissioners. See BETHELL, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century; KLOSE, Fabian, Humanitäre Intervention und internationale Gerichtsbarkeit,

Under the bilateral treaties, mixed commissions were to have representatives from both signatories of treaties, but sometimes they worked even in the absence of one or more representatives. Commissioners easily sickened in foreign lands —Sierra Leone and other African territories were frequently called "a white man's grave"— or withdrew for other reasons. Differently from other states, Britain generally responded with expeditious replacement of its commissioners, since they could always be recruited from the local officials in the colonial administration[240]. Those were occasions when commissions usually acted with British majority, when British representatives covered for the absence of foreign commissioners by taking decisions by themselves. That practice may have started in 1819, when the British personnel consulted the Foreign Office how to proceed, as they were already allocated in Sierra Leone for months and the Portuguese government had not yet appointed its commissioners under the treaty of 1817. Lord Castlereagh instructed them to hear the cases and fill the absentees' positions in the meantime[241]. Later treaties would bring provisions allowing for the continuance of the mixed commissions proceedings despite absences from one of the parties in certain circumstances.

Much of the correspondence about slave trade was handled by the Foreign Secretary himself, including mixed commissions' work. We can imagine the work of commissioners consumed much of the Foreign Secretary's time directed to the aboltion of slave trade, especially

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Militaergeschichtliche Zeitschrift, vol. 72, no. 1, pp. 1–22, 2013, p. 15; SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 42.

[240] The *Consolidation Act of 1824* provided for the substitution on Article LIV: "[…] it shall be lawful for the governor or lieutenant-governor, or principal magistrate of the colony or settlement in which such commission or court shall sit, within the possessions of His *Britannic* Majesty, to fill up every vacancy which shall arise in such commission or court, either of commissary judge, commissioner of arbitration, or any officer thereof appointed by His Majesty […] *ad interim*, until such vacancy or vacancies shall be thereafter filled by some person or persons appointed by His Majesty for that purpose".

[241] SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 44.

in Viscount Palmerston's and the Earl of Aberdeen's terms of office.[242] British consuls were also informants to the Foreign Office on any issues related to slave trade and mixed commissions.[243]

Commissioners frequently kept in contact with the Foreign Office on which should be the best legal interpretation for their cases — specially for hard cases—, either before or after decisions. Besides general guidelines and other commissions' case law, British commissioners relied on the Law Officers' opinions, all transmitted through correspondence from the Foreign Office.

The Foreign Secretary would consult the Law Officers of the Crown whenever a legal question was addressed by the commissioners to the Foreign Office. It also happened when any change of case law was inaugurated in any of the commissions; when the commissions issued their first decrees; and when the Foreign Office required legal grounds to respond to foreign diplomatic correspondence protesting about mixed commissions decisions or other treaty-related issues. In all those cases, the Law Officer would issue a report comprising his own analysis of the concerning cases alongside a suggestion to the Foreign Office on how to proceed in each situation. Some of those reports would suggest to the Foreign Office to send instructions for mixed commissioners to follow certain cases as a basis in future adjudication, or to change their approach. The Foreign Office usually accepted the suggestions, but frequently changed their language or selected certain information as the focus of instructions to the commissioners.

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[242] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, pp. 77-78. Viscount Palmerston and the Earl of Aberdeen were responsible for the most incisive policies against slave trade in their terms; they held the chair of the British Foreign Office in 1835-1841 (Palmerston), 1841-1846 (Aberdeen) and 1846-1851 (Palmerston).

[243] SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 49.

Mixed commissions' proceedings were initially quite confusing, but subsequently became more similar to the British admiralty courts'.[244] The *Memoranda for the guidance of Commissions* of 1819, which we explored before, originally intended to solve the problematic procedural disagreements among commissioners and the British naval officers that had occurred in the previous years.[245] The document was prepared by the Law Officers of the Crown with the collaboration of the registrar to the Anglo-Portuguese mixed commission in London, which awarded compensation to Portuguese vessels unduly captured by the British Navy in the Napoleonic Wars.[246] Once the *Memoranda* was ready, Viscount Castlereagh sent it to British representatives in foreign governments and to commissioners of the Anglo-Spanish, Anglo-Portuguese and Anglo-Dutch commissions. This was already mentioned above, but Castlereagh's message deserves our attention. He indicated the attached document was "grounded upon the *proceedings in the Court of Admiralty* here [in Britain], and drawn up under the superintendence of *Sir W. Scott* [who had decided the British prize law cornerstone cases[247]], for the information and guidance, as far as circumstances would allow, of the several Mixed Commissions".[248]

The document didactically presented the dates each of the three bilateral treaties that had been concluded by then— remember that they were the first triple formula treaties to be signed — became effective and summarised their provisions. The *Memoranda* also included a number of practical instructions for commissioners, besides those

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[244] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, pp. 73-74.

[245] BETHELL, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century, p. 84.

[246] BETHELL, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century, p. 84 (footnote 20).

[247] See section A, "change in case law".

[248] *BFSP*, v.8, p. 210-211. Emphasis added.

directed to the captors we explored above[249]. It provided guidance about the *steps to be taken after the arrival of the captured vessel* to the mixed commissions' location, and about the *documents to be produced* by the captor and by the registrar during the adjudication proceedings.

The registrar should receive the documents of the captor and log the proceedings of each case in the *mixed commission book*, identifying them by the name of the vessels.[250] Proceedings should be written in the language of the state where the commission was established.[251]

The first step for the proceedings was to produce an *affidavit.* A *form* was provided for that matter, with blank spaces for the captor (represented by the commander or the officer in charge of the ship) to indicate the circumstances of capture. All papers found on board should be annexed to those statements.[252] Such papers were usually crucial evidence to the case, as they would detail the journey and its objective. In case two sets of papers had been found, for instance, stating different nationalities for the ship, or different passports with different routes, there was strong evidence for proving evasion of search and attempt to engage in slave trade.[253]

In the *Memoranda* of 1819, a *form of minute* guided how the case should be presented, with information on which were the circumstances of the capture and which was the allegedly breached treaty. A monition (which served as a kind of summons) should be issued for people who held any right, title or interest in the said ship to appear before the commissary judges. They should to present a lawful cause why the

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[249] See the previous section in this chapter.

[250] *BFSP, v. 8, 1820-1821*, p. 31.

[251] *BFSP, v. 8, 1820-1821*, p. 27.

[252] *BFSP, v. 8, 1820-1821*, p. 30-31.

[253] SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 47.

ship "should not be pronounced […] to have been employed in an illegal Traffic in Slaves".[254] A separate document prepared according to the *form of monition* should be handed to the representative of the captor, who was responsible for giving a copy to whom the legal notice was addressed.[255]

The papers of the captured ship and an affidavit of the capture, accompanied by a recorded summary of the questionings, opened the proceedings. Captain and crew of both captured and captor vessels should be heard.[256] On the examination of witnesses, the recommendation was, besides the captain, the mate or the boatswain should also be heard, "these Persons being considered as the most likely to have a correct knowledge of the general circumstances attending the course and employment of the Vessel."[257] The number of Africans heard in mixed commissions was minimal[258]; sometimes the surgeon of the ship and passengers would be heard. All the examination of witnesses should be registered in accordance with the *form of oath to be administered to the master and others belonging to the captured ship.* The *Memoranda* also offered a *form of compulsory,* in case there was any need for witnesses to be subpoenaed to appear in mixed commissions.[259] In case interpreters were necessary, a *form of oath to the interpreter* was provided.[260] In practice, the examination of witnesses was usually conducted by the

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[254] *BFSP, v. 8, 1820-1821*, p. 31-32.

[255] *BFSP, v. 8, 1820-1821*, p. 33.

[256] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, pp. 74; *BFSP, v. 8, 1820-1821*, p. 34.

[257] *BFSP, v. 8, 1820-1821*, p. 34.

[258] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p. 99}

[259] *BFSP, v. 8, 1820-1821*, p. 36-37.

[260] *BFSP, v. 8, 1820-1821*, p. 34-36.

registrar without the presence of commissary judges, who would come to know the details of the case through the records.[261]

Proctors, not always attorneys, would argue both parties' cases, and then the commissary judges would either ask for further evidence or present their opinions.[262] The *form of allegation* and *form of claim* corresponded to the aggregate of facts and legal grounds presented by the person acting on behalf of the captor and of the captured respectively.[263]

The *Memoranda* also brought forms for the various possible ways mixed commissioners could express their views. The *form for a decree where further proof is directed to be made* and the *form of commission of inspection* covered the possibilities of further proof to be necessary in order to decide the case. The *form for decree where the commissary judges do not agree in the sentence they are to pronounce* covered the case of disagreement between the British and the foreign commissary judges. Disagreement, in this sense, meant not concurring in the final result they suggested in their opinions, either for *condemnation of the ship as good prize* (emancipating the slaves on-board) or its *restitution as bad prize*. As provided in the treaties, in the case of disagreement, a commissioner of arbitration would be *drawn by lot* to "compose majority" and give the final word.

The *form of decree of condemnation* contained a summary of the case followed by the pronounced *condemnation* of the ship and *emancipation of slaves found on-board*. The *form for a decree of restitution* concerned the case where the mixed commission decided for

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[261] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, .p. 74}

[262] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, .p. 74}

[263] *BFSP, v. 8, 1820-1821*, p. 37-41.

acquittal, i.e. when the commissioners found the ship's voyage to be in conformity with the corresponding treaties and therefore ruled the ship to be restored to the claimant. Costs, damages, and expenses emerging from the seizure should also be arbitrated in such a case.[264] Treaties for the suppression of slave trade provided that indemnities for unlawful captures should be paid by the captor's state.[265]

Finally, under the bilateral treaties' provisions, once declared lawful prize, the ship and its cargo should be sold for the profit of the two governments. For that matter, the *form of commission of appraisement and sale* supplied the basic lines for a document to empower an office who would be responsible for selling the goods for the highest bidder and return the money to the registrar.[266]

The triple-formula treaties usually stipulated cases should be resolved as soon as possible and within two months. In reality, mixed commissions would spend from few days to several months adjudicating cases.[267] The Sierra Leone court (composed by various commissions, among which the Anglo-Brazilian commission) was the most efficient in

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[264] Under British law, slaves on board ships to be judged by Vice-Admiralty Courts would receive food and other basic provisions, during the proceedings, by the British local governor in case of omission of those claiming rights over them (*Act of 1824*, Article XXXII). In the cases of mixed commissions allocated there, Freetown colonial administration also had the responsibility for feeding and clothing liberated Africans, and the costs would be added to the costs (SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 49.}). In foreign states, there would be continuous discussions on how to support and deal with slaves waiting for mixed commissions judgements. In Cuba and Brazil, the refusal to land them was the subject of strong diplomatic tensions with British representatives. MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**; MAMIGONIAN, Beatriz G., In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil-British West Indies, 1830s-1850s), **Slavery & Abolition**, vol. 30, no. 1, pp. 41–66, 2009.

[265] About this point, see CALVO, **Derecho internacional teórico y práctico de Europa y América**, p. 360 v.2.

[266] *BFSP, v. 8, 1820-1821*, p. 45-49.

[267] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p. 73.

the number of condemnations[268]. That was possibly related to the particular homogeneity of members — as we saw, it was not rare to find commissions composed only by British commissioners there. The commissions in Sierra Leone also received more cases — with an obvious impact in the numbers of decisions—, due to the high rates of captures by the Royal Navy patrol in the African West coast.

The expenses of maintenance of mixed commissions were equally shared by the treaty's parties, except for mixed commissions in Freetown, for which Britain paid one third of the costs; the remaining two thirds were shared among Portugal, Spain, Brazil and the Netherlands[269].

Traces of prize law and emancipation

By design, mixed commissions would hear cases about ships, not people. Yet the main variation in the decisions of mixed commissions in relation to prize courts was their power to declare slaves found on-board as free. Even though they had this power, they did not rule on their rights but rather on the legality of the capture of the whole ships that were transporting them.[270] The jurisdiction of the commissions did not extend to the owners of the ship either, or to its master and its crew personally. Any personal responsibility would be left to domestic jurisdictions, as for the prosecution for crimes of piracy.

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[268] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p. 73.

[269] SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 43.

[270] The fact that slaves were rarely heard at mixed commissions and that the law commissions implemented did not deal with their rights directly should not leave their agency in searching for alternatives unnoticed. Emily Haslem's study, for instance, analysed cases at Sierra Leone mixed commissions which were impacted by slave resistance to re-captivity translated by commissioners as "unforeseen circumstances" which impeded restitution. See HASLAM, International Criminal Law and Legal Memories of Abolition: Intervention, Mixed Commission Courts and "Emancipation."

In practice, some commissioners did remind foreign governments of their duties (founded in morality or in treaties) to act upon their domestic obligations, but those reminders would be perceived as personal interferences, outside the jurisdiction of the commissions. From the commission's function of liberating slaves found on-board also came a responsibility for supervision of their change of status. Commissioners would frequently report to the Foreign Office on such declarations of freedom. That information would be used in diplomatic correspondence to pressure foreign governments into the enforcement of domestic law of abolition.

The motivation for Britain and other signatory states to keep mixed commissions' jurisdiction restricted to the prize is yet to be studied in detail. Benton reveals a possibly relevant point: abolitionists had seen signs of the complications for enforcing criminal laws. Pardon to criminal offences of slave trade charges by the first decade of the century, Benton submits, may have led abolitionists to focus on prize proceedings as potentially more effective than the other "more politically charged issue of the imperial state's authority to restrict the legal prerogatives of slave owners".[271]

Mixed commissions were to rule on the ships used for the practice of slave trade and the corresponding cargo, as prize courts did. Of course, this meant that human beings, held captive as slaves, were also affected by the rulings. The *Consolidation Act of 1824,* which provided for the regulation of measures to be taken against the slave trade, illustrates the legal language the British used to depict slaves found onboard:

> XXII. And be it further enacted, That all slaves and all persons treated, dealt with, kept, or detained as slaves, which shall be seized or taken as prize of war

[271] BENTON, Abolition and Imperial Law, 1790–1820, pp. 364-368.

> or liable to forfeiture under this act, shall and may, for the purposes only of seizure, prosecution, and condemnation, as prize or as forfeiture, be considered, treated, taken, and adjudged as slaves and property, in the same manner as negro slaves have been therefore considered, treated, taken, and adjudged, when seized as prize of war, or as forfeited for any offence against the laws of trade and navigation respectively[272]

In this excerpt we can notice a parallel use of the languages of the warfare regime of prize law and the new regime for the suppression of slave trade, which seemed to be employed as a way of exhausting the possible meanings of comparable instances. In the bilateral treaties both sets of vocabulary were used interchangeably, but it was common to notice a separation between the goods found onboard the detained ships, which should be considered prize (as well as the ship), and slaves, who should be declared free. Liberation was usually regulated by separate articles and instructions. It does not mean slaves' rights were considered separately from the objects (the vessel and other goods), though; they were directly dependent as a rule. According to the language of the treaties, slaves found on-board would be liberated only when the vessel was considered good prize. In case of acquittal, the ship and its goods would be returned to their owners, and so would the slaves on-board. Owners could even claim losses and costs to be arbitrated in order to compensate for the illegal capture — e.g., for the interim death of slaves or for costs with feeding them and the crew of the ship for the time.[273]

[272] *Act of 1824*, Article XXVI.

[273] SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 48.

Could this mixed commissions be considered the first human rights courts? I argue that is a too farfetched statement[274]. By design, the only individual rights that could be claimed before mixed commissions were those of the owner of the ship[275]. By discussing rights and duties of both states and applying restrictions to flagged ships, mixed commissions delivered a decision which balanced one state's sovereignty over the property of its nationals against the other state's project of formally freeing enslaved people.

One could argue, as Martinez does, that the humanitarian goal of emancipating slaves should be enough of a reason to situate these courts in the origins of what we understand as human rights courts today.[276] The author's strongest claim for the humanitarian value of those courts are the significant numbers of liberated Africans resulting from

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[274] This excerpt from Jenny Martinez provides a clear statement of her argument in this line: "Though all but forgotten today, these slave trade courts were the first international human rights courts. Called the 'Mixed Commissions' because they consisted of judges from different countries, the slave trade tribunals sat on a permanent, continuing basis, and they applied international law. The courts explicitly aimed to promote humanitarian objectives." (Martinez:2012ue p.6 See also MARTINEZ, Jenny S, Antislavery Courts and the Dawn of International Human Rights Law, **The Yale Law Journal**, pp. 550–641, 2008. While some have joined her position (e.g. SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts.) others have expressed disagreements (e.g. BENTON, Lauren, Review-The Slave Trade and the Origins of International Human Rights Law, **Victorian Studies**, vol. 56, no. 1, pp. 127–129, 2013; ALSTON, Philip, Does the past matter? On the origins of human rights, **Harvard Law Review**, no. 126, pp. 2043–2081, 2013; MOYN, Samuel, Of Deserts and Promised Lands: The Dream of Global Justice, **The Nation**, 2012.). The author reacted to the first reviews in MARTINEZ, Jenny S, Human Rights and History, **Harvard Law Review**, no. 126, pp. 221–240, 2013.

[275] That point was already made by Erpelding: **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)**, p. 96.

[276] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law** (chapters 1/4/9). According to Eltis, 86.012 were liberated by mixed commissions; 73.114 were liberated by British Admiralty courts (located in London and in all British dominions with maritime coasts); 14.915 by domestic courts (5.861 in Brazil; 6.212 in the United States; 1.683 in courts of Portuguese and 362 in French dominions in Africa). The Haitian navy liberated 808 Africans and 3.000 were liberated by Britain without judicial proceedings (ELTIS, The significance of Africans who escaped from transatlantic slave ships in the nineteenth century, p. 19.).

their sentences.[277] We should undeniably take formal liberations into account when evaluating the histories of slave trade abolition. Yet, first, even if it was proved that mixed commissions ended up being essential for human rights improvement[278], this would not be sufficient to make them human rights courts. Second, the analysis of their role in promoting human rights should come alongside the context of continuous exploration of liberated Africans not only in the slavery-based states which were parties of treaties with Britain[279], but also by Britain itself in its dominions, whose plantations profited with miserable conditions of liberated Africans arriving through schemes of emigration.[280] Although I do not aim to make such a complex evaluation in this thesis, I will bring further evidence that might contribute to the dubious character of the British efforts in relation to effective freedom in chapter 4.

The point of mixed commissions

In 1818, a bill for ratification of the Anglo-Portuguese Treaty of 1817 was under scrutiny at the British Parliament. The British

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[277] See MARTINEZ, Antislavery Courts and the Dawn of International Human Rights Law.

[278] Although the point of effectiveness of mixed commission to the overall abolition of slave trade is repeatedly employed by Martinez, besides the numbers of formal liberation by the commissions, the connection between their work and the "change of ideology" that she claims to be the successful result of the British (state and abolitionists) campaign by the end of the century remained unexplored. That argumentative link is rather similar to the one present in the British 19th-century discourse; see chapter IV, E, "liberation and deviation of vessels".

[279] For the history of liberated Africans in Brazil, see MAMIGONIAN, Beatriz G., **Africanos livres: a abolição do tráfico de escravos no Brasil**, São Paulo: Companhia das Letras, 2017.

[280] See ASIEGBU, Johnson U J, **Slavery and the Politics of Liberation 1787-1861: a study of liberated African emigration and British Anti-Slavery Policy**, New York: Africana, 1969. For those who claim that the anti-slavery project was not at all self-serving, or that it was benign in character, Joel Quirk comments, "[h]owever appealing this argument might appear at first glance, it runs into severe problems when placed alongside European involvement in the enslavement of tens of millions of African and Native Americans, the annihilation of numerous indigenous peoples, the appropriation of vast territories through bloody conquest and systematic repression, numerous massacres in many corners of the globe, long-term economic exploitation, and the widespread use of forced labour well into the twentieth century" QUIRK, Joel, **The anti-slavery project : from the slave trade to human trafficking**, Pennsylvania: Philadelphia : University of Pennsylvania Press, 2011, p. 68.

Foreign Secretary Castlereagh saw himself in the position of having to explain some of the reasoning behind the third element of the triple formula when Dr. Joseph Phillimore (Robert Phillimore's father) objected to the point of the mixed commissions' provision. Phillimore was defending that "[b]y the law of nations, the practice had been, that all disputed captures should be adjusted by the tribunals of the country of the captors, and not the country of the captured; […] otherwise justice could not be impartially administered."[281] Why would then Britain choose to substitute the well-known prize courts' model of adjudication for the mixed commissions'?

Lord Castlereagh responded that what Phillimore said was perfectly true for times of war. Yet "[a]s foreign states would not in time of peace submit to the tribunals of this, to them a foreign country, the only expedient had been to create a mixed tribunal". [282] According to the Foreign Secretary, the decision lied between that or "to abandon the cognisance of the different cases that might arise to foreign tribunals".[283] The point was backed by the Attorney General: "We should certainly not choose that a Portuguese tribunal should judge of matters respecting our vessels taken by them. A mixed jurisdiction had therefore appeared the most satisfactory and proper".[284]

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[281] *The Parliamentary Debates from the year 1803 to the present time*. House of Commons, v. 38. London, 1818. p. 997. This document was previously used by Beatriz Mamigonian as evidence of the concern by the Foreign Secretary in "following all the cases of suppression of the slave trade". MAMIGONIAN, Beatriz G. **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**. University of Waterloo, Waterloo (Ontario), 1995.

[282] *The Parliamentary Debates from the year 1803 to the present time*. House of Commons, v. 38. London, 1818. p. 998.

[283] *The Parliamentary Debates from the year 1803 to the present time*. House of Commons, v. 38. London, 1818. p. 998.

[284] *The Parliamentary Debates from the year 1803 to the present time*. House of Commons, v. 38. London, 1818. p. 999.

A genuine concern with British citizens' property might have been involved in the choice. Mixed commissions had previously been used for disputes on territorial boundaries and warfare damages resulting from the American Civil War and Napoleonic Wars.[285] Britain would generally avoid national rulings on strategic matters for its imperial influence in non-British colonies during the nineteenth century. It would create instances of extraterritorial jurisdiction in China, the Ottoman Empire and Japan[286]. Within that trend, Britain had secured, under the Treaty of 1810 with Portugal, a special jurisdiction to rule on civil and criminal cases involving British subjects. Those privileges would be kept by Brazilian national legislation until 1832 and abolished in practice only in 1844[287].

Louis' reasoning about the adjudication of a foreign detained vessel might also be insightful at this point. We can start from the most basic question which emerged from the capture of the vessel *Louis*. Scott had to answer what should be done to a vessel from another state (France) which had been captured by a British subject in the absence of a treaty providing for a right of visitation, capture or adjudication. "I answer without hesitation, restore the possession which has been unlawfully divested: — *rescind the illegal act* done by your own subject; and leave the foreigner to the *justice of his own country*."[288] Scott himself acknowledged that it would not be without a moral consequence. In cases of confirmed traffic, slave traders' vessels would be just sent back to their "unfortunate business". Scott's response to this moral problem was that, unfortunate as it appeared to be, and even if the foreign nation's laws proscribed slave trade, nothing else could be decided during peacetime.

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[285] KLOSE, Humanitäre Intervention und internationale Gerichtsbarkeit, p. 12.

[286] See KAYAOĞLU, Turan, **Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China**, Cambridge: Cambridge University, 2010.

[287] We will explore that further in the next chapters.

[288] *Le Louis*, 165 English Reports 1464, 1817, p. 1480.

William Scott's analysis reveals that the main rational of his decision was not the content of other nations' laws on slave trade, as in the previous prize law cases of *Amedie* (1810), *Fortuna* (1811) and *Diana* (1813), but the absence of any legal right to enforce them in peacetime. In his words, "a nation in 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*."[289]

Through treaty-making, Britain was filling that gap by building a system of consented use of force, based on three enabling elements (visitation, capture and adjudication). To make this system sustainable and compatible with peacetime, mixed commissions were the point of that system where a stronger sense of accountability and legal boundaries could be granted to *both* parties. In fact, mixed commissions represented a kind of window of interference to the foreign parties to the British treaties.[290] It is reasonable to assume that other states perceived visitation and capture, usually implemented by the British navy, as elements that lied further from their control than mixed commissions. This way, "an avenue would not be shut against foreign powers that complained of injustice", in Viscount Castlereagh's words.[291].

The Foreign Secretary left us yet another hint about the point of mixed commissions: they would enable "a final decision to be gained, which would not be the case should it be sent to ordinary tribunals"[292]. That statement, in connection with the fact that triple

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[289] *Le Louis*, 165 English Reports 1464, 1817, p. 1480, *emphasis added*.

[290] This will become quite clear in the following chapters, when we see the battles between British and Brazilian representatives at and about mixed commissions.

[291] *The Parliamentary Debates from the year 1803 to the present time*. House of Commons, v. 38. London, 1818. p. 998.

[292] *The Parliamentary Debates from the year 1803 to the present time*. House of Commons, v. 38. London, 1818. p. 998.

formula treaties usually provided for the prohibition of appeal, leads to the idea that a faster and final decision was perceived as better serving slave trade suppression.

When we compare that arrangement with the prize courts system, which Castlereagh probably also had in mind, the choice of mixed commissions does seem theoretically more effective for the objective of having a decision fully recognised by both states as to prevent diplomatic tensions. In the prize system, decisions made by foreign prize courts would be considered *res judicata* in relation to the transfer of property; the captor would have an irrevocable dominium over the prize.[293] Yet claims of reparation emerging from arbitrary or unlawful decisions could still be raised, and would be resolved by the diplomatic bodies and formalized in diplomatic agreements.[294] The language of anti-slave trade treaties provided that any decisions about the prize or reparations (in case of illegal captures) would be centralized in commissions composed by both states' representatives. As such, there would be (theoretically) weaker political grounds on which to base diplomatic claims of reparation linked to unjust decisions.

The practice of mixed commissions showed another important function within the strategy for the suppression of slave trade not revealed in those discussions. By placing British nationals in foreign countries, mixed commissions would have a particular diplomatic value.[295] Commissioners would report on general developments of slave trade proscription, supervise the emancipation of slaves freed by their commission and even inform about departing suspicious ships, either

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[293] See chapter 1, A, "prize law, neutrality and the flags".

[294]BELLO, **Principios de derecho de gentes**, pp. 234-235.

[295] See DRESCHER, Seymor, From Consensus to Consensus: Slavery in International Law, *in*: **The Legal Understanding of Slavery From Historical to the Contemporary**, Oxford: 2012, p. 221; BETHELL, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century; MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, pp. 78-79.

through correspondence with the Foreign Office or with the African squadron.

One could fairly argue such diplomatic position of mixed commissions was more relevant than their judicial function. That position would be reinforced by the numbers: from 1808 to 1867, when Britain acted to implement its triple-formula treaties, only 572 out of the 1635 slave trade ships condemned were tried by mixed commissions. The other 823 ships were condemned by British vice-admiralty courts[296]. These numbers are in great part explained by the substitution of mixed commissions by vice-admiralty courts by the middle of the century. It coincided with the most voracious stage of the British policy of suppression, as we will see in chapter 4.[297]

Despite the undeniable fact that the "work" of mixed commissions did not have such a considerable weight in the overall adjudication of slave trade vessels, I argue mixed commissions' judicial function still deserves more credit. Beyond a "judicial diplomacy"[298] of promoting anti-slave trade international law from a privileged position of being in slavery-based countries or at the coast of Africa, they were

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[296] The numbers are presented by Alston against Martinez' broad celebration of mixed commissions. See ALSTON, Does the past matter? On the origins of human rights, p. 2053; MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**.

[297] We will return to this point in chapter 5.

[298] The expression was coined by Farida Shaikh, who describes commissioners as placed somewhere in between diplomacy and law: "[…] commissioners were not considered members of either the diplomatic or consular services. Nor were they invariably men with legal experience and training. They adjudicated, arbitrated and assessed; they gathered intelligence on the slave trade; and they reported to the Foreign Office. Some developed a strong personal commitment to the suppression of slave trade: this, however, was not a prerequisite of their selection. Better remunerated than most clerks in Whitehall, and with fewer opportunities for long-term career advancement in what has since been perceived as one of the earliest attempts to enforce international human rights law." (SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 42.).

essential for reinforcing treaty-law by being a *locus of interpretation* and by *triggering further interpretation* over their decisions.

Interpretation was constantly reinvented inside commissions quarters, through the exchange of opinions and occasional *clashes among commissioners* over the meaning of the treaty's provisions. Mixed commissions' cases were also a subject of disputes *by British and foreign representatives*, constituting a second level of interpretation of the treaties, which happened whenever decisions were reanalysed in relation to the treaty-regime. By that I do not mean that mixed commissions were the main part or the central element of the British system of suppression. By the contrary, mixed commissions concentrated only a step of the triple formula and many of their features would hardly fit what we currently expect of judicial bodies. Frequently enough, commissioners acted as diplomatic representatives of their state's interests, stretching treaties' meanings as to tip decisions to one side or to the other depending on which arbitrator was chosen by lot to decide in each case. Notwithstanding this and other strange features, mixed commissioners had in their job description to decide cases according to international treaties and were surrounded by an orbit of actors constantly reinterpreting those treaties *because* of its work, *for* its work or to go *against* it.

CHAPTER III — BRAZIL ABOARD: SLAVE TRADE SUPPRESSION AND INTERNATIONAL LAW DEBUT

> *[…] upon the* ***separation of the Empire of Brazil from the Kingdom of Portugal****, His Majesty The King of the United Kingdom of Great Britain and Ireland, and His Majesty The Emperor of Brazil, respectively acknowledge the obligation which devolves upon Them* ***to renew, confirm, and give full effect*** *to the stipulations of the Treaties subsisting between the Crowns of Great Britain and Portugal, for the regulation and final abolition of the African Slave Trade, in so far as these stipulations are binding upon Brazil:— And whereas, in furtherance of that important object, His Majesty The King of the United Kingdom of Great Britain and Ireland, and His Majesty The Emperor of Brazil, are animated with a* ***sincere desire to fix and define the period at which the total abolition of the said Trade****, so far as relates to the Dominions and Subjects of the Brazilian Empire, shall take place […].* (Anglo-Brazilian Treaty of 1826)

The preamble for the Anglo–Brazilian Treaty for the suppression of slave trade tells its history in a nutshell. The Brazilian independence from Portugal had implications for the enforcement of slave-trade suppression treaties between Britain and Portugal (of 1815 and 1817). At the same time, Brazil had a clear interest in securing international recognition for the declaration of independence. The ensuing negotiations to that end with Britain quickly made clear that slave trade suppression would be a central factor for British recognition and for its influence to act as a mediator with Portugal. Part of the price named

by Britain was a new treaty, a partial solution to its concerns that also emerged with Brazilian independence: enforcing the mechanisms of slave-trade suppression towards Brazilian vessels and subjects.

The choice of verbs in the preamble were not without a reason: by "renewing, confirming and giving full effect" to the Articles of the Anglo–Portuguese treaties, the recently-independent state provided consent and reaffirmed already known structures of the Anglo–Portuguese triple formula. This is not to say the treaty was limited to simple confirmation: by establishing a deadline for total abolition, it meant that a recently independent Latin American slavery-based country was to enter an anti-slave trade system that originated in the "European family of civilised nations".

This chapter will be a first step in telling the story about how Brazil was sewed onto an international project of abolition through the threads of international law. First, we will examine the Anglo–Portuguese treaty regime and the processes of change that the Brazilian independence induced. Then, we will consider the stakes involved in the Brazilian adherence to the network of British treaties and take a look at the overall application of the triple formula for Brazil under the Anglo–Brazilian Treaty of 1826.

A. CHANGE OF STATUS, SAME TREATY

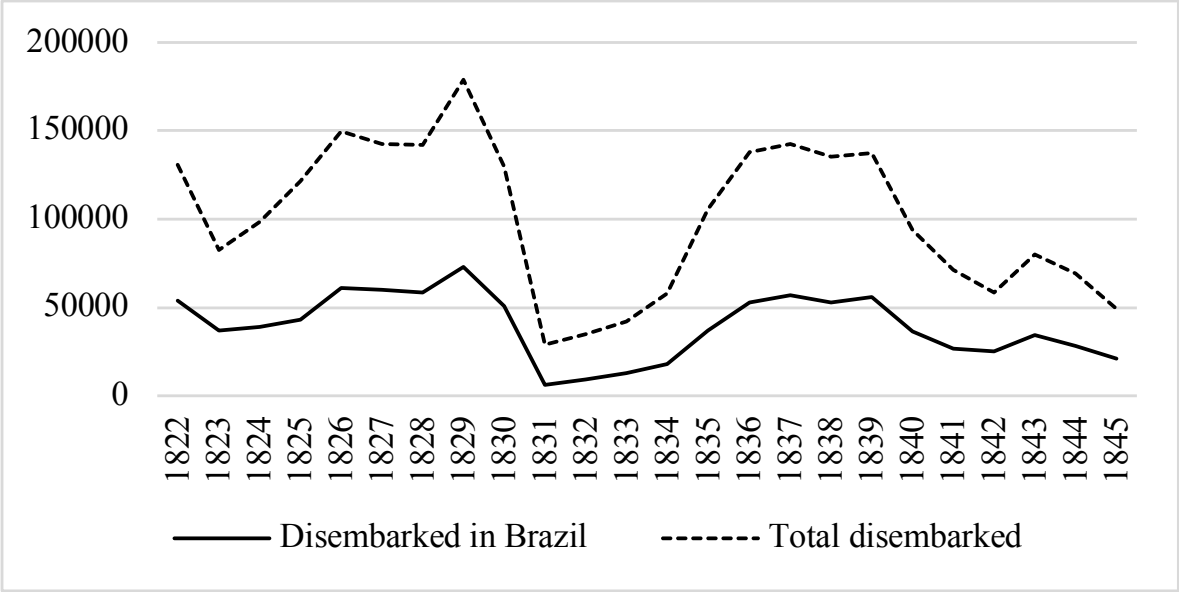
The Anglo-Portuguese regime

Between 1811 and 1870, an estimated total of 1.145.400 slaves would arrive in Brazilian ports, out of the 1.898.400 total destined to all the American territory (including the United States, Spanish Caribbean, French Caribbean, and Brazil).[299] In the timeline bellow, the

[299] CURTIN, Phillip D, **The Atlantic slave trade: a census**, Madison: University of Wisconsin, 1969, p. 234.

registered total voyages per year show the significance of the enslaved to be disembarked in Brazil in relation to the total number of registered slave trafficking:

Figure 1 – Number of captives disembarked per year[300]



Brazilian history with slave trade irredeemably starts by the fact that, since the beginning of the 19h century, Portugal controlled much of the slave shipments departing from Africa. Most of those slaves were brought to Brazil, its largest colony in the Americas.[301] Portuguese relations with Britain were marked by an economic dependence that is epitomised by the British escort to the relocation of the Portuguese Crown to Rio de Janeiro, in 1808, with the imminent invasion by Napoleonic forces. That new phase of relations, between 1810 and 1815 in the context

[300] Figure designed by the author with data from the Trans-Atlantic Slave Trade Database.

[301] BETHELL, Leslie, The Independence of Brazil and the Abolition of the Brazilian Slave Trade: Anglo-Brazilian Relations, 1822-1826, **Journal of Latin American Studies**, vol. 1, no. 2, pp. 115–147, 1969, pp. 118-119.

of the Congress of Vienna, was formalised by the Treaty of Trade and Navigation and the Treaty of Friendship and Alliance.[302]

The Treaty of 1810 renovated the convention signed in 22 October 1807: Britain confirmed its support of the transfer of the Portuguese Crown to Rio de Janeiro and recognised Braganza as the legitimate royal house of the Kingdom of Portugal[303]. Portugal declared its will of cooperating "in the cause of humanity and justice", that is, the slave trade carried on the Coast of Africa not belonging to the Portuguese dominions.[304] The convention did not provide for enforcement mechanisms, as a right to capture vessels pursuing illicit slave trade or any right of visit to verify the legality of the trade. Notwithstanding, in the following years, Portuguese ships would be captured in great numbers by the British navy[305], possibly by taking advantage of the privilege British ships then enjoyed of circulating freely and in any number though the ports of Brazil.[306]

The Anglo–Portuguese Treaty of 1815 declared most parts of the Treaty of 1810 void— only commercial agreements were left untouched[307]. The Treaty of 1815 regulated slave-trade suppression more

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[302] BETHELL, The Independence of Brazil and the Abolition of the Brazilian Slave Trade: Anglo-Brazilian Relations, 1822-1826 119-120.

[303] Anglo-Portuguese Treaty of 1810, Article III.

[304] Anglo-Portuguese Treaty of 1810, Article X.

[305] Within the two subsequent years, seventeen Portuguese vessels were captured by the British Navy (RODRIGUES, Jaime, **O infame comércio : propostas e experiências no final do tráfico de africanos para o Brasil, 1800-1850**, Campinas: Unicamo, 2005, p. 97.). The Treaty of 1817, Article XI, would provide for indemnifications related to such captures in the value of £300.000.

[306] Among the provisions 1810 Treaty, Article VIII provided the number of British warships in any harbour belonging to the Portuguese Crown was not limited to six anymore, as stipulated by former treaties, but rather unlimited (Anglo-Portuguese Treaty of 1810).

[307] "The Treaty of Alliance concluded at Rio de Janeiro on the 19th February, 1810, being founded on circumstances of a temporary nature, which have happily ceased to exist, the said Treaty is hereby declared to be void in all its parts, and of no effect; without prejudice however, to the ancient Treaties of Alliance Friendship and Guarantee, which have so long and so happily subsisted between the Two Crowns, and which are hereby renewed by the High Contracting

carefully. It established a partial proscription of slave trade in the Portuguese dominions, to be applied to vessels in the harbours of the northern coast of Africa or bound to any destination outside the Portuguese dominions.[308] Any vessel destined to trade slaves where the practice continued to be lawful should carry a passport issued by the Secretary of the Government for the Marine Department.[309]

To give that regulation some teeth, an additional agreement, concluded in 1817, provided for the right of visit and search, stipulated rules for apprehension of suspected vessels heading north of the Equator, and created Anglo–Portuguese mixed commissions that would adjudicate such cases. There it was, the triple formula fully established as an international regulatory regime between Portugal and Britain.

By the time of the declaration of independence, Brazil had been the destination of circa 60% of the total numbers of slaves sent to the Americas since the beginning of the century, conserving the position it had as the main destination of slaves as a colony[310]. By then, approximately one third of the population living in Brazil was formally enslaved.[311] The magnitude of interests involved in the traffic was dictated by the agrarian economy supported by slavery. The Brazilian mercantile production system was fundamentally based on slave labour,

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Parties, and acknowledged to be of full force and effect." Anglo-Portuguese Treaty of 1810, Article III.

[308] Anglo-Portuguese Treaty of 1817, Article I, further specified in Article II.

[309] Anglo-Portuguese Treaty of 1817, Article IV.

[310] ELTIS, David; RICHARDSON, David, **Atlas of the Transatlantic Slave Trade**, New Haven & London: Yale University, 2010, pp. 203/261; CURTIN, **The Atlantic slave trade: a census**, p. 234.

[311] MAMIGONIAN, Beatriz G. **Africanos livres: a abolição do tráfico de escravos no Brasil**. Introduction, location 119. Under the Constitution of 1824, even after being freed, former slaves brought from Africa were not entitled to become Brazilian citizens and would always be differentiated from those born in Brazil on the grounds of the racist ideology that they were not worth of integrating the nation. *Idem,* location 131.

both for international and domestic markets[312]. Involvement in the transatlantic trade was also considered a profitable activity in itself.[313]

Although not yet recognised, the declaration of independence of 7 September 1822 rapidly entered international debates. It was especially relevant for the anti-slave trade arrangements between Britain and Portugal. Until then, Portugal did not see itself pressed to any further agreements on the slave trade after the signature of the 1817 Treaty and issuance of the *1818 Alvará*, a domestic regulation for the total implementation of the treaty.[314] Yet, in sequence of the declaration of independence, British Foreign Secretary George Canning revealed his intention to inaugurate an innovative interpretation of the treaties established with Portugal.

According to the new understanding proposed by Canning, the only exception to the prohibition of slave trade that was available to Portugal — that is, slaves destined to its colonies south of the Equator[315]—, was *ipso facto* abrogated once the colonial status of Brazil had ceased.[316] The Portuguese Minister of Foreign Affairs responded that Brazil was not a colony, but an integral part of the Portuguese Kingdom — so the exception could never have been read as designating Brazil — and that, historically, the 1817 Treaty had not been signed in favour of Brazil. If it had been, that would indeed eventually lead to an *ipso facto* abrogation of the exception clause in case of Brazil actually left the

[312] SLENES, Robert W, Brazil, *in*: **The Oxford Handbook of Slavery in the Americas**, Oxford: Oxford University Press, 2012, pp. 1–27.

[313] DE ALMEIDA, Paulo Roberto, O Brasil e a diplomacia do tráfico (1810-1850), **Locus-Revista de História**, vol. 4, no. 2, pp. 1–27, 1998, p. 14.

[314] On the Portuguese diplomatic position after signing the 1817 Treaty, see SANTOS, Guilherme de Paula Costa, **A Convenção de 1817: debate político e diplomático sobre o tráfico de escravos durante o governo de D. João no Rio de Janeiro**, Master's degree dissertation. Universidade de São Paulo, São Paulo, 2007, p. 157 et seq.

[315] See the Anglo-Portuguese Treaty of 1817, Article I.

[316] *HCPP*, Correspondence with Foreign Powers, relative to the Slave Trade, 1822-1833. Mr. Secretary Canning to E.M. Ward Esq. October 18, 1922, p. 93-94.

Portuguese dominions; but the treaty had been signed rather to *protect the interests of the Portuguese dominions in the Coast of Africa*, interests which would be ruined by an immediate abolition.[317] Silvestre Pinheiro Ferreira further argued an eventual separation of Brazil from Portugal would rather have the effect of abrogating *all commitments*[318] — "because no Treaty can be conceived to continue to exist when the circumstances under which it was concluded are found to have undergone an essential change"[319]. In between the lines, the Portuguese Foreign Secretary suggested that, first, Britain would lose its rights of visitation, capture and shared adjudication of the 1817 Treaty towards Portuguese vessels and subjects[320]. Second, the Treaty of 19 February 1810 would be included in the abrogation package[321], or at least the part that had not been annulled by the Treaty of 1815[322], i.e. the renovation of past commercial treaties between Portugal and Britain — whose terms were quite unfavourable to the Portuguese.

Silvestre Pinheiro Ferreira, the Portuguese Minister for Foreign Affairs, would add yet another element to his position: should

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[317] In 1824 Marquis de Palmella would make the opposite statement, saying that, in case of the Brazilian independence, he could consent at once to the total abolition of Slave Trade, taken by Secretary Canning as an invitation for negotiations around a new Anglo-Portuguese treaty (HCPP, Class B – Correspondence with Foreign Powers relating to the slave trade, 1824-1825. Mr. Secretary Canning to Sir Edward Thornton, May 13, 1824, p. 38-39). The invitation was promptly refused by Marques of Palmella, as it would be a virtual acknowledgement of the independence of Brazil (*HCPP*, Class B – Correspondence with Foreign Powers relating to the slave trade, 1824-1825. Mr. Secretary Canning to Sir Edward Thornton, May 13, 1824, p. 45).

[318] *HCPP*, Correspondence with Foreign Powers, relative to the Slave Trade, 1822-1833. E.M. Ward Esq.to Mr. Secretary Canning, November 15, 1822. p. 97.; Signor Pinheiro Ferreira to E.M. Ward, Esq., December 12, 1822.

[319] *HCPP*, Correspondence with Foreign Powers, relative to the Slave Trade, 1822-1833. Signor Pinheiro Ferreira to E.M. Ward, Esq., December 12, 1822.

[320] Undeniably, interests of other sorts were involved, but I am focusing here on the effects of each interpretation to the triple formula regime.

[321] *HCPP*, Correspondence with Foreign Powers, relative to the Slave Trade, 1822-1833. Signor Pinheiro Ferreira to E.M. Ward, Esq., December 12, 1822.

[322] See *Anglo-Portuguese Treaty of 1810*, Article III.

Canning's innovative interpretation prevail, Portugal would be unable to sign any additional articles to the 1817 Treaty.[323] He was referring to ongoing negotiations to enhance the 1817 triple-formula regime against slave trade. British representatives were invested in getting the Portuguese to consent to additional articles to address two fronts. First, a subtler kind of equipment clause, by which vessels without slaves on-board could be detained in the occasion of undeniable proof slaves had been on board in that particular voyage. Second, a stipulation which would expand the cases of replacement for vacant commissioner seats.[324]

Those abrogation discussions notwithstanding, the Anglo–Portuguese Treaty of 1817 continued to be applied in the same terms[325]. Captures of Brazilian ships continued to be made and the mixed commissions continued their work of adjudication.[326] In the meantime, Netherlands and Spain agreed to similar additional articles to those Britain was forcing onto Portugal; through diplomatic correspondence, British diplomats pointed out that fact to the Portuguese representatives. A counter-project introduced by the Portuguese in response would add an article providing that, whenever lots had to be drawn because the commissary judges were not in agreement, the final opinion could be delivered by either the arbitrator *or* the other representative of the drawn nation.[327] The British turned down this counter-project. In contrast, the

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[323] *HCPP*, Correspondence with Foreign Powers, relative to the Slave Trade, 1822-1833. E.M. Ward, Esq.to Mr. Secretary Canning, December 18, 1822. p. 100.

[324] *HCPP*, Papers relating to the Slave Trade, May 1823. Mr. Secretary Canning to the Duke of Wellington, October 1, 1822, p. 3.; HCPP, Additional Articles for the prevention of the Illicit Traffick in Slaves, Signed in Lisbon, March 15, 1823.

[325] See e.g. *HCPP*, Class A – Correspondence with Foreign Powers relating to the Slave Trade, 1823-1824. Mr. Consul-General Chamberlain to M. de Andrada e Silva, May 10, 1823. p. 18, where such interpretation is stated.

[326] See e.g. *HCPP*, Class A – Correspondence with Foreign Powers relating to the Slave Trade, 1823-1824. Mr. Secretary Canning to Mr. Consul-General Chaberlain, August 25, 1823. p.20, with a discussion about on which State should lie the expenses of the Rio Mixed Commission.

[327] *HCPP*, Correspondence with Foreign Powers, relative to the Slave Trade, 1822-1833. Mr. Secretary Canning to E.M. Ward, January 22, 1823. p. 106.

British points of negotiation reached a successful outcome: additional Articles were signed in 15 March 1823 and ratified in 19 August 1823, providing for a subtler kind of equipment clause and a broader provision for the circumstances of Portuguese absentees in the mixed commissions. Article I provided for the possibility of legal capture whenever slaves were proven to be on board during the voyage, even before the moment of capture —so vessels only equipped for the transportation of slaves could be seized whenever there was proof of presence of actual slaves on board at any point. Article II extended the possibility of the other members of the mixed commission to decide pending cases in the absence of Portuguese commissioners; Article XIV of the Regulations to the Treaty of 1817 had provided for it in case of deaths among Portuguese commissioners, while the additional article II of 1823 granted permission for the British commissions to proceed with the work in the absence of Portuguese commissioners by any circumstances. [328]

In 1826, in a report responding to the Foreign Office, the King's Advocate Christopher Robinson eliminated any remaining doubts about the legality of Canning's proposal of interpretation. According to the Law Officer's report, the Anglo–Portuguese treaties did not allow for slave trade to be universally abolished to Portugal ipso facto just because of the Brazilian independence[329]. Another report, by King's Advocate Herbert Jenner, reaffirmed that position to the Earl of Aberdeen in 1830[330], and yet again two years later, to Viscount Palmerston[331]. Britain would have to apply the Portuguese treaty regime to Portuguese vessels and subjects regarding all its limitations.

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[328] *HCPP*, Class A – Correspondence with Foreign Powers relating to the Slave Trade, 1823-1824. E.M. Eard, Esq to Mr. Secretary Canning, August 26, 1823. p.9. We will explore this further in chapter 4.

[329] FO 83/2344, Christopher Robinson to Mr. Secretary Canning, July 27th, 1826.

[330] FO 83/2345, Herbert Jenner to the Earl of Aberdeen, 19 November 1830.

[331] FO 83/2344, Herbert Jenner to Viscount Palmerston, 19 January 1832.

Recognition

According to the 19th-century understanding, the admission of a state to the international community — and its *debut* in the world of international law — depended on its recognition by other states.[332] As it depended on reaching a certain level of civilisation, recognition was not self-evident and declaratory only, it had a constitutive effect, based on which the very internal legal personality of a state emerged. According to such understanding, there could be no legal claim for recognition; rather, "recognition had to remain a decision that was left to political estimations".[333]

Other powers recognised new states by treaties, appointment of diplomatic missions, among other means of relationship.[334] Recognition by a parent state — that is, Portugal, in the case of Brazil — was considered a "more conclusive evidence of independence than recognition by a third power", as "by implying an abandonment of all pretensions over the insurgent community, […] it removes all doubt from the minds of other governments as to the propriety of recognition by themselves"[335]. For Brazil, formal recognition by Portugal was not mandatory for "measures of practical policy"[336], such as maintaining commercial relations. Like to other former colonies, however, "recognition by European States, especially the 'mother country', served two purposes: to avoid recolonization and to allow for commercial treaty-making".[337]

The British Foreign Office Secretary himself, in the course of his

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[332] GREWE, **The Epochs of International Law**, p. 466.

[333] GREWE, **The Epochs of International Law**, pp. 500-502.

[334] HALL, **A Treatise on International Law**, p. 87.

[335] HALL, **A Treatise on International Law**, p. 89.

[336] GREWE, **The Epochs of International Law**, pp. 499-500.

[337] OBREGÓN, The Civilized and the Uncivilized, p. 5.

negotiations with Latin American States, had been formulating conditions for recognition. According to his criteria, recognition would not be granted by Britain unless the new nation-state[338] "(1) ha[d] notified its independence by public acts; (2) possessed the whole country; (3) ha[d] reasonable consistency and stability; and 4) *ha[d] abolished slave trade*"[339].

It was George Canning himself who dealt with the first interaction with the recently-independent, recognition-seeking Brazil.[340] Canning received a visit from emissaries of Emperor Pedro I to negotiate the terms for British recognition.[341] The British Foreign Secretary demanded a pledge of full outlawing of slave trade.[342]

After further negotiations, the new nation received Portuguese recognition in 29 August 1825[343], with mediation by Britain[344]. British recognition would follow in October of that same year at the same day Brazil signed a convention assuming the obligation to gradually eliminate slave trade. Even though that particular convention was not ratified by the British Parliament, in 1826 Brazil would officially accept all obligations

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[338] The term "nation-State" was commonly used for States, indicating that a nation, as a range of social facts as common heritage, culture and language, was willing to join in a national community. (GREWE, **The Epochs of International Law**, p. 485.).

[339] GREWE, **The Epochs of International Law**, p. 499(emphasis added).

[340] Mentions to the Brazilian exchange of its ratification of treaties with Britain for the recognition of its independence appears at e.g. MATHIESON, William Law, **Great Britain and the Slave Trade, 1839-1865**, London: Longmans, Green and CO, 1929.

[341] Canning negociated with Felisberto Caldeira Brant Pontes de Oliveira Horta (the Marquis of Barbacena) and Manoel Rodrigues Gameiro Passo (the Viscount of Itabaiana). **PINTO, Antonio Pereira, Apontamentos para o Direito Internacional** - Tomo 1, vol. I, pp. 1–516, 1864, p. 313.

[342] BETHELL, The Independence of Brazil and the Abolition of the Brazilian Slave Trade: Anglo-Brazilian Relations, 1822-1826, pp. 122-124.

[343] *Tratado de Independência de 1825*. About the context of the treaty, see PINTO, Apontamentos para o Direito Internacional - Tomo 1, p. 327 et seq.

[344] The Treaty of 1825 between Brazil and Portugal had the that mediation registered in its preamble. See the treaty in PINTO, Apontamentos para o Direito Internacional - Tomo 1, p. 322.

set in the Portuguese–British treaties with particular additional provisions.[345]

Times of transition

From the date of the declaration of independence, Brazil was "tolerating" the Portuguese–British treaty, according to the Brazilian commentator Antonio Pereira Pinto, even though Brazilians "reserved their right to abandon the treaties whenever they liked"[346]. By then, the author argued, treaties of 1810, 1815 and 1817 between Britain and Portugal "should be considered non-applicable [*caducado*] by the nascent empire, in case it was in its interests to do so".[347]

The British Foreign Office had doubts about that matter, as shown by a consultation sent to the King's Advocate: "To what period it is considered that Brazilian subjects are bound by the treaties entered into with Portugal for the slave trade"?[348] Robinson answered with the all-too-familiar lawyerly undertones. His exact words are worth mentioning:

> This has been a question of considerable nicety, dependent on the doubtful relation of Brazil, on the proclamation of her Independence. The application of legal principles to such a state of things was necessarily affected by it, and became in some degree experimental. The principal objection, however, having been waived on the part of the Brazilian

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[345] See BETHELL, Leslie, **A abolição do comércio brasileiro de escravos**, Brasília: Senado Federal, 2002, p. 108 et seq.

[346]PINTO, Apontamentos para o Direito Internacional - Tomo 1; DE ALMEIDA, O Brasil e a diplomacia do tráfico (1810-1850), p. 11.

[347] PINTO, Apontamentos para o Direito Internacional - Tomo 1, p. 311.

[348] FO 83/2344, Foreign Office to the King's Advocate, July 21, 1826.

> Government, I would submit, be very desirable, that no difficulty should be publicly raised, in the form in which the question is now proposed. The Treaty which is in progress with the Brazilian Government on the subject of the Slave Trade, will I conceive, effectually separate that Country from further virtual obligations, under the Brazilian Convention. It will be advisable, therefore, I humbly submit, to suspend this question, until the Treaty shall be ratified.[349]

In the meantime, between Brazilian independence and the ratification of the Anglo-Brazilian treaty, Brazil continued experiencing the treaty regime as if it was a part of the Portuguese Crown. Visitation and capture of Brazilian ships worked no different than for Portuguese ships. While the Rio commission did not rule on any cases from August 1821 to October 1830, the commission in Sierra Leone continued to adjudicate Brazilian vessels alongside the Portuguese.[350]

B.A NEW TREATY-REGIME

Independence and civilisation

The first Brazilian book of public international law to be published[351] was *Questões sobre presas marítimas oferecidas ao cidadão*

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[349] Emphasis added. FO 83/2344, Christopher Robinson to Mr. Secretary Canning, July 25th, 1826.

[350] See in the appendix that the vast majority of cases decided by the Anglo-Portuguese commission in Sierra Leone dealt with Brazilian vessels. They continued being adjudicating in that commission after the declaration of Brazilian independence (1822), after its recognition (1825) and even some time after the ratification of the Anglo-Brazilian Treaty (1827).

[351] According to RANGEL, Vicente Marotta, Prefácio à 1a edição (1980), *in*: TRINDADE, Antônio Augusto Cançado (Ed.), **Princípios do Direito Internacional Contemporâneo**, Brasília: Fundação Alexandre de Gusmão, 2017, pp. 35–50.

Rafael Tobias de Aguiar (1836), written by José Maria de Avellar Brotero.[352] He taught natural law at the first law faculty in Brazil, established in 1827.[353] According to Laura Jarnagin, the book was the result of a consultation: "José Maria was asked to render a legal opinion regarding maritime law and, indirectly, the slave trade"[354]. Rafael Tobias de Aguiar, an important liberal anti-loyalist figure in São Paulo[355], intended "to know if it was legal for a ship of one nation to seize that of another on the high seas before issuing a declaration of war, a reference to the British navy's practice of capturing ships suspected of being engaged in the slave trade".[356]

Perhaps surprisingly, however, the book — introduced in the inside cover as the first part of the work (the only part to which we have access) — does not discuss slave-trade prizes. Brotero did not even mention the Anglo–Brazilian treaty-regime against slave trade or the British policy for suppression. Instead, he examines a set of questions of *maritime law* under warfare: Is a capture legal if there is no prior declaration of war? Is a capture legal if the vessel captured has a safe conduct pass? Is the capture legal if it occurs in neutral seas? Does the captor acquire definitive title to the captured ship just by capture? Can a judgement in a neutral state transfer the property of the captured vessel? His overall approach in answering those questions was to refrain from unnecessary use of violence, to favour the employment of diplomacy

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[352] BROTERO, José Maria de Avellar, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, São Paulo: Typ. de Costa Silveira, 1836.

[353] MACHADO JÚNIOR, Armando Marcondes, **Cátedras e catedráticos: curso de bacharelado faculdade de direito universidade de São Paulo 1827-2009**, São Paulo: Mageart, 2010.

[354] JARNAGIN, Laura, **A Confluence of Transatlantic Networks: elites, capitalism and confederate migration**, Alabama: University of Alabama, 2014(chapter 12).

[355]See PANG, Eul-Soo, **In pursuit of honor and power**, Alabama: University of Alabama, 1988, pp. 140-141.

[356] JARNAGIN, **A Confluence of Transatlantic Networks: elites, capitalism and confederate migration**(chapter 12).

before hostilities, and to protect the limits that neutrality imposes to belligerents.

Brotero's choice of studying prizes through the lenses of the laws of war could be read in many ways. We could assume that he did not intend any dialog with the question of slave trade abolition at all. Although the triple formula was informed by the laws of war, 19th-century authors usually classified anti-slave trade measures in the "peace" section of their textbooks; it was not without a reason, it had to do with the main characteristics of the anti-slave trade regime, as we explored in chapter 1. Another hypothesis is that he was actually aiming at informing the Brazilian belligerent position, as in the recent Cisplatin War (1825-1829) and consequent ongoing discussion of prize law arising from the foreign claims for Brazilian captures and blockades. Regardless, his contribution on the old-style prize law (as opposed to the peacetime regime established to address slave trade after the end of the Napoleonic wars)[357] — and the British legal understanding of the matter— could possibly have been useful for Brazilians in resisting to the British interpretative innovations, as we will see in the next chapter.

In the book, Brotero was decidedly critical of the British practice in prize law adjudication, which he perceived as too conveniently favouring captors. "Abuses do not constitute law"[358], he urges, quoting from British textbooks. He chastises what he sees as "manipulations" by the High Admiralty Court on the dispensation of a declaration of war to perform captures, and offers an explanation for British impulsiveness: "false politics willing to favour its navy, to conserve the dominion which it has conserved over the seas, forcing — as it did before— Nations to

[357] See chapter 1.

[358] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, p. 5.

unite for Britain to assume its duties and respect the rights of others".[359] In another chapter, Brotero takes up that same issue with a rhetorical question: Where is the legal basis that gave Britain the power to limit the commerce and the freedom of the neutrals? He responds with a sharp critique: "In the law of cannons" ("No direito dos canhões").[360]

At one point in *Presas Marítimas*, Brotero opens a four-page footnote to explain what could be inferred from the saying that some nations are superior to others. He delves into the meaning of independence and submission. Those two incompatible notions and as such could not come together in a same level of analysis. He uses the example of Britain and Brazil to illustrate that idea. Brotero argues that the inequality found in the superiority of Britain, which should be always qualified —as superiority in knowledge, in industry, in naval power, in wealth —, could not be extended to law, as a power to force submission on nations such as Brazil, lest independence (of Brazil) would simply lose its meaning.[361] "Britain had the right to pursue its conservation and perfection, governing itself according to its own understanding, according to the physical and moral means within its reach"; its only limit, continued Brotero, was not to infringe the rights of others. The exact same rule applied to Brazil.[362]

Next, Brotero used an example of his time, the conflicts between French and Algerians, to underscore the main idea that comes from that account of independence and submission. The sense of superiority in law, which means laying down the law, or destroying the

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[359] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, p. 7.

[360] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, p. 91.

[361] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, p. 83.

[362] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, p. 84.

sovereignty of other nation, is not legitimised by de facto superiority; nor is it sanctioned to vindicate an offence, which creates a right of satisfaction and nothing more. Thus, the French destruction of the Algerian sovereignty was a mere act of power, Brotero maintained. "The extreme necessity authorises the use of force, and the hostilities become legitimised"; but from that legitimacy could never come jurisdiction, except for the military jurisdiction of occupation.[363] In the case of France towards Algeria, it "had means to introduce civilisation, civilisation would change the habits and customs, so they would alter the constitution and the politics of the government", so the ends could have been reached without open-war and total destruction as it happened.[364]

Further research would be required to establish the exact extent of his critiques. Yet the elements Brotero emphasises when arguing for equality under law reflect a broader context in which Brazil was placed by the time of its independence and acquiescence to the treaty against slave trade. Brazil did not escape the 19th-century dilemma of Latin-American former colonies when they first employed the language of international law as independent states. By then, the rule was that "[i]n order to attain equality, the non-European community must accept Europe as its master — but to accept a master was proof that one was not equal"[365]. In a similar fashion to other neighbouring nations, 19th-century Brazil had to cope with distancing itself from colonial relations by showing resemblance with the civilised European states, and at the same time demonstrating the capacity to operate autonomously.[366]

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[363] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, p. 84.

[364] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, p. 85.

[365] KOSKENNIEMI, Martti, **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1980**, Cambridge: Cambridge University, 2004, p. 136.

[366] Liliana Obregón comments on the measures that Spanish American States took to ascertain their status as civilized with the example of Simón Bolivar's unification of principles, forms of

During the nineteenth century, the process of universalisation of international law (an expansion from the "Christian-European family of nations" to the society of "civilised nations") was occurring alongside a movement towards the adoption of the civilisation status as the main criterion for the legal acceptance in the international community. [367] That meant, should they be considered non-civilised, nations would not be recognised as states and consequently would not be subjects of international law (with rights and duties grounded on equality). It did not mean non-civilised nations did not enter into legal relations, as they even had general common principles among them.[368] Yet they were considered as pertaining to a totally different legal system, with inequality as its starting point.[369]

Edward Keene's analysis might help us understand how that formal distinction between the *civilised* and the *non-civilised* reflected in the Brazilian position among the state-parties to the British network of treaties. Keene employs different theoretical approaches of international relations to make sense of the British treaty-making to supress slave trade. According to the author, power politics might be important in explaining the "hierarchy of prestige" within the "family of civilized nations".

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government and institutions as a sign of internal stability and Andrés Bello initiative of promoting international law education, besides literature, grammar and laws (OBREGÓN, The Civilized and the Uncivilized.). Further studies are necessary to compare the Brazilian experience in that aspect. Although Brazil did have the similar continuity of European-descendant elites in power, factors as the stability of the absence of revolutions as those occurred in the Latin-American countries may have left Brazil in an easier position of proving autonomy and avoiding recolonization. For the 'willingness of civilization' as the Spanish Latin American's elites drive to constitute a notion of progress by law and institutions, see OBREGÓN, Liliana, Between Civilization and Barbarism: Creole interventions in international law, **Third World Quarterly**, vol. 27, no. 5, pp. 815–832, 2006.

[367] GREWE, **The Epochs of International Law**, p. 445 et seq.

[368] GREWE, **The Epochs of International Law**, p. 466.

[369] "Nineteenth-century international law achieved global geographical scope by including two separate regimes: one governing relations between Western sovereigns under formal equality, and the other governing relations between Western and non-Western polities under inequality, granting special privileges to the former" LORCA, Universal International Law: Nineteenth-Century: Histories of Imposition and Appropriation, p. 477.

Portugal, for example would be pressed into certain agreements much more assertively (with force if necessary) than other states such as France and the United States. That may also explain the willingness of the former two states to mobilize power as a resistance to the British maritime domination.[370]

Even so, Keene argues, a certain degree of respect was carried by the language of reciprocity in all treaties with "civilized nations", and that separated those from treaties with the "barbarous" nations.[371] Part of that difference in treatment did not have to do with "prestige", but rather with judicial, cultural, social, political qualities connected to the "civilization" status.[372] A realist approach fails to justify the difference between treaties with "barbarians" and treaties with the *weak "civilized" states* — which might be explained by institutionalist approaches. Finally, the constructivist or poststructuralist approach might help us see that states were negotiating the terms of their identity:[373] "by calling African rulers' international personality into question, the British undermined the very rights that they were hoping to obtain".[374]

Under the Anglo–Brazilian Treaty of 1826, most provisions simply incorporated articles of the 1815 and 1817 treaties with Portugal. Such confirmation of the Anglo–Portuguese regime to Brazil as an independent state had come from a diplomatic move by the British Foreign Secretary Canning. After failing to secure a new treaty —

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[370] KEENE, A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century, p. 330.

[371] KEENE, A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century, p. 330.

[372] KEENE, A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century, p. 330.

[373] KEENE, A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century, p. 332.

[374] KEENE, A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century, p. 332.

especially after a refusal by the British Parliament to ratify the result of a previous attempt —the Foreign Secretary assumed that "if those arrangements were *the same* as the arrangements already in force by treaties on the same subject with Portugal" they would "most simply be effectually secured by reference to those existing treaties".[375]

Brazil would receive international recognition by 1825; it was therefore formally admitted to a former exclusively European law of nations that was growing into a wider set of actors.[376] To that we must add that Brazil adhered to a model of treaty originally applied to a European state —maybe one of the less "prestigious", but still European. Brazil was then a *weak civilized state,* coming from a colonial heritage and conserving the economic dependence (on states like Britain) from before. Yet to conserve its autonomy —as a recently-independent state — it had to constantly reaffirm its "civilised" status. For Brazil, arguing its cases in the language of international law was a way of affirming its status of *independent and civilised* as constitutive elements of the representation of the newly independent nation[377].

The universalisation of international law was a two-way street. The formal criterion of civilisation did count as a significant door that would open or close the way to formal legal equality. Yet the nineteenth century would see a process in which "semi-peripheral appropriations of international legal thought and the global circulation of rules, lawyers and legal ideas transformed existing international legal regimes into a universal international law".[378]

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[375] Emphasis added. FO 83/2344. Foreign Office to the King's Advocate, January 5th, 1826, p. 2

[376] GREWE, **The Epochs of International Law**, p. 466.

[377] See SÁ, Maria Elisa Noronha de. **Civilização e barbárie: a construção da idéia de nação: Brasil e Argentina.** Garamond, 2012.

[378] LORCA, Arnulf Becker, **Mestizo International Law - a global intellectual history 1842–1933**, Cambridge: Cambridge University, 2014, p. 139.

For Brazil, the field of slave trade suppression was one of the first where its international law appropriations (as a semi-periphery) would happen. In the case of the Anglo-Brazilian relations on slave trade abolition, reaffirming Brazilian autonomy meant both accepting the treaty at first and afterwards reinforcing the project of a slavery-based Brazil by resisting to slave trade abolition. While short, the Anglo–Portuguese treaty-regime offered some accumulated experience on the dynamic of the visit, search and adjudication of the formula. From that starting point, Brazil would learn with the process how to employ the Anglo–Brazilian treaty regime to move forward a conservative and perverse project of protecting slave trade.

By the time Brazil acceded to the system of slave trade suppression, Britain counted with accumulated experience not only from its wartime prize law, but also from the ongoing practice of the concomitant implementation of the Anglo–Portuguese and other treaty regimes. Mixed commissions had developed some case law that spread new understandings of the language of the treaties through diplomatic correspondence. In the different instances of implementation (the navy's work, mixed commissions and diplomatic dynamics), the interpretation of treaties was being transformed to meet new demands and advance the objective of slave trade abolition.

After its independence, Brazil accumulated other experiences that might have contributed to the previous short one with the Anglo–Portuguese treaties. Other types of mixed commissions composed the reality of the Brazilian diplomatic life, for instance. From a provision of the treaty of independence signed in 1825 with Portugal[379], a mixed commission would be installed in 8th October 1827. That Brazilian–Portuguese commission would solve claims by private individuals and by

[379] The Treaty of Peace, Alliance and Friendship signed in Rio de Janeiro in 29th August 1825 was ratified by Brazil in 30th August 1825 and by Portugal in 15th November 1825.

the respective States[380] emerging from the damages of the so-called "war of independence".[381]

Recent developments in such commissions were included in the Foreign Office Reports presented annually to the Brazilian parliament, accompanied by a section reserved for another range of mixed commissions to which the country was part. They were mixed commissions established to deal with the vessels from neutral states captured by the Brazilian Navy in the blockade of Rio de la Plata during the war against Argentine (1825-1828). Among the cases which passed by those adjustments were the property of nationals from Netherlands, Switzerland, Sweden, Britain, United States, Chile, Denmark and France.[382] Those commissions, sometimes referred as *prize commissions,* were established to rule on claims against Brazilian courts' decisions over prizes and to liquidate their sentences.

Appreciating the operation of the Anglo–Brazilian Treaty necessarily includes both the understanding of the starting positions of the British and the Brazilians and the ways they appropriated the legal technique that was the triple formula. We will explore the latter aspect in the next chapter. But first, we should have an overview of the implementation of the Anglo–Brazilian triple-formula treaty.

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[380] That was an interpretation given to the Treaties after some discussion, as registered by Antonio Pereira Pinto PINTO, Apontamentos para o Direito Internacional - Tomo 1, p. 319.

[381]The creation of that mixed commission was provided for article 8 of the Treaty of Peace, Alliance and Friendship, where the independence of Brazil as an independent empire was recognized. It would deal with the claims under article 6 and 7 (regarding seized property or vessels); in case of a tie vote, the representative of the mediating sovereign would decide. For an example of a report of the commission's activity, see *MRE* 1830, p. 4.

[382] See *MRE* 1830, p. 5-7; *MRE* 1831, p. 2-4; *MRE* 1832 p. 7-9; *MRE* 1833, p. 8-10; *MRE* 1834, p. 8-10; *MRE* 1835, p. 6-18.

Three versions of the triple formula

The Anglo–Brazilian Treaty of 1826 had a quite complex mode of application for a five-article treaty. One of the reasons for that is the very fact that three of its articles actually replicated the entire Anglo–Portuguese regime for the suppression of slave trade.

Article II established the adoption and renewal of the Anglo–Portuguese treaty of 1815 and 1817, besides its explanatory articles, "as effectually as if the same were inserted, word for word". Article III recreated by remission "all the matter and things" of the Anglo-Portuguese treaty of 1817, as well as instructions, regulations and forms of instruments, which should "be applied, *mutatis mutandis,* to the said High Contracting Parties and their subjects, as effectually as if they were recited, word for word". Article IV prescribed that Anglo–Brazilian mixed commissions were to be appointed under the form of those previously created under the 1817 treaty.

The triple formula of 1817 would thus be carried on by the 1826 Treaty. In its original words, it provided for "effectual means to prevent *Portuguese* vessels trading in Slaves"[383]; now, the same applied to Brazilians. It established that the parties "mutually consent[ed], that ships of war of their royal navies […], may visit such merchant-vessels of the two nations as may be suspected, upon reasonable grounds, of having Slaves on board, acquired by an illicit Traffic"— i.e. the right of visit and search. Then, those ships of war could, "in the event only of their actually finding Slaves on board", "detain and bring away such vessels, in order they be brought to trial before the tribunals established for this purpose".[384] As mentioned before, the possibility of legal captures under the treaty would be extended by the Additional Articles of 1823, to any

[383] *Anglo-Portuguese Treaty of 1817*, Preamble.

[384] *Anglo-Portuguese Treaty of 1817*, Article V.

vessels where slaves had been on board before the seizure in the same voyage[385].

The Anglo–Portuguese treaty of 1817 had originally provided for the creation of three commissions: one to reside in Brazil, another in the Coast of Africa, and a third in London. The London commission would, however, be established within six months of the ratification, only to adjudicate claims related to Portuguese captured ships from the 1st of July 1814 until the point when the other two commissions were installed in their respective locations[386]. The reference to the London commission hence did not apply to Brazil. Accordingly, *two* Anglo–Brazilian commissions were to be created, containing the same number of representatives from the two nations, one commission in the Coast of Africa (located in Freetown) and one in Brazil (in Rio de Janeiro).

Aside from those three articles which replicated the Portuguese regime in the Anglo–Brazilian treaty, there were other two articles in the treaty. One of them, Article V, provided for the deadline for ratifications.[387] The other, Article I, brought a significant novelty to the regime of slave-trade suppression in Brazil: it called for total abolition of slave trade.

The treaties with Portugal of 1815 and 1817 did not go that far in the proscription of slave trade in international law. Those bilateral treaties provided only for *partial* prohibition of slave trade, obtained with the promise of further instalments of a loan to the Portuguese Crown. The Anglo–Portuguese regime proscribed slave trade only to the *northward of the Equator*[388]. Parties were expected to sign a new treaty in the future

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[385] We will explore this further in the next chapter.

[386] *Anglo-Portuguese Treaty of 1817*, Article IX.

[387] *Anglo-Brazilian Treaty of 1826*, Article V.

[388] *Anglo-Portuguese Treaty of 1815*, Article I, V.

establishing the deadline for the absolute prohibition of slave trade in the dominions of Portugal.[389]

In the treaty with Brazil, however, Article I was a clause for the *total* abolition of slave trade. It provided that (1) within the *deadline of three years* (that is, 13 March 1830), from the exchange of ratifications (13 March 1827), all slave trade would become unlawful for the subjects of the Emperor of Brazil; and that (2) after that period, the practice of slave trade by any subject of the Emperor of Brazil would be "deemed and treated as *piracy*".

Under all those provisions, the triple formula worked at least in three different modes within the period when the Anglo–Brazilian treaty was in force. Although Article I established the total proscription of slave trade in Brazil to enter into force just within three years from ratifications, the other Articles of the treaty would be in force *immediately*. Thus, the mechanism of the right of visit (and search), capture and adjudication would be first applied to enforce the partial abolition of the 1815 and 1817 treaties (extended expressly by the 1826 treaty to Brazilian subjects), from the date of ratifications of the 1826 treaty until the deadline for total abolition in Brazil.

Some months would pass until the Brazilian mixed commissions would actually start working. Until then, cases of Brazilian vessels (i.e. of the application of the Anglo–Brazilian Treaty) were decided by the Anglo–Portuguese commission. Actually, that was only the case for the Sierra Leone commission, as no cases were decided in the mixed commission in Rio during those years of transition.[390] We could then think of the implementation of the triple formula as an enforcement mechanism of the *partial* abolition with the adjudication of Brazilian

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[389] *Anglo-Portuguese Treaty of 1815*, Article IV.

[390] See the cases of Brazilian vessels adjudicated by the mixed commissions in the appendix.

cases by the *Portuguese commission* as a *first version* of the application of the triple formula (*1827-1828*). The *second* version would be the triple formula applied as an enforcement mechanism of the *partial abolition* but now with the adjudication at *Anglo–Brazilian commissions* (*1828-1830*).

The division between the *second* and a *third* chronological version of the triple formula was supposed to be the date of the deadline for total abolition of slave trade by Brazilian subjects (13 March 1830). That date was changed in practice, however, as negotiations between Brazilian and British diplomats allowed for six months for Brazilian vessels to return to the coasts of Brazil. Therefore, the *third* version of the triple formula started on the 13th of September 1830, working for the *total* suppression of slave trade by Brazilians (*1830-1845*).

Yet it was not obvious that the triple formula would continue in force after the deadline for total abolition. As we will see in the next chapter, the continuance of mixed commissions was a subject of dispute between the Brazilian view —that Article I was a resolutive clause — and the British view — that it just meant the triple formula should be applied for total abolition from then on. The British interpretation prevailed.

Article I would operate independently from the other articles after the 13th of March 1845, when both parties agreed that the remaining articles had expired— i.e. all triple-formula provisions. That date came from an interpretation of a separate article of the Portuguese treaty of 1817, as we will see later in chapter 4.

Interpretative disputes were decisive for the specification not only of the timeline of the treaty but also of the contents of the triple-formula provisions. In those battles over meanings, constant reinterpretations pointed to new renovated expectations of what the law was, as in which practices were to be considered slave trade, what was the weight of the flag in determining nationality, how would mixed

commissions work, which should be their proceedings etc. Next, we will explore both the arrangements of the "battlefields" and the battles around disputed points as a way to observe what the Anglo-Brazilian treaty regime became when transformed through the interpretation of the language of treaties.

CHAPTER IV — MEANINGS AND OPPORTUNITIES: THE ANGLO-BRAZILIAN ARTICULATIONS

> *[W]hen a public act is drawn up in clear and precise terms, when its meaning is manifest, and does not lead to any absurdity, there is no reason to reject the meaning such an act naturally presents. To have recourse to irrelevant conjectures for the purpose of restricting or of amplifying it, is equivalent to a desire to elude.*[391]

The quote above happens to be Brazilian, yet during the application of the rules of the triple formula, those were recurring accusations of both Brazilian and British representatives. The actors who interpreted the Anglo–Brazilian treaty for the suppression of slave trade often claimed results were reached through problematic interpretative readings; all in all, they somehow pointed to the fact certain interpretations "could no longer be defended by texts, facts, or histories to which they provided meaning".[392]

In the previous chapters, we have explored what we could call the starting points of the general positions Brazil and Britain could find in their bilateral treaty. From the British perspective, the treaty, by the formalisation of consent, rendered legal a series of practices that would be otherwise illegal. The enforcement mechanisms of visitation, capture and adjudication of ships opened the possibility, although limited, for Britain to use force against the property of foreign subjects. Brazil, by its turn, had acquiesced to the treaty with its recognition in mind, at the same time it entered in the paradox of being a slavery-based country

[391] *HCPP, Class B*, 1845, Mr. Hamilton to the Earl of Aberdeen, Rio de Janeiro, 11 November 1845 (enclosing Senhor d'Abreu to Mr. Hamilton, Rio de Janeiro, 2 October 1845), p. 389.

[392] KOSKENNIEMI, Martti, **The Politics of International Law**, Oxford: Hart, 2011, p.62.

bound to abolish slave trade. Brazilians lived the tension of having to comply to the treaty to show a certain European-civilised degree not to lose its autonomy; they also had to use the treaty as to limit British powers of seizure to protect itself from capture, again lest they lost claim to sovereignty.

Next, we will explore divergencies on the Brazilian and British strategies for interpretation of the *Anglo-Brazilian Treaty* during the years the triple formula was in force. Instead of a linear narrative about the changing rules applied in Anglo–Brazilian cases, I will present a set of stories orbiting around contingent legal points. The choice of such stories reflects a preference to those which seems to have represented the most significant battles for both British and Brazilian agendas. They show that interpretations by both sides were invariably informed, as it occurs with international law, by *conceptual matrices* and *political projects*, to employ international law in that (and constituting that) "arena of political struggle" [393].

Among them, there will be the points of greater legal complexity, which will lead the actors to refer to *general international law* and to *prize law* practices. Other cases, seemingly not hard at first sight, received great attention because of their potential in entailing *restrictions* and *amplifications* of rights. Through their description, this chapter will expose the "underlying world of beliefs" of those interpretative practices.[394]

Where did those battles occur? We will see that each one of them involved different levels of interpretation and manifestations of different staff. At times, the contentious points were waged in the

[393] KOSKENNIEMI, Martti, **The Politics of International Law**, Oxford: Hart, 2011, p.62.

[394] KOSKENNIEMI, Martti, What is Critical Research in International Law? Celebrating Structuralism, **Leiden Journal of International Law**, vol. 29, no. 03, pp. 727–735, 2016, p. 733.

commissions. Sometimes, it generated diplomatic correspondence between representatives of both governments. In many cases, they would come over and over again to the desks of the British Law Officer or of the Brazilian State Council members[395].

Of course, even though signing the treaty involved states' express consent, not everything that happened under it can be considered as state policy. The British navy openly disagreed with many of the Foreign Office measures and seamen sometimes acted by conviction. Mixed commissioners, now and then, applied interpretative approaches disapproved by their government and would be instructed to change their way for future decisions. And diplomatic interactions certainly reflected personal styles which sometimes did not rank legal rigour as a priority. Yet those were the actual disputes of interpretations occurring in the daily professional life of the actors charged with implementing and controlling the implementation of the treaty.

Next, we will explore six sets of disputes, over procedural regulation, over the indicia of slave trade practice; over the effects of the flags, over jurisdiction and over the consequences of the triple formula's extinction. Although all of them have central dispositions of the treaty from which most of interpretations set off, we will see that not so obviously related stipulations also interfere and, most importantly, that a simple reading of the treaty provisions would not necessarily lead to the interpretation held by the parties. Accordingly, the most important aspect of these battles for the aim of understanding the role of international law

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[395] As we explored in chapter 2, the Law Office would have a central role in giving the Foreign Office legal advice on the questions relating to slave trade treaties. The Brazilian State Council had a different part in the interpretative construction, as per its advisory and litigation functions, especially for its reports responding to consultations by mixed commissioners and its advice on foreign relations (*Consultas da Seção dos Negócios Estrangeiros*). About the Brazilian State Council, see REZEK, José Francisco (Ed.). Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros. Brasília: Câmara dos Deputados, 1978; LOPES, José Reinaldo de Lima. O Oráculo de Delfos: O Conselho de Estado no Brasil-Império. São Paulo: Saraiva, 2010.

in a historical context is not their outcome — many of them ended as we could expect, others did not have an end or were just abandoned. The point of recounting those battles is exposing the use of the technologies (or weapons) of international law once in the hands of British or Brazilians.

A. UNDER THE SHIELD OF "NO-APPEAL"

Without appeal

Under the Anglo-Brazilian regime, as per the system of adjudication by the mixed commissions, they were to "judge the causes submitted to them without appeal"[396]. The meaning and extent of the no-appeals clause of Article VIII of the 1817 Treaty would be discussed at various points. As early as the transition from the Anglo-Portuguese to the Anglo-Brazilian treaty regime, Brazil had expressed an interest in reassessing rulings of the commission. In 1826, Viscount d'Itabayana requested that the Brazilian commissioner in Sierra Leone be given access to the records of the proceedings against Brazilian vessels in Sierra Leone

[396] *OHT, Anglo-Portuguese Treaty of 1817*, Article VIII: "In order to bring to adjudication, with the least delay and inconvenience, the vessels which may be detained for having been engaged in an illicit traffic of slaves, there shall be established, within the space of a year at furthest, from the exchange of the ratifications of the present Convention, two mixed Commissions, formed of an equal number of individuals of the two nations, named for this purpose by their respective Sovereigns.

These Commissions shall reside one in a possession belonging to His Britannic Majesty — the other within the Territories of His Most Faithful Majesty; and the two Governments, at the period of the exchange of the ratifications of the present Convention, shall declare, each for its own Dominions, in what places the Commissions shall respectively reside. Each of the two High Contracting Parties reserving to itself the right of changing, at its pleasure, the place of residence of the Commission held within its own Dominions, provided, however, that one of the two Commissions shall always be held upon the coast of Africa, and the other in the Brazils.

These Commissions shall judge the causes submitted to them without appeal, and according to the Regulation and Instructions annexed to the present Convention, of which they shall be considered as an integral part."

from 1822 to 23 November 1826 (the date of the signature of the treaty), so they could be examined and submitted to imperial approval.

After receiving such request, the British Foreign Office called for the opinion of the King's Advocate on the matter. The British Law Officer advised the Foreign Secretary, the Earl of Aberdeen, that under the Anglo-Brazilian Treaty of 1826, Brazil had ratified all measures adopted in accordance to the Anglo–Portuguese treaty. Under Article III of the 1826 Treaty, the Law Officer pointed out, the parties agreed to the application of the same provisions of the Treaty of 1817 to Brazil, *mutatis mutandis*, "confirming and approving hereby, all matters and things done by their respective Subjects under the said Treaties, and in execution thereof".[397] As it would be later informed to the Brazilian representatives, the British reading (from the Law Office) was that, from that 1826 Treaty provision it followed that none of the previous decisions, from 1822 to 23 November 1826, required further Brazilian validation to be executed.[398]

The no-appeals clause would be a central feature of the discussion in subsequent controversies around decrees by the mixed commission of Sierra Leone which Brazilian representatives claimed to be unjust. We will explore the rationale behind such claims of injustice later. Before that, we will explore debates around the no-appeals clause that were connected to the most basic aspects *of the design of mixed commissions, its rules of composition, succession and deliberation*. We

[397] *OHT,Anglo-Brazilian Treaty of 1826*, Article III: "The High Contracting Parties further agree, that all the matters and things contained in those Treaties, together with the Instructions and Regulations, and forms of Instruments annexed to the Treaty of the twenty-eighth of July 1817,—shall be applied, *mutatis mutandis*, to the said High Contracting Parties and Their Subjects, as effectually as if they were recited, word for word, herein; confirming and approving hereby, all matters and things done by their respective Subjects under the said Treaties, and in execution thereof."

[398] FO 83/2345. Foreign Office to the King's Advocate, 27 February 1829, p. 12; FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 28 February 1829, p. 18.

will examine these points by considering how they were employed by both Brazilians and British actors within legal interpretative disputes.

To properly understand these discussions, we should remember some important features of the legal regime of the mixed commissions and the reality of the circumstances affecting their work. We must bear in mind that the reality of the two commissions, the Sierra Leone and the Rio de Janeiro commissions, were very different. As mentioned in chapter 2, mixed commissions in Sierra Leone were rather frequently manned exclusively by British members. Brazilians found it difficult to recruit people willing to go to Sierra Leone —which at the time was known as a "white man's grave"[399]—; those who did take on the job fell ill easily. The British "secret" was to make use of the available staff of its African dominions.

Decision by lot

Under the Anglo–Brazilian Treaty of 1826, in line with the general regulation we explored in chapter 2, each party nominated a commissary judge and a commissioner of arbitration, [400] which were joined by a

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[399] See chapter 2, C.

[400] *OHT, Anglo-Portuguese Treaty of 1817 (Regulation)*, Article II: "Each of the above-mentioned mixt Commissions, which are to reside on the coast of Africa, and in the Brazils, shall be composed in the following manner: The two High Contracting Parties shall each of them name a Commissary Judge, and a Commissioner of Arbitration, who shall be authorized to hear and to decide, without appeal, all cases of capture of slave vessels which, in pursuance of the stipulation of the Additional Convention of this date, may be laid before them. All the essential parts of the proceedings carried on before these mixt Commissions shall be written down in the language of the country in which the Commission may reside.

The Commissary Judges and the Commissioners of Arbitration, shall make oath, in presence of the principal Magistrate of the place in which the Commission may reside, to judge fairly and faithfully, to have no preference either for the claimants or the captors, and to act, in all their decisions, in pursuance of the stipulations of the Treaty of the 22nd January, 1815, and of the Additional Convention to the said Treaty.

There shall be attached to each Commission a Secretary or Registrar, appointed by the Sovereign of the Country in which the Commission may reside, who shall register all its acts, and who, previous to his taking charge of his post, shall make oath, in presence of at least one of the

registrar charged with log-keeping, appointed by the government of the country where the commission was located[401]. In case of *disagreement* between the *commissary judges* of each state, one of the commissioners of arbitration (either the Brazilian or the British appointed for the positions) would be *drawn by lot* to give the final decision.[402]

The regulation that provided for the operation of both mixed commissions also set general criteria for succession or *replacement* of commissioners in the cases of vacancies. In the Anglo–Brazilian treaty, the rules that applied to Britain and Brazil were different. Under Article XIV of the regulation of mixed commissions, British vacancies would be filled by a local governor, magistrate or a consul. The replacement of Brazilian commissioners in Sierra Leone would follow the same rule that governed the 1817 Treaty, which provided that, in case of vacancies resulting *from deaths*, "considering the difficulty which Portugueze Government would feel in naming fit persons to fill the posts in (…) British possessions, (…) the remaining individuals of the above-mentioned Commission shall be equally *authorized to proceed to the judgement*".[403] This offered a limited possibility of appeal against the

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Commissary Judges, to conduct himself with respect for their authority, and to act with fidelity in all the affairs which may belong to his charge."

[401] SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 43.

[402] Article 3, Regulation for the mixed Commissions, which are to reside on the Coast of Africa, in the Brazils and in London. Such different roles of commissary judges and commissioners of arbitration may justify their consistent difference in emoluments. In 1819, for example, a British commissary judge at Freetown was paid £ 2000 plus and outfit allowance of £ 500, while the commissioner of arbitration was paid £ 1000 and the registrar £500 – the Sierra Leone's colonial governor earned £3000 per year (SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 44.). In the 1830s, a British commissary judge in Rio had an annual salary of £1200 and the commissioner of arbitration £800 (SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 44.).

[403] *OHT, Anglo-Portuguese Treaty of 1817 (Regulation)*, Article XIV: "The two High Contracting Parties have agreed, that in the event of the death of one or more Commissioners, Judges and Arbitrators composing the above-mentioned mixt Commissions, their posts shall be supplied, *ad interim*, in the following manner: on the part of the British Government, the vacancies shall be filled successively, in the Commission which shall sit within the possessions of His Britannic Majesty, by the Governor or Lieutenant Governor resident in that colony, by

judgement of the Sierra Leone commission *to the commission in Rio de Janeiro*. However, parties had a specified duty to "supply, as soon as possible, every vacancy that may arise in the above-mentioned Commissions, from death or any other contingency"[404]; failing to fill the vacancy in six months meant the possibility for appeal was foreclosed. The British view of these provisions entitled the commission to operate absent Portuguese representatives, regardless of whether the vacancy resulted from death[405] and was so formalized by Article II of the Additional Articles of 1823[406].

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the principal Magistrate of the place, and by the Secretary; and in the Brazils, by the British Consul and Vice-Consul resident in the city in which the mixt Commission may be established.

On the part of Portugal, the vacancies shall be supplied, in the Brazils, by such persons as the Captain General of the Province shall name for that purpose; and considering the difficulty which the Portugueze Government would feel in naming fit persons to fill the posts which might become vacant in the Commission established in the British possessions, it is agreed, that in case of the death of the Portugueze Commissioners, Judge, or Arbitrator, in those possessions, the remaining individuals of the above-mentioned Commission shall be equally authorized to proceed to the judgement of such slave-ships as may be brought before them, and to the execution of their sentence. In this case alone, however, the parties interested shall have the right appealing the sentence, if they think fit, to the Commission resident in the Brazils; and the Government to which the captor shall belong shall be bound fully to defray the indemnification which shall be due to them, if the appeal be judged in favour of the claimants: it being well understood that the ship and cargo shall remain, during this appeal, in the place of residence of the first Commission before whom they may have been conducted.

The High Contracting Parties have agreed to supply, as soon as possible, every vacancy that may arise in the above-mentioned Commissions, from death or any other contingency. And in case that the vacancy of each of each of the Portugueze Commissioners residing in the British possessions, be not supplied at the end of six months, the vessels which are taken there to be judged, after the expiration of that time, shall no longer have the right of appeal herein-before stipulated."

[404] *OHT,Anglo-Portuguese Treaty of 1817 (Regulation)*, Article XIV, *supra*.

[405] See chapter 2, C.

[406] See chapter 3, B. *BFSP*, *Additional Articles of 1823*, Article II: "Inasmuch as the Convention of the 28th of July, 1817, does not stipulate the mode of supplying the absence of the Commissioners, occurring from any other cause besides that of death, which is the only case provided for by the Fourteenth Article of the Regulation for the Mixed Commissions annexed to the said Convention; the two High Contracting parties have agreed, that, in the event of the recall, or of the absence on account of illness, or any other unavoidable cause, of any of the Commissioners, Judges, or Arbitrators; or in any case of their absence in consequence of leave from their Government (which must be notified to the representative of the Commission) their

The practical implications emerging from this escaped no one. "British commissioners tended to be *more hostile* towards suspected slave traders than their foreign counterparts, and in disputed cases *the nationality of the commissioner of arbitration* (literally decided by the drawing of lots) *could be the most decisive factor*", assesses Farida Shaikh in her study of mixed commissions. That assessment was shared by nineteenth-century *British* representatives as well[407].

The Brazilian perspective on the matter was that the absence of Brazilian commissioners inevitably led to disadvantages to Brazilian subjects. Reporting to parliament on the state of Brazilian foreign relations in 1831, Foreign Minister Francisco Carneiro de Campos wrote: "The Sierra Leone Commission, due to its climate insalubrity, did not have the complete number of Brazilian commissioners since the conclusion of Treaty of 23 November 1826; *finally, a candidate presented himself*, who was then nominated; and his presence, whenever it comes about, *will re-establish in favour of the Brazilian subjects the safeguard emerging from the balance of votes*".[408] Although the seat would still

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Posts shall be supplied in the same form and manner as is determined for the case of death by the above-mentioned Fourteenth Article of the said Regulation."

[407] Turnbull, for example, who stated in his memoirs: "it may be fairly said that the condemnation of a slaver depends not nearly so much on fact, or law, or the merits of the case, as on the less fallible doctrine of chances". David Turnbull, Travels in the West, *apud* SHAIKH, Judicial diplomacy: British Officials and the Mixed Commission Courts, p. 51. Another evidence of the British expectation is found in a correspondence between the British commissary judge in Rio and Viscount Canning. After the disagreement between the judges on the case of *Dous Amigos*(1843), the British commissioner of Arbitration concurred with the Brazilian commissary judge. "As that decision may seem remarkable, I venture to afford to your Lordship all possible explanation(…). Mr. Grigg (…) considers that it is imperative upon him to decline a consultation with Her Majesty's Commissary-Judge upon points which might eventually become matter of reference to him as Arbitrator; and, therefore, did so decline when I sought his advice previous to submitting by opinion at the Board" (*HCPP*, *Class A*, 1843, Her Majesty's Commissary Judge to Viscount Canning, 18 July 1842, p. 236). After a consultation with the King's Advocate, Viscount Canning responded that the commissioner of arbitration was right in keeping his judgement open, but that "he may, without impropriety, and sometimes very advantageously for the public service, confer with her Majesty's Judge in a friendly manner, and give him the benefit of his advice and assistance" (*HCPP*, *Class A*, 1843, Viscount Canning to Her Majesty's Commissioners, 7 October 1843).

[408] Emphasis added. *MRE* 1831, p.2.

remain empty for a couple of years[409], that report showed the filling of the vacancies in Sierra Leone was perceived as a way of benefiting the Brazilian position under the treaty regime. In 1832, another report reiterated that the absence of one or more Brazilian representatives in the deliberation on cases of Brazilian vessels in Sierra Leone was the *cause of condemnations* even when *no evidence* against them had been presented.[410]

That lack of balance of votes would be the reality of Anglo–Brazilian commission's work in Sierra Leone over and over again. Addressing the unequal composition of the commissions in Freetown, Jenny Martinez mentions the Anglo–Brazilian commission as a significant example: out of the 109 cases decided there, in 81 judgements were entered by an exclusively British composition. For the 28 remaining cases, tried with participation of a Brazilian commissioner, the British and Brazilian commissary judges were not in consensus in ten, which meant judgement fell to the commissioner of arbitration. In all of those ten cases, the arbitrator affirmed the opinion of his nation's commissioner, as it was often the case in all mixed commissions.[411]

Those numbers relate both with intermittent absences of Brazilian commissioners in Sierra Leone and variations in the commission's caseload.[412] Yet, in the periods of September 1828 through April 1829, February 1837 through January 1842, September 1843 through May 1844, and April 1845 through July 1845, not even a Brazilian *judge* was

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[409] Only the report of 1833 indicated Mateus Egidio da Silveira, Brazilian arbitrator in the mixed commission of Sierra Leone, had finally filled its position there. *MRE* 1833, p. 6.

[410] *MRE* 1832, p. 5.

[411] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, pp. 70-76.

[412] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law** 197-198 (note 13-14).

present in the commission of Sierra Leone.[413] Reports by the Brazilian Foreign Office noted there were *no commissary judges appointed* to the Sierra Leone mixed commission in the years of 1837 to 1839, and *no commissioners of arbitration* appointed for the years of 1830, 1838, 1839, 1841 and 1842.

The frequent vacancies in one or both Brazilian seats opened space for interpretative expansions forced by British commissioners using the advantages of the proceedings under the 1826 Treaty. Very often they did not have to rely on the toss of a coin for the final word. Many times, they did not even have to reach the point of referring the decision to arbitration because no foreign commissary judge was there to disagree with the opinion of the British judge.

Attempts of transposition

In his early efforts on the question of Brazilian cases decided by an exclusively British commission, the first Brazilian commissary judge to be seated in the Sierra Leone commission, José de Paiva, began his new job by trying to include formal protests against previous cases in the written records of the proceedings. That received the objection of British commissioners, corroborated by opposition by the King's Advocate, consulted on the matter: "If the Brazilian Owners conceive that they have sustained any injury, by the absence of a Commissioner on the part of Brazil, the cause of it is attributable solely to the delay of their Government in appointing a proper person to fill that office".[414] By such statement, the British position relied on the very mixed commissions' procedure, the (then underexplored) possibility of the Brazilian participation through the appointment of commissioners.

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[413] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law** 197-198 (note 13-14).

[414] FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 28 November 1829, p. 84.

A number of Brazilian diplomatic complaints followed, taking aim at the overall injustice of the system and in individual cases decided in the absence of Brazilians. The British Foreign Office repeatedly dismissed the Brazilian protests based on the provisions of the treaty that mixed commissions would judge cases *without appeal*[415] and on the *res judicata* principle.

In a report of 1831, the Brazilian Foreign Minister commented on the grounds used to dismiss the protests. He complained about how the British Foreign Secretary employed the principle of *res judicata,* "for which we will soon observe little respect by British Agents regarding British Prize tried by our tribunals"[416]. He was referring to the cases emerging from the blockade of Rio de la Plata (mentioned in chapter 3) and British claims of appeal against the sentences pronounced by the Brazilian courts.

That connection was also present in the following year's report of the Brazilian Foreign Office. The report mentioned unjust sentences that had been taken by the Sierra Leone mixed commissions, such as condemnations of vessels without slaves on board.[417] The prompt repudiation by the British on the basis of the no-appeals clause was contrasted in the report with the "different point of view" British representatives espoused when it came to the "extraordinarily generous" possibility of revisiting sentences handed by Brazilian prize courts which was afforded to the French in the Rio de la Plata cases — which the very

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[415] *Anglo-Portuguese Treaty of 1817*, Article VIII; *Anglo-Portuguese Treaty of 1817(Regulation)*, Article I, II.

[416] *MRE* 1830, p. 4.

[417] As we will see, the Brazilian Treaty of 1826 did not provide for an equipment clause, and British attempts to stablish additional articles to entitle capture and condemnations in such circumstances were unsuccessful.

same British now claimed as it suited them and at the same time disavowed, in Sierra Leone, when it did not.[418]

Foreign Secretary Viscount Palmerston – just as his successors would –requested the opinion of the King's Advocate about how to respond to reiterated claims of injustice by Brazilian representatives.[419] In August 1831, the King's Advocate Herbert Jenner presented his opinion on the best way to proceed before the most recent requests of the Brazilian Chargé d'Affairs in London, Chevalier de Mattos. He contended that the Brazilian Government was completely aware that under the Treaty of 1826, by then, there was no right of appeal. And that point should be once again brought to their attention.[420]

The Brazilian Foreign Office took the point that the regulation of mixed commissions did *not* provide for the right of appeal *per se*, but insisted in a re-examination on the basis that decisions which flagrantly violated the treaty should be declared *null*.[421] By April 1831, Chevalier de Mattos wrote to the British Foreign Secretary with yet another strategy. He argued that the fact *state-parties' subjects could not appeal* from the sentences of mixed commissions *could not "prevent the Government from complaining of those decisions when they interfere with national interests, and from demanding adequate reparation for them"*.[422] This way, he offered a more restrictive reading of the prohibition of appeal as regarding just the private party affected by the seizure of his property and stood by the possibility of reparation by request of the States concerned.

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[418] *MRE* 1831, p. 10.

[419] FO 83/2345. Foreign Office to the King's Advocate, 20 April 1831, p. 281.

[420] FO 83/2345.

[421] *MRE* 1831, p. 10.

[422] *HCPP, Class B*, 1833. The Chevalier de Mattos to Viscount Palmerston, 9 April 1832, p. 27.

Chevalier de Matos' demand does not seem that absurd when we take into account Andrés Bello's explanation on the way prize courts worked in that century. Prize court decisions constituted undisputable titles, to be executed in foreign countries even if based in domestic laws incompatible with the law of nations.[423] Claims on illegalities or injustices were only admitted to discussion in civil claims if the illegalities or injustices were *explicit* in the prize courts' *sentences*. [424] Notwithstanding those restrictions, the status of *res judicata* given to prize courts (necessarily belonging to the capture's sovereign or its allies) by customary law did *not* hinder foreign states from *claiming reparation* for damages emerging from the injustice or illegality of prize courts decisions.[425]

Consulted about the new type of claims by the Brazilian government, the British King's Advocate once more based his opinion on Article 8 of the 1817 Treaty, which provided for the creation of the mixed commissions to "judge the causes submitted to them *without appeal*". That article, according to the Law Officer, registered the *consent* of the parties that the decisions of the mixed commissions should "be *final* and *conclusive*, and binding upon all parties, as well as two *Governments* as their *Subjects*". After all, the parties decided to refer decisions to a tribunal to which they could appoint judges from their *own nationality*, so it would be "almost absurd" to presume such remaining possibility of claim. He argued *all* the regulations annexed to the treaty were conceived towards preventing subsequent discussions to the ruling at the mixed commissions, *including* claims of compensation emerging from illegal captures. In the Law Office's view, the *Anglo-Brazilian Treaty of 1826* and its respective regulations only provided for one mean for correcting

[423] BELLO, **Principios de derecho de gentes**, p. 232.

[424] BELLO, **Principios de derecho de gentes**, p. 232.

[425] BELLO, **Principios de derecho de gentes**, p. 234.

injustices at commissions: the *removal of individual commissioners*.[426] Other constructions about the treaties "would render the Mixed Commission Courts worse than useless, and would, necessarily, lead to *endless disputes and discussions*, between the two Governments, in every case, founded upon the different representations, which each would receive from its own subjects".[427]

The next proposal by the Brazilian representatives was to submit patently unjust cases to *arbitration by a third state* (in accordance with *ius gentium*)[428]. In an opinion about that proposal, the King's Advocate confirmed in 1833 the correspondence exchanged by the British Foreign Office since then, denying any possibility of re-examination.[429] Consulted about the matter, the Brazilian Council of State agreed with the unfavourable opinion of the Brazilian King's Advocate and decided unanimously to leave that particular claim, as "the law was completely on the British side".[430]

One of the matters related to the continuous disputes between Brazilian and British representatives during those years were the *embargos* to the proceedings of the Rio commission. *Embargos* were petitions for the mixed commission *not to carry its sentences into effect*; it aimed at creating *an extension for the claimant to enter further evidence into the proceedings*. In case the new matter affected the sentence, it would be revisited by the commissioners and reformed, to be subsequently executed. The matter was first brought to the British King's Advocate in 1835, on the practice of *embargos* in the cases of *Angelica*

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[426] *Anglo-Portuguese Treaty of 1817 (Regulation)*, Article XII. The article provided, literally, for the possibility of removal of commissioners in cases of "evident injustice". Yet it was usually applied to cases of corruption or actual involvement of commissioners with slave trading.

[427] FO 83/2345. Herbert Jenner to Viscount Palmerston, 15 August 1831.

[428] *MRE* 1832, p. 6.

[429] FO 83/2346. Herbert Jenner to Viscount Palmerston, 25 February 1833.

[430] *CE*. Records, Session No. 116, 27 August 1833.

(1835) and *Amizade Feliz* (1835). His report indicated that, as a form of appeal, such practice should be refused by British commissioners. Despite subsequent instructions from the Foreign Office to the British commissioners in Rio, the Brazilian government refused to give instructions to its commissioners to abandon the practice. Brazilian representatives argued *embargos* was a part of the custom and laws of Brazil.

The discussion about the *embargos* would return in Rio by February 1839, intertwined with another significant point of disputes: the deviation of vessels from the Brazilian coast[431]. In the cases of *Diligente* (1839) *and Feliz* (1839), the British Chargé D'Affaires in Rio acted upon the conflict between the positions of British and Brazilian commissioners there when *embargos* were presented by the advocate of the owner: the British followed instructions to refuse *embargos*, Brazilians were in favour of admitting them. In a long letter to Maciel Monteiro, Ouseley criticised the Brazilian persistency in maintaining *embargos* as a sign, between many, that "the means and power of the Imperial Government are not exerted with energy or frankness, to put down the increasing and glaring evil of the importation of Africans". Addressing the Brazilian justification to conserve *embargos,* he stated: "it must be remembered that the Mixed Commission is not a Brazilian tribunal, and as well might the peculiar forms of British Jurisprudence be introduced in its practice, as those of Brazil; neither, however, are admissible"; the commissioners should only be guided by "the convention under which they are named, and the instructions that they may from time to time receive from their Governments".[432] Mr. Ouseley even referred to the other mixed commissions that were in function. He mentions the Brazilian–

[431] See chapter IV, D, "liberation and deviation".

[432] *HCPP*, *Class B,* 1840. Mr. Ouseley to Senhor M. Monteiro, 15 January 1839, p. 119; The note by Ouseley was approved by the Foreign Secretary by April 1839. See *HCPP*, *Class B,* 1840. Viscount Palmerston to Mr. Ouseley, 1 April 1839, p. 127.

Portuguese commission, "to which no *embargos* are admitted", and then the Anglo-Brazilian mixed commission to liquidate the prize claims related to Rio de la Plata: "the agent for the British claimants, on more than one occasion, presented embargos, which were uniformly rejected, —as the sentences were declared *final.*" The British Chargé D'Affaires in Rio was ready (yet it ended up not being necessary) to use the two captured ships (with almost 500 African people onboard) for blackmail: should the Brazilian government not cease its acceptance of embargos, the ships would be sailed by the British to Demerara.[433]

In the Portaria of 14 February 1839, Brazilian commissioners were ordered to no longer admit *embargos* against the mixed commissions decisions. That did not mean the Brazilian government was convinced by the British interpretation of the mixed commissions regime, though — the report made it clear. It rather ceased the opportunity of such public statement to reclaim the *Brazilian agency* over slave trade abolition. Candito Baptista de Oliveira, then Brazilian Foreign Minister, pointed out two reasons for the measure of ceasing the practice of embargos in the Rio commission. First, mixed commissions were *ad hoc* tribunals, regulated by treaties, off the category of domestic courts; second, once the traffic had been *prohibited* by the 1826 Treaty *and the Act of 7 November 1831*, the reasons for the necessity of embargoes ceased to exist.[434] The Act was the first Brazilian law to prohibit slave trade. He just failed to consider in his report that the Act of 1831 was suffering a boycott already for some years at that point.[435] By April 1839, Viscount Palmerston was sent a letter by Marques Lisboa

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[433] MAMIGONIAN, In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil-British West Indies, 1830s-1850s), p. 43.

[434] *MRE* 1839, p. 5.

[435] See PARRON, Tamis Peixoto, **A política da escravidão no império do Brasil, 1826-1865**, Universidade de São Paulo. Master's degree dissertation, 2009, pp. 66-67.

assuring that *embargos* would not be admitted in the Rio commission anymore.[436]

Another instance of discussions where the no-appeals clause feature emerged from the British complaints was about the delay in the enforcement of mixed commission's sentences in Brazil. In contrast with the general rule we have seen in chapter 2, the execution of the sentences of the Rio mixed commission was under the jurisdiction of domestic courts — the judges of contraband. The matter was firstly brought up in 1842 by British commissioners in Rio, regarding the case *Maria Carlota*, which had been decided in 1839[437] and kept arising in protests by British representatives. It resulted in a consultation by the Minister of Justice to the Brazilian Council of State in September 1842, that intended to clarify the limits of the enforcement of mixed commissions' sentences, which had been constantly transposed by then — and was a factor causing the delays.[438] In the report, the Council of State starts with a legal reasoning that is worth mentioning:

> […] prizes are acts of hostility, real conquests, allowed by ius gentium in the case of war or by conventional law in the cases provided by treaties. The generally accepted use by modern nations is considering the jurisdiction of the belligerent state (forum arresti) as the proper one for the adjudication

[436] *HCPP*, *Class B,* 1840. Marques Lisboa to Viscount Palmerston, 8 April 1839, p. 128.

[437] *HCPP*, *Class A,* 1845. Her Majesty's Commissioners to Mr. Hamilton (and enclosures), 18 July 1844, p. 311.

[438] *BDLB, Alvará of 1818*, Article IV of: "The complaints, and all the proceedings until their final sentence and execution will be brought before the Judges of Contraband […], as well as [the proceedings] […] to execute the decisions given by the Mixed Commissions, […] and to judge […] other cases under its jurisdiction, [… and] appeals under the *Ordenação*. Any of the parties may, however, request the Mixed Comission to judge [their case]; whether it is a case of prohibition or not; and in this case the proceedings will be sent to [the mixed commission…]; And whatever is decided by it shall be executed."

> over the legitimacy of prizes; when they are authorized by convention, however, it is for the signatory powers to establish courts which shall rule on them. In the latter, as in the former case, mixed commissions were ad hoc tribunals: their actions, the way of proceedings, and the means of execution are regulated administratively and are subject to direct governmental actions. According to those principles, no one can annul, alter or in any way obstruct the enforcement and the effects of the Anglo–Brazilian mixed commission sentences, established by the 1817 Convention for the judgement of prizes of slave traffic.[439]

The report continued with the counsellors saying that the disposition of Article 4 of the Alvará of 1818, the domestic regulation originally arising from the 1817 Treaty, gave to Brazilian judges of contraband (of domestic jurisdiction) solely the jurisdiction over the *enforcement* of the sentences of mixed commissions; the only possibility of appeal at that point should be against the proceedings of the *execution per se*.[440] That is why in the case *Maria Carlota*, to which the report

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[439] Original in Portuguese. *CE*. Consultation of 9 September 1842. REZEK, José Francisco (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, Brasília: Câmara dos Deputados, 1978, p. 109.

[440] See *BDLB, Alvará of 1818*, Article 4, *supra*. *OHT*, *Anglo-Portuguese Treaty of 1817 (Regulation)*, Article VII: "In case of the condemnation of a vessel for an unlawful voyage, she shall be declared lawful prize, as well as her cargo, of whatever description it may be, with the exception of the slaves who may be on board as objects of commerce; and the said vessel, as well as her cargo, shall be sold by public sale, for the profit of the two Governments; and as to the Slaves, they shall receive from the mixed Commission a certificate of emancipation, and shall be established, to be employed as servants or free labourers. Each of the two Governments binds itself to guarantee the liberty of such portion of these individuals as shall be respectively consigned to it."

specifically addressed and which was decided by the mixed commission years before, any discussions about the destination of the prizes should cease. The shipowners' criminal conduct created the right of the captor to the prize, said the State Council. Shipowners' creditors could not claim any part of it, "they cannot redeem something that had been lost forever, as in a wreck, fire or any other similar events."[441]

In 1844 discussions would be resumed when the British commissioners pointed out the delay in the enforcement of the sentence of *Dous Amigos* (1843).[442] The commissioners suggested that the 1826 Treaty did not by itself provide for the enforcement of sentences by local authorities, so it remained under the jurisdiction of the mixed commissions to guarantee it. That position was corroborated by the King's Advocate.[443]

In November 1844, the Brazilian Council of State presented the draft of a decree to the Emperor that probably intended to address British claims against its domestic jurisdiction over the enforcement of mixed commissions sentences. Its explicit objective was to *adjust the compatibility of the interpretation of Article 4 of Alvará of 1818 with Article 7 of the regulations of the Anglo-Portuguese Treaty of 1817*. Accordingly, the judges of contraband — and municipal judges, by the Act of 3 December 1841— were directed to enforce mixed commissions sentences limiting themselves to coordinate the auctions of ships and their cargos, without any further opposition or manifestation by the parties which might lead to delay.[444] Probably for the proximity of the events of

[441] *CE*. Consultation of 9 September 1842. REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, pp. 108-111.

[442] *HCPP*, *Class A,* 1845. Her Majesty's Commissioners to Mr. Hamilton, 31 July 1844, p. 313.

[443] Foreign Office to the Queen's Advocate, 26 October 1844, p. 232; FO 83/2352. John Dodson to the Earl of Aberdeen, 15 August 1845, p. 397.

[444] *CE*. Consultation of 29 November 1844, REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, pp. 281-282.

March 1845 —which we will explore by the end of this chapter —, the decree was never actually enacted.

Yet the discussions over re-examination or Brazilian claims for reparation emerging from unjust cases had not ceased. While those positions were taken in Rio de Janeiro regarding embargos and other attempts of review during execution, the Brazilian chargé d'affaires in London continued to insist with the British Government on reparations for unjust decisions. In the reports of 1843 and 1844, Brazilian Foreign Minister Ernesto Ferreira França remarked Brazilian diplomats were instructed to keep expostulating with the British government about the matter.[445] Further cases would still be judged according to the British expanded interpretations in Sierra Leone until the end of the commissions' work in 1845.

B. UNTAMING PROCEDURAL LAW

Form of the process

The general instructions for procedure of the mixed commissions can be found in one paragraph of the regulation annexed to the Anglo-Portuguese Treaty of 1817. A first reading of the provision might lead us to think that the commissary judges should just follow some steps, the "form of the process". [446] First, they should "proceed to the

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[445] *MRE* 1843; *MRE* 1844 p.11-12.

[446] *OHT, Anglo-Portuguese Treaty of 1817 (Regulation)*, Article III: "The form of the process shall be as follows: The Commissary Judges of the two nations shall, in the first place, proceed to the examination of the papers of the vessel, and to receive the depositions on oath of the Captain and of two or three, at least, of the principal individuals on board of the detained vessel, as well as the declaration on oath of the Captain and of two or three, at least, of the principal individuals on board of the detained vessel, as well as the declaration on oath of the captor, should it appear necessary, in order to be able to judge and to pronounce if the said vessel has been justly detained or not, according to the stipulations of the Additional Convention of this date, and in order that, according to this judgement, it may be condemned or liberated. And in the event of the two Commissary Judges not agreeing on the sentence they ought to pronounce, whether as to the legality of the detention or the indemnification to be allowed, or on any other question which might result from the stipulations of the Convention of this date, —they shall

examination of the papers of the vessel"; second, "receive the depositions on oath of the Captain and of two or three, at least, of the principal individuals on board of the detained vessel"; third, "[receive] the declaration on oath of the Captain and of two or three, at least, of the principal individuals on board of the detained vessel, as well as the declaration on oath of the captor, should it appear necessary." Those steps seemed to aim at collecting evidence "in order to be able to judge and to pronounce if the said vessel has been justly detained or not, […] and in order that, according to this judgement, it may be condemned or liberated".[447]

Yet the rules on admissible evidence and the forms of hearing —which, granted, are not sufficiently detailed in the treaty as to be ready for practice— became part of the disputes among Brazilian and British representatives during the treaty implementation. In contrast with the procedural rules we discussed before, exploring the strict reading of the "form of the process" constituted (in general) a more profitable strategy to Brazilians. In practice, the reference to that procedural provision of the treaty would ground Brazilian efforts to gain some control over part of the interpretative process, including both innovative and conservative interpretations of the regime, frequently entailing bureaucratic hurdles to the work of the commissions.

The same Brazilian commissary judge in Sierra Leone (José de Paiva) who insisted on entering into record complaints over the cases decided in the absence of Brazilians in 1829 also tried other strategies to make up for the vacancy in the seat of the Brazilian commissioner of arbitration (in his four-year term, he would have the company of a

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draw by lot the name of one of the two Commissioners of Arbitration, who, after having considered the documents of the process, shall consult with the above-mentioned Commissary Judges on the case in question, and the final sentence shall be pronounced conformably to the opinion of the majority of the above-mentioned Commissary Judges, and of the above-mentioned Commissioner of Arbitration."

[447] *Anglo-Portuguese Treaty of 1817 (Regulation)*, Article III, *supra*.

Brazilian commissioner of arbitration in single one).[448] His next move, in the case of the Brazilian vessel *Ismenia* (1831), was to demand the captor be present to let the proceedings of the case to continue. This time, when consulted upon the complaint by the British commissioners, the King's Advocate agreed it was his right to require the presence of the captor. The British King's Advocate stated that the British Commissioners could not "insist upon proceedings to the adjudication of that vessel, in the absence of the captor, without the concurrence of M. de Paiva".[449]

Another contentious point would rise over admissible evidence. When the Brazilian Chargé D'Affairs wrote to the British Foreign Office about the claims for indemnities regarding the cases *Interdora* (1827), *Eclipse* (1827) and *Venturoso* (1827), he included a point about the illegality of the proceedings: more evidence had been produced by the captors beyond the vessels' papers and depositions of the crew. That went against the practice of the *prize law*, he claimed, as in the *British* High Admiralty Court's case law. Consulted on how to respond to this point, the King's Advocate agreed, that was indeed the practice of the High Admiralty Court; yet the fact that captors were permitted to bring further evidence besides the deposition of witnesses in those cases *was not a violation* of the *proper legal regime* applicable in those cases, the King's Advocate pointed out. Mixed commissions' proceedings were not just any proceeding under the *general law of nations*; they were rather a proceeding "*under a treaty, entered into for a particular purpose*". Under Article III of the regulation for mixed commissions, according to the King's Advocate's reading, it was "in the *discretion of the Court*, in every case, to admit the Captor's Evidence, *if they think the circumstances are such as to require it*".[450]

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[448] See *MRE* 1830-1833.

[449] FO 83/2345, Herbert Jenner to Viscount Palmerston, 4 December 1830, p. 237.

[450] FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 15 November 1830, p. 197 et seq.

In the Rio mixed commission, such debate about evidence emerged in the case of the *Eliza* (1830). The Brazilian commissioners maintained that, under Article III of the *Regulations*, the only evidence to be admitted should be the vessel's papers and the depositions of the crew. In that ruling on that case, further evidence submitted to the commission showed the affidavits of the crew and the vessel's papers to be false regarding the date of the voyage, thus countering crucial basis for acquittal. The British commissioners insisted in admitting further evidence, which favoured condemnation of the vessel. Lots were drawn, and the British arbitrator affirmed the opinion of the British judge.

Brazilian commissioners were not put off by this; instead, they took advantage of the procedural rule of *decision by lot*. The Brazilian position by then was that a new arbitrator should be chosen whenever a new point of disagreement should arise. In the context of the case, they insisted that the decision on the admissible evidence should be regarded as a kind of interim decision— notwithstanding the clear impact this decision had on the result of the proceedings —, and that the final decision itself required a different commissioner of arbitration (to be drawn between the Brazilian and the British arbitrator) to solve the disagreement between the Brazilian and the British judges. Having convinced the British commissioners to acquiesce to draw lots one more time for the final decision, this time the Brazilian commissioner of arbitration was chosen.

Following this case, once more the King's Advocate was asked to express his views about the matter of the admissible evidence. He reiterated his previous opinion on the interpretation of Article III of the regulations: although the ship's papers and depositions of the captain and principal individuals aboard were indeed primary evidence, *further evidence were not prohibited*; assuming so would contradict "[t]he

constant practice of mixed commissions courts"[451]. On the procedure adopted by the Rio commission concerning the drawing of lots, the King's Advocate maintained that the proper reading of Article III was that "the Commissioner of Arbitration having once been chosen in a particular case, is the proper person to whom all subsequent matters of dispute in the same Case ought to be refereed"[452]. He added: "[t]he inconvenience of a different interpretation is sufficiently apparent, in the present instance, as the second Commissioner of Arbitration has […] in effect reversed the decision of the first".[453] But it was too late for regrets: all the King's Advocate could do was to advise the Foreign Secretary to send instructions to the British commissioners to prevent similar results in the future.[454]

A much shorter-lived dispute arose in 1842, when the Brazilian commissioners in Rio de Janeiro demanded that the witnesses be examined by the commissioners instead of the registrar. As we discussed in chapter 2, this contradicted a general practice of the mixed commissions. The British commissioners disagreed with the Brazilians and submitted a consultation on the matter to the British Law Office. The King's Advocate responded that the examination of witnesses by the registrar was an *established general practice since the Instructions of 1819*.[455] The dispute ended there.

Imperial seal

Another related matter emerged in the Rio commission regarding papers containing the imperial seal found on board of captured vessels. It first appeared during the first step of the triple formula, during

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[451] FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 30 April 1831.

[452] FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 30 April 1831.

[453] FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 30 April 1831.

[454] FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 30 April 1831.

[455] FO 83/2350. John Dodson to the Earl of Aberdeen, 12 June 1842, p. 180.

visitation and search of a Brazilian vessel. In 1842, the Changé D'Affairs in Rio de Janeiro wrote to the Foreign Office about a complaint by the Brazilian government that needed address. The commander of a British ship had *broken a seal* to read a letter on-board a Brazilian vessel during visitation. The Foreign Office requested the opinion of the Queen's Advocate on the matter[456]. The Law Officer responded that opening a dispatch containing an imperial seal was *part of the right to visit and search* and as such should *not be perceived* as an act of violence by the Brazilian Government.[457]

Two years later the matter would appear once again in 1844. The Brazilian judge to the Rio commission requested help from the Foreign Office with a position on whether documents with the Brazilian seal, found aboard the *Nova Granada* (1844), could be opened by the commissioners. The Council of State affirmed that adopting a rule which permitted the breaking of the seal in all circumstances was ill-advised; *rather, the case should be submitted to imperial decision*. In that specific case, it seemed reasonable to allow it, as the documents would probably indicate details about the vessel's destination and journey and thus contribute to the findings of the case.[458]

The Brazilian Council of State would be called on that same question again in 27 December 1844, after a formal complaint by the British government. The opinion of the council members was that Article III of the regulations to the 1817 Treaty, which the British Minister had cited, *did* provide for the examination of the *ship's papers*, but *not* to *any*

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[456] FO 83/2350. Foreign Office to the Queen's Advocate, 14 May 1842, p. 151.

[457] FO 83/2350. John Dodson to the Earl of Aberdeen, 31 May 1842, p. 170.

[458] *CE*. Consultation of 27 December 1844, REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, pp. 281-282.

sealed document found on board. That was the reason breaking the seal was allowed in the case of *Nova Granada* but *not in general*.[459]

In the meantime, the British commissioner in Rio corresponded with the Foreign Office reporting on the matter: "The Brazilian Government seems to arrogate to itself a discretionary power to adjudge which of the papers belonging to the ship detained shall or may be scrutinized by the Judges of the mixed Court". In his opinion, the measure represented a new way of encouraging slave traders giving them more security in their illicit activity; "The vile purposes to which the Imperial office seals are shamelessly applied by the subordinate servants of this Government would, by this novel regulation, more frequently escape detection".[460] In March 1845, consulted by the Foreign Office[461], the Queen's Advocate agreed with the position of the British commissioners in Rio: keeping papers from examination was against "the tenor of the treaty", "because an inferior department (the Custom House) think proper to enclose them in an envelope, and make use of a seal bearing the arms of the Brazilian Empire".[462]

The relevance given to evidence was not just a feature of the Brazilian interpretation. As we will see next, the way of looking to evidence also enabled the British expansion of what meant for a vessel to be "engaged in slave trade".

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[459] *CE*. Consultation of 27 December 1844, REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, pp. 285-287.

[460] *HCPP, Class A*, 1846. Her Majesty's Commissioners to the Earl of Aberdeen, Rio de Janeiro, 10 December 1844.

[461] FO 83/2352. Foreign Office to the King's Advocate, 26 February 1845, p. 300.

[462] FO 83/2352. John Dodson to the Earl of Aberdeen, 11 March 1845, p. 304. *HCPP, Class A,* 1846. The Earl of Aberdeen to Her Majesty's Commissioners, 2 April 1845, p. 480.

C.PUSHING THE LIMITS OF CONSENT

A subtler equipment clause

Under the language of the 1817 Treaty, a visit could be performed whenever a vessel "may be suspected, upon reasonable grounds, of having slaves on board"; a capture should follow in the "event only of their actually finding slaves on board".[463] As we have seen, the Anglo–Brazilian treaty adopted that provision together with the basic triple formula clauses contained in that treaty, which made it binding to the subjects of both nations after March 1827[464].

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[463] *OHT, Anglo-Portuguese Treaty of 1817*, Article V: "The two High Contracting Powers, for the more complete attainment of their object, namely, the prevention of all illicit traffic in Slaves, on the part of their respective subjects, mutually consent, that the ships of war of their Royal navies which shall be provided, may visit such merchant vessels of the two nations, as may be suspected, upon reasonable grounds, of having slaves on board, acquired by an illicit traffic, and, (in the event only of their actually finding slaves on board,) may detain and bring away such vessels, in order that they may be brought to trial before the tribunals established for this purpose, as shall hereinafter be specified.

Provided always, that the commanders of the ships of war of the two Royal navies, who shall be employed on this service, shall adhere strictly to the exact tenor of the instructions which they shall have received for this purpose.

As this Article is entirely reciprocal, the two High Contracting Parties engage mutually to make good any losses which their respective subjects may incur unjustly, by the arbitrary and illegal detention of their vessel:

It being understood that this indemnity shall invariably be borne by the Government whose cruizer shall have been guilty of the arbitrary detention; provided always, that the visit and detention of slave ships, specified in this Article, shall only be effected by those British and Portugueze vessels which may form part of the two Royal navies, and by those only of such vessels which are provided with the special Instructions annexed to the present Convention."

[464] *OHT*, *Anglo-Brazilian Treaty of 1826*, Article II and III: "II - His Majesty The King of the United Kingdom of Great Britain and Ireland, and His Majesty The Emperor of Brazil, deeming it necessary to declare the engagements by which They hold Themselves bound to provide for the regulation of the said Trade, till the time of its final abolition, They hereby mutually agree to adopt and renew, as effectually as if the same were inserted, word for word, in this Convention, the several Articles and Provisions of the Treaties concluded between His Britannick Majesty and The King of Portugal on this subject, on the twenty-second of Jan. 1815, and on the twenty-eighth of July 1817, and the several Explanatory Articles which have been added thereto. III - The High Contracting Parties further agree, that all the matters and things contained in those Treaties, together with the Instructions and Regulations, and forms of Instruments annexed to the Treaty of the twenty-eighth of July 1817,—shall be applied, *mutatis mutandis*, to the said

Some months after the ratification of the Anglo–Brazilian Treaty, British commissioners in Sierra Leone were writing about how easier it would be both for the navy and for them to do their work if Britain could get Brazil to sign additional articles as "similar in all aspects to the treaty with Netherlands".[465] They were talking about an alteration to the strict rule of permitting capture only when slaves were found aboard. As we have seen in chapter 1, the so-called *equipment clause* included a list of indicia that were enough for the capture to be performed on the grounds of the vessel being fit to receive slaves. Sierra Leone commissioners thought by then that an equipment clause would help preventing cases of Brazilian vessels engaging in slave trade under the disguise of mercantile passports to trade goods north of the Equator.

British and Brazilian diplomats negotiated additional articles to that end, which were signed in 27 July 1835.[466] Those articles contained not only an *equipment clause*, but also a *breakup clause*.[467] Nine

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High Contracting Parties and Their Subjects, as effectually as if they were recited, word for word, herein; confirming and approving hereby, all matters and things done by their respective Subjects under the said Treaties, and in execution thereof."

[465] *HCPP, Class A,* 1837. Correspondence with the British Commissioners. His Majesty's Commissioners to Viscount Dudley, September 28, 1827.

[466] *MRE* 1834, p. 6.

[467] See chapter 1. *BFSP*, *Additional Articles of 1823*, Articles I and II: "I- Whereas it is stated, in the First Article of the Instructions intended for the British and Portuguese Ships of War, employed to prevent the illicit Traffick in Slaves, that "Ships on board of which no Slaves shall be found, intended for the purposes of Traffick, shall not be detained on any account or pretence whatever:" and whereas it has been found by experience, that Vessels employed in the illegal Traffick have put their Slaves momentarily on shore, immediately prior to their being visited by Ships of War, and that such Vessels have 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 Convention of the 28th of July, 1817: the two High Contracting Parties therefore feel it necessary to declare, and it is hereby declared by them, that, if there shall be clear and undeniable proof that a Slave or Slaves, of either sex, has or have been put on board a Vessel for the purpose of illegal Traffick, in the particular voyage on which the Vessel be captured, then and on that account, according to the true intent and meaning of the Stipulations of the above-mentioned Convention, such Vessel shall be detained by the Cruizers, and finally condemned by the Commissioners.

II- Inasmuch as the Convention of the 28th of July, 1817, does not stipulate the mode of supplying the absence of the Commissioners, occurring from any other cause besides that of death, which

circumstances were provided which authorised detention even when no slaves were found aboard — this was the equipment clause—; state-parties should proceed to the immediate dismantle of the vessels condemned by the mixed commissions — the breakup clause.[468] Yet the idea of those additional articles was not well received by the Brazilian government and the additional articles were *never ratified* by Brazil.[469]

In the field of the history of slave trade, one can always find at least some words on the matter of Brazilian vessels captured without slaves on board, even among the most diverse historical approaches. Leslie Bethell, for instance, writes that "*many ships captured without slaves on board were condemned or acquitted literally on the toss of a coin*".[470] He gives the example of the cases *Galianna* (1842) and *Ermelinda* (1842), both heard by the Anglo–Brazilian commission in Sierra Leone and quite *similar in their equipment*. In both cases Brazilian and British judges disagreed, so the decision was referred to the commissioner of arbitration. After lots were drawn, the British commissioner of arbitration was selected in the *Galianna* and condemned the vessel; the Brazilian commissioner was selected in *Ermelinda* and

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is the only case provided for by the Fourteenth Article of the Regulation for the Mixed Commissions annexed to the said Convention; the two High Contracting parties have agreed, that, in the event of the recall, or of the absence on account of illness, or any other unavoidable cause, of any of the Commissioners, Judges, or Arbitrators; or in any case of their absence in consequence of leave from their Government (which must be notified to the representative of the Commission) their Posts shall be supplied in the same form and manner as is determined for the case of death by the above-mentioned Fourteenth Article of the said Regulation."

[468] The ten elements were the same indicated in Treaty between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade of 1841 and the Palmerston Act in 1839, but the separate tenth article to indicate the presence of mats for slaves. PINTO, Apontamentos para o Direito Internacional - Tomo 1.

[469] *CE*. Records, Session No. 116, 27 August 1833.

[470] BETHELL, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century, p. 87.

released the ship.[471] Still on the same matter, Jenny Martinez reveals from her research of all slave trade commissions that the "*greatest disagreement among judges*" happened at Anglo–Brazilian mixed commissions over equipped vessels. She explains that *British commissioners pushed for covering cases of vessels that did not carry slaves aboard, while Brazilians resisted on the basis of the Brazilian refusal to ratify an equipment clause amendment*.[472] Ward, in contrast, mentions that, even though Brazil had not accepted the equipment clause, "the Brazilian Government seemed to acquiesce in the condemnation of Brazilian vessels taken without slaves on-board, *at all events if they had already discharged their cargo*."[473]

How can we make sense of all those historical statements? A first step should be addressing the apparent contradiction of Ward's account and the others. If the Brazilian government actually accepted that vessels would be captured without slaves on board, why would Brazilian commissioners insist in their release? The answer is not in any kind of disagreements between the Brazilian government and its commissioners. Ward was referring to the capture of vessels with no slaves on board in a very specific situation, when *they had been already disembarked before the capture yet had been on board beforehand*.[474]

Brazil did not ratify the additional articles signed in 1835, but it did consider itself bound to a subtler kind of equipment clause, the

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[471]BETHELL, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century, p. 87.

[472]MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p. 76; BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, pp. 194-198.

[473]WARD, **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**, p. 126.

[474] Another possibility is that he was taking into account the cases decided in the last years of the commission in Sierra Leone, when Brazil was being represented only by judge Manoel de Oliveira Santos. We will explore this point by the end of this section.

one ratified by Portugal in 1823 — which we explored in chapter 3.[475] That clause provided for the right of capture in *cases of evidence that there had been slaves on board the vessel before during that same voyage*. It is not clear from the language of Article II and III of the Anglo–Brazilian Treaty of 1826 whether those additional articles were considered part of the Anglo–Portuguese regulation Brazil was accepting thereby.[476] The Additional Articles of 1823 do not appear in reprints of the Treaty of 1817, either[477]. Yet they were mentioned as binding in many instances. For example, in *Paquete do Sul* (1834), a vessel which seemed only to have received slaves on board *before* capture, was condemned with concurring opinions of the British and the Brazilian judges; Brazilian judge understood that papers found on board were *sufficient in indicating that slaves had been on board before the capture*, so the vessel was liable to condemnation under the *Additional Articles of 1823*.[478] The same occurred in *Aventura* (1835) and in *Dom João de Castro* (1840).[479] In all cases, although the ships carried Portuguese flags, they were considered

[475] See those additional articles in the appendix.

[476] *OHT, Anglo-Brazilian Traty of 1826*, Articles II and III: "II- His Majesty The King of the United Kingdom of Great Britain and Ireland, and His Majesty The Emperor of Brazil, deeming it necessary to declare the engagements by which They hold Themselves bound to provide for the regulation of the said Trade, till the time of its final abolition, They hereby mutually agree to adopt and renew, as effectually as if the same were inserted, word for word, in this Convention, the several Articles and Provisions of the Treaties concluded between His Britannick Majesty and The King of Portugal on this subject, on the twenty-second of Jan. 1815, and on the twenty-eighth of July 1817, and the several Explanatory Articles which have been added thereto.

III - The High Contracting Parties further agree, that all the matters and things contained in those Treaties, together with the Instructions and Regulations, and forms of Instruments annexed to the Treaty of the twenty-eighth of July 1817,—shall be applied, *mutatis mutandis*, to the said High Contracting Parties and Their Subjects, as effectually as if they were recited, word for word, herein; confirming and approving hereby, all matters and things done by their respective Subjects under the said Treaties, and in execution thereof."

[477] They do not appear in the Oxford Treaties Series nor in Antonio Pereira Pinto's selection of treaties.

[478] *HCPP, Class A*, 1834. His Majesty's Commissioners to Viscount Palmerston, Rio de Janeiro, 30 January 1834 (and enclosures), p. 132 et seq.

[479] *HCPP, Class A*, 1835. His Majesty's Commissioners to Viscount Palmerston, Rio de Janeiro, 31 July 1835 (and enclosures), p. 290.

"sufficiently Brazilian" as to fall under the jurisdiction of the mixed commission—we will explore that point further in the following section.[480] Even stronger evidence that the *Additional Articles of 1823* were considered binding by Brazilians is an explicit indication, in a report by the Brazilian State Council in 1845, that such articles were accepted by Brazil under the *Anglo–Brazilian Treaty of 1826.*[481]

Therefore, one kind of disagreements that did occur within mixed commissions, as depicted by Martinez and Bethell, was on the point whether there was enough evidence to establish that slaves had been on board the vessel at some point of the voyage. That was the main subject of discussion in the above-mentioned cases. Yet we should also consider other approaches to the matter of equipment developed along the years when the treaty was in force.

Breach of passport and illegal license

During the application of the Anglo–Brazilian triple formula to the partial prohibition of slave trade (as we saw in chapter 3), a particular interpretation expanded the understanding of the Sierra Leone commission on the circumstances of legal capture. The first case to be decided under those grounds was *Heroina* (1827), concerning a Brazilian vessel captured out of the expected course covered in its passport. The commissioners understood, basing their interpretation on recent diplomatic exchanges and on the language of the 1815 and 1817 treaties, that, first, the passport was "an integral part of the convention", so it was under the mixed commission's jurisdiction to examine its conditions.[482]

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[480] We will explore those criteria of nationality in the next item.

[481] *CE.* Consultation of 25 January 1845, p. 293.

[482] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, pp. 38, p.165. British commissioners in Sierra Leone regularly based their decisions on the Vice-Admiralty Court practice and general prize case law, as shown in *HCPP, Class A*, 1843. Her Majesty's Commissioners to the Earl of Aberdeen, Sierra Leone, 28 June 1843; Her Majesty's Commissioners to the Earl of Aberdeen, Sierra Leone, 7 July 1843, p. 36 et seq...

That reasoning was possibly influenced by prize law practice. Under prize law, a vessel could be considered good prize if it deviated from the voyage or the objective of a safe-conduct pass. Other similar rule was that the private foreign vessel without a letter of marque (but with other formal registrations) taking part in hostilities during war was considered "a thief by lack of authorization".[483] In the reasoning of the decree in *Heroina,* by deviating from the course fixed in its passport, a vessel that was otherwise just equipped to engage in a legal slave trade, fell outside the permission given by treaty.[484] In *Heroina*, the central fact to consider it illegal was that the vessel "has broken faith with her Government".[485] A similar ground from the *condemnations for breach of passport* would be used in *condemnations for irregular license,* after *Sociedade* (1828). Both types of condemnation would join the usual "condemnation for engagement in slave trade" in the reports of the Sierra Leone mixed commission until 1830.[486] As we will explore next, those circumstances emerged as a coverup for condemning vessels without slaves on board, or even *regardless* of the signs of their presence. They represented one step out of others towards the implementation, in practice, of an equipment clause to which Brazil never consented.

Condemning for equipment

Under the circumstances we have just mentioned, vessels only equipped for slave trade but carrying irregular passports or with irregular licenses would be condemned in Sierra Leone. That interpretation was developed by the British commissioners in the Anglo–

[483] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, pp. 38; 165.

[484] *HCPP, Class A,* 1828. His Majesty's Commissioners to Mr. Secretary Canning (with enclosures), 2 February 1827, p. 50.

[485] *HCPP, Class A,* 1828. His Majesty's Commissioners to Mr. Secretary Canning (with enclosures), 2 February 1827, p. 50.

[486] See the list and the way the decisions were registred in the appendix.

Portuguese commission[487] and then replicated in the Anglo–Brazilian commission. Yet another approach would be inaugurated in *Empreendedor* (1839). The case was decided by an entirely British composition, in the absence of both the Brazilian judge and arbitrator, and established that Brazilian ships equipped for slave trade could be held as good prize even when it was not proved that they had received slaves on board. Such decision would be so significant that the British Queen's Advocate himself would regard it as a turning point: from then on, he acknowledged, cases without slaves on board were decided by the toss of a coin because Brazilians and British commissioners maintained opposite views on the matter in Sierra Leone. "It is certainly not desirable, —and indeed very unseemly— that things should remain in this state, but I know not how any remedy can well be applied unless some understanding should be come to on the subject between the two Governments".[488]

Such intense division in interpretation, to which Martinez and Bethell were referring, occurred in many other cases, especially when the captured vessels did not have any other evidence of a possible violation of the treaty besides being *equipped for slave trade*. In consequence, those disputes were extended from *among Brazilian and British commissaries'* disagreements[489] to further discussions between the diplomatic representatives of the two governments.

Brazilian diplomats repeatedly claimed there had not been any breach of the treaty to justify the capture and the condemnation of such vessels—neither those condemned for breach of passport and license or those condemned for mere equipment. Those grounds were simply not

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[487] See chapter 3.

[488] FO 83/2350, John Dodson to the Earl of Aberdeen, 27 September 1842, p. 328.

[489] Leslie Bethell summarized the contrast of the situation about vessels without slaves on board in the Rio commission and in Freetown for the outcome of innovative interpretations on the matter in BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, pp. 175-179.

provided by the agreement Brazil has signed in 1826 with Britain.[490] The cases condemned in Sierra Leone for irregular license or breach of passport would receive the British government's repeated support.[491] In contrast, Brazilian claims of compensation for the injustice of condemnations in Sierra Leone based solely on equipment would be dismissed on the grounds of the impossibility of appeal.[492]

In a January 1839 letter, British commissioners in Rio questioned the Foreign Office whether Brazilian vessels could only be captured and condemned while carrying slaves on board. On the one hand, they recently heard about a British visitation on a Brazilian vessel near the Brazilian coast which did not proceed to capture on those grounds. On the other, four cases of vessels only fitted for slave trade but without slaves have been brought to the Rio commission (*Paquete do Sul, Dous de Março, Aventura,* and *Vencedora)*.[493]

The Foreign Office forwarded the consultation to the Law Office. In the King's Advocate opinion about the consistency of condemnations and captures of vessels containing equipment for slave trade, John Dodson contended such actions would not be justified under the *Anglo–Brazilian Treaty* of 1826. [494] Around five months later, the King's Advocate's views were once more requested on the matter. This time, the Foreign Secretary explicitly referred to the clause by which the engagement by Brazilian subjects in slave trade was absolutely prohibited and from then on should be treated as piracy—the Foreign Office had questioned if such clause was not enough ground for captures and

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[490] *HCPP, Class B*, 1830. Presented to both Houses of Parliament, by Command of His Majesty, 1831.

[491] FO 83/2345. Herbert Jenner to the Viscount Palmerston, 29 November, 1830; FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 4 December 1830, p. 239.

[492] We explored that previously in this chapter, section A.

[493] FO 84/275. Commissioners to Viscount Palmerston, Rio de Janeiro, 22 January 1830. p. 80.

[494] FO 83/2348. Dodson to Viscount Palmerston, 3 April 1839, p. 45.

condemnations for equipment. The King's Advocate stated he did not believe there was any reason for a change of his previous opinion that it was not possible to condemn solely based on equipment. Yet, he granted, should the Brazilian government come to *agree with that construction*, he did not see any reason for it not to be adopted.[495] That report was transmitted by Viscount Palmerston to the Rio commissioners in that same month, instructing them to seek the concurrence of the Brazilian government and commissioners, but not to act upon it if the Brazilian opinion still opposed such construction[496].

In 1843, the British commissioners in Sierra Leone wrote to the Earl of Aberdeen expressing concern for "enormous expenses for damages" which would ensue should Brazilian opposition to equipment condemnations persist — considering the prospect of the appointment of a second Brazilian commissioner, which could thus affirm acquittal in half of the cases after drawing of lots. Their suggestion was "disallowing the Brazilian Judge the power of calling for the 'toss up', or drawing of lots, for the choice of Arbitrators, whenever the disagreement is for *illegal equipment"*.[497]

The British commissioners on Sierra Leone reported they were placed in a "peculiar circumstance" once the Brazilian commissary judge Hermenegildo Frederico Niteroi bluntly refused to condemn any Brazilian vessel unless slaves were found on board. The British commissioners explained to the Earl of Aberdeen they had two cases in their hands which would be affected: the *Confidencia* (1843) and the *Esperança* (1843) —"they have slave-decks, slave-provisions, slave-coppers, slave-night-tubs, slave-mess-tins, slave-gratings, slave-

[495] FO 83/2348. Dodson to Viscount Palmerston, 20 August 1839, p. 188.

[496] FO 84/276. Viscount Palmerston to

[497] *HCPP, Class A*, 1844. Her Majesty's Commissioners to the Earl of Aberdeen, Sierra Leone, 28 June 1843. p. 37 (emphasis in the original).

provisions; in short, a complete equipment for the Slave Trade".[498] They were adamant it was widely shared by the "highest legal authorities" that equipment sufficed for proving engagement in "carrying on Slave Trade", they stated, citing Lord Stowell, prize law doctrine, and Vice-Admiralty Courts decisions. Since *Empreendedor* (1839), the British commissioners argued, "*about 40 Brazilian vessels have been condemned on the same principle*". Thus, "a *custom* of nearly four years standing, will, we think, authorize us in concluding that we have silent assent from the Government of Brazil to our proceedings".[499] At that point, practical problems could certainly be averted, the commissioners noted, since the seat of the Brazilian commissioner of arbitration was vacant, so any "toss of the coin" would bring the decision back to the British commissioner of arbitration, as it had been when the first cases of condemnation for equipment were decided.[500]

Some months later, Foreign Secretary Earl of Aberdeen responded to Sierra Leone, with a copy to Rio. He just instructed the commissioners "to resist the call for an arbitrator", "because if the determination of M, Niteroi against the condemnation of such vessels were admitted by you so far as to make such cases points for arbitration, the principle recognized by both Governments upon this head, that such cases do come within the meaning of the Convention would be done away with."[501]

In the following year, King's Advocate Dodson would suggest to the Earl of Aberdeen to send new instructions making clear

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[498] *HCPP, Class A*, 1843. Her Majesty's Commissioners to the Earl of Aberdeen, Sierra Leone, 28 June 1843; Her Majesty's Commissioners to the Earl of Aberdeen, Sierra Leone, 7 July 1843, p. 36 et seq..

[499] *HCPP, Class A*, 1843. Her Majesty's Commissioners to the Earl of Aberdeen, Sierra Leone, 28 June 1843. p. 37 (emphasis in the original).

[500] *MRE,* 1840.

[501] *HCPP, Class A*, 1844. The Earl of Aberdeen to Her Majesty's Commissioners, 11 September 1843. p. 41.

what he meant, as from the information Dodson received from Sierra Leone, British commissioners had misunderstood that they could *absolutely refuse* (instead of "resisting") the reference to arbitration in equipment cases. Clear instructions were thus required that they should rather "resist by remonstrance and argument only"[502].

That same "misunderstanding" occurred in Rio. Reporting on the case *Nova Granada* (1844) to the Foreign Secretary, the British commissioners stated that, upon the Brazilian commissioner's demand of referral to arbitration, they resisted, which they believed in compliance with the instructions of the previous year, so the continuance of proceedings were depending on the correspondence of the two governments.[503]

The matter was communicated to the Brazilian Foreign Office and even submitted to the State Council in a consultation. In its report, the council showed prior knowledge of the misinterpretation that happened in Sierra Leone and protested against the attempt of the British commissioners to convince the Brazilian judge to concur with him in condemning *Nova Granada* for equipment. To avoid more of those attempts of condemning Brazilian vessels for equipment, the State Council put forward five fronts that should receive attention: (1) clear instructions should be presented to Brazilian commissioners in Brazil and in Sierra Leone that Brazilian vessels without slaves on board could be condemned solely when they had received slaves on board on the same voyage; 2) guaranteeing that a Brazilian commissioner of arbitration and a judge were always present in the mixed commission in Sierra Leone; 3) in case of condemnations due to decisions of the British commissioners of arbitration, reports should be sent to the Brazilian diplomatic

[502] FO 83/2352. Dodson to the Earl of Aberdeen, 11 May 1844, p. 105.

[503] *HCPP, Class A*, 1846, Her Majesty's Commissioners to the Earl of Aberdeen. Rio de Janeiro, 5 March 1845, p. 485.

representatives for solemn complaints to be presented to the British government; 4) a complaint against that British commissioner should be filled before British representatives.[504]

The Earl of Aberdeen would accordingly instruct the commissioners using with the Queen's Advocate's precise words: "clearly understand that you are to resist no further than by remonstrance and reason, and not by an absolute refusal".[505] Therefore, the British interpretation of condemnation for equipment ended up being endorsed by the British government, despite the reports by its Law Office affirming the lack of legal grounds in the Anglo-Brazilian regime. The successive condemnations in Sierra Leone were mainly the result of imbalance of British and Brazilian commissioners. Yet an exception would show itself.

In 1845, after protests on the case of *Imperador Dom Pedro*, condemned for equipment in Sierra Leone[506], Marques de Lisboa would present the Brazilian opposition to another case of apreehension for equipment at the African coast, of the *Felicidade* (1845)[507]. Alongside, he added a "letter of repentance" by Manoel de Oliveira Santos, the Brazilian commissary judge. From the letter we acknowledge he had concurred with British commissioners in similar cases. In that letter, addressed to the British commissioners at Sierra Leone, Santos wrote he had acted on an erroneous interpretation of instructions by the Brazilian Minister of Foreign Affairs, which he had taken to endorse condemnations for equipment. In *Isabel* (1844), *Aventureiro* (1844), *Virginia* (1844), and *Esperança* (1844), the Brazilian commissioner stated, he was unaware of

[504] *CE.* Consultation of 25 January 1845, p. 291-297.

[505] *HCPP, Class A*, 1846. The Earl of Aberdeen to Her Majesty's Commissioners, 3 September 1845, p. 529. The same instructions sent to Sierra Leone to clarify the matter were sent for orientation of the commissioners, *HCPP, Class B*, 1846. Viscount Canning to Mr. Hamilton, 3 September 1845.

[506] *HCPP, Class B*, 1845. M. Lisboa to the Earl of Aberdeen, 30 June 1845, p. 306 et seq.

[507] *HCPP, Class B*, 1845. M. Lisboa to the Earl of Aberdeen, 7 Oct. 1845, p. 322-323.

the protests by the Imperial government about condemnations of vessels solely fitted for slave trade. He wished to retract his opinions on those cases, as he should have only voted for condemnation solely when cases of slaves were found on board or when it could be established they had been on board before the capture. He asked for his statement to be included in the book of minutes and to be sent to the envoy of Brazil.[508]

Restitution without indemnities

The consequence of *illegal detention* of ships was provided in Article V of the 1817 treaty: "the two High Contracting Parties engage[d] mutually to make good any losses which their respective subjects may incur unjustly".[509] So in case the detained vessel was acquitted by one of the mixed commissions, its proprietor would be entitled to "claim a valuation of the *damages* which they may have a right to demand: the captor himself, and in his default, his Government, shall remain

[508] *HCPP, Class B*, 1845. M. Lisboa to the Earl of Aberdeen (enclosure), 5 Aug. 1845, p. 324.

[509] *OHT, Anglo-Portuguese Treaty of 1817*, Article V: "The two High Contracting Powers, for the more complete attainment of their object, namely, the prevention of all illicit traffic in Slaves, on the part of their respective subjects, mutually consent, that the ships of war of their Royal navies which shall be provided, may visit such merchant vessels of the two nations, as may be suspected, upon reasonable grounds, of having slaves on board, acquired by an illicit traffic, and, (in the event only of their actually finding slaves on board,) may detain and bring away such vessels, in order that they may be brought to trial before the tribunals established for this purpose, as shall hereinafter be specified.

Provided always, that the commanders of the ships of war of the two Royal navies, who shall be employed on this service, shall adhere strictly to the exact tenor of the instructions which they shall have received for this purpose.

As this Article is entirely reciprocal, the two High Contracting Parties engage mutually to make good any losses which their respective subjects may incur unjustly, by the arbitrary and illegal detention of their vessel:

It being understood that this indemnity shall invariably be borne by the Government whose cruizer shall have been guilty of the arbitrary detention; provided always, that the visit and detention of slave ships, specified in this Article, shall only be effected by those British and Portugueze vessels which may form part of the two Royal navies, and by those only of such vessels which are provided with the special Instructions annexed to the present Convention."

responsible for the above-mentioned damages"[510]. Article VIII of the regulations specified a list of what was included under "just and complete indemnification".[511] In cases of total loss, the commissions should

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[510] *OHT, Anglo-Portuguese Treaty of 1817 (Regulation)*, Article VI: "As soon as sentence shall have been passed, the detained vessel, if liberated, and what remains of the cargo, shall be restored to the proprietors; who may, before the same Commission, claim a valuation of the damages which they may have a right to demand: the captor himself, and in his default, his Government, shall remain responsible for the above-mentioned damages. The two High Contracting Parties bind themselves to defray, within the term of one year, from the date of the sentence, the indemnifications which may be granted by the above-named Commission, it being understood that these indemnifications shall be at the expense of the Power which the captor shall be a subject."

[511] *OHT*, *Anglo Portuguese Treaty of 1817 (Regulation)*, Article VIII: "(…) And in all cases wherein restitution shall be so decreed, the Commission shall award to the claimant, or his, or their lawful attorney or attornies[*sic*], for his or their use, a just and complete indemnification:

First, for all costs of suit, and for all losses and damages which the claimant or claimants may have actually sustained by such capture and detention; that is to say, in case of total loss, the claimant or claimants shall be indemnified;

1st. For the ship, her tackle, apparel, and stores;

2ndly. For all freight due and payable;

3dly. For the value of the cargo of merchandize, if any;

4thly. For the slaves on board at the time of detention, according to the computed value of such slaves at that place of destination; deducting therefrom the usual fair average mortality for the unexpired period of the regular voyage; deducting also for all charges and expenses payable upon the sale of such cargoes, including commission of sale when payable at such port; and

5thly. For all other regular charges in such cases of total loss; and in all other cases not of total loss, the claimant or claimants shall be indemnified, —

First, for all special damages and expenses occasioned to the ship by the detention, and for loss of freight when due or payable;

Secondly, a demurrage when due, according to the schedule annexed to the present Article;

Thirdly, a daily allowance for the subsistence of slaves, of one sbilling [*sic*], or one hundred and eighty reis for each person, without distinction of sex or age, for so many days as it shall appear to the Commission that the voyage has been or may be delayed by reason of such detention; as likewise,

Fourthly, —for any deterioration of cargo or slaves;

Fifthly, — for any diminution in the value of the cargo of slaves, proceeding from an increased mortality beyond the average amount of the voyage, or from sickness occasioned by detention; this value to be ascertained by their computed price at the place of destination, as in the above case of total loss; Sixthly, an allowance of five per cent on the amount of capital employed in the purchase and maintenance of cargo, for the period of delay occasioned by the detention; and

Seventhly, —for all premium of insurance on additional risks.

consider items such as the ship's apparel, cargo, and slaves on board — "according to the computed value of such slaves at that place of destination; deducting therefrom the usual fair average mortality for the unexpired period of the regular voyage". In cases of partial loss, indemnities should cover expenses emerging from the detention, i. e. loss of goods; demurrage (a charge for not making the voyage in the time agreed with the buyers); "premium of insurance for additional risks" and "any deterioration of cargo or slaves". [512]

Yet an interpretive construction by the British over the regulations and instructions of the treaty allowed them to *refuse to pay indemnities even in cases of illegal capture*. One of the situations concerned an alleged exception to the general rule of indemnities related to ships which, although illegally captured, should not be considered *worthy of indemnities*.[513]

In his report of January 1828, the British King's Advocate would analyse two sentences alongside a suggestion, by the British Treasury, proposing that the owners of vessels captured while engaged in slave trade in *patent violation to the law of their countries* could be considered as *not* entitled to indemnities even when the capture might not lead to a condemnation of the said vessel or cargo[514]. The cases that led to that suggestion had been *Activo* (1826) and *Perpetuo Defensor* (1826),

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(…)"

[512] *OHT*, *Anglo Portuguese Treaty of 1817 (Regulation)*, Article VIII, *supra*.

[513] Another situation was in the case of fugitive slaves. Interpretative construal established the distinction between cases where the "loss of slaves" generated the obligation to pat indemnities under article VIII and cases where indemnities were not due. The point was, slaves voluntarily escaping to British colonies should not be seen as the same situation as a dismemberment of slaves commanded by a British Officer. The latter was considered a damage to the owners of the vessel caused by an illegal act of an officer of the Crown, while the former was a voluntary act of the captured people to recover their freedom, according to the British interpretation. See FO 83/2346. Herbert Jenner et al to Viscount Palmerston, 9 April 1834, p. 164. See also HASLAM, International Criminal Law and Legal Memories of Abolition: Intervention, Mixed Commission Courts and "Emancipation."

[514] FO 83/2344. Christopher Robinson to the Earl of Dudley, 26 January 1828, p. 241 et seq.

where the capture of the vessels had occurred south of the Equator, in a clear breach of the Anglo–Portuguese regime. Instructing for future similar cases, the King's Advocate cautioned it was *better not to generalise this rule*, as decisions should be compatible with the Articles of the Instructions and Regulations, and counselled a case-by-case analysis. To be maintained as a principle, this construction *should be declared to the Brazilian authorities*, as occurred in *Sinceridade* with Portugal.[515] In the case of *Sinceridade* (1823), a Portuguese vessel had been captured in a location not covered under the Portuguese treaty, while at the same time it was clear the ship was engaging in illicit traffic of slaves because capture took place outside of Portuguese dominions (under the 1817 Treaty). Foreign Secretary Canning sent instructions for the British Chargé D'Affaires in Portugal to share with the Portuguese Government that "no compensation should be allowed in that case", and to remove the "ambiguities of the treaty", Portugal should be "induced to extend, by an Explanatory Article or Declaration, the penalty of confiscation to all Vessels found trading in Slaves"[516]. The point of indemnities would receive explicit acquiescence by Portugal only in the treaty of 1842. Accordingly, in the cases when the vessel had been found equipped for slave trade, no compensation should be paid for its detention, even if no condemnatory decree was entered by the mixed commission.[517]

A similar question to the one which had been answered some days before would be put to the British Law Officers, which Herbert Jenner, the new King's Advocate, responded with two of his colleagues.[518] Could costs and damages be due to vessels illegally trading

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[515] FO 83/2344. Christopher Robinson to the Earl of Dudley, 26 January 1828, p. 241 et seq.

[516] *HCPP, Class B,* 1824. Mr. Secretary Canning to Sir Edward Thornton, 25 October, 1823, p. 9.

[517] *Anglo-Portuguese Treaty of 1842*, Article X.

[518] FO 83/2344. Foreign Office to Her Majesty's Law Officers, 7 February 1828, p. 244.

but unwarrantably captured? Their answer was no.[519] They offered "*the true object and spirit of the Treaties*" as basis. The objective of the Anglo–Portuguese Treaty of 1815 (replicated in the Anglo–Brazilian treaty of 1826) was the abolition of the slave traffic northward of the Equator, according to them. *Violations of its provisions should not be construed as creating a legal entitlement for indemnity*. Notwithstanding, the Law Officers recommended that no general instructions should be sent to Sierra Leone commissions on the subject —commissioners had consulted the Foreign Office on that point in the first place. They advised the Foreign Office to make it a matter of representation between the Governments or even subject it to additional articles, which presented "a more safe course than to send our instructions to the Commissioners *which it must be admitted would be at variance with the letter of the Treaties and Instructions*".[520]

The Foreign Secretary instead preferred to stand by that unilateral interpretation of the treaty provisions, reminding the British Chargé D'Affaires in Rio that, under the Anglo–Portuguese regime which Brazil ratified, Portugal had been notified of British views on the matter, just as Brazilian authorities were made aware by the British envoy at Rio in 1827. In an exchange of correspondence, he stressed that "if compensation should be allowed to slave-traders for losses incurred in their illegal undertakings, encouragement would thereby be given to the violation of the special object of the Convention, which is to prevent illegal Slave Trade".[521]

The matter would return to diplomatic discussions in the next year around the case of *São João Voador*(1828), the first Brazilian vessel to be declared bad prize after the Treaty of 1826 entered in force.

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[519] FO 83/2344. Herbert Jenner *et al*. to the Earl of Dudley, 23 May 1828, p. 275 et seq.

[520] FO 83/2344. Herbert Jenner *et al*. to the Earl of Dudley, 23 May 1828, p. 277.

[521] *HCPP, Class B,* 1841. Viscount Palmerston to Mr. Ouseley, 6 July 1840, p. 158.

The justification for detention was that the ship carried equipment for slavery and was suspected to be waiting for a delivery of slaves.[522] *São João Voador* was brought before the mixed commission of Sierra Leone— the Anglo–Portuguese commission, as the Anglo–Brazilian one had not been established at that point. Its defence relied on a passport, issued by Brazilian authorities, for the vessel to trade in palm oil. The British captain brought an expert witness to attest to the inexistence of any palm oil in Keta, from which the Brazilian vessel was departing in the time of detention. The defence then brought another expert to affirm that although rare, palm oil could be obtained there. The examination of the passport to determine the legality of the voyage will be the subject of our focus in the next section. Now, we should observe another interesting point of the mixed commission's decision: although the vessel was declared bad prize because the capture was considered illegal, the decree indicated the ship should be released but the commission rejected the claim for indemnities, stating that a vessel which was intended to legal trade should not carry slaving equipment.[523]

The same decision was given by the Sierra Leone mixed commission in the case of *Vencedora* (1828). The vessel sailed to the Coast of Africa ostensibly to the procuring of palm oil, ivory, gold, among other articles, when it was captured and brought to the Sierra Leone mixed commission. To answer to the protests by the Brazilian Chargé D'Affaires Chevalier de Mattos on the injustice of the decrees, the Foreign Office requested an opinion of the King's Advocate. The Law Officer simply advised the Foreign Office to remind Chevalier de Mattos that no appeal was possible against ruling of the commission, rejecting his claim that the

[522] WARD, **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**, p. 123.

[523] WARD, **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**, p. 123.

decision should be reconsidered.[524] The King's Advocate position was that the same answer should be applied to the case of *São João Voador*[525], as reported by Viscount Palmerston to the Chevalier de Mattos.[526] In 1831 the question was brought up again by the Brazilian government and responded by a note by Palmerston to M. Ribeiro ratifying the British position of 1827. In 1840 the British Government had considered the matter once more and once again reiterated the same position.[527]

In 1834, the British position on indemnities grounded the decision not to pay any values relating to the *Maria da Gloria* case (1833). The Portuguese-flagged vessel would come to be one of the most symbolic cases of the cruelty in 19th-century slave trade. It was captured with more than 400 enslaved people, mostly children under twelve years old. The vessel would be released by the Rio mixed commission on the grounds that it lacked jurisdiction to rule on a Portuguese vessel. The captors would then bring them to the mixed commission in Sierra Leone, in a new attempt of condemnation. In Sierra Leone, the mixed commission held it as bad prize, as the capture had been performed south of Equator.[528] By then, more than a hundred slaves had died, sixty-four had to be disembarked in Sierra Leone due to the severity of their condition, and the remaining ones also suffered from illnesses and malnutrition.[529]

In February 1840, a letter from M. Lopes Gama dealt with two questions "many years pending between the respective

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[524] FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 19 November 1830.

[525] FO 83/2345. Herbert Jenner to Viscount Palmerston, 30 November 1830.

[526] *HCPP, Class B,* 1831. Viscount Palmerston to the Chevalier de Mattos, 10 December 1830, p. 64.

[527] *HCPP, Class B,* 1841. Viscount Palmerston to Mr. Ouseley, 6 July 1840, p. 158.

[528] We will return to this case to talk about the battles over colours in a following section.

[529] BETHELL, Leslie, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, Cambridge: Cambridge University, 1970, pp. 135-136.

Governments".[530] One was special civil and criminal jurisdiction for British citizens, which I will mention later. The other was the pending indemnities for the vessels held as bad prizes by the Sierra Leone mixed commission. It was unnecessary to explain, he stated, "the degree of *additional difficulty, encountered by the Imperial Government, in reconciling the public opinion of Brazil to the cause of the extinction of the Slave Trade, in consequence of failure of representations to the British Government in favour of individual interests seriously injured*".[531]

Viscount Palmerston responded that such claims regarded Brazilian vessels "which had been detained by British cruizers, because they were illegally trading in slaves, but were afterwards released by the Mixed Commission, because the Captors, in detaining them, had outstepped the authority delegated to the cruizers under the Convention".[532] According to Palmerston—who resumed the same argument we have seen before—, Britain had declared to the Portuguese government in 1823 that "in point of equity no compensation whatever could be due to traders engaged in illegal Slave Trade".[533] He pointed out this declaration met no resistance from Portugal. According to him, that same statement was made in 1827 to Brazilian representatives, so there was no point in continuing the discussion—the Foreign Secretary made no mention of any of the Brazilian protests to that statement.[534]

In 1841, in the case of the *Pompeu* (1839), in the phase of arbitrating indemnities in consequence of acquittal the question was brought up in the Rio commission. Examining the British commissioner's

[530] *HCPP, Class B,* Extract of a Letter from M. Lopes Gama to Mr. Ouseley, dated Rio de Janeiro, 26 February 1840, p. 157.

[531] *HCPP, Class B,* 1841. Extract of a Letter from M. Lopes Gama to Mr. Ouseley, dated Rio de Janeiro, 26 February 1840, p. 157.

[532] *HCPP, Class B,* 1841. Viscount Palmerston to Mr. Ouseley, 6 July 1840, p. 158.

[533] *HCPP, Class B,* 1841. Viscount Palmerston to Mr. Ouseley, 6 July 1840, p. 158.

[534] *HCPP, Class B,* 1841. Viscount Palmerston to Mr. Ouseley, 6 July 1840, p. 158.

opposition to the arbitration of such indemnities, Queen's Advocate John Dodson responded to Viscount Palmerston that, although indemnities were already part of the sentence in that case and there was no place for change anymore, there was ground for refusing to arbitrate indemnities in cases alike, quoting from the declaration to the Portuguese government in 1823 and the 1827 declaration to Brazil, as well as the precedent established in *Maria da Gloria* in 1834.[535]

D. FLAGS FOR FORUM SHOPPING

Nationality to expand jurisdiction

In January 1827, King's Advocate Christopher Robinson responded to a consultation by the Foreign Office on how to deal with the claim by Brazilian authorities that Brazil had no obligation towards Britain under which it was bound "not to receive slaves imported in Portuguese vessels". Robinson began by noting, under domestic regulation, it was possible to read the Alvará of 1818 as applying against Portuguese vessels as well, yet it was unclear that Brazil, as an independent nation, would enforce the Alvará. Turning to the question of obligations after the Anglo–Brazilian treaty entered in force, he contended that Brazil could read the treaty in two ways. It could adopt a reading informed by the *spirit* of the 1817 Treaty, reinstated by the 1826 Treaty, so it would apply to Brazilian as well as Portuguese vessels suspected of slave trade. Under this view, vessels belonging to subjects of both nationalities would be subject to the steps of the triple formula created in the model of the Anglo–Portuguese one. The other possibility was that Brazilians would adopt an interpretation that the 1826 Treaty provisions as applying exclusively to Brazilian vessels.[536]

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[535] FO 83/2349. John Dodson to Viscount Palmerston, 7 January 1841, p. 4.

[536] FO 83/2344. Christopher Robinson to Mr. Secretary Canning, 15 January 1827, p. 128.

A too simplistic first impression from the list of cases adjudicated by the Anglo–Brazilian mixed commission at Rio de Janeiro (see appendix) would seem to indicate that the mixed commission and the Brazilian navy supported the understanding that Portuguese vessels were covered by the 1826 treaty. Most of the cases judged from 1830 to 1840 were of Portuguese flags. And, in contrast with what happened generally in the years of suppression (1827–1845), almost all the vessels brought to the mixed commission in Rio from 1830 to 1835 were captured by the Brazilian navy.

We could speculate that the overwhelming presence of the Portuguese ships in the Rio commission during that period reflected a harsher persecution of Portuguese ships by the Brazilian navy, so as to benefit Brazilian traders. A different hypothesis — which does not necessarily preclude the first one — accounts for strategical behaviour after the passage of the Act of 1831 against slave trade. While the Act is often remembered as ineffective, it would be nevertheless better for slave traders to pass as Portuguese, at least in the first years the act was in force and still had effectivity. By then, as Bethell remarks, "[s]peculators in the Brazilian slave trade […] were able to call themselves Portuguese or Brazilian as the circumstances dictated […], according to its convenience."[537]

The first case decided by the Anglo–Brazilian mixed commission in Rio de Janeiro dealt with a Portuguese vessel whose owner opted for the jurisdiction of the mixed commission under article 4 of the 1818 Alvará[538]. The brig *Africano Oriental* (1830) was released *and* had

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[537] BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, p. 135.

[538] As mentioned above, the Alvará was a Brazilian domestic regulation, enacted before Brazilian independence, which proscribes slave trade to the coast of Africa to the north of Equator. According to this regulation, cases of slave trade would be brought before judges of contraband, Brazilian judicial bodies, and referred to mixed commissions whenever one of the parties made such request.

the slaves found on board liberated, under article III of the 1817 Treaty combined with the Article 1 of the Alvará of 1818. The Alvará provided for the execution of the Treaties of 1815 and 1817; it provided for the "loss of slaves" in case of illegal slave trade (all ports of the African Coast north of Equator) and the seizure of the ship, but it was deemed not applicable in its second part.[539] Therefore, concerning a Portuguese vessel, the Anglo-Brazilian mixed commission did not apply the 1817 treaty per se.

As it was commonly done when a new commission started its work, the Foreign Office sent the record of the case to the Law Office for evaluation. A new officer was filling the seat of King's Advocate by then. After receiving the papers of the case, Herbert Jenner confirmed the correctness of the decision. According to the Law Officer, the jurisdiction of the mixed commission as regulated by the 1826 Treaty did not cover vessels of Portuguese property. "It was only under the Alvará of the 26th of January 1818, referred to, that they were enabled to enter into consideration of the Case at all".[540] Such interpretation, according to the King's Advocate, "tend to show that the Brazilian Government are acting with good faith, in their endeavour to supress this traffic, in conformity with the Treaties subsisting between the two Countries"[541]. The circumstances and corresponding decisions were the same in the cases that followed, *Destemido* (1830), *Dom Estevão de Atayde* (1830), and

[539] *BDLB, Alvará de 1818*, Article 1: "All persons of whatever rank and status, who outfit and equip ships for the rescue and purchase of slaves in any of the ports of the Coast of Africa situated to the North of Ecuador shall incur the penalty of loss of the slaves, who shall immediately be freed (...); And their ships will be confiscated as well as all its equipment and cargo […]. "

[540] FO 83/2345. Herbert Jenner to Viscount Palmerston, 9 February 1831.

[541] FO 83/2345. Herbert Jenner to Viscount Palmerston, 30 April 1831.

Camila (1832).[542] Yet in the subsequent case, *Maria da Gloria* (1833), everything would change.

The Portuguese-flagged vessel was captured by a British ship in 1833 while carrying a quite higher number of enslaved people than other captured vessels.[543] As we saw earlier, this would be a particularly symbolic case of the cruelty of slave trade, as most of the captives were children, and most of them would suffer to death in the next few months.[544] The proceedings evoked many points of disagreement which related to the Brazilian and British circumstances regarding slave trade suppression. First, in the words of the British judge, the decisions that had been taken so far by the Rio commission in cases of Portuguese-flagged vessels were an "anomaly", as not condemning the ships and actually leaving the emancipation of the slaves to the Brazilian authorities actually "perpetrated the crime". By then, the destiny of liberated people was uncertain, as a provision on re-exportation of slaves brought illegally to Brazil under the Act of 1831 was pending implementation by the lack of agreements on how and to which place the exportation should occur.[545] A second element was that, at some point of the proceedings, the Brazilian judge raised the point that the Alvará had been superseded by the Act of 1831.

Consequently, the discussion among the judges shifted focus to whether the owner, a resident in Brazil born in Portugal, could

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[542] They all received the confirmation of the King's Advocate as well. FO 83/2345. Herbert Jenner to Viscount Palmerston, 27 April 1831; Herbert Jenner to Viscount Palmerston, 30 April 1831.

[543] See the number of slaves liberated in the cases ruled by the Anglo-Brazilian Commissions in the Appendix.

[544] See section E of this chapter

[545] See *MRE* 1832-1835. We will explore this further in this section.

still be considered Portuguese.[546] Despite relying on flags as the indication of the nationality of a ship *a priori*, according to Article I of the Treaty of 1815, the terms of abolition of slave trade referred to the *subjects* of the state-parties who should not be involved in the traffic.[547] Given the evidence presented, however, both the British judge and the Brazilian judge concurred in saying the owner of the vessel could not be considered Brazilian; thus, the commission had no jurisdiction over a case of a Portuguese property belonging to a Portuguese subject.[548]

In 1830, British commissioners had submitted a hypothetical question to the Foreign Office, redirected to the Law Office[549]: how should the Anglo–Brazilian Treaty be applied against Brazilian traders who managed to get Portuguese papers to carry on the trade north of the Equator?[550] The treaty had provided for the illegality of any slave trade conducted by Brazilians in 1830; yet Portuguese vessels could maintain the slave trade by south of Equator, since no further agreements had been established with Portugal to secure the universal proscription of slave trade by Portuguese subjects and the right of visit, capture and adjudication over cases besides those north of Equator. Responding in November 1830, King's Advocate Herbert Jenner was of the opinion that under Article I of the *Anglo–Portuguese Treaty of 1817*,

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[546] *HCPP, Class A,* 1835, His Majesty's Commissioners to Viscount Palmerston, 26 December 1833, p. 121.

[547] *OHT, Anglo-Portuguese Treaty of 1815*, Article I: "That from and After the ratification of the present Treaty, and the publication thereof, it shall not be lawful for any of the subjects of the Crown of Portugal to purchase Slaves, or to carry on the Slave Trade, on any part of the coast of Africa to the northward of the Equator, upon any pretext, or in any manner whatsoever: Provided nevertheless, that the said provision shall not extend to any ship or ships having cleared out from the ports of Brazil, previous to the publication of such ratification; and provided the voyage, in which such ship or ships are engaged, shall not be protracted beyond six months after such publication as aforesaid."

[548] *HCPP, Class A,* 1835, His Majesty's Commissioners to Viscount Palmerston, 26 December 1833, p. 121.

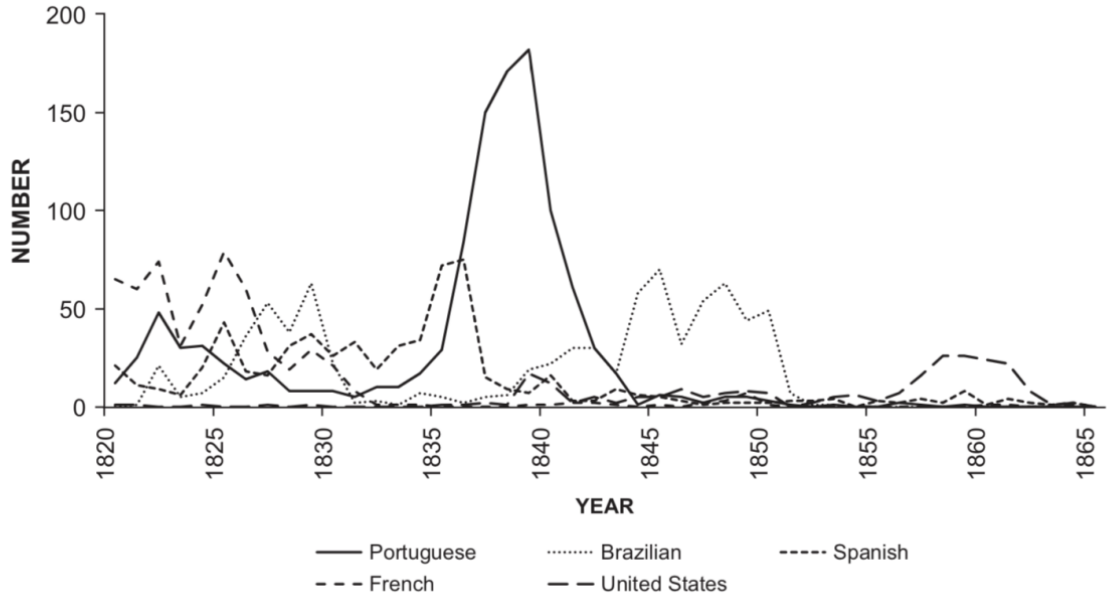
[549] FO 83/2345. Foreign Office to His Majesty Advocate General, 22 June 1830, p. 142.

[550] *HCPP, Class A*, 1830. W. Smith, Esq. To the Earl of Aberdeen, Sierra Leone, 17 April, 1830, p. 58.

Brazilians were barred from slave trade even if they chose to conduct it using Portuguese vessels or vessels carrying a Portuguese flag.[551]

With *Maria da Gloria*, the British concern with the legal restraints to condemn Portuguese vessels would become even more evident. By the middle of the 1830s, the main British battle was against Portuguese vessels. As shown in the following chart, the number of slave traders using the Portuguese flag started an increase that would reach its highest rates in 1839, after which the Palmerston Act, enforced by a new treaty with Portugal in 1842, would trigger a plummet.

Figure 2 – Known voyages by nationality of ship's registration[552]



In this scenario of an increase of Portuguese-flagged slave traders, Viscount Palmerston requested the views of the Law Office on *Maria da Gloria*[553]. King's Advocate Herbert Jenner presented an

[551] FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 19 November 1830, p. 216.

[552] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p. 89.

[553] FO 83/2346. Foreign Office to the King's Advocate, 31 March 1834, p. 154.

opinion about the sentence handed by the Rio commission diverging from the commissioners by asserting the ship's nationality could be considered as Brazilian, despite a Portuguese flag, Portuguese papers, and an owner born in Portugal. He argued other elements should have more weight in such consideration, as that the vessel had been equipped in Rio de Janeiro and was to return to Brazil, the place of residence of the owner. According to a principle of the law of nations, he argued, "the national character of a Merchant is to be taken from the place of his residence and of his Mercantile Establishment, and not from the place of his birth". This made the owner a Brazilian subject and satisfied the test of jurisdiction to the Rio mixed commission.[554]

Acknowledging the instructions sent by the Foreign Office to the British commissioners to carry out that new interpretation, Brazilian Secretary of State for Foreign Affairs Manoel Alvez Branco informed the British representatives that the Regency opposed that approach and would not make it a directive to the Brazilian commissioners. Branco maintained that while the principle of considering the residence of merchants as comparable with nationality did exist in the general law of nations, it was *not applicable* to courts such as the mixed commissions, established by treaty to control subjects of the signatory States.[555]

Called upon the matter by the British Foreign Officer, the new King's Advocate John Dodson agreed with his predecessor in the opinion about the criteria of residence for nationality. Concerning Brazilian opposition, he insisted that a merchant residing in Brazil

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[554] The King's Advocate admitted, about the decision in Sierra Leone, that commissioners there could not have reached any other decision. As the capture had occurred Southward of Equator, restitution should follow. The refusal to award costs or damages was also right in the opinion of the King's Advocate.FO 83/2346. Herbert Jenner to Viscount Palmerston, 29 September 1834, p. 209.

[555] *HCPP, Class B*, 1835. Enclosure n. 76, Senhor Branco to Mr. Fox, Palace of Rio de Janeiro, 7 February 1835, p. 73

"divested himself of his original national character, and became a Brazilian in all matters appertaining to Commerce[,] subject to precisely the same Tribunals as if he had been a natural born subject of that State".[556]

After *Maria da Gloria*, Brazilian and British mixed commissioners would continue to examine the question of the jurisdiction of the commission over vessels with Portuguese flags from the perspective of whether there was enough evidence that the owner was Brazilian. Brazilians would still reject the criterion of residence, yet most of the future cases would be decided in agreement between both judges, resulting from unanimous findings of fraudulent papers.

In 1836, Viscount Palmerston consulted the King's Advocate if there was anything to be done, under the treaties, against the persistent practice of transferring Brazilian vessels to Portuguese subjects and fitting them with Portuguese flags.[557] John Dodson responded there was nothing to be done except to "urge" the Brazilian government "in the strongest manner" to take measures against the practice to suggest laws to be enacted prohibiting the equipment of vessels in its territory and the depart of equipped vessels from its ports.[558]

Meanwhile, even though Portugal had passed the abolition of slave trade by the Decree of 10 December 1836, British saw their hands tied by the Anglo-Portuguese treaty in relation to slave trade vessels navigating south of the equatorial line. The British *right of visit and search*, conferred *only by treaty*, was restricted to the cases of prohibition

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[556] FO 83/2346. John Dodson to Viscount Palmerston, 23 June 1835, p. 275.

[557] FO 83/2347. Foreign Office to the King's Advocate, 5 April 1836.

[558] FO 83/2347. John Dodson to Viscount Palmerston, 9 April 1836. p. 39. He reiterated his position at John Dodson to Viscount Palmerston, 15 August 1836. p. 91.

established in 1817. Therefore, the King's Advocate concluded, any capture performed outside the limits of the treaty was illegal.[559]

A significant change of the British policy would come in 1838. After consulting with the Queen's Advocate and receiving a response on the legality of the measure[560], Viscount Palmerston sent new instructions to the Rio commissioners. "I have recently received from various quarters, showing that the Slave Trade is carried on in Brazil to a great extent under the Portuguese flag, by vessels which are not Portuguese built", he started. As the number of vessels carrying the Portuguese flag approached its highest figures, Portugal passed the Decree of the 16 of January 1837, concerning which vessels could be considered Portuguese, as he mentioned in the letter.

In practice, the decree restricted the weight the Portuguese flag was to have in the determination that a vessel was of Portuguese nationality. Under the Decree, vessels could only be considered Portuguese if they had been navigating under a Portuguese flag before its enactment, or if they had been built in Portuguese dominions or, in the case of steam boats, if they had been purchased by Portuguese nationals, in accordance with Portuguese law, within the three years preceding the enactment of the decree. Citing the opinion of Queen's Advocate about the rightful implementation of the decree, Palmerston directed commissioners to apply the *Anglo–Brazilian Treaty of 1826* to vessels suspected of engaging in slave trade that were either owned by Brazilian subjects *or owned by Portuguese subjects* who resided in Brazil if they

[559] FO 83/2347. John Dodson to Viscount Palmerston, 28 September 1838, p. 404; FO 83/2347. John Dodson to Viscount Palmerston, 29 September 1838, p. 406.

[560] FO 83/2347. Foreign Office to the Queen's Advocate, 23 March 1838. P. 314; FO 83/2347. Dodson to Viscount Palmerston, 23 April 1838, p. 328; FO 83 /2347, Dodson to Viscount Palmerston, 6 September 1838, p. 388.

failed to *comply with those criteria for claiming Portuguese nationality — in which case they were to be treated as Brazilian vessels*.[561]

By 1839 (but before the enactment of the Palmerston Act), Viscount Palmerston asked the Queen's Advocate to delineate objective elements to be considered by the British navy and commissioners when evaluating the true nationality of a ship to prove it actually belonged to a different legal regime, giving Britain the rights of capture and adjudication. In the Law Officer's opinion, it sufficed to prove that the papers carried by the vessel were fraudulent and that the vessel belonged to another nation. He offered no further specifics, but added that capturing vessels for fraudulent papers to only have confirmation after a ruling in mixed commissions was risky and could lead capturers to "incur a serious responsibility".[562]

Beyond the change in the approach of British commissioners, along those years, most of the cases of Portuguese-flagged vessels were condemned by the mixed commission, which by then accepted that vessels with Portuguese colours could be captured south of Equator.[563] Notwithstanding all the incentives to condemn Portuguese vessels at the Rio commission, the vessels brought for adjudication there did not increase significantly, perhaps because, as the Queen's Advocate had suggested, the captors did not want to risk capturing vessels with Portuguese flags.[564]

The series of attempts to expand the jurisdiction of the Rio mixed commission would cease when the British policy invested in the

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[561] FO 84/241. Viscount Palmerston to Commissioners, 30 April 1838.

[562] FO 83/2348. John Dodson to Viscount Palmerston, 19 August 1839, p. 179.

[563] BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, p. 136.

[564] BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, p. 138.

opposite direction. Next, we will see how the concern with the Portuguese flags crossed another dispute of suppression, the dispute over the "meaning of freedom"[565] and the effectivity of slave trade proscription in Brazil.

Palmerston Act

As we have seen in Figure 1 (above), the employment of vessels carrying Portuguese flags mushroomed in the second part of the 1830s. In Leslie Bethell's words, "Portugal was a particularly hard nut for Britain to crack".[566] As British attempts to establish a treaty with Portugal to implement a right of search and detention of Portuguese ships involved in the slave trade south of the Equator proved unsuccessful, Lord Palmerston presented the "Slave Trade Bill" to the British Parliament in 1839, extending the possibility of capture of Portuguese ships trafficking south of the Equator.

The bill attracted two significant objections in the British Parliament. The criteria established in *Louis* (1817) were raised to oppose the bill on the grounds that under the law of nations the right of search during peacetime could only be granted if provided *by treaty*. Another point was that, as the next natural political step after failed negotiations would be a declaration of war, British parliament should not entertain the bill, as doing so implied usurping royal prerogative[567]. Despite those objections the bill was passed, as a solution for protecting Britain of any

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[565] See MAMIGONIAN, In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil-British West Indies, 1830s-1850s).

[566]BETHELL, The Independence of Brazil and the Abolition of the Brazilian Slave Trade: Anglo-Brazilian Relations, 1822-1826, p. 116.

[567] BETHELL, Leslie, Britain, Portugal and the Suppression of the Brazilian Slave Trade: The Origins of Lord Palmerston's Act of 1839, **The English Historical Review**, pp. 761–784, 1965, p. 779.

claims brought to British courts by private individuals seeking reparation.[568]

As we have seen when considering the Act through the minutely detailed *Instructions* of 1844 in chapter 2, British law provided for the possibilities when a foreign vessel outside British waters could be liable to capture and their respective fora of adjudication in case of seizure.

Once the captor had evidence about the nationality of the ship in hand (with or without a visitation for that end), the circumstances of the ship should be classified in one out of three options: *under the regulation of a treaty* (that provided or not for the right of search etc.); *certainly out of the reach of any treaty* (which would prevent any right of visit or search besides the essential inspection of sufficient papers as to confirm its nationality under the British interpretation); and *under suspicion of being a vessel that cannot "justly claim" the protection of a flag*. That last case was regulated by the Palmerston Act.

The Palmerston Act dealt with "Portuguese vessels engaged in the Slave Trade, *and other vessels* engaged in Slave Trade *not being justly entitled to claim the protection of the flag of any state or nation*". Under the Act, it was lawful for British officers "to detain, seize, and capture any such vessels, and the slaves, if any, found therein (…) as if such vessels and the cargoes thereof were the property of *British* subjects".[569] Accordingly, they should be brought to adjudication in the *High Court of Admiralty of England, or in any Vice-Admiralty Court within British dominions*. During the proceedings, it fell for the proctor of the captured vessel to prove it *not to be British or Portuguese* and thus

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[568]BETHELL, Britain, Portugal and the Suppression of the Brazilian Slave Trade: The Origins of Lord Palmerston's Act of 1839, pp. 780-781.

[569] *CPGS, 1839, Palmerston Act*, Article I.

"stablish to the satisfaction of such court that they are entitled to claim the protection of the flag of a state other than *Great Britain and Portugal"*.[570]

That is, capture could be based on a suspicion that a vessel was Portuguese, and the burden of proof lied with the captured vessel to establish its nationality. The Act further included for an equipment clause, which enabled detention of ships only fitted for slave trade,[571] and a breakup clause, which provided for the dismantling of condemned ships that the British chose not to incorporate into British service[572]. In case the owner succeeded in proving "to the satisfaction of the court" that the vessel was under the protection of any other flag (for being inside the network of treaties or outside it), the vice-admiralty court should proceed to the restitution of the vessel and its cargo to the owners.[573]

Three years after the Act had entered into force, in July 1842, Portugal and Britain exchanged ratifications at Lisbon for a new treaty establishing rights of mutual visit and search[574], with less restrictions[575], which would thereafter govern the adjudication by the Anglo–Portuguese mixed commissions (established by the 1817 Treaty)[576]. The treaty also included a ten-article equipment clause[577] and a breakup clause applying in case neither of the parties of the treaty wished to acquire the ship after its declaration as good prize. Following the treaty, the British Act of 12 August 1842 repealed the provisions of the Palmerston Act within British legislation concerning Portuguese

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[570] *CPGS, 1839, Palmerston Act*, Article I.

[571] *CPGS, 1839, Palmerston Act*, Article IV.

[572] *CPGS, 1839, Palmerston Act*, Article V.

[573] *CPGS, 1839, Palmerston Act*, Article III.

[574] *Anglo-Portuguese Treaty of 1842*, Article II.

[575] *Anglo-Portuguese Treaty of 1842*, Article II, 5.

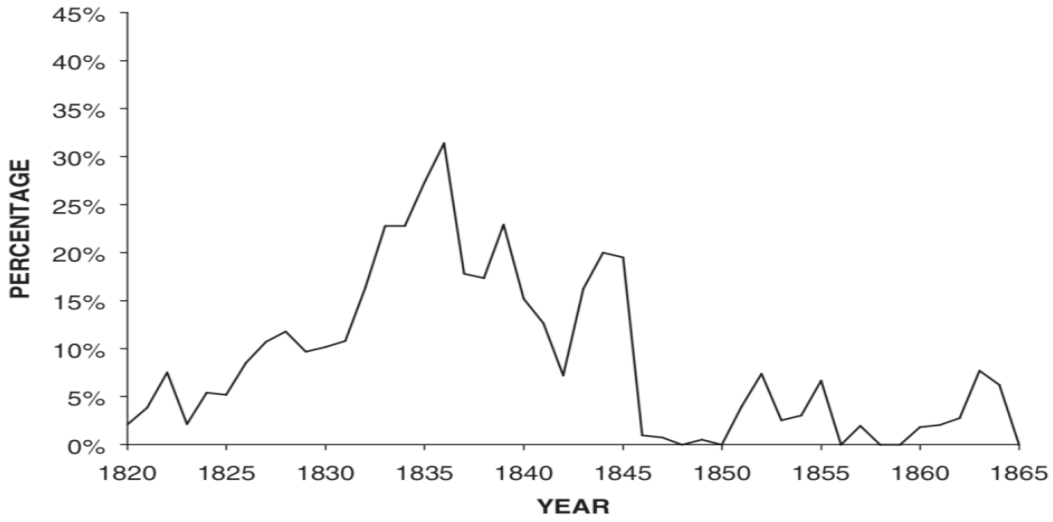
[576] *Anglo-Portuguese Treaty of 1842*, Article VI, VII.

[577] *Anglo-Portuguese Treaty of 1842*, Article IX.

vessels, but not those concerning those vessels "not entitled to claim the protection of any flag".

The Act definitely expanded the number of captured vessels that were adjudicated in British dominions such as St. Helena and in the Cape of Good Hope.[578] In his correspondence with the Law Officers, it was clear that Palmerston envisioned the Act as linked to a systemic policy of redirecting liberated African people to British colonies.[579] The quantitative relevance of the adjudication of mixed commissions in relation to the known number of slave trade voyages and to the adjudication by British Vice-Admiralty Courts is visible in the following figures. We can see a broader trend in the British policy of abandoning mixed commissions in favour of the admiralty courts, starting by 1839.

Figure 3- Percentage of known slave voyages adjudicated in mixed commissions[580]

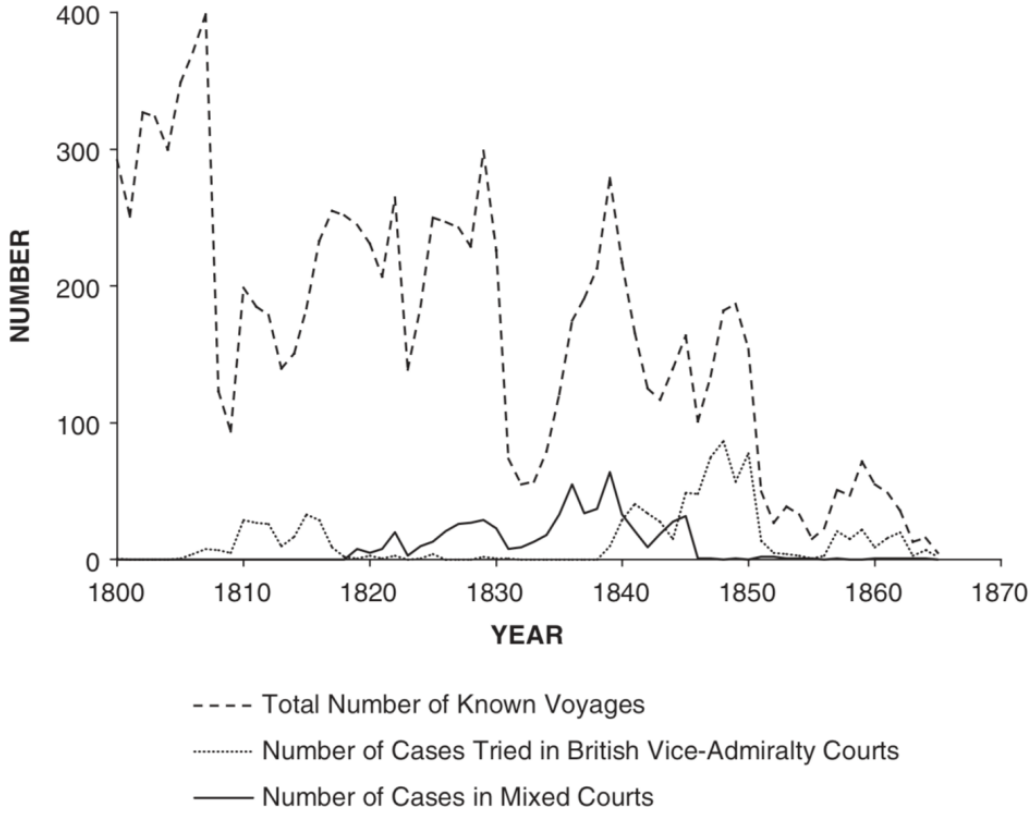


[578] See BETHELL, Britain, Portugal and the Suppression of the Brazilian Slave Trade: The Origins of Lord Palmerston's Act of 1839, p. 783.

[579] MAMIGONIAN, In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil-British West Indies, 1830s-1850s), p. 44.

[580] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p.81.

Figure 4 -Number of known slave trading voyages that ended in adjudication[581]



Under British law, Anglo–Brazilian mixed commissions never enjoyed exclusive jurisdiction over apprehended vessels. The 1824 Act explicitly limited jurisdiction for Spanish, Portuguese and Dutch captured ships.[582] Cases of captured Dutch vessels were barred from being brought to any court other than the mixed commissions established under the bilateral treaty. Spanish or Portuguese vessels could be judged by other courts and judges unless already pendent before mixed commissions.[583]

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[581] MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**, p.81.

[582] *CPGS, 1824, Consolidation Act of 1824*, Article LIX; LX.

[583] The 1824 Act does not specify the nationality of the courts. As a British regulation, one can safely interpret it as talking about, at least, British courts. The Anglo-Dutch treaty does not have any provision differentiating itself from the Anglo-Portuguese in the matter of jurisdiction, so

According to the British *Instructions of 1844*, a British capturer was *directed* to send a captured *Brazilian* ship —but not a Portuguese one— to other instances other than mixed commissions in one particular circumstance. Should a Brazilian slave trade ship be captured in British waters, it should be brought to Admiralty courts instead of mixed commissions. Otherwise, if a Brazilian ship, suspected to be engaged in slave trade, was captured outside British waters, the captor should follow the Treaty of 1817. The capturer should bring it to one of the "two Mixed Commissions […] which shall be the nearest, or which the commander of the capturing ship shall upon his own responsibility think he can soonest reach from the spot where the Slave ship shall have been detained".[584]

Yet a "deviation" of vessels *suspected to be Portuguese* would be legitimised by the Palmerston Act in 1839. This would drastically shift the policy that Britain had pursued so far, that is, expanding the jurisdiction of the Rio mixed commission to cover Portuguese vessels through broader criteria for nationality. Next, we will examine the context of the employment of the Palmerston Act as linked to other ongoing discussions about the conditions of liberated Africans in Brazil.

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evidence on the Dutch legislation or the Treaty's interpretation of the Anglo-Dutch treaty would be necessary to affirm that limitation to be applied beyond the British jurisdiction.

[584] *OHT*, *Anglo-Portuguese Treaty of 1817 (Instructions)*, Article I: "Every British or Portugueze ship of war shall, in conformity with Article 5 of the Additional Convention of this date, have a right to visit the merchant ships of either of the two Powers actually engaged, or suspected to be engaged in the Slave Trade; and should any slaves be found on board according to the tenor of the 6th Article of the aforesaid Additional Convention;—and as to what regards the Portugueze vessels, should there be ground to suspect that the said slaves have been embarked on a part of the coast of Africa where the traffic in slaves can no longer be legally carried on, in consequence of the stipulations in force between the two High Powers: these cases alone, the commander of the said ship of war may detain them; and having detained them, he is to bring them, as soon as possible, for judgement before that of the two mixed Commissions appointed by the 8th Article of the Additional Convention of this date, which shall be the nearest, or which the commander of the capturing ship shall upon his own responsibility think he can soonest reach from the spot where the slave-ship shall have been detained."

Liberation and deviation of vessels

Tensions between Brazilians and British representatives on the destination of liberated Africans began when Brazil passed the 1831 Act on the Abolition of Slave Trade. It was a response to the Brazilian commitment to abolition in three years, as per Article I of the 1826 Treaty[585].

The Act would come to be known as the "Law for British eyes" or a "totally inoperative"[586] Act. Although most of Brazilian and international historiography regard the 1831 Act as a stillbirth, more recent works point to at least three points that must be considered beyond such general idea: first, the Act was an expression of national sovereignty in the sense it was meant not exclusively to grovel to British pressure but as an attempt to redescribe the first abolitionist move in Brazil as coming from Brazilians themselves; second, the Act was central in legal argumentation, on one side, by slaves, abolitionists and British pressures towards effective abolition of slavery and, on the other side, by those who sought to delay the process of abolition.[587] Third, the Act was effective in at least two of its first years, when the numbers of slave trafficking considerably dropped. Notwithstanding, does not belie the fact that the Act would later indeed be subject to total boycott after a couple of years, by the actions of a group of elite slave holders. [588]

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[585] *OHT*, *Anglo-Brazilian Treaty of 1826*, Article I: "At the expiration of three years, to be reckoned front the exchange of the Ratifications of the present Treaty, it shall not be lawful for the Subjects of The Emperor of Brazil to be concerned in the carrying on of the African Slave Trade, under any pretext or in any manner whatever, and the carrying on of such Trade after that period, by any person, Subject of His Imperial Majesty, shall be deemed and treated as Piracy."

[586] As mentioned e.g. in LLOYD, **The Navy and the Slave Trade**, p. 45.

[587] The employment of the 1831 Act by both abolitionists and anti-abolitionists is depicted by Beatriz Mamigonian in details through the social history of its implementation: MAMIGONIAN, Beatriz G. **Africanos livres: a abolição do tráfico de escravos no Brasil**. São Paulo: Companhia das Letras, 2017.

[588] The original phrase in Portuguese ("*lei para inglês ver*") roughly means "just-for-show law", or "the law just to show to the English", i.e. for the sake of maintaining appearances with the

The final version of the Act of 1831 declared that all slaves coming from outside Brazil[589] were to be declared free, and imposed sanctions to slave importers, whose punishment should follow Brazilian criminal code provisions on the crime of enslaving free people. This entailed three to nine years of imprisonment, with the condition that prison time should be at least equal to the unjust captivity plus one third of its time. Further sanctions included a fine and total restitution of the *expenses arising from transportation of those captured back to Africa*. The Brazilian government would, according to the Act, arrange with African authorities for the liberated Africans to be *granted asylum*[590].

The point of returning the people captured as slaves back to Africa did not have precedent in the regime against slave trade established since the first Anglo–Portuguese treaties. Under the previous Portuguese regulation to the treaty of 1817[591], African people liberated by the Rio mixed commission would be issued certificates of emancipation, and would work as servants or free workers, under the curatorship of judges of orphans[592].

The British response to the 1831 new regulation was a formal protest by the British *chargé d'affairs* in Brazil, in which he observed that returning the Africans would only risk their lives, as they

English. See PARRON, **A política da escravidão no império do Brasil, 1826-1865**, pp. 66-67.; MAMIGONIAN, Beatriz G. **Africanos livres: a abolição do tráfico de escravos no Brasil**, p. 970 et seq. chapter 2.

589 *CLI*, *Act of 1831*, Art. 1.

590 *CLI*, *Act of 1831,* Art. 2. Such provisions were to be applied in case of apprehension by the Brazilian forces in national or foreign harbours. 'Importers' were broadly defined as the commander of the ship, the recipient of its cargo, or anyone that, in any capacity, assisted their debarkation. Those who *consciously* bought slaves that should be free by the law were liable only for the costs of their return to Africa.

591 *BDLB*, *Alvará of 1818.*

592 MAMIGONIAN, Beatriz G., **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**, University of Waterloo, Waterloo (Ontario), 1995, p. 28.

would once more suffer the bad conditions of voyage, and would be susceptible to ill treatment by disappointed slave traders[593].

Brazilians responded by pointing to the risk the government perceived that those African people could represent to the white population of Brazil[594]. With the increase of the number of slaves in the country — as a result of mushrooming importations that began in the 1820s —, public fear arose in the elite that a "Haitian revolution" could happen in Brazil. In the subsequent years, several slave insurgencies led to a governmental response of more violent repression, increased surveillance, and censorship of abolitionist publications.

Naval officers would then refuse to command Brazilian schooners charged with searches and apprehensions due to the social risk of its duties.[595] The lack of support by the judiciary was registered in other accounts, which highlighted, for example, the fact that most slaves who were indicated in legal proceedings as potential beneficiaries had to wait for judicial decisions "under the protection" of his or her master.[596]

By then, openly racist speculations linked slaves to diseases and many other social harms.[597] In parliamentary debates that culminated in the 1831 Act — as on other questions related to slave trade in the subsequent two decades —liberals and conservatives discussed slave trade in terms of *public security, economic stability, national*

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[593] MAMIGONIAN, **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**, p. 29.

[594] MAMIGONIAN, **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**, p. 29.

[595] MAMIGONIAN, **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**, p. 27.

[596] MAMIGONIAN, **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**, p. 26.

[597] See GRADEN, Dale T, An Act "Even of Public Security": Slave Resistance, Social Tensions, and the End of the International Slave Trade do Brazil, 1835-1856, **Hispanic American Historical Review**, pp. 1–27, 1996.

development, foreign interference, and the "dignity of the nation". The humanitarian side of abolishing slave trade was rarely addressed in isolation, as a central argument or even as a disagreeable idea. There were, however, those who favoured more urgent measures to implement either such *humanitarian necessity* of slave trade abolition or actions to keep the *autonomy* of the recently-independent state. Others combined justifications to defend a *slower pace in its implementation*.[598]

Since the beginning of the British project to abolish slave trade in Brazil, British diplomatic representatives and commissioners allocated in Brazil kept the Foreign Office informed about the main facts on law and social life involving slavery.[599] There were points when correspondence would include also some instructions for adjusting their reporting or their conduct accordingly. In 1835, the British legation in Rio was instructed to change its position regarding the 1831 Act clause on the transportation of freedmen and women back to Africa. As the Act evidenced Brazilian interest of declining to receive free African people in its territory, Britain should start offering them a destination. Their destination should not be their place of origin as stated in the 1831 Act, but Trinidad, a British colony, which would willingly receive them, with the condition that all transportation costs be covered by Brazilian authorities.[600]

By September 1836, in response of a request by the Foreign Office,[601] King's Advocate John Dodson contended that the measure of re-exportation contained in the Law of 7 November 1831 *directly affronted* the *Anglo-Brazilian Treaty of 1826*. His objection was not

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[598] See RODRIGUES, **O infame comércio : propostas e experiências no final do tráfico de africanos para o Brasil, 1800-1850**, pp. 69-93.

[599] MAMIGONIAN, **Africanos livres: a abolição do tráfico de escravos no Brasil**(chapter 5).

[600] MAMIGONIAN, **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**.

[601] FO83/2346. Foreign Office to His Majesty's Advocate General, 6 May 1833, p. 114.

against all cases of re-exportation provided by Brazilian law, but only in the cases of slaves liberated by decision of the mixed commission. Cases of slaves brought in mere violation of domestic law would *not* violate the treaty *per se*. It was up to the British government the choice of calling on Brazilian authorities to "abstain […] from the Reexportation of the Negroes until measures had been adopted for securing them an Asylum on the Coast of Africa, but it could not […] justly complain of an infraction of the Treaty".[602] The arrangement for their removal to the Island of Trinidad, put on the table by Britain, would probably "prevent any further misunderstanding", the Law Officer added. [603]

It was common knowledge in Brazil that Britain needed workforce for plantations in its colonies. A similar agreement of emigration had been made with Spanish authorities in Cuba.[604] Under these circumstances, Brazil refused the offer.[605]

After some years of diplomatic failed pressures against ineffective efforts of Brazilian authorities in securing conditions of freedom to liberated Africans[606], British representatives started a new policy that would be combined with a shift on the reading of the colours of suspected vessels. In 1841, the Foreign Office openly implemented what Beatriz Mamigonian calls the "Brazilian branch of the African emigration scheme".[607]–The vessel *Dois de Fevereiro* was the first one taken in this new practice. *Dois de Fevereiro* was a Portuguese-flagged

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[602] FO 83/2347. Dodson to Viscount Palmerston, September 1836, p. 126

[603] FO 83/2347. Dodson to Viscount Palmerston, September 1836, p. 126

[604] MAMIGONIAN, **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**, p. 41.

[605] MAMIGONIAN, **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**, p. 41.

[606] See MAMIGONIAN, **Africanos livres: a abolição do tráfico de escravos no Brasil**(chapters 5-6).

[607]MAMIGONIAN, In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil-British West Indies, 1830s-1850s).

vessel which was sent to the British colonies for adjudication instead of being brought to the Rio commission.

Writing to Viscount Palmerston, Mr. Ouseley commented on how the circumstances corroborated his opinion on "the expediency of *taking this step* [sending Dois de Fevereiro to the British colonies], *instead of bringing the case before the Mixt Court*, under the present peculiar circumstances of this country and of the Mixed Commission".[608] He reported ongoing delays of mixed commission proceedings due to fraudulent evidence and the susceptibility to bribery by people charged with the administrative proceedings of slave trade vessels and liberated people. He further testified about what he put as how the Brazilian government learned the lesson that by disposing of the slave traders' vessels Britain could press against the "defective execution" of the treaty —by which he meant the proscription of slave trade under Article I, ineffective under the Brazilian Act of 1831.

One can understand from his letter that the mixed commission in Rio accomplished its mission by showing Brazilians the power of such measures through "the reluctance of captors to undergo the vexations and dilatory proceedings of the Mixed Commission". He concluded that, "[i]ndependent, therefore, of the advantages to the Africans[609] and to Her Majesty's colonies gained sending "Dous de Fevereiro" to Demerara, I trust the general objects of Her Majesty's Government have been effectually secured by that measure". [610]

Ouseley also had the opinion that sending captured vessels under Portuguese colours to be adjudicated in the British dominions

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[608] *HCPP, Class B*, 1842. Mr. Ouseley to Viscount Palmerston, 30 April, 1841, p. 641.

[609] Ouseley would be more emphatic in later correspondence that his intention was to secure a more humane treatment for the Africans; "being also certain that no greater discouragement can be given to the Slave Trade than thus disposing of the captured Africans" (*HCPP, Class B*, 1842. Mr. Ouseley to Viscount Palmerston, 18 May, 1841, p. 652).

[610] *HCPP, Class B*, 1842. Mr. Ouseley to Viscount Palmerston, 30 April, 1841, p. 641 et seq.

should become a new directive to all similar cases. "I am prepared for the opposition that must be expected to this plan, as every effort will be made to continue, if possible, the old system" [611].

In a response from Palmerston to Ouseley in 1841, the British Foreign Secretary acknowledges the measure and reports that "Her Majesty's Government entirely approves the vessel having been sent to Demerara for Adjudication, and Her Majesty has commended that directives shall be given to the Board of Admiralty that all vessels under the Portuguese flag may be sent to a British colony for trial, whether with or without slaves on board." [612] He also instructed the British *chargés d'affaires* to notify the Brazilian government the same procedure would be implemented to Brazilian-flagged ships "if the Government of Brazil continues to set at nought, as it hitherto had done, the engagements which carried on by Brazilian subjects".[613]

In that same year, Palmerston instructed the British commissioners in Rio to offer liberated Africans the possibility of going to British colonies, where slavery had been abolished and they would live in freedom.[614] Viscount Palmerston's plan included inspecting the situation of all the previously liberated Africans and offering them all a passage to the British colonies.[615] Such "recruitment" would be extended also to liberated Africans who had not been declared so by the mixed commission, as in the case of *Flor de Loanda* (1838).[616] In 1843, threats

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[611] *HCPP, Class B*, 1842. Mr. Ouseley to Viscount Palmerston, 30 April, 1841, p. 641.

[612] *HCPP, Class B,* 1842. Viscount Palmerston to Mr. Ousely, 23 July 1841, p. 648.

[613] *HCPP, Class B,* 1842. Viscount Palmerston to Mr. Ousely, 23 July 1841, p. 648.

[614] MAMIGONIAN, **Theatre of Conflicts: The Anglo-Brazilian Mixed Commission Court in Rio de Janeiro, 1827-1845**, p. 42.

[615] MAMIGONIAN, In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil-British West Indies, 1830s-1850s), p. 46.

[616] MAMIGONIAN, In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil-British West Indies, 1830s-1850s), p. 49.

of the British representatives of bringing all liberated Africans to British colonies after the judgement of mixed commissions were responded with the accusation of Brazilian Foreign Secretary Paulino Soares de Souza that such measures would be a violation of the Anglo–Brazilian treaty regime. He claimed the regulation to mixed commissions of the 1817 Treaty assigned to the Brazilian government the role of supervising liberated Africans.[617]

"Taken as a whole, the Brazilian branch of the liberated African emigration scheme may have transferred more than 10,000 Africans bound for Brazil to the British West Indies instead."[618] As a declared policy by British representatives, Portuguese vessels that would otherwise be brought before mixed commissions were sent to admiralty courts in British dominions. Such deviation made an obvious difference to the support of British plantations by the work of people living under conditions many times equivalent to formal slavery.[619] Under the Palmerston Act, a legal justification was easy for bringing vessels under the Portuguese flag to admiralty courts. Further research is needed on which were the criteria of nationality applied in those courts and in the Anglo–Portuguese commissions after the Treaty of 1842; Brazilian and Portuguese nationalities were so interchangeable among slave traders by then that it is not unlikely Brazilian vessels were captured under the Palmerston Act or the Treaty of 1842 for the suspicion of being Portuguese and even condemned for *being* Portuguese.

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[617] MAMIGONIAN, **Africanos livres: a abolição do tráfico de escravos no Brasil**, pp. 2318-2339(chapter 5).

[618] MAMIGONIAN, In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil-British West Indies, 1830s-1850s), p. 52. See the list of vessels which disembarked Africans in British colonies coming from Rio de Janeiro at MAMIGONIAN, **Africanos livres: a abolição do tráfico de escravos no Brasil** chapter 5 (table 3).

[619] See ASIEGBU, **Slavery and the Politics of Liberation 1787-1861: a study of liberated African emigration and British Anti-Slavery Policy**.

In fact, from the beginning of the 1840s, British interventions in the open seas increased in quantity and severity towards all vessels; Brazilian and foreign ships would be visited, seized and destroyed by the British navy[620]. Part of that intensified mode of work was British cruisers started taking vessels captured *in the coast of Brazil* to adjudication in the British colonies, where the liberated Africans would be "invited" to stay as indentured labourers.[621]

The provision of Article III of the instructions to the 1817 Treaty was the only legal limitation the Anglo-Brazilian regime presented both to the British deviation scheme and to arbitrary captures that would come between 1840 and 1845: "no merchantman or slave-ship can, on any account or pretence whatever, be visited or detained within cannon-shot of the batteries on shore". Discussions around the application of such clause occupied most of the legal argumentation in those years of relations between Brazilian and British representatives, as most Brazilian protests related to captures allegedly performed within the the cannon-shot perimeters. It represented a last decaying phase before the total extinction of the triple formula.[622]

E.RELEASING THE GHOST

Attempt to extinguish mixed commissions

Discussing French reluctance in adhering to the British three-step formula, Ward observed that "[o]f all rights dear to the heart of man, the right of being tried by a judge of his own people was the dearest."

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[620] DE ALMEIDA, O Brasil e a diplomacia do tráfico (1810-1850), p. 13.

[621] MAMIGONIAN, In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil-British West Indies, 1830s-1850s), p. 46.

[622] See e.g. FO 83/2351. John Dodson to the Earl of Aberdeen, 9 October 1843, p. 325; FO 83/2351. John Dodson to the Earl of Aberdeen, 3 July 1843, p. 200; *CE.* Consultation of 20 September 1845, p. 432-448; FO 83/2352. John Dodson to the Earl of Aberdeen, 13 June 1844, p. 133; FO 83/2352. John Dodson to the Earl of Aberdeen, 26 December 1845, p. 479;

[623] It is probably safe to assume part of that perception had less to do with sentiments, and more with the consequences of having subjects' rights adjudicated by foreigners. As we have seen in chapter 2, this was one of the reasons explicitly mentioned by the British Foreign Office for adopting, at first, a regime of adjudication by mixed commissions for the suppression of slave trade instead of opting for the domestic model of prize courts. The British were also troubled by the idea of having nationals tried by foreign courts —we know from practice, however, that almost all vessels judged by such commissions belonged to subjects of the other state-parties, not to British nationals. In fact, by appointing British commissioners to the commissions in the dominions of foreign states and especially by virtue of its commissioners in Sierra Leone — often manned exclusively by the British—, Britain was able to secure possibly a wider adjudicative presence than it would if the system of adjudication in domestic courts as defined by the prize practice had been adopted.

From the moment Brazil adhered to the rules which were so adamantly refused by the United States and France as incompatible with the protection of their sovereignty, it also started negotiating an exit. One of the most troubling practical consequences of the Treaty of 1826 was precisely the very existence and work of the mixed commissions.

In a report of 1830 to the Brazilian parliament, the Brazilian Foreign Office recorded its first attempts to negotiate a new treaty to eliminate the mixed commissions of Rio and Sierra Leone, portrayed as "anomalous courts", a "too heavy burden to the treasury" which could also "unsettle the administration with inappropriate questions and subject

[623] WARD, **The Royal Navy and the slavers: the suppression of the Atlantic slave trade**, p. 80.

our citizens to poignant penalties"[624]. Those negotiation attempts were met with strong British resistance.[625]

Apart from negotiation, Brazilian representatives also tried to get rid of the Anglo–Brazilian mixed commissions through legal interpretation. Chevalier de Mattos, Brazilian *chargé d'affairs*, in correspondence with the Earl of Aberdeen in October 1830, requested him to carry on the measures necessary to a "concerted dissolution of the mixed commissions". He argued that, after the date of 13 March 1830, mixed commissions were rendered superfluous; suspected vessels could then be brought to the respective ordinary courts of the parties, in accordance with the stipulations of the 1826 Treaty.[626] He was referring to Article I, providing for the *total prohibition of slave trade* by Brazilians and the treatment of slave trade as piracy within *three years from the exchange of ratifications* (i.e. 13 March 1830). In connection, Article II did state that the engagements of the Treaty of 1817 —the whole triple formula structure— would "bound to provide for the regulation of the said trade, *till the time of its final abolition*".[627]

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[624] *MRE1830*, p. 4.

[625] *MRE* 1830, p. 4.

[626] *HCPP, Class B,* 1831. The Chevalier de Mattos to The Earl of Aberdeen, 4 October 1830, p. 51.

[627] *Anglo-Brazilian Treaty of 1826*, Article I and II: "I- At the expiration of three years, to be reckoned front the exchange of the Ratifications of the present Treaty, it shall not be lawful for the Subjects of The Emperor of Brazil to be concerned in the carrying on of the African Slave Trade, under any pretext or in any manner whatever, and the carrying on of such Trade after that period, by any person, Subject of His Imperial Majesty, shall be deemed and treated as Piracy.

II-His Majesty The King of the United Kingdom of Great Britain and Ireland, and His Majesty The Emperor of Brazil, deeming it necessary to declare the engagements by which They hold Themselves bound to provide for the regulation of the said Trade, till the time of its final abolition, They hereby mutually agree to adopt and renew, as effectually as if the same were inserted, word for word, in this Convention, the several Articles and Provisions of the Treaties concluded between His Britannick Majesty and The King of Portugal on this subject, on the twenty-second of Jan. 1815, and on the twenty-eighth of July 1817, and the several Explanatory Articles which have been added thereto."

Viscount Palmerston rejected what he apparently perceived as a political proposal and responded that dissolution would be of "*much and serious inconvenience*", as it would take some time to arrange courts to exercise the criminal jurisdiction of piracy cases under the terms of the Treaty.[628] Chevalier de Mattos insisted, arguing that the three-year period established by the treaty was not only a *vacatio legis* for the total abolition of slavery, but rather marked *the period at the end of which the system of mixed commissions expired*. He argued that those *commissions were temporarily created* to rule on the *legality of the activity as per the treaty.* Only during that three-year period before total abolition was it reasonable to maintain commissions to decide if certain practices were *lawful depending on their circumstances*. According to the Brazilian *chargé d'affaires* in London, when that regime of only *partial* abolition was substituted by *total abolition* to Brazilian citizens, the point of mixed commissions had accordingly ceased to exist.[629]

The Foreign Office consulted British Law Officer Herbert Jenner on the grounds to answer Chevalier de Mattos' claim. Palmerston would answer the Brazilian diplomat in a note of July 1831, which adopted much of the wording on the Law Officer's report. He countered that the deadline of Article I of the *Anglo–Brazilian Treaty of 1826* established the period of three years *solely for the total proscription of slave trade*; the only deadline applicable to the mixed commissions was the one provided by the *Separate Article of 1817*.[630]

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[628] *HCPP, Class B,* 1831.Viscount Palmerston to the Chevalier de Mattos, 10 December 1830, p. 65.

[629] *HCPP, Class B,* 1832. The Chevalier de Mattos to The Earl of Aberdeen, 30 March 1831, p. 86.

[630] *HCPP, Class B,* 1832. Viscount Palmerston to the Chevalier de Mattos, 16 August 1831, p. 161. *Anglo-Portuguese Treaty of 1817 (Separate article)*: "As soon as the total Abolition of Slave Trade, for the subjects of the Crown of Portugal, shall have taken place, the two High Contracting Parties hereby agree, by common consent, to adapt, to that state of circumstances, the stipulations of the Additional Convention concluded at London, the 28th of July last; but in default of such alterations, the Additional Convention of that date shall remain in force until the

That separate article was part of the Anglo–Portuguese regime that Brazil had renewed under Articles II and III of the Treaty of 1826.[631] It provided for the expiration of the *Anglo–Portuguese Treaty of 1817* after *15 years of the date of total abolition of slave trade*, in case no further agreements were established between Portugal and Britain to update the treaty's provisions. The British Law Officer reasoned —and the Foreign Secretary repeated the argument to the Brazilian *chargé d'affaires*—, that as the entirety of the 1817 Treaty had been reproduced by Article II of the 1826 Treaty with Brazil, the wording of the separate article referring to the *total abolition of slave trade* should be read together with the *deadline under Article I* of the Treaty of 1826.[632] Thus, absent further agreements between Britain and Brazil, *Anglo–Brazilian mixed commissions would exercise their functions until 15 years after the 13th of March 1830*, i. e. the 13th of March 1845. Moreover, the note added, the subsistence of mixed commissions for the enforcement of the total abolition of trade to the Brazilian subjects was not a *particularity* of

expiration of fifteen years from the day on which the general abolition of the Slave Trade shall so take place, on that part of the Portugueze Government. […]".

[631] Anglo-Brazilian Treaty of 1826, Articles II and III: "II- His Majesty The King of the United Kingdom of Great Britain and Ireland, and His Majesty The Emperor of Brazil, deeming it necessary to declare the engagements by which They hold Themselves bound to provide for the regulation of the said Trade, till the time of its final abolition, They hereby mutually agree to adopt and renew, as effectually as if the same were inserted, word for word, in this Convention, the several Articles and Provisions of the Treaties concluded between His Britannick Majesty and The King of Portugal on this subject, on the twenty-second of Jan. 1815, and on the twenty-eighth of July 1817, and the several Explanatory Articles which have been added thereto.

III- The High Contracting Parties further agree, that all the matters and things contained in those Treaties, together with the Instructions and Regulations, and forms of Instruments annexed to the Treaty of the twenty-eighth of July 1817,—shall be applied, *mutatis mutandis*, to the said High Contracting Parties and Their Subjects, as effectually as if they were recited, word for word, herein; confirming and approving hereby, all matters and things done by their respective Subjects under the said Treaties, and in execution thereof."

[632] FO 83/2345. Herbert Jenner to Viscount Palmerston, 28 July 1831, p. 328.

the Anglo–Brazilian regime; mixed commissions were *adjudicating Spanish ships in that same circumstance*.[633]

Expiration of the triple formula

Fast-forward to 1845. A Brazilian diplomatic note was sent on 12 March 1845 to the British government conveying that the next day would mark *fifteen years after the date of exchange of ratifications to the Anglo–Brazilian Treaty of 1826*. Consequently, the provisions of the Treaty of 1817, in force among the parties under the articles II and III of the 1826 Treaty, were to be expire; "thus ceasing the right of visit, search, and all its other provisions", *i.e.* the right of capture and all provisions on the adjudication by mixed commissions. The note also offered a six-month extension, so the mixed commissions could finish adjudication of pending cases[634].

This was not the first communication of that sort Britain received from Brazilian diplomats in those years. The Anglo–Brazilian Treaty of Commerce of 1827 — signed in the same context of the treaty for the abolition of slave trade, was declared by Brazil to have expired in 9th November 1844[635]. The treaty provided for the privilege of special civil and criminal jurisdiction (*juízes conservadores)* for British citizens. It also provided for British consuls to manage the property of British citizens deceased *ab intestato,* against creditors and legal heirs, all in accordance with the British law.[636] The question of the special jurisdiction

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[633] *HCPP, Class B,* 1832. Viscount Palmerston to the Chevalier de Mattos, 16 August 1831, p. 161.

[634] *HCPP,* Papers relating to the Convention between Great Britian and Brazil on the Slave Trade. Senhor França to Mr. Hamilton, 12 March 1845, p. 4.

[635] PINTO, Antonio Pereira, **Apontamentos para o Direito Internacional – tomo II**, Rio de Janeiro: F. L. Pinto, 1865, pp. 279-282. On the application of such privileges, see e.g. *CE*. Consultation of 27 October 1843, REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, p. 145. Consultation of 8 November 1844, REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, pp. 277-280.

[636] PINTO, **Apontamentos para o Direito Internacional – tomo II**, pp. 286-287.

had been one of the most prominent pending questions between the two governments in the previous decade and had come up alongside claims for injustice in the slave trade suppression system. [637]

Before the British received the second correspondence of that nature, indicating the expiration of the anti-slave trade treaty, the Brazilian Council of State had issued a report in the *previous Sunday* on the question whether the British government should be informed of the expiration of the that treaty.[638] The Council recalled Palmerston's correspondence of 1831 and considered the interpretation offered within it when contemplating the recommendation in favour of the communication. It was the Council that suggested the six-month extension. It was the time granted by Britain for Brazilian vessels to return to its ports before the total abolition provided by Article I was implemented — instead of 13 March 1830, the total abolition actually entered into force at 13 September 1830.

On the more complex question of which steps should be taken by the Brazilian government after the communication, the Council issued a report two months later. Among the recommendations was that Brazil should wait for a proposal from Britain; that any further treaty should follow the Anglo–French model of the 1831 and 1833 treaties of *domestic adjudication* and should prevent against captures of vessels leaving Brazilian ports and vessels transporting foreign migrants.[639] "The right of visit, search, and capture, so *oppressive by its own nature*, even when exercised with the greatest loyalty and good faith, is so liable to

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[637] *HCPP, Class B,* Extract of a Letter from M. Lopes Gama to Mr. Ouseley, dated Rio de Janeiro, 26 February 1840, p. 157.

[638] *CE*. Consultation of 9 March 1845, approved in 7 May 1845, REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, p. 309.

[639] *CE*. Consultation of 9 March 1845, approved in 7 May 1845, REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, pp. 321-326.

abuses, and so grave are they that the Imperial Government shall employ all efforts, and even no small sacrifices in that is not re-established". [640]

Three councillors dissented. Two of them thought it essential to Brazilian interests to seek new agreements with Britain. One of them, Lopes Gama, argued it would be better to reach an agreement before declaring the treaty expired; as slave trade was to be treated as piracy, *it was easy to foresee the problems Britain could cause now that it was not bound by anything*.[641]

Lord of Aberdeen and Canning had been collecting ideas on how to proceed in case Brazilians had recorded the date of expiration. Aberdeen had a first suggestion of proposing to the Brazilian government a new treaty, similar to the Anglo–Portuguese Treaty of 1842, and, in case this proposal was declined, informing Brazil it would be treated in the same manner as Portugal.[642] Some years later, Aberdeen himself would come up with the idea of using the remaining Article I and the word *piracy* to ground a new policy without exceeding British rights under the treaty —and avoid a political problem that happened with the massive opposition to the Palmerston Act at the past.

Aberdeen had shown interest in the piracy clause many years before. In 17 October 1829, he had called for the views of the King's Advocate on that matter for the future. The Earl of Aberdeen contemplated *"[w]hether would not be desirable, that some competent court should be erected in Africa to take cognizance of Acts of Piracy committed by Brazilian subjects under the Convention of November, 1826*". After all, he reasoned, were not the other provisions in force just

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[640] REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, p. 322.

[641] *CE*. Consultation of 18 April 1845, REZEK (Ed.), **Conselho de Estado 1842-1889: consultas da seção de negócios estrangeiros**, p. 324.

[642] BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, p. 244.

until the formal slave trade abolition?[643] Surprisingly, this consultation was never addressed by the Law Office. There is no further correspondence on the matter, and, in 1845 (more than 15 years later), Viscount Palmerston himself mentioned no report had been presented to answer his question.[644]

The Law Office would partially address the matter of the piracy clause in a report of January 1835 by John Dodson, answering a question raised by the Brazilian commissioners in Rio de Janeiro on how the mixed commissions could enforce the provision of piracy under the treaty. By then, the Law Officers were of the opinion that the mixed commissions were *not authorized by the 1826 Treaty to determine the penalties for the practice of slave trade "deemed as piracy" under Article I*. It was then for the *Municipal Court of Rio de Janeiro to try the offender*, under *domestic laws* against piracy.[645]

Now called upon to offer an opinion on what should be the answer to the Brazilian note of 12 March 1845, the Law Officers prepared one of the longest reports on the matter of slave trade. The Law Officers had been made aware of all the previous correspondence on the matter, including Viscount Palmerston's letter of 1831 which indicated the date of 13 March 1845 as the possible expiration date of mixed commissions[646]. Law Officers had to respond whether Britain should agree to the expiration of any of the treaty's provisions, report on any

[643] FO 83/2345. Foreign Office to the King's Advocate, October 17, 1829.

[644] See FO 83/2352. Foreign Office to Her Majesty's Advocate, Attorney and Solicitor General, 13 May 1845, p. 325.

[645] FO 83/2346. John Dodson et al. to the Duke of Wellington, 26 January 1835, p. 237.

[646] See the previous subtitle on the extinction of mixed commissions.

rights remaining in force and, if necessary, write a proposal of a legal regulation to enable Britain to act upon them.[647]

They answered that, first, the dispositions of the 1817 Treaty were definitely *no longer applicable*, and this should so be conceded to the Brazilian government. Yet, they reasoned under Article I of the Anglo–Brazilian Treaty of 1826, Britain still had the right to "order the seizure of all *Brazilian Subjects found upon the High Seas* engaged in the Slave Trade, of *punishing them as Pirates*, and of *disposing of their vessels* in which they may be captured together with the goods on board belonging to them as *Bona Piratorum*". Further legislation should be prepared to carry it into full effect.[648]

In the words of Leslie Bethell, "It was already beginning to look as though Lopes Gama [the Brazilian State Council member who opposed the Brazilian move to declare the expiration of the treaty] might be right".[649] Both the British squadron and the British commissioners held fast onto their positions, refusing to stop their functions until an explicit order was given.[650]

The Aberdeen Act would take some months to be enacted into law, on 9 August 1845. Before being submitted to parliament, the bill, which was prepared by a Judge of the High Court of Admiralty, Stephen Lushington, and Herbert Jenner (who had been Advocate General in the 1830s), [651] was also placed before the consideration of

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[647] See FO 83/2352. Foreign Office to Her Majesty's Advocate, Attorney and Solicitor General, 13 May 1845, p. 325.

[648] FO 83/2352. John Dodson et al. to the Earl of Aberdeen, 30 May 1845, p. 349.

[649] BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, p. 252.

[650] BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, p. 252-253.

[651] BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, p. 256.

King's Advocate John Dodson[652]. Not without opposition in parliament, the Aberdeen Bill passed[653].

Piracy and the Aberdeen Act

In a note of 25 July 1845 to the British Foreign Secretary, M. Lisboa discusses the system of commissions, which would soon expire, and the new strategy Britain was entertaining, through its domestic law. Mixed commissions, he claimed, had served to enable the *British government to expand, arbitrarily, the right of visit, both by its commissioners and British cruizers*. Now, the Aberdeen bill *was poised for flagrantly violating the principles of international law*, by imposing *sanctions to Brazilian subjects which were exclusively the prerogative of the Brazilian Crown*.[654]

Lisboa's view about the Aberdeen bill seemed very similar to John Dodson's opinion of January 1835 that we saw above. While the mixed commissions were working, they were *not authorized* to determine the penalties for *piracy* under Article I of the Anglo–Brazilian Treaty exactly because it *was under the domestic jurisdiction to rule on piracy* to be established *under domestic laws*.

One of the strongest objections to the Aberdeen bill in the British parliament related to that point: *Britain did not have a right to pass a law to punish subjects of a foreign nation*.[655] Given that slave trade was

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[652] FO 83/2352. John Dodson to the Earl of Aberdeen, 2 July 1845, p. 365.

[653] MATHIESON, **Great Britain and the Slave Trade, 1839-1865**, p. 22; BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, pp. 260-263.

[654] *HCPP, Class B*, 1846. M. Lisboa to the Earl of Aberdeen, 25 July 1845, p. 314.

[655] BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, pp. 263-265.

not deemed as piracy under the law of nations, no other state could enforce it. The contemporary doctrine was unanimous in that point.

Wheaton (a US lawyer) and Hall (a British lawyer) concurred in their textbooks on the idea that states could declare certain offenses as piratical and punish their own citizens for that, even when they were not considered piratical under the law of nations. "*Municipal laws* extending piracy beyond the limits assigned to it by international custom *affect only the subjects* of the state enacting them and foreigners doing the forbidden acts within its jurisdiction".[656]

Brotero (the Brazilian lawyer we mentioned in chapter 3) also saw a *clear difference* between piracy as a civil offence and as a *jus gentium* offence: the former might only be judged by domestic courts and under domestic laws; the latter, by the capturer's courts from whatever nationality.[657] As Antonio Pereira Pinto (also Brazilian) would assess in 1865, the British interpretation was violating "a civil law principle, of a political character, and universally adopted by the *civilized nations*, which *would never allow the interference, in their territory, by a foreign country in the administration of justice*".[658]

Robert Phillimore (the most prominent British international law author of that century) did not address exactly that point when writing in 1854. He stated, generally, that pirates were "justiciable everywhere", as the pirate is *hostis humani generis*[659], so could not claim immunity from trial in the tribunal of the captor[660]. In fact, he noted, *the pirate does*

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[656] HALL, **A Treatise on International Law**, p. 264; This idea is also found in WHEATON; CALVO, **Historia de los progresos del derecho de gentes, en Europa y en América, desde la paz de Westfalia hasta nuestros dias**, pp. 289-290.

[657] BROTERO, **Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar**, p. 162.

[658] PINTO, **Apontamentos para o Direito Internacional – tomo II**, p. 286.

[659] PHILLIMORE, **Commentaries upon International Law**, p. 281.

[660] BELLO, **Principios de derecho de gentes**, p. 365.

not have a national character.[661] By that time, he conceded, British law did not yet consider slave trade as *jure gentium* piracy. Yet when he addresses the Aberdeen Act, Phillimore links it to the case of *Felicidade* as to point a justification for the necessity for the Act.

Felicidade was a Brazilian schooner which was captured by a British ship in July 1845. After the British had taken control of the ship, the crew of *Felicidade* reacted and killed the British seamen aboard. They were brought to trial before a British court and were sentenced to death, but the British Court of Criminal Appeal reversed the conviction. The acquittal relied on the illegality of the capture of the Brazilian vessel in the first place, as it was only equipped for slave trade.[662] It is quite unclear for the reader if Phillimore meant the case was a proof of the British respect for legal provisions or of a British resentment linked to a will of justice to its nationals. Phillimore states: "It is impossible, however, to be much surprised after this trial, and the facts revealed during its pendency, at the statute of the British Parliament in August, 1845."[663]

Phillimore underscored that even though *lives of British subjects* were concerned, Brazilian seamen convicted for murder had their sentence thrown out on the basis that the *possession of the Brazilian ship by the British officers had been illegal*. He explains the concept of piracy: "an assault upon vessels navigated on the high seas, committed *animo furandi*, whether the robbery or forcible depredation be affected or not, and whether or not it be accompanied by murder or personal injury".[664] Taking that notion into consideration,"[t]he decision must have been founded on the two propositions that, *jure gentium*, the Slave Trade was not Piracy, and that unless it were so, the *British Courts had, under the*

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[661] PHILLIMORE, **Commentaries upon International Law**, p. 281.

[662] BETHELL, **The Abolition of the Brazilian Slave Trade: Britain, Brazil and the Slave Trade Question 1807-1869**, pp. 274-275.

[663] PHILLIMORE, **Commentaries upon International Law**, p. 254.

[664] PHILLIMORE, **Commentaries upon International Law**, p. 282.

circumstances, no jurisdiction over an offence committed on board of Felicidade."[665]

Going back to those two set of critiques by Mr. Lisboa, to the regime that was then expiring and to the bill of Aberdeen regime that was being prepared by Britain, the Earl of Aberdeen was faced with the task of evaluating the past and responding the most serious critique to the British legal choice for the future. In his letter, he argued that as far as Brazil was dissatisfied with the work and the role of mixed commissions, Brazil should have engaged in new negotiations— he ignored the years of Brazilian attempts to extinguish them. On the violence described by M. Lisboa against Brazilian subjects and their property, he retorted pointing to the disrespect directed to British representatives by the Brazilian government—in what was probably a reference to the repeated consultations and complaints made by the British representatives on the treatment of liberated Africans.

The Earl of Aberdeen also contended that while it was the right of Brazil to act for the extinction of mixed commissions — and Britain, he maintained, had acknowledged this in the past — Britain was now claiming *its own "right to ensure that Brazilian subjects convicted of carrying on the slave trade shall be deemed and treated as pirates"*. A right Britain "possessed ever since the expiration of three years from the ratification of the Treaty of 1826".[666] He continued: the context changed when the Brazilian government created a *necessity* for it. On the criticism directed at the Aberdeen Act, he argued it was not the case that a British law was used to punish Brazilian subjects, as M. Lisboa stated; rather, the *Treaty of 1826 itself provided for the absolute prohibition of slave trade*

[665] PHILLIMORE, **Commentaries upon International Law**, p. 254.

[666] *HCPP, Class B*, 1845. Earl of Aberdeen to M. Lisboa, 6 August 1845, p. 320.

within *the period of three years, as well as the treatment of slave trade as piracy*.

He grounded this claim on an interpretation of the piracy clause in Article I of the treaty: "[t]here is nothing here to show that the penalties of piracy are to be inflicted on the offenders by Brazil alone; or that a municipal regulation of Brazil, attaching the penalties of piracy to the offence, is to be considered as a fulfilment of the engagement".[667] *Had the intention been different, he claimed, Brazil should have insisted in a different wording as the interested party*. After all, *the term "piracy" implied "that those of their subjects whom the two Contracting Parties designated as guilty of that crime, are placed within the reach of other laws than those of their own country*". And that permission for both parties of the treaty to regard slave traders as pirates meant they could *establish as their penalties those that, under the law of nations, "every nation may inflict upon pirates"*. [668] That, he added, was the position of Great Britain about the remaining Article I of the Anglo–Brazilian Treaty.

In September 1845, the Brazilian State Council was once again called to examine the matter.[669] The resulting report informed most of the points made in the Brazilian note of October 1845. The Brazilian position about Article I of the Anglo–Brazilian treaty was it imposed *two measures to be adopted by Brazil*: first, proscribing slave trade within three years of exchange of ratifications (i.e. 13 March 1830); second, treat slave trade as piracy. About the second, "the intervention of the British Government with reference to trade carried on by subjects of the Empire, ought to be restricted to the *demanding from the Imperial Government the*

[667] *HCPP, Class B*, 1845. Earl of Aberdeen to M. Lisboa, 6 August 1845, p. 318.

[668] *HCPP, Class B*, 1845. Earl of Aberdeen to M. Lisboa, 6 August 1845, p. 318.

[669] *CE*. Consultation of 20 September 1845, p. 432-448.

exact and timely observance of the Treaty".[670] That was the extent to which Britain could have acted upon that provision, in the Brazilian view. Any alleged delegation of powers to Britain should have been established expressly and "*to assume, under pretence of interpretation, the delegation of a sovereign power which is not expressly declared, would be an infringement of the first principle in the art of interpretation*".[671] Article I, it was the opinion of the Council, had the simple implication of binding the parties to conventionally establish the implementation of laws equating slave trade to piracy, as in so many treaties for the suppression of slave trade Britain stablished with the Argentine Republic (1839), Bolivia (1840), Chile (1839), Haiti (1839); México (1841); Texas (1841); Uruguay (1839); Venezuela (1839). [672]

Based on the State Council's report and reproducing the arguments mentioned above, the next diplomatic note to be sent by the Brazilian representatives also refers to the *difference between piracy per se and piracy as a fiction of law*, as the former are effectual just for the purpose of its creation. The Brazilian note follows to deploy a notion which resembles Lord Stowell's differentiation between piracy and slave

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[670] *HCPP, Class B*, 1845, Mr. Hamilton to the Earl of Aberdeen, Rio de Janeiro, 11 November 1845 (enclosing Senhor d'Abreu to Mr. Hamilton, Rio de Janeiro, 2 October 1845), p. 385 et seq.

[671] *HCPP, Class B*, 1845, Mr. Hamilton to the Earl of Aberdeen, Rio de Janeiro, 11 November 1845 (enclosing Senhor d'Abreu to Mr. Hamilton, Rio de Janeiro, 2 October 1845), p. 389.

[672] The language of those treaties was clearer on their provisions about piracy. The treaty with Bolivia, e.g., so stated "Article II. The Republic of Bolivia hereby specially engages, that, Two Months after the exchange of the ratifications of the present Treaty, if the ordinary Congress shall be assembled at that time, or Two Months after the subsequent meeting of Congress, it will promulgate throughout its Territories a penal law, inflicting the punishment attached to Piracy on all those citizens of Bolivia who shall, under any pretext whatsoever, take any part whatever in the traffic in Slaves; (…) Article III. Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the Republic of Bolivia hereby mutually engage, that, by an additional Convention to the present Treaty hereafter to be concluded between the said High Contracting Parties to the present Treaty, they will concert and settle the details of the measures by which the law on Piracy, which will become applicable to that traffic by the legislation of each of the two Countries shall be immediately and reciprocally carried into execution with respect to the Vessels and subjects or citizens of each." *HCPP,* Bill of 23 March 1845.

trade (see chapter 1): "In truth, the traffic is not so easily carried on as robbery on the high seas. The same difficulty does not exist in detecting and convicting its agents, as with reference to pirates. In a word, the traffic does not menace the maritime commerce of all people, as piracy does".[673] That was why, the note continued, its penalties cannot be the same as those imposed on pirates. It then registered, resembling quotes from *Louis*, that *unless the right of visit was established by consent, incalculable evils would come, even universal war*.[674]

Finally, the note stated that if the understanding of piracy in Article I of the treaty was the one Britain now endorsed, there would have been no need of the dispositions of Articles II, III and IV; i.e. *there would have been no need of a special authority to visit, search, capture or adjudicate Brazilian vessels*. The note concludes with protests against the Act: the Brazilian government considered it a violation of Brazilian sovereign rights and independence, thus "not recognizing any of its consequences except as the effect and result of power and violence".[675]

All in all, the Brazilian interpretation was that, once the contents of the Treaty of 1826 relating to the Treaty of 1817 expired, the right of visit and search was revoked alongside the other elements of the triple formula; the consequence of that expiration was Britain was limited to pressing the Brazilian government to implement the remaining dispositions of Article I *domestically* and by *its own jurisdiction*.[676] The British position was that the word "piracy" by itself brought to Britain a

[673] *HCPP, Class B*, 1845, Mr. Hamilton to the Earl of Aberdeen, Rio de Janeiro, 11 November 1845 (enclosing Senhor d'Abreu to Mr. Hamilton, Rio de Janeiro, 2 October 1845), p. 389.

[674] *HCPP, Class B*, 1845, Mr. Hamilton to the Earl of Aberdeen, Rio de Janeiro, 11 November 1845 (enclosing Senhor d'Abreu to Mr. Hamilton, Rio de Janeiro, 2 October 1845), p. 391.

[675] *HCPP, Class B*, 1845, Mr. Hamilton to the Earl of Aberdeen, Rio de Janeiro, 11 November 1845 (enclosing Senhor d'Abreu to Mr. Hamilton, Rio de Janeiro, 2 October 1845), p. 391.

[676] The Brazilian position about the right of visit is clear in *HCPP, Class B*, 1845, Mr. Hamilton to the Earl of Aberdeen, Rio de Janeiro, 4 July 1845 (enclosing Senhor d'Abreu to Mr. Hamilton, Rio de Janeiro, 2 July 1845), p. 340-341.

new kind of right of visit and search, of capture and of adjudication related to the *nature* of the practice; the consequence of the expiration of the consented triple formula was merely the *necessity* of recurring to *another set of rights derived from piracy which had also been consented by Brazil but never executed*.

As pointed by Howard Wilson, at least two points in general international law would be notable results (or failures) of the British policy against suppression by the end of the century. First, notwithstanding British efforts to advance the status of slave trade as piracy *jure gentium*, such view would not echo general support and would remain outside general international law.[677] Second, the British claim to verify foreign vessels' flags undoubtedly did not abide by general international law, due to the broad recognition of the freedom of the seas.[678]

Although Britain failed to qualify slave trade as a quasi-piracy under general law of nations[679], it still largely employed this legal fiction to legitimise the capture in any point of the high seas or in ports under its dominion and judge any captured vessels in British courts. The interpretation given to the piracy of the Treaty of 1826 would not openly recognise a break with the consent established in Lord Stowell's principle and at the same time would not be bound to any of the limitations the previous triple formula imposed through limitations of circumstances of visit and capture, jurisdiction or even shared (mixed) proceedings.

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[677] WILSON, Howard Hazen, Some principal aspects of British efforts to crush the African slave trade, 1807-1929, **The American Journal of International Law**, vol. 44, no. 3, pp. 505–526, 1950, p. 524.

[678] WILSON, Howard Hazen, Some principal aspects of British efforts to crush the African slave trade, 1807-1929, **The American Journal of International Law**, vol. 44, no. 3, pp. 505–526, 1950, p. 524.

[679] GREWE, **The Epochs of International Law**, pp. 562-563; See also MARTINEZ, **The Slave Trade and the Origins of International Human Rights Law**.

As we recount the history of the emergence of that new British interpretation in the relations with Brazil, we also testify to the death of the general belief in the triple formula as a way of abolishing slave trade. After 1845, only seven other cases of non-Brazilian vessels were heard in Sierra Leone mixed commissions until the final discontinuation of the commissions in 1871.[680] By the perspective of legal interpretation, a new phase of the history of the suppression of slave trade would start, albeit enabling a trend inaugurated by Britain years before, a trend of linking slave trade suppression (as a humanitarian goal) to the practical gains of creating new conditions of work (and production). In that "civilisational quest", Britain would enjoy the support of other European nations; the consent *among them*, in sharing such efforts and gains, would be much valued.[681]

[680] ALLAIN, **The Law and Slavery**, p. 68.

[681] About that history, see ERPELDING, **Le droit international antiesclavagiste des "nations civilisées" (1815-1945)**.

CONCLUSION

The Anglo–Brazilian Treaty for the suppression of slave trade was one of the products of the British quest of treaty-making which transferred a set of rights from the laws of war to peacetime. The mechanism of enforcement comprising visitation, capture and adjudication by mixed commissions offered a set of tools for the legal use of force. In chapter 1, I explored the starting-point possibilities of such legal technologies and how they were supposed to work according to the design given by treaty and further normative production.

The second chapter analysed the triple formula model, the ideal model for the enforcement of the British policy, which was also the one accepted by Brazil. Delving into general rules and regulation applied to all triple-formula treaties offered the first steps to understand the operation of the Brazilian triple formula.

The third chapter then focused on the Brazilian adherence to the anti-slave trade system of treaties. The moment of the Brazilian independence generated a set of elements that would concur to compose the paradox informing the Brazilian debut in international law: Brazil would assume a regime similar to the Anglo–Portuguese, confirming its ties of dependence to Britain, while simultaneously affirming its autonomy and sovereignty, perversely, by resisting to slave trade abolition.

Lastly, in the fourth chapter, I explored the results from the combination of political projects and conceptual matrices to the interpretation of the bilateral treaty. The dynamics of visit, capture and adjudication involved transforming meanings and opportunities. In those interactions, Brazil interprets the treaty so as to create obstacles to proceedings and limit the British use of force legitimised in its provisions. Britain pushes for meanings favouring its policing actions and

manipulates the implementation of the cases to serve its changes of policy. Those overall dynamics of interpretation could be organized in at least three lines of strategy: interpretative extensions under the unilateral dominance of Britain; differentiation of the triple formula in relation to the general international law and prize law by both parties; extensive use of procedural law by Brazil to create bureaucratic hurdles.

The discussions of the preceding chapters should help us better understand important aspects relating to slave trade suppression. They also suggest new aspects of the interplay between Brazil and Great Britain related to that matter.

A first important point is documenting how *Brazilians actively engaged in the dynamics of interpretation and by doing so created the argumentative onus which transformed British subsequent legal approaches and the very expectations about the content of the law the two parties were applying*. From those cycles of interpreting and reinterpreting treaty provisions resulted changes with impact in the most realistic level. Before leaving the ports, a moment of decision would come to a slave ship master and his crew to furnish the ship with a Brazilian or a Portuguese flag; from a certain point, they would need to check the precision of licenses and passports, to avoid being held as engaged in an illegal slave trade voyage. The questions about the law to be applied continued: at sea, where was it legal for Brazilian vessels to be captured? Could capture follow from a search finding the ship as equipped for slave trading? Or, rather, was capture legal only when slaves were actually on board? Further questions would follow.

At another level, the Brazilian engagement with the triple formula provisions points to a different image from the one usually found of Brazil in global histories of slave trade suppression. It did not entirely refuse to implement the Anglo–Brazilian treaty. At the same time it failed to abolish slave trade — and thus failed to implement one of the

provisions of the treaty—, Brazil was actively engaged in applying the triple formula provisions. And *by advocating for limitations of the treaty, Brazilian representatives were slowing down abolition as a way of protecting its autonomy (and its perverse slavery project) against the expansion of the British use of force* (chapter 3 and 4).

The practical implementation of the triple formula paradoxically points to limitations to the legal project of suppression of slave trade itself. After reading all those discussions on proceedings, property, ships, and deviations, it is shocking how far most of them were from acknowledging the countless lives lost or the condition of people who were treated as objects in that traffic and continued suffering from slavery (even after being set free).

As I mentioned in the introduction, another set of battles would emerge in parallel to the ones focused here, battles which would deal with effective freedom (as we see it today, with striking material limitations to what was considered to be free) and the treatment of freed slaves. Those battles were fought by diplomatic representatives, civil society groups and slaves themselves, and extended through the nineteenth century as a connection between slave trade suppression and the abolition of slavery. They did benefit from the Rio mixed commission's decrees of bad prize and the consequent formal liberation of the people found on board — that was one among other ways to prove the status of freed men and women.[682] Yet, most importantly, those battles did not anchor their legal argumentation in the enforcement mechanisms that composed the object of this thesis (the mechanisms in force from

[682] For an account of the presumption of slavery in the absence of a proof of freedom, the general legal uncertainty suffered by the black people in the nineteenth-century Brazil, and the institutional mechanisms mobilized to elude the implementation of the anti-slave trade laws through the perspective of social history, see CHALHOUB, Sidney. **A força da escravidão**. São Paulo: Companhia das Letras, 2012. For a political history perspective of the non-implementation of the slave trade abolition, see PARRON, **A política da escravidão no império do Brasil, 1826-1865.**

1827 to 1845). Those parallel battles occurred mainly around interpretations of the domestic legislation proscribing slave trade (the 1831 Act and the 1850 Act) and referred to the treaty merely as a source for the Brazilian commitment to abolition.[683]

Examining the battles (chapter 4) *over the enforcement mechanisms of the 1826 treaty uncovers the multiple debates emerging as a consequence of the formula of enforcement that Britain connected with its project of suppressing slave trade, and highlights how most of such enforcement did not rely on humanitarian argumentation*. By using the language of the triple formula to defend its slave trade practice from the British effort to expand its room for manoeuvre, Brazil did not have to argue against the goal of abolishing slave trade, presenting its stance as opposing the British pushes to use force.

This points in a different direction than that suggested by Jenny Martinez. One of the "Slave Trade and the Origins of International Human Rights Law" theses is precisely that the origin of the "first effort to use international law to prosecute those accused of gross human rights abuses" is misplaced in the twentieth century, with the Nuremberg trials. The author argues that the "original 'crime against humanity'" were at the centre of the 19th-century cases heard by "international courts in Sierra Leone, Cuba, Brazil, and other places around the Atlantic".[684]

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[683] The centrality of the 1831 and the 1850 Acts for various actors arguing about abolition in general and about the individual freedom of Africans brought illegally to Brazil is clear in the history recounted by Beatriz Mamigonian in MANIGONIAN, **Africanos livres: a abolição do tráfico de escravos no Brasil**. The book includes an account about the most significant reliance by the British representatives on the mixed commissions' powers to pressure Brazilian authorities by the threat of deviating workforce (by promising freedom to Africans brought to Brazil) and of adjudicating captured vessels in British courts; those points were explored in chapter IV, D, of this thesis.

[684] MARTINEZ, Jenny S. **The Slave Trade and the Origins of International Human Rights Law**. Oxford: Oxford University, 2012.p. 6.

As shown in chapter 2, mixed commissions did have an important role in the treaties' implementation process, so there is some truth to the assertion that those "[…] courts explicitly aimed to promote humanitarian objectives". Yet the a more encompassing understanding of the practice of the enforcement mechanism (chapter 2 and 4) shows that the legal structures of mixed commissions actually focused on rights of property and were far from qualifying slave trade as an incipient version of crime against humanity. The humanitarian element that grounded the permission to use force formalised in the Anglo-Brazilian treaty of 1826 disappeared during the implementation of rights — limited by formalistic procedures — grounded in the very legitimacy of freedom of navigation under general international law.

Martinez argues that the British treaties (with their proscription of slave trade and respective enforcement mechanisms) legitimised the British effort to convince other states of the *morality* of abolition.[685] She attributes special value to the mixed commissions in this process: "The history of the antislavery courts is not only a story of military and economic power, however, but also a story about the power of ideas."[686] For the author, "the nineteenth century abolition movement

[685] "…close examination of the history of the abolition of the slave trade should cause international legal scholars to rethink the relationship between power, ideas, and international legal institutions. To the extent that the treaties against the slave trade and the mixed courts were effective, it was in no small part because Britain was willing to use its substantial economic and military power to support them. At the same time, the international legal regime gave Britain's use of its economic and military power a legitimacy that it would have otherwise lacked, and it amplified Britain's ability to influence other nations' conduct with regard to the slave trade. Once other nations had agreed in principle to the immorality of the slave trade, it was difficult for them to overtly oppose efforts to suppress that trade." MARTINEZ, Jenny S. **The Slave Trade and the Origins of International Human Rights Law**. Oxford: Oxford University, 2012.p. 165.

[686] MARTINEZ, Jenny S. **The Slave Trade and the Origins of International Human Rights Law**. Oxford: Oxford University, 2012.p. 167.

was the first successful human rights campaign, and international treaties and courts were its central features"[687].

From the case studied in this thesis, we can imagine that if there was any ideological influence exerted by the British efforts of slave trade suppression, it is likely that the mixed commissions' system did not have that much influence in the process. It is indisputable that mixed commissions had a positive and humanitarian outcome in the sense they formally freed many people captured as slaves — as put by Martinez, they "changed the fate"[688] of many— and forced the continuous reinterpretation of treaties intended to suppress slave trade. It is also beyond question, however, that the law discussed within mixed commissions regulated the limits between the use of force and the freedom of the seas (more broadly, the separation between peace and war).

The preceding discussion also provides further evidence supporting Lauren Benton's point that the system of slave trade suppression must be seen as a prize law-based system[689]. Looking at the history of Anglo–Brazilian interactions under the triple formula in light of the origins of that regime reveals a more nuanced version than the oversimplification of difficulties created by a recalcitrant state that stubbornly held to slave trade and resisted to the humanitarian ideal of freedom.[690] Beyond that, *if the model of prize law is not taken into*

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[687] MARTINEZ, Jenny S. **The Slave Trade and the Origins of International Human Rights Law**. Oxford: Oxford University, 2012.p. 13

[688] MARTINEZ, Jenny S. **The Slave Trade and the Origins of International Human Rights Law**. Oxford: Oxford University, 2012.p. 12.

[689] BENTON, Lauren. Review-The Slave Trade and the Origins of International Human Rights Law. **Victorian Studies**, vol. 56, no. 1, pp. 127–129, 2013.

[690] MARTINEZ, Jenny S. **The Slave Trade and the Origins of International Human Rights Law**, chapter 7.

account, some of the Brazilian legal arguments seem like merely desperate and delirious claims (chapters 1 and 4). The prize law structure is hardly humanitarian. Instead, it relies on the property–nationals–states linkages and may have acted as a factor favouring the representation of slave trade as implicating property rights.

This property-based rationale underpinning the primary structure and vocabulary of the treaty regime must never be left out of sight. Further, if "Britain used international law as one important tool for persuading other countries to abandon a widespread and profitable practice"[691], it must be emphasised that this involved transferring to peacetime an area of international law traditionally applicable to warfare.

Therefore, the regime for the suppression of slave trade, both in its design and implementation, constituted an arena for disputing the meaning of peace. In the beginning of the nineteenth century, war was taken to be the general rule, while peace was the exception. As an exception, the notion of peace was also an ideal. That ideal would undergo some changes once it turned to actuality along the years of the century, in that longest period of peace in the European history[692].

British anti-slate trade policy may be seen as adding an important element to that emerging notion of peace, by incorporating to it modes of use of force that had once belonged to warfare relations. As depicted in conceptual history, the nineteenth-century "peace" would not mean a state of limitation of force, rather a "state of law", a state of affairs

[691] MARTINEZ, Jenny S. **The Slave Trade and the Origins of International Human Rights Law**, p. 14.

[692] KOSKENNIEMI, Martti. **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1980**, p.11.

determined by law and authorised by consent.[693] Slave trade abolition may thus be seen as central for the first steps in the construction of a notion of peace which comprised (and legitimised) "aggression, dominium and conquest"[694] — including the scramble for Africa and new forms of human exploration in the name of civilisation along the nineteenth century.

For that reason, the question remains open as to whether we should consider that historical events proved the British system of treaties, combined with military power, to be a good way of implementing humanitarian goals. In precisely that point, the history of the implementation of the Anglo–Brazilian triple formula might contribute to reflecting on the history and the present of humanitarian interventions.[695] Current efforts to include slave trade abolition as a chapter in the history of humanitarian interventions must look into the actual implementation of the British system of treaties to understand the role of its design and interpretation had in the successes and failures of its promoters.

As slave trade abolition was an evidently international process, it comes without surprise that more research has been conducted on the role of international law in that context — especially after the considerable growth of interest in the history of international law.[696] Yet

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[693] VEC, Miloš. From invisible peace to legitimation of war. In: HIPPLER, Thomas; VEC, Miloš (Ed.). **Paradoxes of peace in nineteenth century Europe**. Oxford: Oxford University, 2015, p. 25-32.

[694] VEC, Miloš. From invisible peace to legitimation of war, p. 25-36.

[695] See e.g. RYAN, Maeve. The price of legitimacy in humanitarian intervention: Britian, the right of search, and the abolition of the West African slave trade, 1807-1867; KLOSE, Fabian. Enforcing abolition: the entanglement of civil society action, humanitarian norm-setting, and military intervention.

[696] Especially after the so-called "turn to history": GALINDO, George. Martti Koskenniemi and the Historiographical Turn in International Law. **European Journal of International Law**, n. 16, p. 539-559, 2005

most of the current literature dealing with slave trade abolition and international law is centred in British or Anglophone perspectives, either because of the sources that inform them, or due to methodological choices. Most of them either focus on a history of the legal tools employed by Britain in its imperial expansion or aim at a global history of slavery or slave trade abolition.

It is perhaps no coincidence that the prize law model and the implantation process of the anti-slave trade system are usually forgotten. Narratives that emphasize the post-1845 phase of the anti-slave trade quest usually focus on force and its humanitarian justification.[697] *When most of accounts of the anti-slave trade quest set off from the British point of view, guided by the noble end to be achieved by the system, the means of its implementation are left underexplored. The very interaction with foreign states that were part of the growth and imposition of British empire, as well as their use of the anti-slave trade legal regime are ignored or else depicted as some kind of naïve or immoral stubbornness*.

This thesis shows that the constant reinvention for the justification of the British influence over the seas and over slavery-based nations was subjected to transformations resulting from its responses to Brazilian interpretations. *The dynamics of seek and capture show the mutual construction of legal interpretation. In that history, law has a constitutive relevance when giving things names*[698] *and therefore highlighting what they mean in the universe of rights and duties, of legality and illegality.*[699]

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[697] See the introduction to this thesis.

[698] BARBOSA, Samuel Rodrigues. Book launch "Africanos Livres". 31 August 2017, University of São Paulo.

[699] "Through law, we sometimes describe our societies in terms of rights-bearing individuals acting upon each other, sometimes as goods, services and capital crossing frontiers. Sometimes we describe the world of political alternatives in terms of environmental degradation,

As Matthew Brown puts it, current efforts of global histories lack engagements with Latin America, not as a peripheral victim, but as a constituent part of global processes. This is not simply a political stand. Since law is an argumentative practice, partial descriptions tend to create stories of heroes and villains because they lack the actions and reactions of concrete legal argumentation. *The history told here is an example that the place for a history comprising of Latin-American positions are not relegated to the "roads not taken" but do "conform the world 'we' live today".*[700]

globalisation of democracy, a place of terror or one of sexually transmitted disease. We situate events sometimes in national histories, sometimes in world history. Each such telling is an intervention in the world that makes some things visible, renders other things invisible." KOSKENNIEMI, Martti. The Fate of Public International Law: Between Technique and Politics. **The Mordern Law Review**. v. 70, n. 1, pp. 1-30, 2007 p. 17.

[700] BROWN, Matthew, The global history of Latin America, **Journal of Global History**, vol. 10, pp. 365–386, 2015, p. 368.

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APPENDIX

A. BILATERAL TREATIES FOR SLAVE TRADE SUPPRESSION

Results based on the online database *Oxford Public International Law - Oxford Historical Treaties* on the topic of slave trade in the nineteenth century and additions from mentions in secondary documents (*).

Treaty between Great Britain and Portugal, signed at Vienna, 22 Jan. 1815
Additional Convention between Great Britain and Portugal for the Prevention of the Slave Trade, signed at London, 28 July 1817
Treaty between Great Britain and Spain for the Abolition of the Slave Trade, signed at Madrid, 23 Sept. 1817
Treaty between Great Britain and the Netherlands, signed at The Hague, 4 May 1818

Treaty between the East India Co. (Great Britain) and Muscat, signed 10 Sept. 1822

Explanatory and Additional Articles to the Slave Trade Treaty between Great Britain and Spain, signed at Madrid, 10 Dec. 1822

Explanatory and Additional Articles to the Treaty of 4 May 1818 between Great Britain and the Netherlands, signed at Brussels, 31 Dec. 1822 and Jan. 25, 1823*

Additional Articles between Great Britain and Portugal, signed at Lisbon, 15 Mar. 1823

Declaration between Great Britain and Tunis, signed at Bardo, 1 Jan. 1824

Slave Trade Treaty between Great Britain and Sweden-Norway, signed at Stockholm, 6 Nov. 1824

Convention between Brazil and Great Britain for the Abolition of the African Slave Trade, signed at Rio de Janeiro, 23 Nov. 1826

Treaty between Great Britain and the Kings of Brekama (Gambia), signed on board the steam vessel of Brekama, 29 May 1827

Treaty between Great Britain and King of Cumbo (Gambia), signed at Bathurst, 4 June 1827

Treaty between Great Britain and the King of Bulola (Sierra Leone), signed at Lawrence Town, 23 June 1827

Supplementary Slave Trade Convention between France and Great Britain, signed at Paris, 22 Mar. 1833

Treaty between France and Great Britain and Denmark for the Accession of Denmark to the Slave Trade Conventions of 1831 and 1833, signed at Copenhagen, 26 July 1834

Treaty between France and Great Britain and Sardinia for the More Effective Suppression of the Slave Trade, signed at Turin, 8 Aug. 1834

Additional Article relative to the Slave Trade between Great Britain and Sweden, signed at Stockholm, 15 June 1835

Treaty between Great Britain and Spain for the Abolition of the Slave Trade, signed at Madrid, 28 June 1835

Slave Trade Convention between France and Sweden, signed at Stockholm, 21 May 1836[701]

[701] This was the only treaty for the suppression of slave trade to which Great Britain was not a party. ALLAIN, **The Law and Slavery**, footnote 57.

Treaty between France and Great Britain and Denmark for the Accession of Denmark to the Slave Trade Conventions of 1831 and 1833, signed at Copenhagen, 26 July 1834

Treaty between France and Great Britain and Sardinia for the More Effective Suppression of the Slave Trade, signed at Turin, 8 Aug. 1834

Additional Article relative to the Slave Trade between Great Britain and Sweden, signed at Stockholm, 15 June 1835

Treaty between Great Britain and Spain for the Abolition of the Slave Trade, signed at Madrid, 28 June 1835

Slave Trade Convention between France and Sweden, signed at Stockholm, 21 May 1836

Additional Article to the Slave Trade Treaty of 4 May 1818 between Great Britain and the Netherlands, signed at The Hague, 7 Feb. 1837

Convention between France, Great Britain and the Hanse Towns (Bremen, Hamburg and Lubeck), for the Accession of the Latter to the Slave Trade Conventions, signed at Hamburg, 9 June 1837

Convention between France and Great Britain and Tuscany for the Accession of Tuscany to the Slave Trade Conventions, signed at Florence, 24 Nov. 1837

Treaty between Great Britain and Ras-ul-Khaimah (Trucial Sheikhdoms), signed at Shargah, 17 April 1838

Slave Trade Treaty between Chile and Great Britain, signed at Santiago, 19 Jan. 1839

Slave Trade Treaty between Great Britain and Venezuela, signed at Caracas, 15 Mar. 1839

Treaty between the Argentinian Republic and Great Britain for the Abolition of the Slave Trade, signed at Buenos Aires, 24 May 1839

Agreement between Great Britain and Ras-al-Khaimah (Trucial Sheikhdoms), signed at Ras-al-Khaimah, 3 July 1839

Slave Trade Treaty between Great Britain and Uruguay, signed at Montevideo, 13 July 1839

Slave Trade Convention between Great Britain and Haiti, signed at Port-au-Prince, 23 Dec. 1839

Slave Trade Treaty between France and Haiti, signed at Port-au-Prince, 29 Aug. 1840

Slave Trade Treaty between Bolivia and Great Britain, signed at Sucre, 25 Sept. 1840

Treaty between Great Britain and Texas for the Suppression of the African Slave Trade, signed at London, 16 Nov. 1840

Slave Trade Treaty between Great Britain and Mexico, signed at Mexico City, 24 Feb. 1841

Slave Trade Treaty between Ecuador and Great Britain, signed at Quito, 24 May 1841

Additional and Explanatory Convention for the Abolition of the Slave Trade between Chile and Great Britain, signed at Santiago, 7 Aug. 1841

Slave Trade Treaty between Great Britain and Portugal, signed at Lisbon, 3 July 1842

*Webster–Ashburton Treaty, (1842) boundary of the U.S. and providing for Anglo–U.S. cooperation in the suppression of the slave trade.

Declaration between Great Britain and Texas, supplemental to the Slave Trade Treaty, signed at Washington, 16 Feb. 1844

Treaty between Great Britain and King William of Bimbia (West Africa) for the Abolition of the Slave Trade, signed 17 Feb. 1844

Additional Articles relative to the Slave Trade between France and King Fanatoro of Fanama, Cap de Monte (Senegal), signed at Cap de Monte, 23 June 1845

Slave Trade Engagements between Great Britain and the Trucial Sheikhdoms of Oman and Bahrein, signed 30 April-8 May 1847

Treaty of Friendship and Commerce, and for the Suppression of the Slave Trade between Great Britain and Borneo, signed at Brunei, 27 May 1847

Additional Articles between Great Britain and the Netherlands to the Slave Trade Treaty of 4 May 1818, signed at The Hague, 31 Aug. 1848

Declaration relative to the Slave Trade between Great Britain and the Chiefs of Gallinas (West Africa), signed at Dumbocorro, 4 Feb. 1849

Protocol of Conference between France and Great Britain for the Suppression of the Slave Trade, signed at London, 8 May 1849

Engagement between Great Britain and the Chief of Sohar (Persian Gulf) for the Abolition of the African Slave Trade, signed 22 May 1849

Declaration relative to the Slave Trade between Great Britain and the Chiefs of Gallinas (West Africa), signed at Minah, 6 Nov. 1849

Declaration relative to the Slave Trade between Great Britain and the Chiefs of Gallinas (West Africa), signed at Minah, 11 Nov. 1849

Treaty of Peace, Friendship, Commerce and the Slave Trade between Great Britain and the Naloes (West Africa), signed at Caniope, 21 Mar. 1851

Treaty for the Suppression of the Slave Trade between Great Britain and New Granada, signed at Bogota, 2 April 1851

Treaty of Peace, Friendship, Commerce, Slave Trade and Navigation between Great Britain and the Macbatee (West Africa), signed at Macbatee, 26 Dec. 1851

Treaty of Peace, Friendship, Slave Trade, Commerce and Navigation between Great Britain and the Kambia (West Africa), signed at Kambia, 26 Dec. 1851

Convention of Peace, Commerce, Slave Trade etc. between Great Britain and the Transvaal Boers, signed at Sand River, 17 Jan. 1852

Engagement for the Abolition of the Trade in Slaves between Great Britain and the King and Chiefs of Cabenda (West Africa), signed at Cabenda, 11 Feb. 1853

Slave Trade Treaty between Great Britain and the Queen of Mohilla (East Africa), signed at Fumbani, 16 Sept. 1854

Slave Trade Treaty between Great Britain and a principal Chief of Comoro (East Africa), signed at Ytsanda, 20 Sept. 1854

Slave Trade Treaty between Great Britain and the Chiefs of Epé (East Africa), signed 28 Sept. 1854

Slave Trade Treaty between France and King Kosoko of Palmas (West Africa), signed at Palmas, 8 Feb. 1855

Engagement between Great Britain and Ambrizette (West Africa) for the Abolition of the Slave Trade, signed at Ambrizette, 17 Sept. 1855

Agreement between Great Britain and the Aulaki (South-Western Arabia), for the Suppression of the Slave Trade, signed at Hour, 14 Oct. 1855

Treaty of Friendship, Commerce and Slave Trade between Liberia and Maryland, signed at Monrovia, 4 Jan. 1856

Agreement of Peace, Friendship, Slave Trade etc. between Great Britain and the Sheiks of the Habr Owul (Somaliland), signed at Berbera, 7 Nov. 1856

Engagement between Great Britain and the King and Chiefs of Kinsembo (West Africa), signed at Kinsembo, 13 July 1857

Agreement between Great Britain and the Comoro Islands (West Africa) for the abolition of the slave trade, signed at Muroni, 29 July 1861

Treaty for the Suppression of the African Slave Trade between Great Britain and the United States, signed at Washington, 7 April 1862

Slave Trade Agreement between Great Britain and Addo (West Africa), signed at Addo, 27 June 1863

Convention between Great Britain and the United States additional to the Slave Trade Treaty of 7 April 1863, signed at Washington, 3 June 1870

Additional Slave Trade Convention between Great Britain and Portugal, signed at London, 18 July 1871

Treaty between Great Britain and Muscat for the Abolition of the Slave Trade, signed at Muscat, 14 April 1873

Treaty between Great Britain and Zanzibar for the Suppression of the Slave Trade, signed at Zanzibar, 5 June 1873

Treaty between Great Britain and Zanzibar supplementary to the Slave Trade Treaty of 5 June 1873, signed at London, 14 July 1875

Engagement between Great Britain and the Chiefs of the South Bank of the River Congo (West Africa), signed 27 Mar. 1876

Treaty between Great Britain and King Anizanza (West Africa), signed at the River Congo, 19 April 1876

Convention between Egypt and Great Britain for the Suppression of the Slave Trade, signed at Alexandria, 4 Aug. 1877

Convention between Germany and Great Britain extending to the German Empire the Slave Trade Treaty of 20 Dec. 1841, signed at London, 29 Mar. 1879

Convention between Great Britain and Turkey for the Suppression of the African Slave Trade, signed at Constantinople, 25 Jan. 1880

Convention between Great Britain and Johanna (East Africa) for the Suppression of Slavery and the Slave Trade, signed at Bambao, 10 Oct. 1882

Convention between Great Britain and Mohilla (East Africa) for the Suppression of Slavery and the Slave Trade, signed at Doani, 24 Oct. 1882

Declaration between Great Britain and Turkey amending the Slave Trade Treaty of 25 Jan. 1880, signed at Constantinople, 3 Mar. 1883

Slave Trade Convention between Abyssinia and Great Britain, signed at Adowa, 3 June 1884

Arrangement between Germany and Great Britain respecting the Suppression of the Slave Trade in East Africa, signed at London, 3/5 Nov. 1888

Treaty between Great Britain and Italy for the Suppression of the African Slave Trade, signed at London, 14 Sept. 1889

General Act of the Brussels Conference relating to the African Slave Trade between Austria-Hungary, Belgium, Congo, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Persia, Portugal, Russia, Spain, Sweden-Norway, Turkey, the United States and Zanzibar, signed 2 July 1890

Treaty between Great Britain and Spain for the Suppression of the African Slave Trade, signed at Brussels, 2 July 1890

Convention between Egypt and Great Britain for the Suppression of Slavery and the Slave Trade, signed at Cairo, 21 Nov. 1895

B. MULTILATERAL TREATIES FOR SLAVE TRADE SUPPRESSION

Results based on the *Oxford Collection of International Law Treaties* on the topic of slave trade in the nineteenth century and additions from mentions in secondary documents (*).

Definitive Treaty of Peace between Austria, Great Britain, Prussia and Russia and France, signed at Paris, 20 Nov. 1815(*)[702]

Declaration respecting the Abolition of the Slave Trade between Austria, France, Great Britain, Prussia and Russia, signed at Verona, 28 Nov. 1822

Treaty between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade, signed at London, 20 Dec. 1841

[702] Slave trade suppression was not one of the main objectives of the treaty. The additional articles between France and Great Britain provided for the intention of both parts to make every effort towards abolition and for the commitment of France to reach total suppression within 5 years.

Protocol of Conference relative to the Slave Trade between Austria, Great Britain, Prussia and Russia, signed at London, 3 Oct. 1845

Treaty between Austria, Great Britain, Prussia and Russia, and Belgium, for the Accession of Belgium to the Treaty of 20 Dec. 1841 for the Suppression of the Slave Trade, signed at London, 28 Feb. 1848

C.BRAZILIAN CASES UNDER MIXED COMMISSIONS

The following tables present data collected from the *House of Commons Papers, Class A, Correspondence with the British Commissioners* (1822-1845).

Brazilian and Portuguese vessels adjudicated by the Anglo-Portuguese Mixed Commission at Sierra Leone since 1822

Information collected from House of Commons Parliamentary Papers, Class A, Correspondence with the British Commissioners.

Type and name of the vessel	Flag	Date of capture	Date of Decree	Decree	Slaves emancipated
[…]Minerva	BR	30 Jan. 1824	*withdrawn		---
Brig Bom Caminho	BR	10 Mar. 1824	15 May 1824	Condemned for being engaged in slave trade	326

Maria Pequena	PT	8 May 1824	14 July 1824	Condemned for being engaged in slave trade	11
Brigantine Dianna	BR	11 Aug. 1824	15 Nov. 1824	Condemned for being engaged in slave trade	114
Brigantine Dos Amigos Brazileiros	BR	18 Sept. 1824	15 Nov. 1824	Condemned for being engaged in slave trade	253
Brig Avizo	BR	(before) 8 Nov. 1824	19 Nov. 1824	Condemned for being engaged in slave trade	424
Brig Cerqueira[703]	BR	30 Jan. 1824	16 April 1824	Restitution	0
Schooner Bella Eliza	BR	23rd Nov. 1824	31st Jan. 1825	Condemned for being engaged in slave trade	359

[703] Not admitted in the Rio Mixed Commission for appeal (17th May 1825).

Schooner Bom Fim	BR	14 Jan. 1825	19 Mar. 1825	Condemned for being engaged in slave trade	146
Sumaca Bom Jesus dos Navigantes	BR	17 July 1825	14 Sept. 1825	Condemned for being engaged in slave trade	266
Schooner Uniao	BR	9 Sept. 1825	4 Nov. 1825	Condemned for being engaged in slave trade	249
Brig Paquete da Bahia	BR	22nd Nov. 1825	10 Jan. 1826	Condemned for being engaged in slave trade	385
Brigantine San Joao /Segunda Rosalia	BR	25 Nov. 1825	Mar. 21, 1826	Condemned for being engaged in slave trade	186
Brig Activo	BR	11 Feb. 1826	9 May 1826	Restitution	---
Sloop Esperança	BR	4 of Mar. 1825	8 June 1826	Condemned for being	4

				engaged in slave trade	
Brigantine Netuno	BR	4 of Mar. 1825	8 June 1826	Condemned for being engaged in slave trade	84
Brig Perpetuo Defensor	BR	18 of April 182	Restored by captors		0
Ship Sam Benedito	BR	11 of June 1826		Restitution	0
Brig Principe de Guiné	BR	---	26 Sept. 1826	Condemned for being engaged in slave trade	579
Brigantine Heroina	BR	17 Oct. 1826	24 Jan. 1827	Condemnation (for breach of imperial passport)	0
Schooner Eclipse	BR	6 Jan. 1827	16 Mar. 1827	Condemnation (for irregular license)	0

Ship Invencivel	BR	21st Dec. 1826	16 Mar. 1827	Condemned for being engaged in slave trade	250
Schooner Venus	BR	6 Feb. 1827	9 April 1827	Condemned for being engaged in slave trade	188
Brigantine Dos Amigos	BR	8 Feb. 1827	9 April 1827	Condemned for being engaged in slave trade	308
Schooner Independencia	BR	28 Feb. 1827	15 May 1827	Condemnation (for breach of imperial passport)	0
Schooner Carlota	BR	14 Mar. 1827	30 April 1827	Condemnation (for breach of imperial passport)	0
Brig Venturoso(a)	BR	14 Mar. 1827	30 April 1827	Condemnation (for breach of imperial passport)	0

Brig Trajano	BR	13 Mar. 1827	30 April 1827	Condemnation (for breach of imperial passport)	0
Schooner Tentadora/ Tenterdora/Interdora	BR	14 Mar. 1827	30 April 1827	Condemnation (for irregular license)	0
Brigantine Conceição de Marie	BR	4 Mar. 1827	15 May 1827	Condemned for being engaged in slave trade	198
Schooner Providencia	BR	16 Mar. 1827	30 April 1827	Condemnation (for irregular license)	0
Schooner Trez Amigos	BR	19 April 1827	15 May 1827	Condemned for being engaged in slave trade	3
Conceição Paquete do Rio	BR	22d Mar. 1827	15 May	Condemnation (for irregular license)	0
Brigantine Creola	BR	11 April	9 June	Condemned for being engaged in slave trade	289

Brig Bahia	BR	3rd April 1827	19 June 1827	Condemnation (for breach of imperial passport)	0
Brig Silveirinha	BR	12 Mar. 1827	19 June 1827	Condemned for being engaged in slave trade	209
Sumacca Copioba	BR	15 May 1827	20 July 1827	Condemnation (for irregular license)	0
Schooner Toninha	PT	18 June 1827	21 July 1827	Condemned for being engaged in slave trade	58
Brig Henriqueta	BR	6 Sept. 1827	29 Oct. 1827	Condemned for being engaged in slave trade	542
Schooner Dianna	BR	12 Oct. 1827	8 Dec. 1827	Condemned for being engaged in slave trade	83

Sumacca São João Voador	BR	23rd Oct. 1827	10 Jan. 1828	Restitution	0
Schooner El Vencedora	BR	24 Oct. 1827	26 Jan. 1828	Restitution	0
Schooner Esperanza	BR	13 April 1828	26 May 1828	Condemnation (for breach of imperial passport)	0
Schooner Voadora	BR	19 April 1828	16 June 1828	Condemned for being engaged in slave trade	61
Brig Vingador	PT	16 May 1828	16 June 1828	Condemned for being engaged in slave trade	624
Schooner Terceira Rosalia	BR	20 April 1828	17 June 1828	Condemnation (for breach of imperial passport)	0
Schooner Josephina	BR	4 July 1828	8 Aug. 1828	Condemned for being	74

			engaged in slave trade	

Brazilian vessels adjudicated by the Anglo-Brazilian Mixed Commission at Sierra Leone from 1828 (establishment in 19 Aug. 1828) to 1845

Type and name of the vessel	Date of capture	Date of Decree	Decree	Slaves emancipated
Schooner Nova Viagem/Virgem	28 July 1828	18 Sept. 1828	Condemned for being engaged in slave trade	320
Brig Clementina	5 Aug. 1828	18 Sept. 1828	Condemned for being engaged in slave trade	156
Schooner Sociedade	8 Aug. 1828	3rd Oct. 1828	Condemnation (for irregular license)	0
Brig-Schooner Voador	20 Aug. 1828	17 Nov. 1828	Condemnation (for breach of imperial passport)	0
Schooner Santa Effigenia	17 Oct. 1828	26 Nov. 1828	Condemned for being engaged in slave trade	217

Schooner Penha da França	3rd Oct. 1828	16 Dec. 1828	Condemned for being engaged in slave trade	169
Sloop Minerva da Conceição	17 Oct. 1828	19 Dec. 1828	Condemned for being engaged in slave trade	82
Schooner Zepherina	14 Sept. 1828	9 Dec. 1828	Condemned for being engaged in slave trade	153
Schooner Arcenia	30 Oct. 1828	19 Dec. 1828	Condemned for being engaged in slave trade	269
Schooner Estrella do Mar	30 Oct. 1828	19 Dec. 1828	Condemnation (for irregular license)	0
Schooner Triumpho	23rd Nov. 1828	17 Jan. 1829	Condemned for being engaged in slave trade	122
Schooner Bella Eliza	7 Jan. 1829	27 Feb. 1829	Condemned for being engaged in slave trade	215
Brigantine Uniao	6 Feb. 1829	13 Mar. 1829	Condemned for being engaged in slave trade	366
Brig Andorinha	19 Feb. 1829	11 April 1829	Condemnation (for irregular license)	0

Schooner Donna Barbara	15 Mar. 1829	13 April 1829	Condemned for being engaged in slave trade	351
Schooner Carolina	15 Mar. 1829	13 April 1829	Condemned for being engaged in slave trade	399
Schooner Mensageira	15 Feb. 1829	24 June 1829	Condemned for being engaged in slave trade	117
Schooner Ceres	6 Aug. 1829	22 Sept. 1829	Condemned for being engaged in slave trade	128
Schooner Emilia	21 Aug. 1829	22 Sept. 1829	Condemned for being engaged in slave trade	435
Schooner Santa Jago	7 Aug. 1829	30 Sept. 1829	Condemned for being engaged in slave trade	148
Schooner Tentadora	1 Nov. 1829	1 May 1830	Condemned for being engaged in slave trade	320
Brig Emilia	31 Oct. 1829	1 May 1830	Condemned for being engaged in slave trade	148

Brigantine Emilia	9 Dec. 1829	1 May 1830	Condemned for being engaged in slave trade	128
Schooner Nao Lendia	10 Dec. 1829	1 May 1830	Condemned for being engaged in slave trade	159
Schooner Nossa Senhora da Guia	7 Jan. 1830	13 May 1830	Condemned for being engaged in slave trade	238
Brigantine Primeira Rosalia	23 Jan. 1830	13 May 1830	Condemned for being engaged in slave trade	242
Schooner Umbelino	15 Jan. 1830	13 May 1830	Condemned for being engaged in slave trade	163
Schooner Nova Resolução	2 Feb. 1830	13 May 1830	Condemned for being engaged in slave trade	42
Brigantine Ismenia	28 Nov. 1829	29 June 1831	Condemnation (for irregular license)	0
Incomprehensivel	23 Dec. 1836	17 Feb. 1837	Condemned	
Schooner Jacuhy	14 June 1839	18 July 1839	Condemned	196
Brig Emprehendedor	23 June 1839	3 Aug. 1839	Condemned	---

Brigantine Simpathia	27 July 1839	7 Sept. 1839	Condemned	---
Brig Firmeza	25 July 1839	14 Sept. 1839	Condemned	---
Brig Intrepido	9 Aug. 1839	24 Sept. 1839	Condemned	---
Brig Aug.o	5 Sept. 1839	19 Oct. 1839	Condemned	---
Brigantine Pampeiro	?	30 Oct. 1839	Condemned	---
Brigantine Golfino	19 Sept. 1839	?	Condemned	---
Brig Destemida	29 Sept. 1839	18 Nov. 1839	Condemned	---
Schooner Calliope	27 Oct. 1839	3 Dec. 1839	Condemned	---
Brigantine Sociedade Feliz	21 Nov. 1839	24 Dec. 1839	Condemned	---

Brigantine Conceição	28 Nov. 1839	6 Jan. 1840	Condemned for being engaged in slave trade	---
Brigantine Julia	29 Nov. 1839	6 Jan. 1840	Condemned for being engaged in slave trade	---
Polacca Santo Antonio Victorioso	2 April 1840	21 May 1840	Condemned for being engaged in slave trade	---
Brig Republicano	12 April 1840	5 June 1840	Condemned for being engaged in slave trade	---
Claudina	29 Aug. 1840	1 Oct. 1840	Condemned for being engaged in slave trade	---
Onze de Novembro	11 Oct. 1840	11 Nov. 1840	Condemned for being engaged in slave trade	---
Gratidão	14 Oct. 1840	16 Nov. 1840	Condemned for being engaged in slave trade	0
Emilia	9 Nov. 1840	9 Dec. 1840	Condemned for being engaged in slave trade	---
Feliz Ventura	29 Nov. 1840	11 Jan. 1841	Condemned for being engaged in slave trade	---
Bellona	14 Dec. 1840	11 Jan. 1841	Condemned for being engaged in slave trade	---

Nova Inveja	20 Jan. 1841	3 Mar. 1841	Condemned for being engaged in slave trade	---
Bom fim	20 Jan. 1841	13 Mar. 1841	Condemned for being engaged in slave trade	---
Juliana	12 Feb. 1841	6 April 1841	Condemned for being engaged in slave trade	---
Orozimbo	8 Jan. 1841	6 April 1841	Condemned for being engaged in slave trade	---
Firme	30 May 1841	---		---
Nova Fortuna	6 June 1841	---		---
Flor de América	29 June 1841	---		---
Donna Ellisa	30 June 1841	---		---
Schooner Galianna	1842	---	Condemned	---
Barque Ermelinda	1842	---	Liberated	---
Brigantine St. Antonio	1842	---	Condemned	---

Polacca Brigantine St. João Batista	27 June 1842	---	Condemned	---
Brigantine Resolução	4 Sept. 1842	---	Condemned	---
Barque Ermelinda Segunda	11 July 1842	---	Condemned	---
Brigantine Bom fim	---	---	Condemned	---
Brig Clio	---	---	Condemned	---
Schooner Brilhante	---	---	Condemned	---
Barque Confidencia	17 Mar. 1843	5 July 1843	Condemned for being engaged in slave trade	---
Schooner Esperança	29 May 1843	18 July 1843	Condemned for being engaged in slave trade	---
Brig Furia	8 Aug. 1843	18 Sept. 1843	Condemned for being engaged in slave trade	529
Brigantine Independencia	8 Aug. 1843	10 Nov. 1843	Condemned for being engaged in slave trade	---

Brigantine Conceição Flora	14 Sept. 1843	18 Nov. 1843	Liberated	
Brig Temerario	3 Nov. 1843	2 Dec. 1843	Condemned for being engaged in slave trade	279
Brigantine Loteria	1 Nov. 1843	15 Dec. 1843	Condemned for being engaged in slave trade	---
Schooner Linda	20 Nov. 1843	29 Dec. 1843	Condemned for being engaged in slave trade	---
Brigantine Helena	---	---	Condemned	418
Brigantine Imperatrix	---	---	Condemned	---
Schooner L'Egeria	---	---	Condemned	---
Polacca Brig Prudencia	---	---	Restitution	---
Schooner Santa Anna	---	---	Condemned	21
Brig Maria	---	---	Condemned	---
Schooner Rafael	27 Mar. 1844	27 May 1844	Condemned for being engaged in slave trade	---

Brigantine Conceição Feliz	6 May 1844	30 May 1844	Condemned for being engaged in slave trade	---
Schooner Minerva	17 April 1844	10 June 1844	Condemned for being engaged in slave trade	---
Brigantine Triumpho de Inveja	23 May 1844	18 June 1844	Condemned for being engaged in slave trade	---
Brig Izabel	1 June 1844	24 June 1844	Condemned for being engaged in slave trade	---
Schooner Tentador	3 June 1844	27 June 1844	Condemned for being engaged in slave trade	---
Brig Izabel/Isabel	16 July 1844	21 Aug. 1844	Condemned for being engaged in slave trade	---
Brig Aventureiro	13 Aug. 1844	19 Sept. 1844	Condemned for being engaged in slave trade	---
Schooner boat Grande Poder de Dios	16 Sept. 1844	2 Nov. 1844	Condemned for being engaged in slave trade	39
Schooner Aventura(o)	28 Sept. 1844	13 Nov. 1844	Condemned for being engaged in slave trade	362

Schooner Virginia	20 Oct. 1844	20 Nov. 1844	Condemned for being engaged in slave trade	---
Brig Imperador or Don Pedro	23 June 1844	14 Dec. 1844	Condemned for being engaged in slave trade	0
Schooner Diligencia	16 Nov. 1844	24 Dec. 1844	Condemned for being engaged in slave trade	177
Schooner Ave Maria	25 Oct. 1844	26 Dec. 1844	Condemned for being engaged in slave trade	---
Schooner Carolina	17 Dec. 1844	Feb. 1845	Condemned for being engaged in slave trade	---
Brigantine Esperança (2nd)	8 Jan. 1845	21 Feb. 1845	Condemned for being engaged in slave trade	---
Brigantine Esperança (1st)	19 Jan. 1845	3 Mar. 1845	Condemned for being engaged in slave trade	---
Launch Cazuza	30 Jan. 1845	25 Mar. 1845	Condemned for being engaged in slave trade	---
Launch Diligencia	23 Jan. 1845	2 April 1845	Condemned for being engaged in slave trade	---
Schooner Vivo	11 Feb. 1845	2 April 1845	Condemned for being engaged in slave trade	---

Brigantine Oliveira	2 Mar. 1845	5 April 1845	Condemned for being engaged in slave trade	---
Schooner Diligencia	8 Feb. 1845	9 April 1845	Condemned for being engaged in slave trade	---
Brig Atala	23 Feb. 1845	14 April 1845	Condemned for being engaged in slave trade	---
Brigantine Echo	2 Mar. 1845	21 April 1845	Condemned for being engaged in slave trade	412
Schooner Vinte Nove	27 Mar. 1845	21 April 1845	Condemned for being engaged in slave trade	---
Brigantine Donna Clara	18 April 1845	16 May 1845	Condemned for being engaged in slave trade	---

Vessels adjudicated by the Anglo-Portuguese Mixed Commission at Rio de Janeiro

Type and name of the vessel	Flag	Seizor	Date of capture	Date of Decree	Decree	N. of slaves emancipate[704]
Schooner Emília	PT	GB	14 February 1821	31 July 1821	Condemned for being engaged in slave trade	---

Vessels adjudicated by the Anglo-Brazilian Mixed Commission at Rio de Janeiro

Type and name of the vessel	Flag	Seizor	Date of capture	Date of Decree	Decree	Slaves emancipated
Brig Africano Oriental	PT	BR	Sept. 1830	12/17 Nov. 1830	Restitution and liberation	56
Bark Eliza	BR	BR	Sept. 1830	10 Dec. 1830	Restitution	0

[704] The numbers of emancipated slaves in the Rio mixed commission differ from those presented by Beatriz Mamigonian, who aggregated data from series of Brazilian and British primary documents which were not consulted for this table. See MAMIGONIAN, Beatriz G. **Africanos livres: a abolição do tráfico de escravos no Brasil**. São Paulo: Companhia das Letras, 2017, "anexo".

Brig Dom Estevão de Atayde/d'Athaide	PT	BR	6 Oct. 1830	10 Dec. 1830	Restitution and liberation	50
Schooner Destimida(o)	PT	GB	2 Dec. 1830	22 Jan. 1831	Restitution and liberation	50
Schooner Camila	PT	BR	(before) Dec. 1831	24 Jan. 1832	Restitution and liberation	5
Barque Maria da Glória	PT	GB	25 Nov. 1833	20 Dec. 1833	Lacking jurisdiction	0
Brig Paquete do Sul	PT	BR	23 May 1833	14 Jan. 1834	Condemned for being engaged in slave trade	0
Schooner Duquesa de Braganza	PT	GB	15 June 1834	21 July 1834	Condemned for being engaged in slave trade	249
Patacho Dois de Março	PT	BR	May 1834	27 Aug. 1834	Lacking jurisdiction	0
Patacho Santo Antonio	PT	BR	May 1834	4 Sept. 1834	Condemned for being engaged in slave trade	91

Brig Rio da Prata	Montevidean	GB	28 Nov. 1834	6 Feb. 1835	Condemned for being engaged in slave trade	430
Brig Amizade Feliz	PT	BR	12 Feb. 1835	13 May 1835	Lacking jurisdiction	0
Schooner Angelica	PT	BR	17 Mar. 1835	17 June 1835	Lacking jurisdiction	0
Patacho Continente	BR	BR	7 July 1835	28 July 1835	Condemned for being engaged in slave trade	45
Schooner Aventura	PT	BR	7 June 1835	30 July 1835	Condemned for being engaged in slave trade	0
Smack Novo Destino	BR	BR	25 July 1835	18 Sept. 1835	Restitution	0
Brig Orion	PT	GB	17 Dec. 1835	18 Jan. 1836	Condemned for being engaged in slave trade	243

Smack Vencedora	P T	G B (N)	8 Jan. 1836	7 Mar. 1836	Restitution	0
Schooner Flor de Loanda	P T	G B	13 April 1838	15 May/10 June 1838	Lacking jurisdiction	0
Brigantine/Patacho Cesar	B R	G B	13 April 1838	May 26/June 26 1838	Condemned for being engaged in slave trade	202
Brigantine Brilhante	P T	G B	13 May 1838	25 June 1838	Condemned for being engaged in slave trade	245
Brig-Schooner Diligente	P T	G B	1 Dec. 1838	10 Jan./15 Feb. 1839	Condemned for being engaged in slave trade	246
Brig Felix(z)	P T	G B	27 Dec. 1838	30 Jan. 1839	Condemned for being engaged in slave trade	229
Brig-Schooner Carolina	P T	G B	27 Mar. 1839	16 April 1839	Condemned for being engaged in slave trade	211

Patacho Especulador	P T	G B	25 Mar. 1839	4 May 1839	Condemned for being engaged in slave trade	268
Brig Ganges	P T	G B	7 April 1839	31 May 1839	Condemned for being engaged in slave trade	386
Brig Leal	P T	G B	11 April 1839	17 June 1839	Condemned for being engaged in slave trade	319
Barque Maria Carlota	P T	G B	29 May 1839	13 Sept. 1839	Condemned for being engaged in slave trade	0
Patacho Recuperador	P T	G B	28 May 1839	24 Sept. 1839	Restitution	0
Brig Pompeo(u)	P T	G B (N)	28 Aug. 1839	26 Oct. 1839	Restitution	0
Brig Dom João de Castro	P T	G B	17 Oct. 1839	28 Jan. 1840	Condemned for being engaged in slave trade	0
Patacho Providencia	P T	B R	July 1839	4 May 1840	Lacking jurisdiction	0

Patacho Africano Atrevido	P T	B R (N)	--	6 April 1840	Lacking jurisdiction	0
Patacho Paquete de Benguela	P T	G B	29 Aug. 1840	28 Sept. 1840	Condemned for being engaged in slave trade	274
Galliot Alexandre	B R	G B	2 Sept. 1840	10 Sept. 1840	Restitution	0
A canoe 40 feet long/ launch	--	B R	24 Sept. 1840	29 Oct. 1840	Lacking jurisdiction	---
Brig Asseiceira	P T	G B	31 Dec. 1840	8 Marc. 1841	Condemned for being engaged in slave trade	323
Brig Nova Aurora	B R	G B	26 Feb. 1841	15 April 1841	Restitution	0
Patacho Castro	B R	G B	1 June 1841	25 July 1841	Restitution	0
Brig Convenção	B R	G B	3 Dec. 1841	30 Dec. 1841	Restitution	0
Brig Schooner Aracaty	B R	B R	18 Mar. 1842	16 July 1842	Condemnation	0

Brig Dous Amigos	B R	G B	14 June 1843	22 July 1843	Restitution	0
Polacca Bom Destino	B R	G B	7 Sept. 1844	7 Oct. 1844	Condemnation	0
Brigantine Nova Granada	B R	G B	8 Nov. 1844	_ _	_ _	_ _