GLOBAL PERSPECTIVES
ON LEGAL HISTORY 22

ADRIANE SANCTIS DE BRITO

Seeking Capture, Resisting Seizure

An International Legal History of the Anglo-Brazilian Treaty for the Suppression of the Slave Trade (1826–1845)

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An International Legal History of the Anglo-Brazilian Treaty for the Suppression of the Slave Trade (1826–1845)

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1 The doctoral dissertation was archived with the University of São Paulo in November 2018 and is available at https://www.teses.usp.br/teses/disponiveis/2/2139/tde-30102020-143337/en.php.

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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.'[1]

When the *Act for the Abolition of Slave Trade of 1807* passed in the British Parliament,[2] Britain was not the only state to abolish the previously widely accepted traffic. Denmark had abolished the slave trade in 1803, the Haitian Revolution had culminated in the declaration of slavery abolition in 1804 and the United States would enact a prohibition in 1808. Yet it was Britain that came to be known as the bastion of international slave trade suppression in numerous celebratory historical accounts. How was Great Britain any different?

Britain expanded its domestic abolition into an international policy[3] enforced through legal imperialism.[4] Ward's account, quoted above, is just one revealing example of the many exalted readings depicting the British quest. He portrays a complex operation involving diplomatic representatives working hard behind the scenes to design and enforce treaties, all directed at 'freeing up' the navy to do its 'work'. British seamen would be responsible for the main act, that is, spotting, stopping, capturing and bringing to adjudication vessels suspected of being engaged in the slave trade. After all, that was the way Britain went about fighting and winning battles: over the seas, using its incomparable navy.

1 Ward (1969) 116.
2 The Abolition Act of 1807 was the first to prohibit slave trade for British subjects. This prohibition was later expanded in subsequent legislation. See Haslam (2019) 37–38.
3 See Nelson (1942) 192.
4 Benton / Ford (2016) 125.

There is no shortage of studies on the motivation behind Britain's undertaking of the international effort to abolish the slave trade. Over the years, many have tried to explain abolition by aggregating elements of moral, religious and economic grounds.[5] It is of course likely, and these accounts are evidence of it, that all these factors played a role, and that each may have begun to vary throughout the years. Identifying the central reasons behind the British quest is not the aim of this study; nor is delving into the vast literature on the history of the slave trade and its abolition. Instead, this book hopes to contribute to the discussion about the *means* used in the project of slave trade suppression, specifically the *legal* means.

Ward's account quoted leaves a central factor unnoticed. The 'freedom' enjoyed by the British navy to battle against the slave trade was created and maintained by diplomats who were busy translating its 'work' – in effect an expression of the British fleet's force and might – into *rights* held by Great Britain against other states (or, by extension, foreign citizens and their property). While a powerful tool in that context, international law remains overshadowed by narratives recounting how '[t]he Slave Trade was […] suppressed by the twin weapon of *diplomatic pressure* and *exercise of naval power*'.[6]

This book is conceived as a modest contribution to a broader understanding of the constitutive relationship of international law and power in the field examining the history of slave trade abolition. Here, I 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 *bundle of techniques*'.[7]

In recent years, the abolition of the slave trade has been gaining more attention in historical accounts of international law.[8] Additionally, some of the work on the global history of the slave trade or slavery has paid specific

5 Among the most cited contributions to this debate are e.g. Du Bois (1904); Coupland (1933); Williams (1944); Temperley (1972); Eltis (1987); Drescher (1987, 2010); Blackburn (1988); Davis (2006). For an account of different 'stages' of the literature on abolitionism, see Stauffer (2012).

6 Lloyd (2016) x.

7 Crawford/Koskenniemi (2012) 2, emphasis added.

8 Especially after the so-called 'turn to history': Galindo (2005).

attention to legal structures and has brought important contributions to the international legal history of slavery.[9] More recently, however, works *centred* on the role of international law in the process of slave trade suppression have begun to reveal new perspectives on that part of history.

Holger Lutz Kern, for example, has published a brief account of Britain's strategic use of international law, among other available means, to implement the project of slave trade abolition. He highlights the transformation of the main legal foundations of the British policy from the unilateral extension of belligerent rights to the efforts of British representatives to urge other states to consent to a new set of peacetime rights.[10] Using a similar approach, Janine Voigt reconstructs the development in multilateral conferences among European countries towards slave trade abolition in international law.[11] In tackling slave trade suppression as a chapter of the anti-slavery legal history, Jean Allain has also contributed to the history of the conferences, focusing on the European and US interpretations of the law against the slave trade in the 19th century.[12]

Other publications continue the line of research inaugurated by Leslie Bethell's seminal work on mixed commissions – special tribunals created to adjudicate on ships captured for being suspected of engaging in the slave trade.[13] Among them, Jenny Martinez' much-debated book looks to slave trade suppression in search of 'missing pieces' in the history of human rights, arguing that mixed commissions can be considered the first international human rights courts.[14] Using a different approach, Emily Haslam finds important lessons in mixed commissions' practices for inscribing the slave trade in the history of international criminal law and alternative thinking about its victims.[15]

In addition to international human rights and criminal law, other authors have begun to consider slave trade suppression in the context of humanitarian interventions. Maeve Ryan looks to the 19th-century efforts

9 See especially Du Bois (1904); Blackburn (2011).
10 Kern (2004).
11 Voigt (2000).
12 Allain (2012, 2015).
13 Bethell (1969).
14 Martinez (2012) 6.
15 Haslam (2016, 2019).

against the slave trade as a historical example of the burdens of carrying out a humanitarian action.[16] Fabian Klose proposes a new understanding of the genealogy of humanitarian intervention (as a political science concept) by placing its origin in the 19th century, when the slave trade abolition and other interdependent imperial efforts generated the idea of military protection of humanitarian norms.[17]

Incorporating key moments of the history of slave trade abolition, Lauren Benton and Lisa Ford's depiction of the British 'rage for order' places law in the spotlight of the 19th-century imperialism.[18] Their book make sense of a set of initiatives by which Britain dictated the terms of various kinds of relations well beyond the formal boundaries of its dominions.[19] In that governance arrangement, both diplomatic pressure and naval power relied on international law to help advance their goals of imperial control.[20]

Michel Erpelding's analysis of the history of anti-slavery international law comprises the period from the first decades of the 19th century up to the mid-20th-century creation of the United Nations. In his account, the campaign for the abolition of the slave trade led to the first of many changes formalised in international law under the liberal goal of ending slavery, conceived as a necessary step towards 'civilization'. Erpelding points out how, paradoxically, legal mechanisms for the suppression of slavery legitimised the conservation of exploitative relations among states and practices such as forced labour.[21]

Despite differences in their objectives, these studies share a common element: their narratives mention treaties and broad legal policies, which provide us with vivid pictures of international law in this period of history. When observing general changes in the policies against the slave trade, however, many of these studies either assume the British position or focus heavily on British efforts. This methodological choice results in stories that portray (in varying degrees) foreign parties to the British either as recalcitrant to the humanitarian British efforts or resistant to abuses of British actions legitimised by those goals. Consulting those works, the reader is left mes-

16 Ryan (2011).
17 Klose (2013, 2016, 2019).
18 See Benton/Ford (2016).
19 Benton/Ford (2016), ch. 1.
20 Ibid.
21 Erpelding (2017); Brito (2019).

merised by the contrasting visions of the British undertaking, as either a flagbearer or an empire augmenting its dominions. She is also left in doubt as to how the other parties could have reacted to those plans the authors describe. Yet every history of human accomplishments, including empires, is jointly constructed: 'The external world is no passive receptacle of imperial influences but plays the centre's factions against each other using imperial favour or opposition to advance its agendas.'[22]

This book takes another direction. Changing the scale, I argue, allows for the observation of the exchanges, tensions and interpretations emerging from the common ground of law. Zooming in on those colourful images and looking at the grey areas in-between the pixels enables us to gain a deeper understanding of how international law *worked* to regulate *relations*, either as a *language* or *a bundle of techniques.*[23]

This study will seek to offer an understanding of the dynamics of international law in the slave trade suppression, deliberately avoiding stories of heroes and villains among states, instead 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 mobiliser.[24] 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'.[25]

This approach is particularly valuable for creating counter-narratives to the usual perspective through which international law is conceived and its history is told. It is not a matter of 'adding more and more histories' to international law in order to make it 'truly comprehensive'.[26] Instead, by considering the dynamics of the 'constant work of imagining and reimagining', that is, the work of legal interpretation, it reveals how these interpreters 'used power through the various mechanisms they have'.[27] This helps bring

22 Koskenniemi (2011) 162–163.
23 Crawford / Koskenniemi (2012) 2.
24 Koskenniemi (2016).
25 Orford (2016). See also Orford (2012).
26 The point against portraying the legal history of peripheries as 'missing pieces' in a wider narrative is advanced by Veçoso (2018) 128.
27 Koskenniemi (2017).

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

Global accounts of slave trade abolition that *centre* on international law usually contain two subplots within their larger narratives. The first begins with the British quest to establish treaties with other powers: 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 19th-century European conferences, other states, one by one, are convinced by Britain to cooperate with slave trade abolition. A second version recounts how Britain applied last-resort measures against the states refusing to implement treaties; that the Palmerston Act gave Britain the power to act against Portuguese slave traders beyond treaty limitations; the Aberdeen Act does the same, but this time against Brazilian slave traders.

Anglo-Brazilian relations do indeed play a central role in the overall history of slave trade suppression of the 19th century, as the second subplot hints. Brazil was the main destination of captured Africans in the Americas and one of the last to effectively abolish the transatlantic slave trade. However, there is more to explore in the Anglo-Brazilian relations beyond the Aberdeen Act (1845): the Brazilian position as a recalcitrant state to the British moral efforts towards slave trade suppression, or as a state that put up a futile resistance to the imperial power of Britain to dictate the new rules. For this reason, the Anglo-Brazilian case will be the focus of this book.

I will consider the *Anglo-Brazilian legal battles as a discrete contribution to a better understanding of how British and Brazilians employed international law in the matter of slave trade abolition*. The events related to the 1845 (Aberdeen Act) – most often mentioned in other historical accounts – will not be the focus. This study will instead adopt the *timeframe* from 1826 to 1845, which covers the period from the signature of the Anglo-Brazilian treaty for the suppression of the slave trade to the expiration of most of its clauses in 1845.

During the period from 1826 to 1845, at least two sets of 'battles' occurred between the parties of that treaty over its provisions. One dealt with the implementation of the clause proscribing the slave trade regarding its impact on the treatment of Africans liberated through the treaty's

28 Anghie (2005).
29 Lorca (2010).

enforcement system against the slave trade. While this is an undeniably relevant set of disputes considering the main point of slave trade abolition, that will not be the focal point of this work,[30] but rather the second set of battles that occurred under the treaty.[31] These consisted of a series of disputes around the mechanisms provided by the treaty to enforce the (partial or total, at different points in time) proscription of the slave trade. Combined, they constituted a set of rights in a triple formula for regulating visitation, capture and adjudication of vessels suspected of engaging in the slave trade. By considering the events from 1826 to 1845, I will examine the life of the triple formula of the Brazilian treaty, from its conception to its abandonment.

I aim to employ historical descriptions of these legal interpretative battles to highlight the political importance (for human exploitation, violence, and inequality) of what might at first glance be perceived as little more than rules governing the execution of proceedings.[32] 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 that constituted each of the battles.

The primary sources I rely on include 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 Officers, of the Brazilian Foreign Office and of the Brazilian Council of State.[33]

30 The timeframe of that particular set of battles extends beyond 1845. A substantial study of them can be found in Mamigonian (2017).

31 Both sets of battles are intimately intertwined in a key point I will analyse in Chapter 5, 'Liberation and deviation'.

32 Orford (2012).

33 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 have translated them into English myself (i.e. cases involving Brazilian domestic legislation and the Brazilian Foreign Office reports). When dealing with mixed commissions, I have adopted the terms most frequently used in primary sources. For this reason, the Anglo-Brazilian com-

The choice of sources to be consulted was informed by an examination of the literature on Anglo-Brazilian relations of the period combined with a first look into the diplomatic correspondence and the British Law Officers' 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 others still involved many exchanges between different *loci* of interpretation through years of resignification.

This book by no means exhausts the legal disputes under the Anglo-Brazilian treaty of 1826, and my intention is certainly *not* to map all discussions involving the treaty. Instead, I want show both the sheer breadth and diversity of the respective Brazilian and British appropriations. The chapters of this book are organised around the Anglo-Brazilian treaty regime, which serves as a focal point that reveals multiple histories of international law and power through the series of interpretations and reinterpretations.

Chapter 1 explores the first steps of the British mobilisation 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 Anglo-Brazilian treaty will be situated within the context of other treatises drafted by the British.

Chapter 2 addresses the functions and meanings of each of the elements of the triple formula (visitation, capture and adjudication). It begins with the interpretative disputes on the limits of the right of visit and search which reveals the stakes involved in the visitation of ships suspected of slave trading. 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 19th century have to take into account when executing the first two steps of the triple formula? I then 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?

missions will be referred to as the *Rio mixed commission* and the *Sierra Leone mixed commission* (instead of 'Freetown mixed commission' or other variations).

Chapter 3 deals with the Brazilian perspective of entering the network of British treaties against the slave trade. How did Brazilian independence first impact the international regulation against the slave trade? What did the transition from the Anglo-Portuguese treaty regime to the Anglo-Brazilian one look like? Lastly, in general, what did that triple formula imply for the Anglo-Brazilian relations?

Chapter 4 delves into the practices of treaty implementation with a focus on the internal mechanisms of the triple formula once it was in motion: What made a capture legal, what constituted the liability to pay indemnities, which positive steps were taken in the mixed commissions proceedings. In-between the blurry lines of war and peace, the nature of the regime was continually reassessed to make sense of its rules and conditions of procedure.

Chapter 5 presents the Anglo-Brazilian battles that dismantled the triple formula. British and Brazilian representatives engaged in disputes avoiding mixed commissions jurisdiction, questioning the legal system's effectivity and ultimately reading their way out of the treaty. This set of battles reveals the process of reimagining the role and purpose of what remained from the system without the triple formula.

Chapter 1
Weaponising Treaties: The British Fight Against the 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.'[1]

In his 1854 textbook, Robert Phillimore – one of the most prominent British international lawyers – proudly proclaimed that to know British treaties was to know the history of international law and abolition.[2] Anyone acquainted with the history of slave trade suppression would be sceptical about the centrality of these treaties, and of their practical benefits, given that Britain already had its powerful navy to do the job. On the other hand, a lawyer – and regardless of what one usually thinks about gunboat diplomacy – would probably be curious about the engineering of those treaties and the legal policy behind them. If legal tools were needed for the policy of slave trade suppression, why choose treaties? What were the treaties aiming at? What rights and obligations did they provide? How were the clauses intended to meet their goals?

These are the first questions to be addressed in this study. To understand these 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 begin by looking at the ways international law was mobilised by Britain to employ its battle-hardened navy to this new kind of fight that was about to begin after the Napoleonic Wars ended. We will see that, at first, the navy relied on the well-established legal grounds of warfare. Peacetime pushed the boundaries of legality in that practice, and a race to

1 Phillimore (1854) 251.
2 Ibid.

create new foundations in international law started. The treaty-making through multilateral conferences designed to establish multilateral agreements would not succeed for decades. Instead, Britain found a way through bilateral treaties to maintain its position of dominance over the seas as a maritime police force against the slave trade. Next, we will explore the conventions that emerged from the British international quest of treaty-making through 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 the slave trade in 1807,[3] Britain would also initiate an international policy of suppressing the traffic. In these efforts, Britain profited from its wartime prerogatives established during the last few years of the Napoleonic Wars (1803–1815). Under the laws of war, British ships could not only board the vessels of foreign enemies but also inspect those of neutral states.[4] 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 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.[5]

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').[6] Beyond general practice, the grounds on which items could be legally seized were usually found in treaties and unilateral proclamations.[7] When such a breach was established, the ship could be detained and brought before *prize courts* to be declared a *good prize* of war.[8]

3 After the Act for the Abolition of the Slave Trade (1807), other British domestic legislation followed to expand its provisions. See Haslam (2019) 37–38.
4 Tavares (1988) 88–89; Kern (2004); Van Niekerk (2004); Benton (2013).
5 Schaller (2015).
6 Schaller (2015). See also Hall (1890) 724; Bello (1844) 328–332.
7 Neff (2000) 64.
8 Kraska (2009).

Both the words '*prize*' in English and '*prise*' in French derive from the Latin verb *prehendere*, which means 'to seize'.[9] Being declared a *good prize* meant a capture (of a ship or its goods) was performed legally, 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 by the mere act of capture.[10] 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.[11] At the centre of the case were always the vessel and its cargo (*in rem* proceedings).[12] The requirement of adjudication was intended to protect neutrals' goods from being mistaken for an enemy prize, or being deliberately abused by the captor, thus preventing uncontrolled pillage.[13]

Neutrality had been a rough compromise between the peacetime legal regime, on the one hand, and the wartime rights held by belligerents, on the other.[14] The regulation of neutrality had emerged as a practical necessity in order 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';[15] considering some states 'neutral' allowed for the preservation of liberal ideals of free trade.[16]

Since the Seven Years War (1756–1763), belligerents would use neutrals to trade on their behalf so they would not lose their market share. This was in contradiction with the previous prohibition that neutrals could not engage in forms of trade different from the ones they did in peacetime.[17] Neutral states gained importance in Atlantic commerce, while Britain

9 Kraska (2009).
10 Bello (1844) 240.
11 Bello (1844) 228.
12 Bello (1844) 231.
13 Bello (1844) 228.
14 Hall (1890) 76.
15 Neff (2000) 1.
16 Hall (1890) 75.
17 Benton (2011) 357.

intended to protect its naval advantage. As a result, treaties would vary in either allowing the seizure of such goods by captors, or protecting the goods against capture.

The exact terms of neutrality had been strongly disputed by the turn of the 18th to the 19th century. Bonaparte's protection of the neutrals (which he would praise as 'respect for the flags') was part of his well-known attempt to defeat Britain by 'conquering the sea by the land'.[18] 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 the protection of neutral ships to take absolute precedence over belligerent rights.[19]

During the 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 Bonaparte's command.[20] During such blockades of enemy harbours, ships attempting to pass through were captured.[21] Britain also insisted on visiting neutral vessels and seizing enemy property, even when carried by neutral ships. The British approach attracted allies over the years.[22] Russia, Prussia, Austria, the Two Sicilies and Portugal abandoned the principle of 'free ships, free goods'. The United States, Denmark and Sweden adhered to the seizure of enemy goods in any circumstances during the last years of the 18th century.[23]

These practices formed a set of divergent approaches to neutrality by European states, which extended until the beginning of the 19th century.[24] As the changes in the treaty regime increased, prize court judges relied heavily on proof of nationality to determine the rights of belligerents and neutrals, among which were the rights of visit, search and seizure of goods.[25] This analytical framework made it possible for British prize courts to broaden

18 Piggot (1919) 83–84.
19 Piggot (1919) 81–86.
20 Bourguignon (2004) 120.
21 See e. g. Kern (2004); Martinez (2012).
22 '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 (2000) 83.
23 Piggot (1919) 87–89.
24 Benton (2011) 360.
25 Ibid.

these new interpretations of belligerent rights in order to extend them to slave traders.[26]

Britain started to employ the possibility of visiting and searching ships for its policy of slave trade suppression during the Napoleonic Wars. The British navy had the perfect justification for implementing the *Act of 1807*, which made the 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.[27] Yet, as we will later see, further elements of the British policy of abolishing the 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 the 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 of the radical differences among its most important cases about captures that happened during and after the Napoleonic Wars: the *Amedie* (captured in 1807), the *Fortuna* and the *Diana* (both captured in 1810) and later the *Louis* (captured in 1816).[28]

All four cases were named after vessels captured by the British navy, as was standard practice with prizes brought before courts. Two were ultimately declared good prize. Decided in 1810, the case of *Amedie* dealt with a North American – thus neutral – ship subject to visitation to be inspected for contraband. The *Amedie* was captured by the British navy three years before while carrying captives to Cuba (a colony of a Britain enemy at that point in time). The *Fortuna* was also found to be a US citizen's property in 1811, even though it was sailing under a Portuguese flag when captured the previous year. 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

26 Benton (2011) 360; Allain (2015) 54.

27 Van Niekerk (2004) 7.

28 *The Amedie*, 12 English Reports (1810) 92 et seq.; The Fortuna, 165 English Reports 1240 (1811) 1240 et seq.; The Diana, 165 English Reports 1245 (1813) et seq.; *Le Louis*, 165 English Reports (1817) 1464 et seq.

have the right to claim restitution of their property (either of the ship or the slaves), due to the proscription of the slave trade under US law.

The other two cases were ultimately declared bad prize. The *Diana* was a Swedish vessel apprehended in 1810 after British officers found captives on board during visitation. In contrast with the first two cases, the *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 the failure of the captor to prove the proscription of the slave trade under Swedish legislation. In the final decision regarding the *Louis* in 1817, a British court also reverted to a prior decision condemning the ship. Although the French-flagged vessel had been captured for its engagement in the slave trade, in open violation of the French law proscribing such practices, the seizure of the vessel was considered to have violated the law of nations because it had been conducted in the absence of a treaty providing for the right of capture.

Beyond the fact they have been referenced in the literature as exemplar of British case law, these four cases form a unique set for at least two reasons. First, they address very similar legal questions concerning the legality of visits and captures. Second, the same jurist delivered opinions on most of their final decisions. That judge was Sir William Scott, later known as Lord Stowell, the most important authority on British prize law.[29]

As we saw above, the case of the *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 the *Amedie*'s final decision was that, given that the British parliament had abolished the slave trade in British dominions, it was a practice 'contrary to the principles of justice and humanity'. Based on these 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

29 We can gain a sense of the British admiration of Sir William Scott (or Lord Stowell) from a statement by Robert Phillimore, a very renowned British writer of international law in 19th century, referring to Scott as one of the most distinguished civilians: PHILLIMORE (1854) xxii. On Robert Phillimore's relevance for the doctrine of the 19th-century Britain, see GAURIER (2005), ch. 1. On Sir William Scott's career, see BOURGUIGNON (2004).

property could be claimed and therefore no right of restitution would follow.[30]

In the *Fortuna* case, this point is restated in this same context of establishing the rights of capture. The *Fortuna* was seized at the end of a slave trade journey, flying Portuguese colours. In 1811, it was condemned by the High Court of Admiralty. In the decision, Sir William Scott explained the context in which he understood the case, 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 to explain two of these considerations: first, a violation of British law could be grounds to condemn a British vessel, as a principle incorporated into British prize law over the course of twenty years; second, as per the case of the *Amedie*, an apparent violation of the law of nations (as interpreted by the British parliament) enabled confiscation and so other parties bore the burden of proof whether the trade was in fact legal under the flag state's law. This new principle of British prize law was thus based on the idea that the 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 a *shifting of the burden of proof*. In the case of the *Fortuna,* as in the *Amedie*, condemnation followed the failure to produce such proof.[31]

In the *Diana* case, we find exactly the same interpretation of British prize law and the burden of proof regarding the slave trade as in *Amedie* and *Fortuna*. *Diana* was a Swedish vessel sailing from Liberia to the Lesser Antilles, captured with captives 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 *reversal of a sentence of condemnation*. According to Sir William Scott, sufficient proof had been produced that the Swedish vessel was legally trading slaves under the state-issued passport to do so. He offered a clear justification for the reversal: 'The Lords of Appeal [in *Amedie*] did not mean to set themselves up as

30 *The Amedie*, 12 English Reports (1810) 92.
31 *The Fortuna*, 165 English Reports (1811) 1241.

legislators for the whole world', so the British could not go beyond the *burden of proof* in dealing with the slave trade by foreign state nationals.[32] That statement confirmed exactly the same reasoning that was used in *Amedie* and *Fortuna.* The decision in *Diana* did not *explicitly* mention the construal of the domestic law and natural law which changed the burden of proof, yet the change in the burden of proof served to ground the reversal in the condemnation of the ship.

The most revealing change in case law is expressed in *Louis*. The French vessel of 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 already noticeable in the main focus of its analysis. The decision in the appeal of the *Louis* case focused on the right of visit and search rather than on the legality of capture, as in the other cases mentioned above. Yet, its main point was that '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*'.[33] 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*'.[34]

William Scott acknowledged that 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'.[35] In times of war, enemies 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'.[36]

32 *The Diana*, 165 English Reports (1813) 1247.
33 *Le Louis*, 165 English Reports (1817) 1475–1476, emphasis added.
34 *Le Louis*, 165 English Reports (1817) 1475.
35 Ibid.
36 Ibid.

The wars, however, had ended. On the opposite end of the spectrum, that is, whether a right of search existed in *times of peace*, Sir W. Scott asserted 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*'.[37] Most importantly, he emphasised that *freedom of navigation did not have any exception*[38] *in times of peace* as it happened with the 'interruption of navigation […] which the rights of war give to both belligerents against neutrals'.[39]

Sir W. Scott noticed the difficulties in the British pursuit of the total and global abolition of the slave trade in the face of these peacetime restraints: it would 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'.[40] *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*.'[41]

The Louis case (1817) thus marked the transition from interpreting the 'navy's work' for the suppression of the slave trade during war to interpreting it in peacetime.[42] That was the central change that occurred among the cases.[43]

37 Ibid., emphasis added.
38 The only other possibility was piracy, as we will explore later in this chapter.
39 *Le Louis*, 165 English Reports (1817) 1475.
40 *Le Louis*, 165 English Reports (1817) 1479.
41 *Le Louis*, 165 English Reports (1817) 1480, emphasis added.
42 Lauren Benton points this out in saying '[t]he court's core finding was that wartime measures of visitation and search could not be legally employed in peacetime'. Benton (2011) 362.
43 By contrasting the four cases, Jean Allain identifies a movement towards a more positivistic approach (discernible both in British and in US case law): 'The decisions […] highlighted the need to gain the consent of a sovereign State for foreign warships to visit its vessels in times of peace on the high seas, no matter the jurisdiction'. First, cases were 'decided on the basis of a "natural law" right to visit', to condemn ships involved in the slave trade. Yet in *Diana,* the unwillingness to condemn ships whose states did not outlaw the slave trade was central, and *Louis* would 'supersede' the previous cases by bringing the

Accordingly, Scott's argumentation shows the practical problem of the change of regimes as a way of differentiating the previous cases from *Louis.* Under its own rationale, it did not represent an overturning of previous case law,[44] but rather a reinforcement of the same tests applied before.[45] The Napoleonic Wars had come to an end, so in contrast 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 course of action in British international policy initiated some years prior. In 1813, British Foreign Secretary, Viscount Castlereagh, had modified the instructions to British cruisers about the interpretation given to treaties with Portugal and Spain, removing restrictions to the protection of the flags[46] and offering indemnities related to the (implicitly considered illegal) captures, to be paid to both states.[47] In 1816, the King's Advocate was explicit in saying that the right of visit had ended with the war,[48] and Britain was already seriously engaged in treaty-making to secure the continuity of the Royal Navy operation against the slave trade.

final element of necessity of an international treaty to the shift. Allain (2015) 54. – Allain may be right in claiming that the case showed a tendency toward positivism, yet we should not overlook the fact 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 in an entirely different legal (peacetime) framework that had to be applied once the wars ended.

44 This was suggested by J. P. van Niekerk, who contrasts the *Amedie* (1810) and the *Fortuna* (1811), on the one hand, with the *Louis* (1817), on the other. Niekerk draws on these cases to show that the unilateral course on 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'. Van Niekerk (2004) 7–11.

45 Benton (2011) 361–364

46 Interestingly, in 1810, a pamphlet produced by the African Institution to serve as guidelines for the Royal Navy contained 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 (2004) 237–238.

47 Kern (2004) 238.

48 Kern (2004) 240.

Louis would be quoted in Parliament and in the Law Officers' 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 for Britain to interfere in foreign vessels. British diplomacy would act accordingly, pursuing treaty-making as the key to overcome those limitations.[49]

B. The ways of treaty-making

Time for treaties

From the beginning to the end of the 19th century, treaty-making 'went from being something that happened perhaps twice a month, to something that happened about every other day'.[50] A good way for us to see the impact of that trend is by placing it side by side with the pace of treaty-making that mushroomed in the late 20th century – a reason for a well-known anxiety about the dangers of fragmenting international law.[51] While in the last boom years of treaties the growth was roughly six-fold – despite starting from a much higher baseline of treaty-making – the number of treaties made per year increased almost seven-fold during the 1800s.[52]

In the 17th and 18th centuries, the rate remained stable or declined, yet in the 1790s an upward trend emerged, perhaps related to wartime coalitions.[53] A dramatic increase in treaty-making followed in the 1810s, which might be explained by the short duration of the treaties signed in the previous decades.[54] In addition, the formal inclusion of new states in international society and the process of industrialisation (with increasing interstate commerce and communication) may have impacted treaty-making by that time.[55]

In broad terms, Wilhelm Grewe links this trend of treaty-making with a positivistic codification push of the 19th century.[56] On his reading, an incli-

49 Van Niekerk (2004) 15; see also Wilson (1950) 505–526.
50 Keene (2012) 478.
51 See e.g. Koskenniemi/Leino (2002); Prost (2012).
52 Keene (2012) 478.
53 Keene (2012) 479.
54 Keene (2012) 478.
55 Keene (2012) 479.
56 Grewe (2000).

nation to codify international law appeared both in the international conferences and in some doctrinal works in the form of a will to create international legislation.[57] While this is a fair overview of the phenomenon, we should be careful not to overstate the role this played in the second decade of the 19th century, when the history of treaty-making aimed at suppression of the slave trade begins.

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

In a much more specific analysis, Edward Keene examines the phenomenon of British treaty-making in the context of slave trade suppression, responding to the question of 'why were the British so interested in treaty-making in the first place?'[58] Keene suggests there was something about positivism that led to treaty-making; it coincided with the years of development of legal positivism, alongside elements of a persistent naturalist doctrine, and was influenced by the process of becoming more and more reliant on civilising claims in the second half of the century.[59] Although this information confirms Grewe's explanation of the phenomenon in the case of slave trade suppression, it is not entirely illuminating with respect to identifying the start of the British quest through treaty-making. Regarding the push towards civilisation, we should bear in mind that, although the Declaration of Vienna of 1815 concerning the abolition of the slave trade was one of the first documents to use the labelling of states as 'civilized',[60] only in the second half of the 19th century would that notion hold sway over the policies designed to combat the slave trade.[61] Corroborating this is the fact

57 Grewe (2000) 512–513.
58 Keene (2007) 315.
59 Keene (2007) 315–319.
60 Obregón (2012) 5.
61 Michel Erpelding shows a change in the British anti-slavery policy which combined the 'duty to civilize' with economic exploitation of the African continent by the last quarter of the century. See Erpelding (2017) part 1.

colonialist discourse expressly grounded on the 'duty to civilize' first appeared only as late as the Act of the Berlin Conference of 1885.[62]

A further aspect of the international legal culture is significant for understanding the choice of treaties in the case of slave trade suppression. A glance at the doctrine over the century reveals it was not only jurists but also philosophers, theologians and members of state bureaucracy who wrote about what constituted international law, or why international law was not law at all.[63] Only in the last third of the century was international law consolidated as a professional discipline, when international lawyers created institutional *loci* where they would share their *'ésprit d'internationalité'* in a much more integrated scenario.[64]

During the 19th century, international law had become a fundamental part of diplomatic practice, which, along with domestic case law, constituted the core of international precedents. That notwithstanding, the doctrinal development and understanding of its canons was quite diverse. The number of theories of international law as distinct from natural law only began to grow when international law appeared as an autonomous discipline in multiple textbooks and translations.[65] Fundamentally, international lawyers (who applied, taught and theorised international law) did not merely disagree sharply in their methods of interpretation or overall conception of international law; they did not share even the most basic criteria of source-identification.[66] The resulting production was a mixture of natural and positive law, seen in the different listings of sources, in the preponderance of one or the other of them in particular fields, and even various conceptions of the status of principles.[67] From this complex scenario, Miloš Vec has identified one tendency: separating the legal normativity of international law from other kinds of normativity, which was accompanied by an increased 'sum of positive explicit legal rules among states'.[68]

62 Obregón (2012) 8.
63 Nuzzo/Vec (2012) 1–8.
64 Koskenniemi (2009) 141–154.
65 Nuzzo/Vec (2012) 1–8.
66 On the complex variation of source-identification and the legal significance given to commonly identified sources, see Vec (2017, 2012).
67 Vec (2017, 2012).
68 Vec (2017) 141.

If there was indeed something about positivism that favoured the option of utilising treaties over other legal technologies used to supress the slave trade, it might have been related to a practical preference for formalism in the ascertainment of legal rules.[69] Treaties may have been considered a good way to bypass, or at least counter, the upheavals resulting from different approaches to law, with correspondingly divergent methodologies and conflicting interests in the implementation of its programmes.

This is especially true in a scenario where the legality of the slave trade was prone to strong disagreements. The law under which its *proscription* should be understood depended on the value assigned to domestic law, natural law and the law of nations. This also applied to the means of implementation of the slave trade suppression in the form of rights and duties. We have seen an example of this in the transition of British prize court case law from wartime to peacetime. Establishing treaties was ultimately a form of control over the interpretative construction regarding the 'work' of the British navy. It was a way of avoiding either of the two worst-case scenarios anticipated by William Scott in *Louis*:[70] 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, which would frustrate ends of the party most interested maintaining both its maritime dominance and commerce.

Multilateral conferences

Treaty-making in the 19th century was characterised by 'a tendency of multilateralism, the conclusion of law-making treaties, the allotment of new fields of international cooperation, the institutionalizations'.[71] In practice, much of the jurisprudential development occurred around international conferences and congresses, where specialised studies would be conducted and treaties would be formalised as written legal rules.[72]

69 Although formalism is usually an element of positivism, identifying the former using the name of the later may be misleading, since the two terms are not interchangeable. See d'Aspremont (2011) 25–27.

70 *Le Louis*, 165 English Reports (1817) 1480.

71 Vec (2017) 142.

72 Mälksoo (2017) 151.

In these exchanges, customary law sometimes showed the influence of natural law, especially when identified as the 'conscience of humanity'.[73] This combination occurs in the Paris peace treaty of 1814, whose additional articles between France and Great Britain included a provision according to which – 'with respect to a description of traffic repugnant to the principles of natural justice and of the enlightened age in which we live' – France committed itself to ending the slave trade in its dominions over the course of the ensuing 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'.[74]

This provision anticipated negotiations during the Congress of Vienna, which took place as provided in the Paris Peace Treaty of 1814 agreed to by France, Austria, Prussia, Russia and Britain.[75] 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 the slave trade.[76] The Congress of Vienna would offer a chance for British Foreign Secretary, Castlereagh, backed by British abolitionists pressure,[77] to advance in treaty-making for that end.

Though abolition of the slave trade was not one of the main items on the agenda of reordering Europe, the topic persisted as part of the negotiations. The Congress of Vienna finally produced the first multilateral document on the slave trade. In the declaration signed on 8 February 1815, Austria, Britain, France, Prussia, Russia, Portugal, Spain and Sweden denounced the slave trade as 'repugnant to the principles of humanity and universal morality', which, as such, should be suppressed by civilised countries as soon as possible.[78] A multilateral treaty did not pass, mainly on account of states' resistance to measures harmful to their sovereignty.[79] Although judgments as to importance of the declaration vary in the international law literature,[80]

73 Mälksoo (2017).
74 *Paris Peace Treaty of 1814*, additional articles between France and Great Britain, Article 1.
75 *Paris Peace Treaty of 1814*, Article 32.
76 Wheaton/Calvo (1861) 264.
77 Voigt (2000) 35; Klose (2019) 150–155.
78 *Declaration of Vienna of 1815*.
79 Voigt (2000) 32–33.
80 Voigt (2000) 33. See also Martinez (2012) 33 et seq.; Erpelding (2017) 76–77.

concluding a declaration at that time meant at least formalising humanitarian values within the law of nations,[81] with the support of all participating members of the Congress.[82] The declaration would be recalled many times in later negotiations towards universal suppression.

The topic of the right of visit returned 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.[83] In their 1818 meeting in Aachen, the great powers once again rejected a variation of that proposal – a mutual right of visit and search. The rejection was attributed mainly to the prospect of misuse and harm to sovereignty rights.[84] 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 the slave trade, all in accordance with prevailing international legislation.[85]

The British quest to create a right of visit through multilateral conferences would culminate in the Brussels Conference of 1890, when the slave trade was declared to be proscribed under international law, and a right of visit and search was thought to serve that end.[86] Yet the right of visit and search under the Brussels Act was much narrower than any definition we can imagine as effective against the 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

81 Voigt (2000) 33.
82 Klose (2016) 107.
83 Kern (2004) 244.
84 Du Bois (1904) 94; Klose (2016) 116–177.
85 Wheaton/Calvo (1861) 268–269; Martinez (2012) 44.
86 Allain highlights the difference between the expressions 'droit des gens' and 'droit international'. In the Berlin Conference of 1885, the slave trade was said to be prohibited under *jus gentium*, which can be interpreted as falling within the domestic laws of European states; while in the Brussels Conference of 1890, the proscription was said to be under *international law*. Allain (2012) 72–73.

the right to visit, search and detention of *specific* ships inside a *specified* maritime zone.[87]

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 in Aachen (1818), that the slave trade should be declared piracy by individual states.[88] How could piracy help the British efforts? The assimilation of the 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. This meant they 'could be visited with impunity by ships of all states – in other words, to use modern terminology, universal jurisdiction would be established'.[89] If Britain succeeded in its piracy proposal, it would have no need to establish the right of visit and search (and, by extension, the right of capture and the right of adjudication) specific to the anti-slave trade efforts.

As mentioned by Lloyd, who himself evokes this strategy, treating the slave trade as piracy from the start would have been much simpler than establishing treaties with recalcitrant states.[90] After all, independently of any treaties, piracy was considered the sole exception to the freedom of the seas, which prohibited interference of foreign ships to one another.[91]

In *Louis*, for instance, the respondent insisted on presenting the ship as engaged in piracy. As Sir William Scott explained 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*

87 *Act of Brussels Conference of 1890,* Chapter 3.

88 Wheaton/Calvo (1861) 271; Du Bois (1904) 96; Martinez (2012) 45.

89 Allain (2012) 68.

90 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 adds: '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 flesh.' Lloyd (2016) 60.

91 Erpelding (2017) 65.

rights of war.'[92] Nevertheless, when addressing the question of whether the slave trade could be considered piracy, Scott argued that it could not. The 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) an activity that, albeit unfortunate, presented no harm to other countries.[93] 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'.[94] Therefore, the slave trade did not contradict the will of governments or their laws, and it did not endanger the freedom of the seas as piratical practices would. William Scott thus concluded, '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'.[95]

Categorising the slave trade as piracy in the absence of treaties providing for its prohibition would be out of question when the British treaty-making in peacetime began. Once it was considered piracy in British domestic legislation in 1818,[96] however, this classification entered the range of Britain's attempts to obtain the consent of foreign states. At that point, and in the years that followed, British and other European states were nonetheless reticent in considering events as piratical even when there were established treaties providing for it.[97]

The move to equate the slave trade with piracy first became the subject of a multilateral agreement in 1841, in the convention establishing the multilateral obligation between Austria, Prussia, Russia and the United Kingdom.[98] Along with multilateral conferences, a series of bilateral treaties were nevertheless being signed by Britain. Some of them enshrined this new classification as a means of enforcing the proscription of the slave trade. None of those bilateral treaties, however, replaced the right of visit for the classification of the slave trade as piracy – both approaches coexisted in the

92 *Le Louis*, 165 English Reports (1817) 1475.
93 *Le Louis*, 165 English Reports (1817) 1476.
94 Ibid.
95 *Le Louis*, 165 English Reports (1817) 1477.
96 *Act of Abolition of the Slave Trade of 1818*.
97 Benton/Ford (2016) 131–147.
98 As mentioned by Allain (2012) 68.

treaties. In practice, the classification of slave trade as piracy came to be central just for the *Anglo-Brazilian treaty of 1826*. Under the bilateral treaty, Britain would endorse a treatment of the slave trade as piracy after the provisions giving Britain the rights of visit and search had already expired. We will return to this in later sections.[99] Before doing so, we shall consider the overall outcome of British treaty-making and the place of the bilateral treaties mentioned above.

C. A network of bilateral treaties

Overall production

Facing resistance to pass both a proscription of the slave trade and a right of visit at the 19th-century European conferences, Britain resorted to a 'tactical adjustment'.[100] Combined with a wide range of measures from negotiations to gunboat diplomacy, Britain sought the consent of foreign states to establish bilateral treaties.

In the first bilateral treaties to deal with the slave trade suppression, states merely declared their concern or promised to act against the slave trade within certain deadlines, with no mention of the right of visit and search. Like the Paris Peace Treaty of 1814, treaties signed before the conclusion of this first multilateral agreement had a broader focus and one or two articles dealing with the 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.[101]

In subsequent years, new bilateral treaties went beyond consent to abolish the slave trade, containing rights and duties linked to mechanisms of enforcement.[102] As we have seen, the right of visit and search was already present in the Congress of Vienna negotiations, and became a central ele-

99 See Chapter 5.
100 Allain (2012) 63.
101 A list of bilateral treaties signed by Britain is provided in the Appendix.
102 The 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 (2012) 28.

ment of the British push towards the slave trade suppression agreements. The first treaty to contain both the right of visit and other enforcement steps emerged from the Vienna negotiations: the additional convention between Britain and Portugal of 1817. As an addition to the slave trade abolition clause of a previous treaty (1815), the 1817 additional convention brought a general *triple formula* recalling the rights and duties of wartime.

We should recall that during the Napoleonic Wars, vessels could be visited, captured and adjudicated by belligerents.[103] Similarly, the peacetime triple formula inscribed in the Portuguese treaty provided for: (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 international law, as occurred in prize courts, but by *mixed commissions*, which were established in each party's dominions and composed by members of both nationalities.[104] This formula would become the ideal British model to secure effectiveness.

From that point onward, the number of anti-slave trade treaties burgeoned. Another 45 treaties were signed between 1817 and 1845, involving at least 31 different parties.[105] These numbers include treaties with parties then considered either 'civilised' or 'non-civilised'.[106] The latter account for seven of the treatises, as the list covers only the very beginning of the British policy of abolition in Africa. These seven treaties were with African native chiefs, all of whom committed themselves to denying permission to slave exports.[107] From the middle of the century onward, British policing extended way beyond the West Coast of Africa: in the second half of the 19th century, the focus of the British policy would shift to the so-called 'Oriental Slave Trade'.[108] Before that, Britain focused on trade destined for the Americas, notwithstanding the ongoing slavery in sub-Saharan Africa (with three million people enslaved in the 19th century alone) carried out through the north-African desert, Indian Ocean, the Persian Gulf and the Red Sea.[109]

103 See the first section of this chapter.
104 We will explore mixed commissions in detail in the next chapter.
105 See the list of treaties in the Appendix.
106 See Van Hulle (2016, 2020).
107 See Lloyd (2016) 59–60.
108 Allain (2015) 52.
109 Allain (2012) 61.

Thirteen of the anti-slavery treaties signed before 1845 were concluded with new American states,[110] including countries that had then recently gained independence such as Brazil. As we will discuss in Chapter 2, when American states entered the 'family of the civilized', a kind of 'expansion' of the reach of international law followed.[111] Even though Spain and Portugal, for instance, had already signed treaties with Britain containing provisions covering these territories as part of their dominions, the change in circumstances of Latin-American states' independence called for new treaties with the recognised new independent states, which were largely based on the previous agreements.

The British system and variation in treaties

Two other elements help us understand these numbers in the context of British treaty-making against the 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 variations in the bilateral treaties with 'civilised' nations. Second, suppression

110 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.

111 The idea of Europeans bringing Latin American states into the family of 'civilized nations' reflects the 19th-century European perspective of a formal listing of nations considered 'civilized'. This does not, however, correspond to the actual historical change in international law promoted by both European and semi-peripheral lawyers who were rethinking its terms. Lorca (2010) 1–78.

regimes were altered along the way to adapt to implementation challenges, leading to special additional clauses to the triple formula.

While recalcitrant at first, Spain (under the treatises of 1817 and 1835), Portugal (1817 and 1842) and Brazil (1826) eventually acquiesced to the full triple formula,[112] entering what we can call the *British system*.[113] Likewise, the British treaties with Netherlands (1818), Chile (1839), the Argentine Confederation (1839), Uruguay (1839), Bolivia (1840), Ecuador (1841) and the United States (1862) all fall within this category.[114] Among the full triple formula treaties, Chile, the Argentine Confederation, Uruguay, Bolivia and Ecuador differed from the others at one point: they rejected mixed commissions in their territories and did not appoint commissioners to the commissions in Sierra Leone.[115] The US treaty of 1862 was also a slightly different case. The treaty was a result of changes to US policy in the face of the slavery-related civil war that arose after years of the United States refusing to acquiesce to the triple formula. It provided for a mutual right of visit and search in a particular maritime zone and the establishment of mixed commissions, which never heard any cases and had their jurisdiction transferred back to domestic courts in 1870.[116]

Another kind of treaty emerged from the US and French rejection to the right of visit and to adjudication by mixed commissions. From 1817 to 1831, France did not ratify any treaties with Britain, notwithstanding the promise contained in the Paris Treaty of 1814 and the Vienna Declaration of 1815, citing concerns with its sovereignty and potential violation of domestic law. The United States opposed a mutual right of visit and search for reasons dating back many years earlier, when the US accused Britain of impressment of North American seamen. The War of 1812 – which the US maintained had been triggered by abuses carried out by the British navy – ceased with the Treaty of Ghent (1815), and it contained a promise by both parties to mobilise against the slave trade, without any mention of rights of visitation.[117]

112 Erpelding (2017) 90.
113 Voigt (2000) 76; Erpelding (2017) 92 et seq.
114 Erpelding (2017) fn. 443; Allain (2015) 85–86.
115 Bethell (1966) 83.
116 Allain (2015) 85–86.
117 Wheaton/Calvo (1861) 248–249; Allain (2015) 77–78.

During the long period when the US and France refused to join any agreements with such provisions, and having nevertheless assumed a duty to abolish the slave trade, both countries employed visitation, capture and adjudication by their own vessels under domestic laws.[118] Britain would reach new treaties with the United States and France in 1842 and 1845, respectively. They would provide for *a joint cruising system*,[119] without a mutual right of search in the terms of the *British system*. A very restrictive right of visit was explicitly stated in the treaty with France. By then, however, Britain insisted on a right of visit independent of any treaties, which caused great controversy on the exact limits of visitation.[120]

A third type of treaty can be discerned in the Anglo-French treaties of 1831 and 1833: *a domestic adjudication system with a mutual right of visit and search restricted to certain maritime zones*. Later, Denmark, Haiti, the Hanseatic League, Sardinia, the Kingdom of the Two Sicilies, and Tuscany all acceded to treaties of that type. As we have already seen, the multilateral treaty of 1841, which equated the slave trade with piracy, would also establish that type of mutual right of visit and the adjudication by domestic courts of each state.

Other elements were also introduced to these various enforcement mechanisms. New treaties and articles were established in addition to treaties already in force, not only because circumstances and power relations changed, but also due to new demands emerging from experience. These were translated into two types of special clauses beyond the basic provisions of visitation, capture and adjudication: the *equipment clause* and the *breakup clause.*

Very early on in the anti-slave trade 'work' of the Royal Navy,[121] the Foreign Office received statements from ship's captains complaining of how difficult it was to capture ships at the precise moment they had captives on board. Seamen had to spend days waiting along the coast until vessels visibly equipped for transporting captives would embark. Most of the time, ships would disappear from sight. It was also a common belief that, on the

118 Erpelding (2017) 92.

119 Keene (2007).

120 See Allain (2015) 73, 81–83. We will explore the difference between the 'simple' right of visit and the right of visit and search in Chapter 2.

121 See the Introduction to this book.

African coast, one was most likely to contract an illness after nightfall, so it was best to avoid it in the evening – the time most slave trade vessels set sail.[122] Adding to these problems was a steady increase in horrific cases of slave traders throwing captives overboard to avoid seizure of their vessels.[123]

Against this backdrop, the provision to which the Dutch had acquiesced in 1823 seemed the best way of improving the effectiveness of slave trade suppression. The so-called *equipment clause* allowed for a capture whenever sufficient evidence of slave trading activity was found, waiving the need to inspect if there were captives on board. The clause included a list of indicia that showed a vessel had been fitted out for trafficking. If any one of these were present, the ship could be lawfully captured and condemned as a vessel engaged in slave trade, unless proof was produced to the contrary. The list included everything from excessive quantities of provisions to design adaptations of the ship or the presence of particular implements for restraints.[124]

122 Ward (1969) 47–48.
123 Ward (1969) 98.
124 The difference between the version to which the Dutch acquiesced in 1823 and, for instance, the treaty between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade, signed at London, 20 December 1841, was only a tenth element 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-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* (1841–1842), pp. 277–280.

This clause was accepted by Spain in 1835 and Portugal in 1842.[125] It was also included in the treaty between Austria, Great Britain, Prussia and Russia of 1845. Almost all subsequent treaties signed between Britain and Western powers included an equipment clause.[126]

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 at market value, the proceeds of which reverted to the states involved in the suppression mechanisms to cover basic costs of staff and structure. From the Royal Navy's reports, the British Foreign Office became aware that many of these vessels were being reacquired by slave traders, who would re-employ them, taking advantage of their special design and equipment.[127]

Instead of reselling the vessels to private parties, the *breakup clause* directed authorities to dismantle captured ships. This clause was accepted, for instance, by France in 1833, Spain in 1835 and Portugal in 1823.

Both the breakup clause and the equipment clause were integrated into the already varied production of treaties, joining political accommodations already present in treaty-making. This messy network of norms, while intricate to manage, served Britain well as a tool of peaceful interference, along with other technologies of governance.[128]

Within the wide range of slave-suppression systems, the British system of the triple formula stands out as the regime deemed at the time as the most suitable for the British 'work' to continue during peacetime. Thus far, we have explored the material and the design with which the triple formula treaties were made. Now it is time to enter into the specifics, in particular, how these 'weapons' were supposed to function in practice. Our next step is to investigate the inner workings of the triple formula and its mechanisms for enforcement.

125 Ward (1969) 47–48.
126 Erpelding (2019) 205–232.
127 Ward (1969) 97.
128 Benton / Ford (2016) 6.

Chapter 2
The 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, [...] may *detain* and bring away such vessels, in order that they may be brought to trial before the tribunals established for this purpose [...].'[1]

Treaty-making offered Britain the leeway it needed to establish the continuity of rights exercised in the 'navy's work' (see Chapter 1) during warfare. However, reading the sole inscription of the triple formula into treaties – as in the quote above – does not provide sufficient understanding of the meaning of each of its three steps. As in Robert Phillimore's statement that treaties contained the whole story about the suppression of the slave trade ('To be cognizant of the Treaties [...] is to be acquainted with the international history of the abolition of the Slave Trade'),[2] their details are also omitted or just partially explored in other historical accounts of British treaty-making. Each element of the triple formula would come to acquire much more complex meanings than the language of the treaties that created them.

As we have seen in the previous chapter, the right of visit was at the core of concerns arising from this transition from wartime to peacetime. 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. At one point, British prize law allowed for capture based on a suspicion of engaging in slave trade as well as condemnation of ships whenever there

1 Anglo-Portuguese additional convention of 1817, reinstated by the Anglo-Brazilian treaty of 1826, emphasis added.
2 Phillimore (1854) 251; see Chapter 1.

was proof of the practice and of the proscription of the traffic by the flag state. With the end of the Napoleonic Wars, *Louis* brought with it the parameters that British diplomacy was more or less already acting upon; during peacetime, however, the right of visit was only possible with consent. Treaties would have to be established with foreign states if Britain desired to continue with this course of action.

As we will see, the strong resistance to transplanting rights of war to peacetime visible in the multilateral conferences did not simply stop once treaties secured these rights. The meaning of the right of visit in peacetime was not only constructed over the course of its implementation but also continued well beyond it – a process that constantly served to reinforce its limits. Yet there was purpose behind this: even Sir William Scott recognised that the reach of the right of visit had the potential to fundamentally change 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 three elements of the formula. These directives comprised not only rules to ground the 'navy's work' but also that of the mixed commissions. Implementing the network of slave trade treaties cannot be compared to the implementation of multilateral agreements or general international law. The situation was much more complex. The variations in the provisions from treaty to treaty amounted to complications in determining under which law each case fell: 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 concerned actors had to answer in working through the mechanism of the triple formula.

Consultation of the documents states used to formalise their consent alone were insufficient to answer the issues raised in these questions. Normative production did not end with treaties themselves, their additional articles or annexed instructions. It expanded into British administrative regulation, infused with professional expertise and complemented by practical adjustments. Those charged with implementing the treaties likely struggled to cope with all the bureaucratic details.

A. The right of visit (and search)

'Decoupled' visitation

The British diplomatic rush to establish treaties was met with great resistance from the United States and France concerning the first step of the triple formula (see Chapter 1). In Leslie Bethell's words, they refused to 'put the necessary teeth into anti-slave trade agreements'.[3]

From this resistance emerged a lively debate regarding 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. By examining the debate on what the right of visit *was not*, we can have a better understanding of what it *was*.

A random sample of the slave trade treaties or of British correspondence with foreign powers may give the impression that the terms 'right of visit', 'visitation', 'right of visit and search' and 'right of search' meant the same thing. It is true they had often been used interchangeably to designate the entitlement of a state, embodied in their seamen, to stop and board other states' ships for verification. However, in the process of treaty-making two deviations from this general usage arose.

One of these was an out-of-the-ordinary provision in the 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 additional convention – a typical triple-formula regime – provided for a mutual right to visit ships whenever there was *reasonable ground of suspicion of having slaves on board*,[4] 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*.[5] In the language of the French treaty, the objective of the right of visit was much more restrictive, as it was intended only to enable the verification of nationality.

Following persistent diplomatic tensions around the right of visit, in 1859 the *Instructions* to the navies on how to implement the 1845 treaty added

3 Bethell (1966) 80.
4 *OHT*, *Anglo-Portuguese additional convention of 1817*, Article V.
5 *OHT*, *Anglo-French treaty of 1845*, Article 8.

clearer limits to the right of visit. In the case of the non-visibility of the flag, two warnings were to be given, and, if necessary, a man would be sent on board with the strict aim of *examining the ship's papers*.[6] The restriction would be narrowed even further in the 1867 Instructions: only *certain papers* could be requested. This provision would persist as an exception to the regulation established in the Brussels Conference in 1890[7] – France was so reluctant to accept a right of visit at that time, it refused to participate in the 1890 Brussels Conference negotiation unless other members yielded to its proposed restrictions on visitation.[8]

This restrictive reading of the rights of visit strongly differed from a common triple-formula provision. Quite unlike the Anglo-French regime, the triple formula right of visitation meant, once a ship was stopped, for instance, by the British navy – as in the majority of cases – British officers could board the vessel and check for the presence of captives on board, whether in the ship's papers, in its holds, or in any of its corners. If the triple formula treaty included an equipment clause, that search could be even more detailed, since officers could use such things as disproportional quantities of provisions or hidden shackles to justify apprehension.

In the absence of a treaty

The Anglo-French treaty, which 'decoupled' the right of visit from the right of search[9] was just one of two modifications to the right of search over the years. The second, 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, US resistance to British claims of visitation was connected with violations significant enough to trigger the War of 1812.[10] Although the Peace treaty of 1814 put an end to the conflict, the treaty remained silent about maritime matters.[11] In the following years, the United

6 Allain (2012) 71.
7 Allain (2012) 71; Erpelding (2017) 93.
8 Allain (2012) 73.
9 Allain (2012) 71.
10 Wheaton (1842) 6.
11 Wheaton/Calvo (1861) 248–249.

States offered various reasons 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 were 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 challenge was that the federal arrangement allowed each state to decide whether or not to sign abolition into law. Finally, and most importantly, the damage caused by the abuse of visitation in the previous years was too fresh in the memory of US nationals for them to accept the terms of the right to visit.[12]

Negotiations went on for decades. Whenever the US agreed to certain terms, the counterproposals ended up being refused by Britain and responded to with other suggestions.[13] This went on until, in an exchange of diplomatic correspondence in 1841, Lord Aberdeen presented a new approach considerably different from the established practice. Aberdeen argued that the *right of visit and search* was actually separated from a *right of visit* with the aim of *determining the nationality of a ship*. The latter, Aberdeen maintained, was not dependant on treaties.[14]

Aberdeen's interpretation prompted a prolific doctrinal discussion, opposing British and US coeval lawyers in the dispute about the limits of the right of visit.[15] North Americans pointed out this distinction was not to be found anywhere in treaties, court opinions or doctrinal writings. Rather, they argued, the right of visit had always 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.[16] In practice, they maintained, there was no discernible distinction

12 Wheaton/Calvo (1861) 267–268; Wheaton (1842) 98. Jenny Martinez argues that many of the US justifications for not accepting the right of visit were actually secondary, and a cover-up for the main problem, which was that the US had memories of impressment of cargo and seamen from the previous decades: Martinez (2012), ch. 3.
13 On all the phases of such negotiations, see Wheaton (1842).
14 Wheaton/Calvo (1861) 299.
15 About the significance of that discussion, see Calvo (1868), vol. 1, 54; vol. 2, 357.
16 Calvo (1868), vol. 2, 357.

between the right of visit in those terms and the right of search anyway – otherwise, visitation would be just a pointless interruption of the ship's voyage.[17]

The discussion among diplomats and lawyers went on for several years. Faced with the growing numbers of slave trade vessels hoisting the United States flag to escape capture,[18] Britain steadfastly maintained that the right to visit corresponded to the simplest verification of nationality identified by the flag of the ship. Robert Phillimore, the distinguished British jurist of the 19th century[19] cited above, argued that the right of visit, in its detached version, should be read as it had been formalised in the Anglo-French treaty of 1845.[20] Phillimore indicated that the experience with the slave trade and with piracy had taught that they often came together – in order to avoid abuses, flags should not be enough evidence of nationality.[21]

The divergent interpretation of the right of visit did not come to an end when the United States signed a treaty with Britain in 1842.[22] The treaty provided only for a joint effort against slave traders. In subsequent diplomatic correspondence, British representatives claimed that the treaty did not mean a renunciation of the British right of visit to verify nationality. In response, the United States declared it did not recognise any right of visitation and that its intention in signing the 1842 treaty was only to impede piracy under the US flag and that this was the sole point of cooperating with Britain in policing against that practice.[23]

Carlos Calvo, a renowned 19th-century Uruguayan internationalist based in Argentina, summarised the various doctrinal positions by contemporaneous international lawyers of British, German, French and US origins: all opposed the British position on the separation of visit and search.[24] Their main line of argument was that the right of visit derived from a state of war, so that during peacetime, the visitation would be an act of policing sover-

17 Wheaton/Calvo (1861) 299.
18 Martinez (2012) 89.
19 See Gaurier (2005).
20 Philllimore (1854) 250.
21 Ibid.
22 As we saw 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.
23 Wheaton/Calvo (1861) 314.
24 Calvo (1868), vol. 2, 358.

eignties, and thus incompatible with the independence of nations.[25] 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 legitimised 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*',[26] but it did not stop there. In Jean Allain's words, '[a]t the heart of the matter was the States' understanding of the nature of the high seas', that is, how one understood the notion of freedom of the seas in relation to the right to visit suspected vessels.[27]

The relevance of this change as linked to international law is explicit in the view of Henry Wheaton, one of the most prominent US international lawyers of the 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*.[28] While this perspective was not that much of a novelty for those familiar with *Louis,* 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'.[29]

Once the right of visit became a right recognised under international law during peacetime through treaties, a new threat emerged: that the system of the freedom of the seas would be converted into a system of controlled navigation. The right of visit had the power to change the very basis of maritime governance. Through the façade of a 'mutual right', states that had accepted the triple formula also agreed to hand over to Britain part of

25 Calvo (1868), vol. 2, 362–363. The general Portuguese position also shared that understanding; see e. g. Lobo (1865) 107–116.
26 *Le Louis*, 165 English Reports (1817) 1478.
27 Allain (2015) 46. See also Klose (2019) 137, 142.
28 Wheaton/Calvo (1861) 290.
29 Wheaton/Calvo (1861) 652.

their sovereign right to use force against their citizens and against their property. Extending this to states outside of the triple-formula regime could compromise the balance of power.

Accounting for the 'balance of power' might now be regarded by some as a matter of political strategy rather than of legal interpretation. It was common, though, in the 19th century, to find scholars who did not separate them in two analytical spheres; the balance of power came to be regarded as political (and not legal) just by the end of the 19th century.[30] By discussing the right of visit, these authors were engaged in furthering international law as much as they were doing diplomacy; international law was central to diplomatic relations and was treated as a creative force.

Now that we have reviewed the effect of rights of visitation, we can have a better understanding of the rights of capture and adjudication that followed. Next, we will focus on the other two situations to which the triple-formula mechanism meant to apply: whether and how to capture and to adjudicate a ship suspected of slave trading.

B. Spotting, visiting and capturing ships

The captor's position

In the British quest to abolish the slave trade, identifying suspicious vessels and deciding whether to visit or capture them was part of the very job description of the British navy. It is no coincidence that British crew members were accounted for a significant number of testimonies about slave trade atrocities. Only they had consistent, concrete, and personal contact with the people captured to be forced into slavery aside from the slave traders themselves.[31]

The eagerness of the British navy to capture suspected slave trade ships was probably the product of a combination of many elements. In addition to a drive resulting from intense personal experiences – having seen with their bare eyes so many inhuman situations[32] – British navy captains and their

30 See Vec (2011).

31 See e. g. Martinez (2012) 70; Wills (2015) 73–94. Yet there were also cases of mistreatment by capturers, in addition to the lasting hazards felt by those kept on board; see Haslam (2019), ch. 5.

32 Martinez (2012) 199 note 21; Van Niekerk (2004) 38 et seq.

crew may have been acting upon religious beliefs[33] or a then-rising humanitarian sensibility.[34] They may also have been enticed by the prospect of increasing their earnings or securing subsistence at least.

During the first half of the century, officers' pay cheques comprised income from 'headmoney paid', 'tonnage bounty paid' and 'proceeds from sale of ships'.[35] At first, bounties for captures, paid to officers and crew (according to their ranks),[36] were calculated based on the number and attributes of the liberated people, according to fixed amounts depending on the number of men, women or children set free – this was 'headmoney'.[37] These rates were considerably reduced over the years.[38] With an increased adoption of the equipment clauses, which enabled captures of ships equipped only to transport captives, 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.[39] Under the 'proceeds', captors were also entitled to part of the earnings in case of condemnation and sale of the captured vessels and goods.[40]

British navy officers assigned to slave-trade suppression duties depended on the adjudication of their captures to earn their living, because none of the three types of payment would be payable 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

33 About the evangelical sentiment in the British navy and its connections to the abolitionist movement, see Wills (2015) 81–82.

34 Moyn (2017), ch. 3. On the relations between the emerging humanitarian sensibilities and the abolitionist movement, see Klose (2019) 70–81.

35 Lloyd (2016) 81–82.

36 Wills (2015) 78.

37 Emily Haslam analyses how bounties commodified recaptives – those found in captured ships and once more treated as property in this practice. See Haslam (2019) 110–112.

38 The Act of 1807 provided £60 for every man; £30 for every woman and £10 for every child; in the *Consolidation Act of 1824 (CGB)*, 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 (2016) 79–80.

39 The captors would receive part of the value due to the Queen's moiety and a value of £4 per ton, in cases of no captives found on board – yet the remaining disparities in the headmoney value appeared as an incentive to wait for embarkment before capture. Lloyd (2016) 81–82.

40 Lloyd (2016) 79–80.

shares of the proceedings could appeal to the High Court of Admiralty against either vice-admiralty courts sentences or mixed commissions decrees.[41] Getting their payment often involved bureaucracy and even corruption, as naval officers had to hire agents to obtain their bounties from the admiralty paymasters.[42]

It is worth noting that at least some navy men thought slave traders were paid more than the suppression force.[43] 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.[44]

Aside from these adversities and the usual dangers associated with maritime occupations in the 19th century,[45] British officers also had to be very careful in their day-to-day professional decisions. The duty of visiting and capturing ships entrusted to them did not come without a burden. Visitation and seizure, especially unlawful ones, could lead to *violent resistance* or *diplomatic tensions*. They could also *limit the seamen's earnings and damage their careers*.

The same slave trade suppression laws navy men were expected to enforce also left them open to being charged with illegal capture. The commanders were '*held answerable*, not only for their own conduct, but for that of their men'.[46] The British regulation established the *personal liability* of those seizing the vessel for payment of any awards arbitrated on account of unlawful detention.[47] Typically, the British government would make a contribution or

41 *CGB*, *Act of 1824*, Article LXXI.

42 Ward (1969) 102–103; Scanlan (2014) 125–126. As Scanlan emphasises, the bounty system – and the economic dynamic built around it – exposes 'the mixture of money and humanitarianism' in the British endeavour to abolish the slave trade.

43 Wills (2015) 77.

44 On the day-to-day life of slave trade crews, see Rodrigues (2005a), ch. 5–6.

45 See Wills (2015).

46 *Instructions of 1844*, 1st Section, Article 8.

47 *Instructions of 1844*, 3rd Section, 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 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'.

foot the bill entirely,[48] which was not without reason, since treaties provided for liability of the British state in addition to the personal liability of the captor. Even so, the literature regarding maritime dynamics and slave trade suppression recounts situations where officers declared themselves to be acting out of 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.[49]

Forms and directives

Any officer commissioned to carry out the first step in the triple formula had to deal with the perils of life at sea and perform their duty with all the associated risks. On top of that, they were also required to interpret the law and to produce documents to inform the adjudication mechanisms about the circumstances of the capture.

Clearly, some kind of practical directive about how to proceed was indispensable. Each of the treaties for suppression was accompanied by corresponding instructions, directed to the ships tasked with implementation.[50] We can get a sense of the generally applicable instructions by looking at the *Memoranda for the guidance of Commissions* of 1819. Inspired by British prize court practice, it was the first official document to combine general instructions with further practical guidance.[51] After it was finished, the British Foreign Secretary sent copies of the document to the British admiralty

48 Shaikh (2012) 48.

49 An interesting example is mentioned by Lloyd (2016) 71: '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 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"'.

50 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 additional convention of 1817 (OHT)*.

51 We will explore this document further when accounting for mixed commissions in the next section of this chapter.

and to foreign powers, so they could also pass on those functional guidelines to their representatives.[52]

Any British seaman should know that neither visitation nor detention should take place in the port or 'within *cannon-shot* of the batteries on shore' of the parties, except for the African Coast placed north of the equator.[53] A seaman 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'.[54] The rule of the cannon-shot was the historical consolidation of a *just mode of appropriation of the seas*, since the exercise of control over the strip of water along the coast was considered essential for the security of citizens and their property upon land.[55] A *cannon-shot* was equivalent to a marine league, or approximately three miles. As the name suggests, this standard was originally based on the

52 *BFSP* (1820–1821), pp. 210–211.

53 For instance, Articles II and III of the *Instructions* attached to the *Anglo-Portuguese additional conventionof 1817*: 'II– No merchantman or slave-ship can, on any account or pretence whatever, be visited or detained whilst in the port or roadstead belonging to either of the two High Contracting Powers, or within cannon-shot of the batteries on shore. But in case suspicious vessels should be found so circumstanced, proper representation may be addressed to the authorities of the country, requesting them to take effectual measures for preventing such abuses. III– The High Contracting Powers having in view the immense extent of the shores of Africa, to the north of the Equator along which this commerce continues prohibited, and the facility thereby afforded for illicit traffic, on points where either the total absence, or at least the distance of lawful authorities, bar ready access to those authorities, in order to prevent it, have agreed, for the more readily attaining the salutary end which they propose, to grant, and they do actually grant to each other the power, without prejudice to the rights of Sovereignty, to visit and detain, as if on the high seas, any vessel having slaves on board, even within cannon-shot of the shore of their respective territories on the continent of Africa to the north of the Equator, in case of there being no local authorities in the preceding recourse might be had, as has been stated in the preceding Article. In such case, vessels so visited may be brought before the mixed Commissions, in the form prescribed in the 1st Article of the preceding instructions.' Similar directives could be found in the *Instructions of 1844,* 1st Section, Article 5, indicating that the search of vessels within the jurisdiction of 'any foreign civilized State' was absolutely forbidden unless by permission of local authorities.

54 Philllimore (1854) 178–179. Maritime territorial rights could also be extended in special circumstances, as arms of the sea, gulfs, bays etc. Boundaries of jurisdiction could also be affected by treaties; Philllimore (1854) 179–180.

55 Hall (1890) 151.

effective range of a ship cannon. But technological development eventually made this measure problematic. Writing in the 1890s, Hall notes the growing uncertainty about this standard in light of the ever-increasing range of artillery.[56]

By the time the *Memoranda for the guidance of Commissions* was prepared, the sole case of legal capture concerned vessels with captives actually on board, as provided in the Anglo-Spanish, Anglo-Portuguese and Anglo-Dutch treaties.[57] Due to the exception to the prohibition of slave trade south of the 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 the equator.[58] Additionally, if the capture happened *south of the equator*, a provision was triggered regarding the *burden of proof*: the captor would have to prove that voyage was illegal, reversing the general rule that it was for the captured to submit proof of its legality.[59]

Apart from ground rules (based on the first signed treaties), sailors assigned to slave-trade suppression also received updates on the circumstan-

56 Hall (1890) 150–152. Hall's 'A Treatise on International Law' was one of the most significant works of the 19th century. See Anghie (2005) 39, fn. 12.

57 Article I of the *Instructions* attached to the *Anglo-Portuguese additional convention of 1817* e. g. stated: 'Ships on board of which no slaves shall be found intended for the purposes of traffic, shall not be detained on any account or pretence whatever.'

58 According to *OHT*, Article IV of the *Instructions* attached to the *Anglo-Portuguese additional convention 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.'

59 *BFSP* (1820–1821), p. 27. Also *OHT*, Article V of the *Instructions* attached to the *Anglo-Portuguese additional convention 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 […] the proof of the illegality of the voyage is to be exhibited by the captor.'

ces in which a suspected ship should be visited and captured. Many more states would be included in the network of treaties and many national flags in their job tasks as a result. Some of these treaties would entitle them to capture ships without slaves on board, whenever other signs of prior occupation by captives or even equipment for their transportation was present.[60]

Still according to the *Memoranda of 1819*, visitation and search had to be carried 'in the most mild manner' by an officer of the rank of lieutenant or higher rank.[61] Once detained, the suspected vessel was required to *be carried to the nearest mixed commission*. Yet, beyond visiting, searching, detaining and bringing a suspected vessel to the nearest mixed commission, the officers capturing a ship 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 an appendix with a set of standard forms with blank spaces for certain information to be inserted.

The 'Form of Declaration of the state of the Vessel at the time of Capture' contained blank spaces for the date of the detention, the name of the capturer's and of the captured ships, their colours, number of guns, the name of commander, origin and destination of the voyage, details of the crew, passengers. If enslaved persons were found on board, a table was provided where the officer was supposed to enter the number of captives in different lines and columns, as well as the number of men and women, boys and girls, healthy and sick. At the bottom of the form, the officer in charge would have to sign attesting to verify the state of the ship (was it seaworthy?) 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 out the form was to document the original state of the ship and any changes that may have taken place during capture: objects

60 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 4.

61 *BFSP* (1820–1821), p. 26. Also *OHT*, Article VII of the *Instructions* attached to the *Anglo-Portuguese* additional convention 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.'

thrown overboard, for instance, or any attempt to destroy documents.[62] The capturer was meant to produce a document for the captain of the captured vessel stating basic information about the capture and testifying to the ship's papers seized in the act of detention, all in accordance with the 'Form of Certificate to be given to the Master of a Vessel captured'.[63]

The *Memoranda of 1819* considered that there might be circumstances under which the captor would have to stop to disembark captives. To that end, the *Memoranda* supplied a 'Form of the Certificate of the necessity of disembarking Slaves from a captured Vessel' to register general information about the captured vessel, the enslaved persons on board, where and why they had to be disembarked. The form provided the example of disembarkation due to insufficient provisions aboard the ship,[64] but the general state of health could also serve as a legitimate reason.[65] Such exceptions further highlight the precarious situation of the captives, even after a ship had been detained.[66] Detailed documentation attesting to the 'urgent motives' was required because the rules specified that captives be kept on board until the captured vessel was adjudicated. The crude economic reasoning behind it was explicit in the Anglo-Portuguese additional convention of 1817: 'in order that, in the event of their [the capture] not being adjudged legal prize, the loss of the proprietors may be more easily repaired'.[67]

62 *BFSP* (1820–1821), pp. 28–29.

63 *BFSP* (1820–1821), p. 29. Also *OHT*, Article VIII of the *Instructions* attached to the *Anglo-Portuguese additional convention 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.'

64 *BFSP* (1820–1821), pp. 29–30.

65 *OHT*, *Anglo-Portuguese additional convention of 1817* (Instructions), Article VIII.

66 Haslam (2019), ch. 5.

67 *OHT*, Article VIII of the *Instructions* attached to the *Anglo-Portuguese additional convention of 1817*: '[…] 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. However, if urgent motives, deduced from the length of the voyage, the state of health of the Negroes, or other causes,

Some years into the British project of suppression, in 1844, another publication would be issued to help British officers 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 publications.[68] The captain's intent was to fill the gap, especially in the training of junior officers, on the international rules they were required to act upon. 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'.[69]

More than 20 years had passed since the *Memoranda of 1819* and the situation was, with regard to the treaties, 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 the particular circumstances of the 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 set of treaties with 27 nations).

The first Article of the *Instructions of 1844* reminded that although 'the Slave Trade has been denounced by all the civilized world as repugnant to

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.'

68 Lloyd (2016) 39.

69 Ibid.

every principle of justice and humanity', the navy man should be mindful that Britain claimed no rights against foreign ships engaged in the slave trade 'excepting such as the Law of Nations warrants, or as she possesses by virtue of special Treaties and Conventions with particular States'.[70] As we have seen above, this came to mean different things through time.

Yet the *Instructions* brought a set of methodological steps to better determine how to proceed. To perform their duty accordingly and establish if there was a 'reasonable ground of suspicion' for a vessel to be seized, British sailors needed to consider in the following order: (1) the part of the Instructions related to the particular description of their circumstances; (2) treaties, conventions, and laws; (3) instructions pertaining to the slave trade (i. e. those indicated in the compilation and those received from the Foreign Office through correspondence).

As a general rule, the *Instructions* advised, visitation should only happen 'in virtue of special authority under treaty' or the commander had 'reason to believe, that the vessel has no right or title to claim the protection of the flag she bears'.[71]

The latter 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). How would a navy officer 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*, one could detain, seize or capture vessels engaged in the slave trade or equipped for this purpose in any of the three following circumstances: when the vessel hoisted a *Portuguese flag*; when one had *reason 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 the *Palmerston Act* to Portuguese vessels was removed.[72] Yet the job for captors probably changed for good after 1839, in significant ways. Before the *Palmerston Act*, they were entitled to exercise the

70 *Instructions of 1844,* 1st Section, Article 1.

71 *Instructions of 1844*, 1st Section, Article 4.

72 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.

right of their 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 a *claim* the captured ship was actually of *other nationality*. After the *Palmerston Act*, once one had at least a *suspicion* as provided by the act, it was for the opponent, the captured, to prove their nationality was neither British nor Portuguese.[73] Therefore, there was an extra incentive for sailors to capture suspected ships of uncertain nationality that would have been much riskier to seize before 1839.

Now imagine that, for any of the reasons mentioned above, one was convinced that a visit is warranted, at least to ascertain the real nationality of a ship. According to the *Instructions*, one should signal the intention to board, use a boat carrying a British flag to go to the vessel, board the vessel with another member of the crew (to serve as witness), inspect the papers, and if warranted make 'courteous inquiries', so to avoid the necessity of a search.[74]

At that point, the contents of the treaty one is supposed to be implementing would of course be foremost in one's mind; 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. If either the law or the information collected led one to think one was *not* entitled to proceed to a search and capture, then one would be required to leave the ship to its original course.[75] Otherwise, and if a search was deemed necessary to establish the conditions for seizure, removing people from the ship was prohibited.[76] Coercive measures were not to be applied without necessity.[77]

If elements for seizure were not found, any items that had been moved or removed should be replaced so that the vessel was reverted to its original state.[78] In addition, before leaving the vessel, one would need to ask whether the master of the visited vessel desired the visitation to be entered in the ship's log book[79] and whether he had any complaint about the way the search had been conducted, which would be written down. One would then

73 At least until 1842, when a new Anglo-Portuguese treaty was signed.
74 *Instructions of 1844*, 1st Section, Article 2.
75 *Instructions of 1844*, 5th Section, Articles 3–6.
76 *Instructions of 1844*, 1st Section, Article 14.
77 *Instructions of 1844*, 1st Section, Article 9.
78 *Instructions of 1844*, 1st Section, Articles 11–12.
79 *Instructions of 1844*, 1st Section, Article 17.

be expected to apply remedies in accordance with circumstances.[80] Upon returning to the British vessel, the visitation proceedings would be written in the log and undersigned; a copy of the statement would then be sent to the Admiralty.[81]

Alternatively, if enough evidence was found to seize the visited vessel, one would have to (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 would have to be taken and listed, with an account of which ones were voluntarily handed to the officer, which were found aboard, and, if any were destroyed, a description of these facts should be added and a person cognisant of them would be required to be sent on board to the court of adjudication;[82] (4) take note of the valuables and items of cargo on board;[83] (5) send at least two members of the capturer's crew to testify before the court of adjudication;[84] (6) provide the officer in charge of the vessel the necessary instructions and supplies for the voyage until the place of the court of adjudication.[85]

As to how enslaved persons were to be treated on board, the *Instructions* indicated that 'every effort is to be made to alleviate their sufferings and improve their condition', promoting cleanliness, ventilation and their 'confidence in the Crown's men'.[86] The landing of captives or transfer to other vessels, as the *Forms* of 1819 indicated was permissible, were measures to be taken only out of 'absolute necessity' – way more detailed than in the 1819 directives. Of course, a 'certificate of all circumstances' relating thereto had to be written and presented in court.[87]

Upon arrival at a port where a mixed commission, admiralty or domestic court was located, all enslaved persons were kept on board, unless the local authorities authorised disembarkation.[88] Although some of the enslaved would be questioned about the time and circumstances of their capture,

80 *Instructions of 1844*, 1st Section, Article 16.
81 *Instructions of 1844*, 1st Section, Article 18.
82 *Instructions of 1844*, 1st Section, Article 19.
83 *Instructions of 1844*, 1st Section, Articles 20, 25.
84 *Instructions of 1844*, 1st Section, Article 22.
85 *Instructions of 1844*, 1st Section, Article 23.
86 *Instructions of 1844*, 1st Section, Article 26.
87 *Instructions of 1844*, 1st Section, Article 27.
88 Martinez (2012) 72–73.

most of the time written and oral reports, along with the testimony of some members of both vessels, were deemed sufficient for the mixed court to reach a decision regarding whether it was a bad or good prize (as we will see in the next section).

It is difficult to assess the scope of the rules on form-filling that were actually respected and enforced. Yet the proof on the circumstances of visit and capture were definitely central for adjudication. Depending on the case, after the commission's decree, one would either deal with personal liability or use the decree to claim one's payment. Once this business had been concluded, the officer of the anti-slave trade fleet would then resume his position and hope for good prizes yet to come.

C. Judging the ships in the dock

Forms and practice

Between 1819 and 1871, mixed commissions – also referred to as *mixed courts of justice*[89] – 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).[90] Together, mixed commissions condemned (and seized) more than 600 ships and released approximately 80,000 enslaved people.[91]

These courts were called '*mixed* commissions' because they were 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

89 See Martinez (2008) 552, fn. 2.

90 Bethell (1966) 83. As already mentioned, countries that had recently achieved independence such as Chile, the Argentine Confederation, Uruguay, Bolivia and Ecuador ratified triple-formula treaties but renounced the commissions in their territories and did not appoint commissioners to the respective Sierra Leone commissions. See Chapter 1.

91 Bethell (1966) 79. Of the estimated 86,012 Africans that were liberated by mixed commissions, 65,859 were liberated in the mixed commissions of Sierra Leone. Two other commissions were known to have liberated significant number of people: the commissions in Havana (14,216) and in Rio de Janeiro (6,528). Eltis (2010) 13–29.

a secretary or registrar named by the state in which the commission was to reside. Those serving on mixed commissions were usually recruited from the diplomatic circles of their countries and did *not necessarily* have legal backgrounds.[92]

Under the bilateral treaties, mixed commissions were to have representatives from both signatories, but they sometimes worked even in the absence of one or more representatives. Commissioners easily took ill in foreign lands – Sierra Leone and other African territories were frequently seen as 'a white man's grave'.[93] Unlike other states, Britain generally responded with expeditious replacement of its commissioners, since they could readily be recruited from among the local officials in the colonial administration.[94] On these occasions, commissions usually acted with the British majority when British representatives covered for the absence of foreign commissioners by taking decisions by themselves. This practice seems to have started in 1819, when the British personnel consulted the Foreign Office as to how to proceed, since they had already been assigned to Sierra Leone for months and the Portuguese government had not yet appointed its commissioners under the additional convention of 1817.[95] Lord Castlereagh instructed them to hear the cases and fill the absentees' positions in the meantime. Later treaties would add provisions allowing for the mixed commissions to proceed even when representatives from one of the parties were not present.

Much of the correspondence involving the slave trade was handled by the Foreign Secretary himself, including the work of the mixed commissions. We can imagine that a large portion of the Foreign Secretary's job of abolishing the slave trade was consumed by the commissions, especially during Viscount Palmerston's and the Earl of Aberdeen's terms of office.[96] British

92 See Bethell (1966); Klose (2013) 16; Shaikh (2012) 42.

93 Bethell (1966) 6.

94 The *Consolidation Act of 1824 (CGB)* 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.'

95 Shaikh (2012) 44.

96 Martinez (2012) 77–78. Viscount Palmerston and the Earl of Aberdeen were responsible for the most incisive policies against the slave trade; they held the chair of the British

consuls were also advisors to the Foreign Office on any issues related to the slave trade and mixed commissions.[97] Commissioners frequently kept in contact with the Foreign Office regarding how best to interpret their cases – especially difficult cases – either before or after decisions. In addition to 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. This also happened when any change in case law was initiated by 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 mixed commissions' decisions or other treaty-related issues. In these cases, the Law Officer would issue a report consisting of his own analysis of the cases concerned along with a suggestion to the Foreign Office as to how to proceed in each situation. Some of those reports would suggest that the Foreign Office instruct mixed commissioners to follow certain cases as a basis for future adjudication, or change their approach outright. The Foreign Office usually accepted the suggestions, but frequently changed their language or selected certain information as the focus of instructions to the commissioners.

The *Memoranda for the guidance of Commissions* of 1819 (which we explored above), originally intended to solve the problematic procedural disagreements among commissioners and the British naval officers that had occurred in the previous years.[98] The document was prepared by the Law Officers of the Crown with the collaboration of the registrar and the Anglo-Portuguese mixed commission in London, which awarded compensation to Portuguese vessels captured by the British navy in the Napoleonic Wars.[99] 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. While

Foreign Office from 1835–1841 (Palmerston), 1841–1846 (Aberdeen) and 1846–1851 (Palmerston).

97 Shaikh (2012) 49.

98 Bethell (1966) 84.

99 Bethell (1966) 84, fn. 20. On the London slave trade commission, see Haslam (2019) 44–45.

this has already been discussed above, Castlereagh's message deserves further attention. He indicated that 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[100]], for the information and guidance, as far as circumstances would allow, of the several Mixed Commissions'.[101]

Employing a didactic tone, the document presented the dates each of the three bilateral treaties concluded up to that point – i. e. the first triple formula treaties to be signed[102] – became effective and summarised their provisions. The *Memoranda* also included a number of practical instructions for commissioners, in addition to those directed to the captors explored above.[103] It provided guidance on 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 was required to receive the documents of the captor and to log the proceedings of each case in the *mixed commission book*, identifying them by the name of the vessels.[104] Proceedings were to be written in the language of the state in which the commission was established.[105]

The first step of 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 the capture. All papers found on board were to be annexed to those statements.[106] These papers were usually evidence crucial to the case, as they would detail the journey and its objective. If two sets of papers had been found, for instance, stating different nationalities for the ship, or different passports with different routes, this constituted strong evidence of evasion of search and attempt to engage in the slave trade.[107]

100 See Chapter 1.
101 *BFSP* (1820–1821), pp. 210–211, emphasis added.
102 See the previous section of this chapter; also Chapter 1.
103 See the previous section of this chapter.
104 *BFSP* (1820–1821), p. 31.
105 *BFSP* (1820–1821), p. 27.
106 *BFSP* (1820–1821), pp. 30–31.
107 Shaikh (2012) 47.

The *Memoranda* of 1819 includes a *'Form of Minute, upon decreeing Monition'* guiding how the case should be presented, which information needed to be included regarding the circumstances of capture, and which treaty was alleged to have been breached. A monition (which served as a kind of summons) was issued to people who held any right, title or interest in the ship to appear before the commissary judges. They had to present a lawful cause concerning why the ship 'should not be pronounced […] to have been employed in an illegal Traffic in Slaves'.[108] A separate document prepared in accordance with 'Form of Monition' was to be handed to the representative of the captor, who was responsible for giving a copy to whom the legal notice was addressed.[109]

Papers from the captured ship and an affidavit of the capture, accompanied by a recorded summary of the questionings, were used to open the proceedings. In practice, the examination of witnesses was usually conducted by the registrar without the commissary judges present, who would later review the records to become familiar with the details of the case.[110] Captain and crew of both captured and captor vessels were to be heard.[111] On examination of the witnesses, the Memoranda recommended that, in addition to 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.'[112] On certain occasions, the surgeon of the ship and passengers would also be heard. The enslaved found on board captured ships (whose future was to be determined) were not only deprived of legal standing but were also rarely heard at mixed commissions.[113]

More often than not, *proctors* – not attorneys – would argue both parties' cases, and then the commissary judges would either ask for further evidence or present their opinions.[114] The *'Form of Allegation'* and *'Form of a Claim'*

108 *BFSP* (1820–1821), pp. 31–32.
109 *BFSP* (1820–1821), p. 33.
110 Martinez (2012) 74.
111 Martinez (2012) 34.
112 *BFSP* (1820–1821), p. 34.
113 Haslam (2019) 69. While this fact is undisputed, Emily Haslam indicates that despite the silencing of the captives, their resistance influenced proceedings and even led to their liberation on at least two occasions. She highlights the significance of these cases and of slave resistance in general for the history of representation of victims in international law.
114 Martinez (2012) 74.

corresponded to the aggregated facts and legal grounds presented by the person acting on behalf of the captor and of the captured, respectively.[115]

The various possible ways commissioners could express their views were also registered in different forms in the *Memoranda* of 1819. 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 suggested in their opinions, either for *condemnation of the ship as good prize* (emancipating the captives 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.[116]

The *'Form for a 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 cases in which the mixed commission decided for acquittal, i. e. when the commissioners found the ship's voyage to be in conformity with the corresponding treaties and thus ruled the ship to be restored to the claimant. Costs, damages and expenses emerging from the seizure would also be arbitrated in such a case.[117] Treaties for the suppression of the slave trade provided that indemnities for unlawful captures should be paid by the captor's state.[118]

115 *BFSP* (1820–1821), pp. 37–41.

116 The different roles of commissary judges and commissioners of arbitration may justify their consistent difference in emoluments. In 1819, for example, a British commissary judge in Freetown was paid £2000 plus an 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. In the 1830s, a British commissary judge in Rio had an annual salary of £1200 and the commissioner of arbitration £800. See Shaikh (2012) 44.

117 Under British law, slaves on board ships to be judged by vice-admiralty courts were provided 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 decided by the mixed commissions in Freetown, the local colonial administration was responsible for feeding and clothing those liberated: Shaikh (2012) 49. In foreign states, the issue of how to support and deal with slaves awaiting judgement by the mixed commissions was a continuous subject of debate. In Cuba and Brazil, the refusal to allow them to land was the subject of strong diplomatic tensions with British representatives: Martinez (2012); Mamigonian (2009) 41–66.

118 On this point, see Calvo (1828) v. 2, 360.

Finally, under the bilateral treaties' provisions – and also registered in the *Forms*, once declared lawful prize, the ship and its cargo were sold for profit and the proceeds split by the two governments.[119]

The triple-formula treaties usually stipulated cases should be resolved as soon as possible and within two months. In reality, mixed commissions would spend anywhere from a few days to several months adjudicating cases.[120] The Sierra Leone court (composed of various commissions, among which was the Anglo-Brazilian commission) was the most efficient in the number of condemnations.[121] This was possibly related to the particular homogeneity of its members – as we saw, it was not rare to find commissions composed entirely of British commissioners there. The commissions in Sierra Leone also received more cases – with an obvious impact on the number of decisions – due to the high rates of capture by the Royal Navy patrol by the African West coast.[122]

Liberation and traces of prize law

By design, mixed commissions would hear cases primarily about ships, not people. Nonetheless, the main variation in the decisions of mixed commissions in relation to prize courts was their power to declare as free any enslaved person found on board. Even though they had this power, they did not rule on their rights but rather on the legality of the capture of the ships that were transporting them.[123] 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.[124]

119 *BFSP* (1820–1821), pp. 45–49.
120 Martinez (2012) 73.
121 Martinez (2012) 73; Bethell (1966).
122 Bethell (1966).
123 The fact that slaves were rarely heard at mixed commissions and that the law implemented by the commissions did not directly deal with their rights did not mean that the agency of slaves went unnoticed. Emily Haslem's study, for instance, analysed cases of the Sierra Leone mixed commissions which were impacted by slave resistance to recaptivity. Escapes ended up being translated by commissioners as 'unforeseen circumstances' that impeded restitution. See Haslam (2016).
124 Bethell (1966) 5; Benton (2013) 128.

With the commission's function of liberating captives found on board also came a responsibility to supervise their change of status. Commissioners would frequently report to the Foreign Office on such declarations of freedom. This information would be used in diplomatic correspondence to pressure foreign governments to enforce domestic laws mandating abolition.

The motivation for Britain and other signatory states to restrict the jurisdiction of mixed commissions to just the prize has yet to be studied in detail. Benton suggests a potentially relevant consideration: abolitionists had foreseen the implications for enforcing criminal laws and consciously avoided them. The increasing number of pardons for the criminal offence of slave trading during the first decade of the century, Benton submits, may have led abolitionists to focus on prize proceedings as potentially more effective than the 'more politically charged issue of the imperial state's authority to restrict the legal prerogatives of slave owners'.[125]

Mixed commissions ruled on the ships used for the practice of the slave trade and the corresponding cargo, just as prize courts did. Of course, this meant that human beings, held captive as slaves, were also affected by the rulings. Yet emancipation depended on the captives being 'the object of lawful intervention'.[126] Liberation was usually regulated by separate articles and instructions in the treaties. It does not mean, however, that slaves' rights were considered separately from the objects (the vessel and other goods); as a rule, they were directly related to one another. According to the language of the treaties, captives 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, as would the enslaved persons held 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 captives or for the costs of feeding them and the crew of the ship for the time involved.[127]

Could these mixed commissions be considered the first human rights courts?[128] I would argue that this goes too far. By design, the only individual

125 Benton (2011) 364–368.

126 Haslam (2019) 89.

127 Shaikh (2012) 48.

128 This excerpt from Jenny Martinez provides a clear statement of her position, Martinez (2012) 6: '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

rights that could be claimed before mixed commissions were those of ownership.[129] By discussing the 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 that the humanitarian goal of emancipating slaves – successfully achieved in hundreds of cases – is reason enough to situate these courts at the origins of what we today understand as human rights courts.[130] Yet, in Emily Haslam's words, 'abolition was a partial and incomplete project which gave rise to injustices of its own'.[131] I consider this reason enough to take a step in another direction and assess the multiple aspects of the anti-slave trade legal developments as a by-product of coexisting contrasting projects.[132] A complete analysis of the mixed commissions' role in promoting rights should be set along with the continuous commodification of captives by the abolition proceedings[133] – their legal framework left the enslaved with no legal standing, rare participation in the proceedings and dependent on 'the question of the legality of intervention rather than their inherent humanity'.[134] In addition, historical assessments should also consider the context of continuous exploitation of the labour of liberated Africans not only in the slavery-based states party to treaties with Britain,[135] but also in the British dominions, whose plantations profited from the miserable

basis, and they applied international law. The courts explicitly aimed to promote humanitarian objectives.' See also Martinez (2008). While some have joined her position, e. g. Shaikh (2012), others have expressed critique, e. g. Benton (2013); Alston (2013); Moyn (2012). The author reacted to the first reviews of her book in Martinez (2013).

129 Benton (2011) 369; Erpelding (2019) 96.

130 Martinez (2012), ch. 1, 4, 9. According to David 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 Britain liberated approximately 3,000 without judicial proceedings. Eltis (2010) 19.

131 Haslam (2019) 3.

132 For a discussion of the galvanised images that historiography risks establishing when dealing with the slave trade abolition, see Brito (2021).

133 Haslam (2019) 106–119.

134 Haslam (2019) 70.

135 For the history of liberated Africans in Brazil, see Mamigonian (2017).

conditions of the workforce arriving through schemes of emigration.[136] Although I do not aim to make such a complex evaluation in this book, I will present further evidence that reinforces the paradoxes of the legal regime to abolish the slave trade in the following chapters.

The point of mixed commissions

In 1818, a bill for ratification of the Anglo-Portuguese additional convention of 1817 came under scrutiny from the British Parliament. The British Foreign Secretary, Castlereagh, found 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[137]) objected to the point of the mixed commissions' provision. Phillimore argued 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'.[138] Why, then, would Britain choose to substitute the well-established model of prize courts for the mixed commissions?

Lord Castlereagh responded that while Phillimore's claim held true in times of war, he added: '[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'.[139] According to the Foreign Secretary, the decision was either to take this path or 'to abandon the cognisance of the

136 See Asiegbu (1969). Regarding 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 (2011) 68.

137 See the introduction to Chapter 1.

138 *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 Foreign Secretary's concern in 'following all the cases of suppression of the slave trade'. Mamigonian (1995).

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

different cases that might arise to foreign tribunals'.[140] The argument 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.'[141]

Mixed commissions had previously been used for disputes over territorial boundaries and warfare damages resulting from the American Civil War and Napoleonic Wars.[142] Britain generally tried to skirt foreign domestic rulings on strategic matters for its imperial influence in non-British colonies during the 19th century. It would create instances of extraterritorial jurisdiction in China, the Ottoman Empire and Japan.[143] Within that trend, Britain had secured, under the Treaty of 1810 with Portugal, special jurisdiction to rule on civil and criminal cases involving British subjects – these privileges would be formally retained under Brazilian national legislation until 1832 and abolished in practice only in 1844.[144]

The reasoning in *Louis* regarding the adjudication of a foreign detained vessel might also provide insight into the motives underlying mixed commissions. We can start from the most basic question which emerged from the capture of the *Louis.*[145] Sir William Scott had to answer the question regarding what should be done to a vessel of another state (France) that 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.*'[146] Scott himself acknowledged that this would not be without 'moral consequence'. In cases of confirmed traffic, the vessels of slave traders would simply be sent back to take up their 'unfortunate business'. Scott's response to this problem was that, though it was unfortunate, and even if the

140 *The Parliamentary Debates from the year 1803 to the present time*. House of Commons, v. 38, London, 1818, p. 998.
141 Ibid., p. 999.
142 Klose (2013) 12.
143 See Kayaoğlu (2010).
144 We will explore this further in Chapter 5.
145 See Chapter 1.
146 *Le Louis*, 165 English Reports 1464, 1817, p. 1480, emphasis added.

foreign nation's laws proscribed the slave trade, nothing else could be decided during peacetime.

Sir William Scott's analysis reveals that the guiding rationale for 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),[147] but the absence of any legal right to enforce them in peacetime. In his words,

> 'a nation is not justified in assuming rights that do not belong to her merely because she means to apply them to a laudable purpose; nor in setting out upon a moral crusade of converting other nations by *acts of unlawful force*'.[148]

Through treaty-making, Britain began 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 conditions, mixed commissions formed a core which enabled a stronger sense of accountability and legal boundaries that could be granted to *both* parties. It is reasonable to assume that other states perceived visitation and capture, usually implemented by the British navy, as elements lying further outside their control than mixed commissions. In fact, for the foreign parties to the British treaties, mixed commissions represented an opportunity for balanced legal power.[149] In Viscount Castlereagh's own words, this meant that 'an avenue would not be shut against foreign powers that complained of injustice'.[150]

The Foreign Secretary leaves us with 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'.[151] This statement, considered alongside the fact that triple-formula treaties usually provided for the prohibition of appeal (see Chapter 4), suggests that a faster and firmer decision was perceived as better serving slave trade suppression.

147 See Chapter 1.

148 *Le Louis*, 165 English Reports 1464, 1817, p. 1480, emphasis added.

149 This will become quite clear in Chapters 4 and 5, when we will look into the battles between British and Brazilian representatives at and about mixed commissions.

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

151 Ibid.

When we compare that arrangement with the prize courts system, something Castlereagh also probably had in mind, the choice of mixed commissions does seem, in theory at least, a more effective way of reaching the objective of having decisions 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.[152] Claims of reparation emerging from arbitrary or unlawful decisions could still be raised, however, and would be resolved by the diplomatic bodies and formalised in diplomatic agreements.[153] The language of anti-slave trade treaties provided that any decisions about the prize or reparations (in case of illegal captures) would be centralised in commissions composed of both states' representatives. As such, there would be – at least in theory – weaker political grounds on which to base diplomatic claims of reparation linked to unjust decisions.

The practice of mixed commissions reveals another important function within the strategy for suppressing the slave trade not revealed in those discussions. By placing British nationals in foreign countries, mixed commissions would have a particular diplomatic value.[154] Commissioners would report on general developments of slave trade proscription, supervise the emancipation of slaves freed by their commission and even inform the court about departing suspicious ships, either through correspondence with the Foreign Office or with the African squadron. One could argue that this diplomatic function of mixed commissions was even more relevant than their judicial one. The numbers support this claim: from 1808 to 1867, when Britain acted to implement its triple-formula treaties, only 572 out of the 1,635 slave trade ships condemned were tried by mixed commissions.[155]

152 See Chapter 1.
153 Bello (1844) 234–235.
154 See Drescher (2012) 221; Bethell (1966); Martinez (2012) 78–79.
155 The numbers are presented by Alston against Martinez' view of mixed commissions as human rights courts. See Alston (2013) 2053. These numbers are in large part explained by the replacement of mixed commissions with 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 5.

Finally, mixed commissions warrant attention for their qualitative legal influence. Beyond their role of 'judicial diplomacy',[156] that of promoting anti-slave trade international law from a privileged position, they were essential for reinforcing treaty-law by serving as *loci of interpretation.* Legal interpretation was constantly reinvented inside the commissions' quarters through the exchange of opinions and occasional *clashes among commissioners* over treaty provisions. Mixed commission cases were also a subject of disputes *by British and foreign representatives*, constituting a second level of treaty interpretation.

Certain attributes of mixed commissions do not fit what we currently expect of judicial bodies. Quite often, commissioners acted as diplomatic representatives of their state's interests, stretching the meaning of a given treaty in order to tip decisions to one side or the other, depending on which arbitrator was chosen (by lot) to decide in each case. That notwithstanding, the primary task of the mixed commissioners was to decide cases according to international treaties. They were constantly surrounded by a variety of actors continually seeking to reinterpret those treaties *to support* its work or go *against* it.

156 The expression was used 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 the 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 (2012) 42.

Chapter 3
The Brazilian Debut: Consenting to the Slave Trade Abolition

> '[…] 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 […].'[1]

While 18th-century theorists assumed 'there was an inherent consensus of the law between states, even without human legislative acts',[2] that rationale did not survive the turn of the century. The Congress of Vienna was a historical turning point in international law: a period when the bidding force on international norms began to be perceived as deriving from the will of the states.[3] It was the starting point for a new 'equilibrium' model of international relations, one that opened up space beyond the 'concert of Europe' to a model that could extend to 'the world as a whole […], but [which] had to follow from state legal acts'.[4]

1 Anglo-Brazilian treaty of 1826, emphasis added.
2 Kleinschmidt (2013) 322 (original in German).
3 Kleinschmidt (2013) 286.
4 Kleinschmidt (2013) 289.

Under the new approach, both theorists and practitioners began to see the engagement with international law 'as a prerequisite for the admission of states outside Europe and America in the club of supposedly "civilized" states'.[5] It was the will of the state, expressed in the form of treaties, that allowed them to be seen as truly a part of the 'body' of states and therefore to be seen as states in the fullest sense of the word. For this reason, 'the governments of the states were not only assigned the task of forming nationals into a nation […], but at the same time also inserting states into the international system as a supranational body'.[6]

The Anglo-Brazilian treaty is a typical embodiment of this conundrum. Brazil expressed its will to adopt an international legal regime in exchange for recognition. The lines of the preamble quoted above tell the history of the treaty in a nutshell. Brazilian independence from Portugal had implications for the enforcement of slave-trade suppression agreements between Britain and Portugal (of 1815 and 1817). At the same time, Brazil had a clear interest in securing international recognition for its declaration of independence. The ensuing negotiations with Britain toward this end quickly made clear that slave-trade suppression would be necessary to gain a prerequisite for British recognition.[7] A key British demand was a new treaty, a partial solution to a concern that also emerged along with Brazilian independence: ensuring its slave trade suppression mechanisms would be enforced in cases involving Brazilian vessels and citizens. The words in the treaty were carefully chosen: by 'renewing, confirming and giving full effect' to the Articles of the Anglo-Portuguese treaties, Brazil provided consent and reaffirmed already-established structures of the Anglo-Portuguese triple formula.

This chapter will take a preliminary step towards telling the story of how Brazil was woven into an international project of abolition with the threads of international law. First, we will examine the Anglo-Portuguese treaty regime and the processes of change that Brazilian independence induced. Then we will consider the stakes involved in 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.

5 Kleinschmidt (2013) 322.

6 Kleinschmidt (2013) 289.

7 Accioly (1927); Bethell (1969); Tavares (1988) 25.

A. A colonial heritage

The Anglo-Portuguese regime

Between 1822 (the date of the Brazilian declaration of independence) and 1845 (the termination of the Anglo-Brazilian treaty), more than 64% of all captives in the Atlantic slave trade disembarked in Brazil.[8] Understanding the context of these numbers inevitably begins with recalling the fact that, since the beginning of the 19th century, Portugal controlled most of the slave shipments departing from Africa. The great majority of those captives were brought to Brazil, its largest colony in the Americas.[9]

By then, Portuguese relations with Britain were marked by strong economic dependence, epitomised by the British escorting the Portuguese Crown during its relocation to Rio de Janeiro in 1808, on the brink of an imminent invasion by Napoleonic forces.[10] This new phase of relations was formalised by the *Treaty of Trade and Navigation* and the *Treaty of Friendship and Alliance*, both signed in 1810. The latter renewed the previous convention of 1807, acknowledging the British support during the transfer of the Portuguese Crown to Rio de Janeiro and recognising Braganza as the legitimate royal house of the Kingdom of Portugal.[11] Portugal had also declared its willingness to cooperate 'in the cause of humanity and justice', that is, to aid in the suppression of slave trade carried on the Coast of Africa territories not belonging to the Portuguese dominions.[12]

The 1810 Treaty did not provide for enforcement mechanisms, such as a right to capture vessels pursuing illicit slave trade or a right of visit to verify the legality of the trade. Nevertheless, in the following years, Portuguese ships were captured in great numbers by the British navy during the Napoleonic Wars.[13] In the new treaty signed by Portugal and Britain in 1815, slave-trade

8 Slave Voyages – the Trans-Atlantic and Intra-American slave trade database. See also Eltis (2010) 203, 261; Curtin (1969) 234.
9 Bethell (1969) 118–119.
10 Tavares (1988) 15–16.
11 *OHT, Anglo-Portuguese treaty of 1810,* Article III.
12 *OHT, Anglo-Portuguese treaty of 1810*, Article X.
13 During the two subsequent years, 17 Portuguese vessels were captured by the British navy, Rodrigues (2005b) 97.

suppression was addressed in more detail.[14] The treaty established a partial proscription of slave trade in the Portuguese dominions, to be applied to vessels in harbours on the northern coast of Africa or bound to any destination outside the Portuguese dominions.[15] Any vessel destined for a location where the practice of slave trading was still lawful should carry a passport issued by the Secretary of the Government for the Marine Department.[16]

To give this 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. Here we see the triple formula fully established as an international regulatory regime between Portugal and Britain.[17]

By the time of its declaration of independence in 1822, approximately one third of the Brazilian population was formally enslaved.[18] The magnitude of interests involved in the traffic was dictated by the agrarian economy sup-

14 'His Royal Highness the Prince Regent of Portugal having, by the 10th Article of the Treaty of Alliance, concluded at Rio de Janeiro, on the 19th February, 1810, declared His determination to co-operate with his Britannic Majesty in the cause of humanity and justice, by adopting the most efficacious means for bringing about a gradual Abolition of the Slave Trade; and His Royal Highness, in pursuance of His said Declaration, and desiring to effectuate, in concert with His Britannic Majesty and the other Powers of Europe, who have been induced to assist in this benevolent object, an immediate Abolition of the said Traffic upon the parts of the coast of Africa which are situated to the northward of the Line: His Britannic Majesty and His Royal Highness the Prince Regent of Portugal, equally animated by a sincere desire to accelerate the moment when the blessings of peaceful industry and an innocent commerce may be encouraged throughout this extensive portion of the Continent of Africa, by its being delivered from the evils of the Slave Trade [...]. III. 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 Parties, and acknowledged to be of full force and effect.' *OHT*, *Anglo-Portuguese treaty of 1815*, Article III.

15 *OHT*, *Anglo-Portuguese additional convention of 1817*, Article I, further specified in Article II.

16 *OHT*, *Anglo-Portuguese additional convention of 1817*, Article IV.

17 About the triple formula and its variants, see Chapter 2.

18 Mamigonian (2017) loc. 119. Under the Brazilian Constitution of 1824, even after being freed, former slaves brought from Africa were not entitled to become Brazilian citizens. Mamigonian (2017) loc. 131.

ported by slavery. The Brazilian mercantile production system was fundamentally based on slave labour, both for international and domestic markets.[19] Involvement in the transatlantic trade was also considered a profitable activity in itself.[20]

Although not yet recognised, the Declaration of Independence of 7 September 1822 rapidly entered international debates. The declaration was especially relevant for the anti-slave trade arrangements between Britain and Portugal. Up to this point, Portugal had successfully resisted British pressure to sign any further agreements on abolition after having signed the 1817 additional convention.[21] Following the Brazilian 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 the slave trade that was available to Portugal – that is, captives destined to its colonies south of the equator[22] – had been *ipso facto* abrogated once the colonial status of Brazil had ceased.[23]

The Portuguese Minister of Foreign Affairs responded with three counterarguments. First, he claimed that since Brazil was not a colony, but an integral part of the Portuguese Kingdom, the exception could never have been read as applicable to Brazil. Had it been read in this way, it would indeed have eventually led to an *ipso facto* abrogation of the exception clause were Brazil to actually leave the Portuguese dominions; in fact, the Portuguese representative argued, the treaty had instead been signed to *protect the interests of the Portuguese dominions in the Coast of Africa*, interests which would have been ruined by an immediate abolition.[24] Silvestre Pinheiro

19 Slenes (2012); see also Tavares (1988).

20 Almeida (1998) 14.

21 On the Portuguese diplomatic position after signing the 1817 *additional convention*, see Santos (2007) 157 et seq.

22 *OHT, Anglo-Portuguese additional convention of 1817*, Article I.

23 *HCPP*, Correspondence with Foreign Powers, relative to the Slave Trade, 1822–1833. Mr. Secretary Canning to E. M. Ward Esq., 18 October 1822, pp. 93–94.

24 In 1824, Marquis de Palmella would later contradict this, saying that, if Brazil became independent, he could consent at once to the total abolition of the slave trade. That was pursued by Secretary Canning as an opportunity 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, pp. 38–39). The invitation was promptly refused by Marques of Palmella, as it would represent an acknowledgement of the independence of Brazil (ibid., p. 45).

Ferreira further argued for an *eventual* separation of Brazil from Portugal, which would have the effect of abrogating *all commitments* among the parties[25] – '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'.[26]

The Portuguese representative was likely suggesting at least three things between the lines, should Canning's innovative interpretation prevail: first, Britain would lose its rights of visitation, capture and shared adjudication of the 1817 additional convention towards Portuguese vessels and subjects;[27] second, the Treaty of 1810 would also be included in the abrogation package,[28] i. e. the commercial agreements (still in force) that were quite unfavourable to the Portuguese;[29] third, Portugal would be unable to sign any additional articles to the 1817 additional convention.[30] This last hypothesis refers to ongoing negotiations to enhance the 1817 triple-formula regime against the slave trade: British representatives were invested in getting the Portuguese to consent to two additional articles in order to address practical problems in the Anglo-Portuguese triple formula. As we have seen in Chapters 1 and 2, these points would later be incorporated in the *British system* for this and other bilateral regimes. They sought a kind of a restricted equipment clause, by which vessels without slaves on board could be detained in the event of undeniable proof slaves had been on board on that particular voyage. Additionally, they wanted a stipulation expanding the situations under which the commission could act despite vacant Portuguese commissioner seats.[31]

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

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

27 While interests of other sorts were undeniably involved, I am here focusing on the effects of each interpretation on the triple formula regime.

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

29 *OHT*, *Anglo-Portuguese treaty of 1810*, Article III.

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

31 *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, 15 March 1823.

In the meantime, the Netherlands and Spain had already agreed to additional articles similar to those Britain was pressuring Portugal to accept, a fact which British diplomats were quick to bring to the attention of the Portuguese representatives. A counterproposal advanced by the Portuguese included an additional article providing that, whenever lots had to be drawn because the commissary judges were not in agreement, the final decision could be delivered by the arbitrator *or* the other representative of the drawn nation.[32] This proposal would have had a tremendous impact for mixed commissions in the future, since cases decided only by British commissioners would be far less common. This proposal was turned down, and the British negotiating points were ultimately agreed upon: additional articles were signed on 15 March 1823 and ratified on 19 August 1823, providing for a restricted equipment clause and a broader provision for the circumstances of Portuguese absentees in the mixed commissions. In other words, the additional articles expanded the power of maritime legal intervention and the space for the British to have the last word in mixed commissions.

These were the circumstances under which Portugal, pressured by the declaration of Brazilian independence, negotiated and signed the additional articles of 1823. The articles considerably changed the triple formula for the Portuguese (and, as we will see in the next chapter, for the Brazilians as well). Article I provided for the possibility of legal capture whenever slaves were proven to have been on board during the voyage, even before the moment of capture. Article II extended the possibility of the other members of the mixed commission to decide pending cases in the absence of Portuguese commissioners, while the previous regulation of the additional convention of 1817 was restricted to the case of death among Portuguese commissioners.[33]

As for Canning's innovative interpretation following the Brazilian declaration of independence (to expand partial abolition to total abolition of the slave trade), the issue was resolved in 1826 once and for all. In a report

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

33 *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.

responding to a Foreign Office request for a legal opinion, the King's Advocate, Christopher Robinson, eliminated any remaining doubts about the legality of Canning's proposal. According to the Law Officer's report, the Anglo-Portuguese treaties did not require Portugal to universally abolish the slave trade on the event of Brazilian independence.[34] Another report, this time by King's Advocate Herbert Jenner, reaffirmed this position to the Earl of Aberdeen in 1830[35] and two years later to Viscount Palmerston.[36] Britain would have to continue to abide by the rules of the Anglo-Portuguese treaty and would be restricted to partial abolition provisions.

Times of transition

The declaration of Brazilian independence and the heated discussions between Britain and Portugal notwithstanding, the Anglo-Portuguese regime of 1817 continued to be applied on the same basis.[37] The capture of Brazilian ships continued unabated and the mixed commissions continued their work of adjudication.[38] From the date of the declaration of independence (7 September 1822), Brazil 'tolerated' the Portuguese-British treaty, according to Brazilian commentator Antonio Pereira Pinto, even though the Brazilians 'reserved their right to abandon the treaties whenever they liked'. By then, the author argued, the agreements 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'.[39]

The British Foreign Office actually had doubts about this matter, as shown by the line of questioning in correspondence sent to the King's Advocate: 'To what period it is considered that Brazilian subjects are bound

34 FO 83/2344, Christopher Robinson to Mr. Secretary Canning, 27 July 1826.

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

36 FO 83/2344, Herbert Jenner to Viscount Palmerston, 19 January 1832.

37 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, 10 May 1823, p. 18, where such interpretation is stated.

38 See e.g. *HCPP*, Class A – Correspondence with Foreign Powers relating to the Slave Trade, 1823–1824. Mr. Secretary Canning to Mr. Consul-General Chamberlain, August 25, 1823, p. 20, with a discussion regarding which state should bear the expense of the Rio Mixed Commission.

39 Pinto (1864) 311.

by the treaties entered into with Portugal for the slave trade'?[40] The King's Advocate answered with all-too-familiar lawyerly undertones:

> 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 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.[41]

The Foreign Office followed the recommendation to avoid the subject. In the meantime, between its formal independence and the ratification of the Anglo-Brazilian treaty, Brazil continued to deal with the treaty regime as if it were still part of the Portuguese Crown. Visitation and capture of Brazilian ships worked no differently 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 cases involving Brazilians along with the Portuguese ones.[42]

B. A new treaty regime

Independence and recognition

According to the 19th-century understanding, the admission of a state to the international community depended on its recognition by other states.[43] Recognition was not self-evident and merely declaratory; it had a constitutive effect from which the very legal personality of a state emerged. Consequently, there could be no legal claim for recognition. Instead, 'recogni-

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

41 FO 83/2344, Christopher Robinson to Mr. Secretary Canning, 25 July 1826.

42 See appendix indicating that the vast majority of cases decided by the Anglo-Portuguese commission in Sierra Leone dealt with Brazilian vessels. They continued to be adjudicated by the 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).

43 Grewe (2000) 466; Jouannet (2013) 107.

tion had to remain a decision that was left to political estimations',[44] 'depended pre-eminently on political and pragmatic considerations'.[45]

Other powers recognised new states by treaties, and by diplomatic appointments, among other forms of relationship.[46] Recognition by a 'parent state' – Portugal, in the Brazilian case – was considered 'more conclusive evidence of independence than recognition by a third power', since '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'.[47] For Brazil, formal recognition by Portugal was not mandatory for 'measures of practical policy',[48] such as maintaining commercial relations. Like 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'.[49]

For Brazil, Britain provided a means to keep its central economic relations on good terms as well as to ensure Portuguese recognition (mainly due to Portugal's political and economic dependence on Britain, as discussed above). The British Foreign Office Secretary himself, in the course of his 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[50] '(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*'.[51]

It was George Canning himself who dealt with the first interaction with recognition-seeking Brazil after its declaration of independence. Canning received a visit from emissaries of Emperor Pedro I to negotiate the terms

44 Grewe (2000) 500–502.
45 Jouannet (2013) 107.
46 Hall (1890) 87.
47 Hall (1890) 89.
48 Grewe (2000) 499–500.
49 Obregón (2012) 5.
50 The term 'nation state' was commonly used for states – indicating that a nation, as a range of social facts such as common heritage, culture and language – willing to join in the form of a national community. Grewe (2000) 485.
51 Grewe (2000) 499, emphasis added.

for British recognition.[52] The British Foreign Secretary demanded a pledge to outlaw the slave trade completely.[53]

After further negotiations, Brazil received Portuguese recognition on 29 August 1825,[54] mediated by Britain.[55] British recognition would follow in October of that year, on the same day Brazilian representatives signed a convention assuming the obligation to gradually eliminate the slave trade. Even though that particular convention was eventually rejected by the British Parliament, Brazil officially accepted another treaty with all obligations set forth in the Portuguese-British treaties, including several extra provisions, in 1826.[56]

Three versions of the triple formula

For a treaty consisting of five articles, the Anglo-Brazilian treaty of 1826 had a rather complex mode of application. One of the reasons for this is the fact that three of its articles actually replicated the entire Anglo-Portuguese regime for the suppression of the slave trade. Article II established the adoption and renewal of the Anglo-Portuguese agreements of 1815 and 1817, '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 additional convention 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 in the same form as those created under the 1817 additional convention.

Under these three articles, the triple formula of 1817 would be carried on by the 1826 treaty. The original wording of the 1817 additional convention provided for 'effectual means to prevent *Portuguese* vessels trading in

52 Canning negotiated with Felisberto Caldeira Brant Pontes de Oliveira Horta (the Marquis of Barbacena) and Manoel Rodrigues Gameiro Passo (the Viscount of Itabaiana). Pinto (1864) 313; Accioly (1927).

53 Bethell (1969) 122–124.

54 *Tratado de Independência de 1825*. About the context of the treaty, see Pinto (1864) 327 et seq.

55 The treaty of 1825 between Brazil and Portugal had the British mediation registered in its preamble. See the treaty in Pinto (1864) 322. See also Accioly (1927), ch. xii–xiv.

56 See Bethell (2002) 108 et seq.

Slaves';[57] the same would now apply to Brazilians. By that instrument, 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*.

Consequently, these ships of war could, 'in the event only of their actually finding Slaves on board', 'detain and bring away such vessels, in order for them to be brought to trial before the tribunals established for this purpose'.[58] As mentioned above, this *right of capture* would be extended by the additional articles of 1823 to any vessels where slaves had been on board before the seizure in the same voyage.[59]

These three articles also reinstated the third element of the triple formula to the Anglo-Brazilian relations: *adjudication by mixed commissions*. The Anglo-Portuguese additional convention of 1817 had originally provided for the creation of three commissions: one to reside in Brazil, another on the coast of Africa and a third in London.[60] Established within six months of its ratification, the London commission was only supposed to adjudicate those claims involving Portuguese-captured ships, starting 1 July 1814, until such time as the other two commissions were installed in their respective locations.[61] For this reason, the reference to the London commission did not apply to Brazil. Under the treaty of 1826, *two* Anglo-Brazilian commissions were to be created, containing the same number of representatives from the two nations: one commission on the coast of Africa (located in Freetown) and one in Brazil (in Rio de Janeiro).

Aside from the three articles replicating the Portuguese regime in the Anglo-Brazilian Treaty, there were two other articles. One of these, Article V, provided for a deadline for ratifications.[62] The other, Article I, brought with it a significant novelty to the regime of slave-trade suppression in Brazil: it called for the total abolition of the slave trade, in contrast with the Anglo-

57 *OHT, Anglo-Portuguese additional convention of 1817*, Preamble, emphasis added.

58 *OHT, Anglo-Portuguese additional convention of 1817*, Article V.

59 On the interpretation of the additional articles of 1823, see Chapter 4.

60 As Emily Haslam rightly points out, the London Commission is rarely addressed, yet its work as the first ever mixed commission may enlighten the continuity between prize law and mixed commissions practice. See Haslam (2019) 44–45.

61 *OHT, Anglo-Portuguese additional convention of 1817*, Article IX.

62 *OHT, Anglo-Brazilian treaty of 1826*, Article V.

Portuguese regime of partial abolition. The Anglo-Portuguese regime arising out of the agreements of 1815 and 1817 proscribed slave trade only *northward of the equator.*[63] According to the additional convention of 1817, parties were expected to sign a new treaty in the future to establish the deadline for the absolute prohibition of the slave trade in the dominions of Portugal[64] – which only happened with the advent of Anglo-Portuguese treaty of 1832, as we will see in Chapter 5. In the treaty with Brazil, however, Article I included a clause for the *total* abolition of the slave trade. It provided (1) that 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 (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 five treaty provisions, the triple formula operated in at least three different modes during the period when the Anglo-Brazilian treaty was in force. Article I established the total proscription of the slave trade in Brazil to enter into force within three years of its ratification, while the other articles of the treaty would *immediately* go into effect. Therefore, the mechanism of the right of visit (and search), capture and adjudication would first be applied to enforce the partial abolition for three years from the date of the ratification of the 1826 treaty.

Some months would pass before the Brazilian mixed commissions would actually begin their work. Until that time, cases of Brazilian vessels (i. e. of the application of the Anglo-Brazilian Treaty) were decided by the Anglo-Portuguese commission.[65] The implementation of the triple formula for *partial* abolition therefore began with the adjudication of Brazilian cases by the *Portuguese commission* as a *first version* of the application of the triple formula (*1827–1828*). The *second* version involved the triple formula being applied as an enforcement mechanism of *partial abolition,* but now with adjudication by *Anglo-Brazilian commissions* (*1828–1830*).

The deadline for the complete abolition of the slave trade by Brazilians had been set for 13 March 1830. Yet this date was postponed in practice, as

63 *OHT, Anglo-Portuguese treaty of 1815*, Articles I, V.

64 *OHT, Anglo-Portuguese treaty of 1815*, Article IV.

65 In practice, this happened only in the case of the Sierra Leone commission, as no cases were decided in the mixed commission in Rio during this transitionary period. See the appendix for a list of the cases of Brazilian vessels adjudicated by the mixed commissions.

negotiations between Brazilian and British diplomats allowed for six extra months for Brazilian vessels to return to the coasts of Brazil. Therefore, the official start date of the *third version* of the triple formula (which finally proscribed all slave trade for Brazilian subjects and fell under the Anglo-Brazilian mixed commissions jurisdiction) happened on the 13 September 1830.

Interpretative disputes were decisive for specifying the contents of the triple-formula provisions. As we will see in the coming chapters, expectations about the applications of the law were updated during the course of these battles over various meanings: which practices were to be considered belonging to the slave trade, how much weight should be given to the flag in ascertaining nationality, how should mixed commissions work and how should their proceedings be structured (Chapter 4). Even the timeline of the treaty was the subject of significant disagreement (Chapter 5). Before proceeding to the story of the treaty in motion, we must recall the broad setting of the legal battles under the 1826 treaty regime.

Starting point

Brazil did not escape the 19th-century dilemma of former Latin American colonies when they began to employ the language of international law as independent states: '[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'.[66] Like its neighbours, 19th-century Brazil had to cope with detaching itself from colonial relations by emphasising its resemblance to the 'civilised' European states, while at the same time demonstrating a capacity to operate autonomously.[67]

During the 19th century, the process of universalisation of international law (perceived as an extension of the 'Christian-European family of nations' to the society of 'civilised nations', not a true universalisation[68]) was occur-

66 Koskenniemi (2004) 136.

67 Liliana Obregón comments on the measures that Latin American states took to assert their status as 'civilized' with the example of Simón Bolivar's unification of principles, forms of government and institutions used to promote the image of internal stability, and Andrés Bello's initiative in promoting international law education: Obregón (2012). See also Obregón (2006).

68 In the 19th century, international law definitely 'reflected the distortion in power among states, the feeling of superiority of a whole political class and the latent racism of an entire age'. Jouannet (2013) 104.

ring alongside a movement towards the adoption of the 'civilised' status as the main criterion for recognition in the international community.[69] This meant, as mentioned above, that nations considered 'non-civilised' would not be recognised as states and consequently would not be full subjects of international law (with rights and duties grounded on equality). It did not mean 'uncivilised' nations could not enter into legal relations.[70] Nonetheless, principles shared among them were considered as belonging to an entirely different legal system, one deemed inferior from the outset.[71]

Edward Keene's analysis may be of help in understanding the role this formal distinction between the 'civilised' and the 'uncivilized' played in the Brazilian position among the state-parties to the British network of treaties. Keene employs different theoretical approaches to international relations to make sense of British treaty-making efforts to supress the slave trade. He argues power politics might be important in explaining the 'hierarchy of prestige' within the 'family of civilized nations'. Portugal, for example, would be pressed into certain agreements much more aggressively (with force if necessary) than other states such as France and the United States. This may also explain the willingness of the former two states to resist British maritime domination.[72]

Even so, Keene argues, a certain degree of respect is embedded in the language of reciprocity in all treaties with 'civilized nations', and this signalled their difference to treaties made with 'uncivilized' nations. Part of this difference in treatment was less a matter of 'prestige' than of judicial, cultural, social, political qualities connected to 'civilized' status.[73] A pure realist approach fails to justify the difference between treaties with 'barbarians' and treaties with the *weak 'civilized' states* – which might be better explained by institutionalist approaches. Finally, Keene points out, only a constructivist or a poststructuralist approach might help us see that states were negotiating the terms of their identity: 'by calling African rulers' international person-

69 Grewe (2000) 104–105.

70 Grewe (2000) 466.

71 Lorca (2010) 477: '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.'

72 Keene (2007) 330.

73 Ibid.

ality into question, the British undermined the very rights that they were hoping to obtain'.[74]

Under the Anglo-Brazilian treaty of 1826, most provisions simply incorporated the articles of the 1815 and 1817 agreements with Portugal. This renewal of the Anglo-Portuguese regime came from a diplomatic move by the British Foreign Secretary, George Canning. After failing to secure a new treaty – especially after the 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'.[75]

Brazil would receive international recognition in 1825; it was thereby formally admitted to what had been an exclusively European law of nations that was then growing into a wider set of actors.[76] To that we must add that Brazil adhered to a treaty model originally applied to a European state – though perhaps not one of the more 'prestigious' ones, it was nevertheless European. Brazil was then a '*weak civilized state*', with a colonial heritage and economic dependence (on states like Britain) lingering from this heritage. Yet to conserve its autonomy – as a recently independent state – it had to continually reaffirm its 'civilised' status. For Brazil, arguing its case in the language of international law was a way of affirming its status as *independent and civilised*, as it was essential to the newly independent nations.[77] This did not mean merely adopting a language, though: the universalisation of international law was a two-way street, 'semi-peripheral appropriations of international legal thought and the global circulation of rules, lawyers and legal ideas transformed existing international legal regimes'.[78]

For Brazil, the practice of slave trade suppression was one of the first areas in which its international law appropriations and transformative potential would be tested. In the case of Anglo-Brazilian relations involving the legal regime for slave trade abolition, reaffirming Brazilian autonomy meant both

74 Keene (2007) 332.
75 FO 83/2344. Foreign Office to the King's Advocate, January 5th, 1826, p. 2, emphasis added.
76 Grewe (2000) 466.
77 See Sá (2012).
78 Lorca (2014) 139.

accepting the treaty at first and later reinforcing the abhorrent slavery project of the Brazilian state of affairs by resisting the abolition of the slave trade.[79] This was how Brazil's debut in international law as an independent state coincided with the state's accession to the anti-slave trade network of treaties and its resistance against its goal.

79 Luís Henrique Dias Tavares emphasises that the combination of factors that composed Brazilian resistance to abolition went beyond corruption and convenience: the resistance movement also had strong international connections reinforced by the capitalist system of that time. Tavares (1988) 27 et seq.

Chapter 4
A Treaty in Motion: Between War and Peace

> **'England, lady of the seas, has committed the greatest abuses: [...] the rules of Maritime Law are twisted at every moment [...]; These contradictions and confusions can be assigned to its national pride [...] or to its deceptive policy of wanting to favour its navy, in order to preserve the dominance that it has unjustly preserved over the seas, forcing, as they already did, Nations to come together so it abides by its duties and respects the rights of others.'[1]**

At the beginning of the 19th century, war was taken to be the general rule and peace was considered the exception. Given the rare status of peace, it was conceptually fashioned as an ideal, one that underwent some changes once it transformed into reality over the course of time[2] – at least among European states, since it was by no means a peaceful period for non-Europeans. The changing practice of warfare elicited new meanings of 'combatants' and 'non-combatants', and the emerging concepts of 'guerrilla' as a method of combat and 'total war' removed any distinctions among the population of a nation.[3] That notwithstanding, 19th-century manuals neither included references to the colonial wars,[4] nor did they mention, for the most part, the anti-slave trade regimes; they were rarely mentioned in either the section of the laws of war or the laws of peace.

On the particular connection of employing military power in the name of humanitarian norms, Fabian Klose argues the 19th century was a turning point. According to Klose, the humanitarian intervention entered international law in the colonial and imperial context when the British abolitionist efforts were joined by the intervention by European powers in the Ottoman

1 Brotero (1836) 6–7.
2 Koskenniemi (2004) 11.
3 Kleinschmidt (2013) 318–320.
4 Kleinschmidt (2013) 320.

Empire and the US in Cuba.[5] Seen as part of a longer historical development, humanitarian intervention represents a parallel and cumulative factor to other commonly considered facets of colonial and imperial penetration, such as religious, missionary or 'civilizing' missions.[6]

British anti-slave trade policy may have added an important element to that emerging notion of peace, by incorporating to it modes of use of force some that had once belonged to warfare relations. As depicted in conceptual history, the 19th-century 'peace' would not mean a state of limitation of force, but rather a 'state of law', a state of affairs determined by law and authorised by consent.[7]

With that in mind, it seems less of a coincidence that the first international law book published in Brazil[8] was a commentary on prize law: *Questões sobre presas marítimas oferecidas ao cidadão Rafael Tobias de Aguiar* (Questions about maritime prize offered to Rafael Tobias de Aguiar), by José Maria de Avellar Brotero.[9] The first edition of *Presas marítimas,* published in 1836, is significant not only for being the first Brazilian book on international law, but also for being the only such book to be published in Brazil during the period in which the Anglo-Brazilian triple formula was in force (until 1845).[10]

In the book, Brazilian lawyer José Maria de Avellar Brotero,[11] accuses the British admiralty courts of misinterpreting maritime law either out of national pride or out of pure interest in maintaining British dominance over the seas. Brotero does not discuss slave-trade prizes or the Anglo-Brazilian treaty; instead, he examines a set of questions of maritime law related to warfare: Is a capture legal if there is no prior declaration of war? Is the capture legal if it occurs in neutral seas? Does the captor acquire definitive title to the captured ship merely by capturing it? Can a judgement in a neutral state transfer the property of the captured vessel?

5 Klose (2019).
6 Klose (2019) 19–34. See also Erpelding (2017).
7 Vec (2015) 25–32.
8 According to Rangel (2017) 35–50. See also Ribeiro (2017) 104, 107.
9 Brotero (1836) 91.
10 The first general international law textbook by a Brazilian scholar would be published in 1851. Ribeiro (2017) 126.
11 Brotero taught natural law at the first law faculty in Brazil, established in 1827. See Machado Júnior (2010).

Despite not addressing the anti-slave trade regime, Laura Jarnagin maintains that the author of the first Brazilian book on international law nevertheless had it in mind. Jarnagin argues that *Questões sobre presas marítimas* was the result of a legal consultation: 'José Maria was asked to render a legal opinion regarding maritime law and, indirectly, the slave trade'.[12] Rafael Tobias de Aguiar, an important liberal anti-loyalist figure in São Paulo, wanted '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'.[13]

In answering questions regarding the requirements for a formal state of war and the circumstances of legal capture among enemies and neutrals, Brotero is decidedly critical of the British case law. He argues that the British understanding of prize law too conveniently favoured captors. Brotero takes up that same issue with a rhetorical question: Where can one find the legal basis that gave Britain the power to limit the commerce and the freedom of the neutrals? He responds with a sharp critique referencing the British maritime power: 'In the law of the cannons' ('No direito dos canhões').[14]

In *Questões sobre Presas Marítimas*, Brotero includes a four-page footnote detailing the implications of the idea that some nations are superior to others. He delves into the meaning of independence and submission, two notions Brotero claims are incompatible and thus cannot coexist on the same level of analysis. Britain and Brazil are used as examples to illustrate this incompatibility. Brotero argues that the relative superiority of Britain – which should be always qualified as superiority in knowledge, industry, naval power, wealth etc. – neither extended to law nor represented the power to force submission on nations such as Brazil, lest independence simply lose its meaning.[15] '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 limitation, Brotero continued, was the infringement on the rights of others – a rule that

12 Jarnagin (2014), ch. 12.
13 Ibid.
14 Brotero (1836) 91.
15 Brotero (1836) 83.

equally applied to Brazil.[16] Brotero does not even mention the standard of civilization (see Chapter 3) in the examples of Brazil and Britain; instead, the point was to prove that the superiority, which he acknowledged was real in terms of British knowledge, industry and naval power, *did not translate into superiority in law*. As long as this boundary was clear, Brazilian independence was safe.

Mirroring Brotero's analysis, as we will see next, Brazilian efforts were concentrated on responding to the British pressures using the language of the law. Once in force, the Anglo-Brazilian treaty for the suppression of the slave trade would constitute a field of contention with its own unique weapons. Of course, as in the book, the issue of the practical effects of British superiority and the Brazilian claim for equality under the law permeated all interpretative disputes. That notwithstanding, the Anglo-Brazilian treaty provided for a certain vocabulary and, along with it, a set of meanings that channelled disputes – as in Brotero's book – into issues regarding the limits of the use of force and the boundary between war and peace.

From the very start, the triple formula was an amalgam composed of, on the one hand, regulations inspired in the anti-slave trade campaign that began during the Napoleonic Wars (and therefore profiting from the laws of war) and, on the other, certain adaptations designed to work during peacetime (such as the decision to use mixed commissions rather than domestic courts).[17] When the triple formula of the 1826 treaty was finally in force, each step involved different combinations of staff and levels of interpretation. At times, the contentious points were disputed in the commissions; at other times, interpretative disputes generated diplomatic correspondence between representatives of both governments. Moreover, controversial cases often landed on the desk of either the British Law Officer or that of members of the Brazilian State Council.[18]

16 Brotero (1836) 84.

17 See Chapters 1 and 2.

18 As we saw in Chapter 2, the Law Officer played a central role in providing legal advice on the questions relating to slave trade treaties to the Foreign Office. The Brazilian State Council played a different role 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 (ed.) (1978); Lopes (2010).

The next section discusses a set of stories revolving around contingent legal points emerging out of each step of the triple formula. The regulations regarding visit and search as well as capture and adjudication will serve as points of entry to a series of interpretations that continuously reimagined the nature of the treaty by resorting to readings based on its particular language, general international law or even prize law.

A. Search in visitation

Inspection of papers

The provisions regulating visit and search under the Anglo-Brazilian agreement were identical to those of the Anglo-Portuguese regime. Under Article V of the 1817 agreement (reinstated by the 1826 treaty), the two parties had the right to visit merchant vessels suspected of slave trade and to search for signs of reasonable suspicion of illicit traffic.

Further details were provided in the *Instructions for the ships of war of both nations, destined to prevent the illicit traffic in slaves*. It was a document annexed to the convention that was also a binding part of it. The *Instructions* contained the main rules explored in Chapter 2 concerning the mandatory steps for the commander and crew of the capturer to visit, and ultimately detain, a ship to bring it before mixed commissions. As spelled out in procedures of visitation, suspicion of involvement in the slave trade (Article I of the Instructions, in conformity with Article V of the Treaty) was the minimal and necessary condition for visitation.

The *Instructions* state that the visitation should be conducted in the 'most mild manner' possible, the commander should be accompanied by a lieutenant or officer of a higher rank (Article VII) and take place no further than a cannon-shot distance off the coast of a nation under the other party's dominion (Article II).[19] The articles included directions regarding what the commander should look for during visitation: slaves on board, or proof of the illegality of the voyage (whether it violated the prohibition of trafficking north of the equator). Although the inspection of papers was not explicated in these provisions, the inclusion of the step of inspection can be

19 See Chapter 2.

inferred from the instructions for ship capture, which included the seizure of the papers to be sent to the mixed commissions along with the apprehended vessel (Article VIII of the Instructions). The treaty did not make any explicit restriction as to which kind of papers could be inspected, unlike the 1833 Anglo-French treaty (previously discussed in Chapter 2) as the result of French resistance to the 'British model' (see Chapter 1) of the right of visitation.[20]

While Brazil raised a number of complaints regarding British violations of the cannon-shot rule in the final years of the treaty's enforcement (a point we will revisit in Chapter 5), the inspection of papers was by far the issue related to visitation that prompted the most prominent interpretative debate. The sealed papers, in particular, became the subject of lively diplomatic discussions.

Sealed papers

In 1842, the Chargé d'Affaires in Rio de Janeiro wrote to the Foreign Office about a complaint by the Brazilian government that needed to be addressed. 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.[21] The Law Officer responded that opening a dispatch containing an imperial seal was *part of the right to visit and search* and thus could *not be perceived* as an act of violence, as the Brazilian Government contended.[22]

Two years later the matter once again became an issue, this time during the mixed commission proceedings. The Brazilian commissary judge at the Rio commission requested instructions from the Foreign Office as to whether documents with the Brazilian seal found aboard the *Nova Granada* (1844) could be opened by the commissioners to judge the case. The Council of State affirmed that adopting a rule permitting the breaking of the seal under any circumstances was ill-advised; *instead, it was suggested that each case should be submitted to imperial decision* and that it was reasonable to

20 See Chapters 1 and 2.
21 FO 83/2350. Foreign Office to the Queen's Advocate, 14 May 1842, p. 151.
22 FO 83/2350. John Dodson to the Earl of Aberdeen, 31 May 1842, p. 170.

allow it in the case of *Nova Granada*.[23] The Brazilian Council members would reaffirm this position once again after a complaint by the British government.[24]

In the meantime, the British commissioner in Rio wrote to 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 by 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.'[25] After consulting with the Foreign Office[26] in March of 1845, the Queen's Advocate agreed with the position of the British commissioners in Rio: preventing papers from being examined was against 'the tenor of the treaty', 'because an inferior department (the Custom House) think [it] proper to enclose them in an envelope, and make use of a seal bearing the arms of the Brazilian Empire'.[27]

That issue was never resolved, and remained open until the termination of the treaty in 1845 (see Chapter 5). This series of exchanges, however, anticipated political implications of each reading of the treaty provisions. On the one hand, the Brazilian understanding of the treaty provisions applied the rules of sovereign rights based on general international law protecting officially sealed documents and did not recognise the bilateral regime provisions as establishing a consented exception to the rule. Brazilian representatives held the view that the opening of sealed letters during either visitation or adjudication without having previously consulted the Brazilian government constituted an improper act in the times of peace.

On the other hand, British manifestations shared the view that the inspection of sealed letters should be conducted in the same way as the inspection of any other papers included under the rights established by consent in the

23 *CE*. Consultation of 27 December 1844, in: Rezek (ed.) (1978) 281–282.

24 *CE*. Consultation of 27 December 1844, in: Rezek (ed.) (1978) 285–287.

25 *HCPP, Class A*, 1846. Her Majesty's Commissioners to the Earl of Aberdeen, Rio de Janeiro, 10 December 1844.

26 FO 83/2352. Foreign Office to the Queen's Advocate, 26 February 1845, p. 300.

27 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.

bilateral regulation. Otherwise, restricting those rights would mean weakening the triple formula and opening the door for slave trade cover-ups. Although the positions on this dispute seem intuitive, if not obvious, we should bear in mind the legal reasoning of both parties in this first case to understand the interpretative variances along the other ones: when it came to the imperial seal, Brazil brought general international law to its rescue, while Britain adopted a literal reading of the treaty.

B. Detention for equipment

Equipment clause

Months after the ratification of the Anglo-Brazilian Treaty, British commissioners in Sierra Leone were writing about how much easier it would be for them and for the navy to carry out their work if Britain could persuade Brazil to sign additional articles 'similar in all aspects to the treaty with Netherlands'.[28] They were complaining about how hard it was to abide by one particular requirement for the second step of the triple formula: the presence of enslaved people on board the ship.

As we have seen in Chapter 1, the so-called *equipment clause* included a list of evidence allowing for the capture of a vessel merely on the grounds that it was equipped to receive captives.[29] At the time when the Sierra Leone commissioners wrote the letter mentioned above, they believed that an equipment clause would help prevent Brazilian vessels from disguising their involvement in the slave trade, e. g. using mercantile passports for trafficking slaves south of the equator.

British and Brazilian diplomats negotiated additional articles to that end, which were signed on 27 July 1835.[30] In addition to the *equipment clause*, these articles also contained a *breakup clause*.[31] The equipment clause provided for nine circumstances in which detention would be authorised, even

28 *HCPP, Class A*, 1837. Correspondence with the British Commissioners. His Majesty's Commissioners to Viscount Dudley, September 28, 1827.

29 See Chapter 1.

30 *MRE* 1834, p. 6.

31 See Chapter 1.

if no slaves were found on board the vessel; under the breakup clause, state-parties were required to proceed to the immediate dismantling of the vessels condemned by the mixed commissions.[32] However, these articles where not well received by the Brazilian government and thus were *never ratified.*[33]

The failure to ratify notwithstanding, one can always find at least some references to the matter of Brazilian vessels captured without slaves on board in the historiography of the slave trade. Leslie Bethell, for instance, writes that 'many ships captured without slaves on board were condemned or acquitted literally on the toss of a coin'.[34] He cites two cases both heard by the Anglo-Brazilian commission in Sierra Leone and involving *similar types of equipment*: the *Galianna* (1842) and *Ermelinda* (1842). Since the Brazilian and British judges disagreed in both cases, the decision was referred to the commissioner of arbitration. After lots were drawn in the *Galianna* case, the British commissioner of arbitration was selected and condemned the vessel; the Brazilian commissioner was selected in the case of the *Ermelinda* and released the ship.[35]

In connection with this, Jenny Martinez's research on slave trade commissions shows that the 'greatest disagreement among judges' took place during the Anglo-Brazilian mixed commissions. She explains that 'British commissioners pushed for coverage of cases of vessels that did not carry slaves aboard, while Brazilians resisted it on the basis of the Brazilian refusal to ratify an equipment clause amendment'.[36] In contrast, William Ward states 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 aboard, *at all events if they had already discharged their cargo*'.[37]

How can we make sense of this set of statements? The first step is to address the apparent contradiction between Ward's account and the disagreement

32 As mentioned in Chapter 1, all the elements were the same indicated in the treaty between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade of 1841 and the Palmerston Act in 1839 except for a tenth article including the presence of mats for captives. See Pinto (1864).

33 *CE*. Records, Session No. 116, 27 August 1833.

34 Bethell (1966) 87.

35 Ibid.

36 Martinez (2012) 76; Bethell (1970) 194–198.

37 Ward (1969) 126.

between Brazilian and British commissioners mentioned by Martinez and Bethell. If the Brazilian government actually had agreed to allow vessels to be captured without slaves on board, why would Brazilian commissioners insist on their release? The answer is that Ward is very likely referring to the capture of vessels in a very specific situation: when enslaved persons *had been aboard the same ship on the same voyage but had disembarked prior to capture*.

Brazil did not ratify the additional articles containing an equipment clause signed in 1835, but it was nevertheless bound to a kind of a more restricted equipment clause, i. e. the one ratified by Portugal in 1823, which we dealt with in Chapter 3.[38] That clause specifically provided for the right of capture in *cases where there was evidence that slaves had been on board the vessel as part of the same voyage*.[39]

The language in Article II and III of the Anglo-Brazilian treaty of 1826 does not expressly include these additional articles as part of the Anglo-Portuguese regulation Brazil was agreeing to.[40] Nor do the additional

38 See Chapter 3.

39 *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.

40 *OHT, 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

articles of 1823 appear in reprints of the additional convention of 1817,[41] though they were mentioned as binding in some instances. In *Paquete do Sul* (1834), for example, a vessel that appeared to have had captives on board prior to capture was condemned by both British and Brazilian judges in concurring opinions. The Brazilian judge believed that the papers found on board were *sufficient to demonstrate that slaves had been on board before the capture*, so the vessel was liable to condemnation under the *additional articles of 1823*.[42] The same occurred in the cases of the *Aventura* (1835) and the *Dom João de Castro* (1840).[43] Even stronger evidence that the Brazilians considered the additional articles of 1823 binding is an explicit mention found in a report by the Brazilian State Council in 1845. Here it is clear that such articles had already been accepted by Brazil as part of the Anglo-Brazilian treaty of 1826.[44]

As a result, one kind of discussion frequently heard within mixed commissions concerned the issue of whether there was enough evidence to establish that slaves had been on board the vessel at some point during the voyage. This was the main subject of discussion in the aforementioned cases (also *Dom João de Castro*, *Paquete do Sul* e *Aventura*). Yet the issue that divided the opinions among commissioners the most involved a line of interpretation that brought the reading of the Anglo-Brazilian provision much closer to an equipment clause than one would have imagined possible from looking at those earlier cases. This reading was inaugurated in the decree of *Empreendedor* (1839).

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.'

41 They neither appear in the Oxford Treaties Series nor in Antonio Pereira Pinto's selection of treaties, Pinto (1864).

42 *HCPP, Class A*, 1834. His Majesty's Commissioners to Viscount Palmerston, Rio de Janeiro, 30 January 1834 (and enclosures), pp. 132 et seq.

43 *HCPP, Class A*, 1835. His Majesty's Commissioners to Viscount Palmerston, Rio de Janeiro, 31 July 1835 (and enclosures), p. 290.

44 *CE.* Consultation of 25 January 1845, p. 293.

Enough for good prize

The case of the *Empreendedor* (1839) was decided by the British commissary judge, in the absence of Brazilian representatives. As we will see in more detail in the next section of this chapter, the realities of the Sierra Leone and the Rio de Janeiro commissions were very different because of the option provided by the treaty regime for the representatives of one state to rule in instances of a vacancy in the other state's seats. As mentioned in Chapter 2, mixed commissions in Sierra Leone were frequently staffed entirely by British commissioners. Brazilians found it difficult to recruit people willing to go to Sierra Leone – known by then as the 'white man's grave' – and those who did take on the job often fell ill. The British 'secret' to filling all the seats was to make use of any available staff from its African dominions.[45] This scenario led to long periods during which the Sierra Leone Anglo-Brazilian commission was composed exclusively of British men. As a result, the final word in many cases was British as well.

Unfilled Brazilian seats led to the decree of *Empreendedor*, which established that Brazilian ships found with equipment for the slave trade was sufficient grounds for them to be held as good prize. This case came to be so significant that the Queen's Advocate himself regarded it as a turning point. From this point onward, he acknowledged, cases involving vessels without slaves on board were decided by the 'toss of a coin'. As we have seen in Chapter 2, this meant that whenever the commissary judges of the two states disagreed, the case was to be decided by the commissioner of arbitration from one of the states, who was drawn by lot. In the wake of *Empreendedor,* whenever the Sierra Leone commission was fully staffed with commissary judges, Brazilians and British commissioners maintained opposite views on the matter. The Queen's Advocate commented on the situation:

> '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'.[46]

This intense difference of opinion occurred in many other cases, especially when the captured vessels had no other evidence of a possible treaty viola-

45 See Chapter 2.

46 FO 83/2350, John Dodson to the Earl of Aberdeen, 27 September 1842, p. 328.

tion beyond being equipped for the trafficking of slaves. As a result, these disputes escalated from disagreements between Brazilian and British commissioners to further discussions between diplomatic representatives of the two governments.[47] As we will see later in this chapter, Brazilian claims for compensation related to unjust condemnations in Sierra Leone based solely on equipment were dismissed by British authorities on the grounds of the impossibility of appeal.

In a letter written in January of 1839, British commissioners in Rio questioned the Foreign Office regarding the issue of whether Brazilian vessels could only be captured and condemned while carrying slaves on board. They referred to information about contradictory cases. On the one hand, they had heard about a recent British visitation of a Brazilian vessel near the Brazilian coast that did not proceed to capture on these grounds. On the other hand, four cases of vessels fitted for trafficking slaves but without slaves on board had been brought before the Rio commission (*Paquete do Sul, Dous de Março, Aventura* and *Vencedora).*[48]

The Foreign Office forwarded the consultation to the Law Officer. In his opinion concerning the consistency of condemnations and captures of vessels containing equipment for the slave trade, Queen's Advocate John Dodson contended such actions were not justified under the *Anglo-Brazilian treaty* of 1826.[49] Five months later, the Advocate's view on the matter was once more requested. This time, the Foreign Secretary questioned whether the clause prohibiting Brazilian subjects from engaging in the slave trade was not sufficient grounds for captures and condemnations for equipment. He cited the clause and argued that captures based solely on the possession of equipment should be treated as piracy from this point onward. The Queen's Advocate disagreed and stated that he did not see any reason to change his previous opinion that Brazilian vessels could not be condemned solely on the basis of equipment. He granted, however, that if the Brazilian government came to *agree with that understanding*, then there was no reason not to adopted it.[50] This report was transmitted by Viscount Palmerston to the

47 Leslie Bethell offers a summary contrasting how both the Rio commission and the Sierra Leone commission dealt with vessels without slaves on board in Bethell (1970) 175–179.

48 FO 84/275. Commissioners to Viscount Palmerston, Rio de Janeiro, 22 January 1830, p. 80.

49 FO 83/2348. Dodson to Viscount Palmerston, 3 April 1839, p. 45.

50 FO 83/2348. Dodson to Viscount Palmerston, 20 August 1839, p. 188.

British Rio commissioners that same month, instructing them to seek the concurrence of the Brazilian government and commissioners, but not to act upon it if the Brazilian position still opposed this construction.

Meanwhile, in Sierra Leone, the prevailing understanding of British commissioners remained the same as in the case of the *Empreendedor*. In 1843, the commissioners eventually wrote to the Earl of Aberdeen expressing grave concerns. They feared 'enormous expenses for damages' that might arise should Brazilian opposition to equipment condemnations persist. It was the Brazilian commissary judge Hermenegildo Frederico Niteroi's blunt refusal to condemn any Brazilian vessel unless slaves were found on board that brought about this 'peculiar circumstance'. The British commissioners considered the prospect of a second Brazilian commissioner being appointed, which would thus ensure acquittal in half of the cases after drawing 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*'.[51] The British commissioners explained to the Earl of Aberdeen that both the cases of the Confidencia (1843) and the Esperança (1843) were relevant: 'they have slave-decks, slave-provisions, slave-coppers, slave-night-tubs, slave-mess-tins, slave-gratings, slave-provisions; in short, a complete equipment for the Slave Trade'.[52] In the letter, the British commissioners were adamant that possession of equipment sufficing to prove engagement in 'carrying on Slave Trade' was a widely shared opinion by the 'highest legal authorities', citing Lord Stowell (Sir William Scott), *prize law doctrine*, and vice-admiralty courts decisions. Since the case of the *Empreendedor* (1839), the British commissioners added that '*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'.[53] As the commissioners noted, however, the

51 *HCPP, Class A*, 1844. Her Majesty's Commissioners to the Earl of Aberdeen, Sierra Leone, 28 June 1843, p. 37, emphasis in the original.

52 *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, pp. 36 et seq.

53 *HCPP, Class A*, 1843. Her Majesty's Commissioners to the Earl of Aberdeen, Sierra Leone, 28 June 1843, p. 37, emphasis in the original.

seat of Brazilian commissioner of arbitration was still vacant, thus any 'toss of the coin' would bring the decision back to the British commissioner of arbitration, just as before.[54]

Several months later, Foreign Secretary Earl of Aberdeen responded to Sierra Leone, with a copy being sent to Rio. He 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.'[55]

The following year, Queen's Advocate Dodson suggested to the Earl of Aberdeen that he send new instructions clarifying what he meant. Based on the information Dodson received from Sierra Leone, British commissioners had mistakenly concluded that they could *absolutely refuse* (their reading of 'resist') the reference to arbitration in equipment cases. Clear instructions were thus required to the effect that they should instead 'resist by remonstrance and argument only'.[56]

That same 'misunderstanding' occurred in Rio. Reporting on the case of the *Nova Granada* (1844) to the Foreign Secretary, the British commissioners stated that, upon receiving the Brazilian commissioner's demand of referral to arbitration, they refused it, which they believed to be in accord with the instructions issued the previous year. This meant that the two governments would have to come to an understanding if proceedings were to continue.[57]

The Rio matter was communicated to the Brazilian Foreign Office and even submitted to the State Council in a consultation. In its report, the Council exhibited prior knowledge of the misinterpretation that happened in Freetown and protested against the attempt by British commissioners to convince the Brazilian judge to concur with him in condemning *Nova Granada* for equipment. To keep such attempts from happening in the future, the State Council put forward five proposals that they argued needed

54 *MRE,* 1840.

55 *HCPP, Class A*, 1844. The Earl of Aberdeen to Her Majesty's Commissioners, 11 September 1843, p. 41.

56 FO 83/2352. Dodson to the Earl of Aberdeen, 11 May 1844, p. 105.

57 *HCPP, Class A*, 1846, Her Majesty's Commissioners to the Earl of Aberdeen, Rio de Janeiro, 5 March 1845, p. 485.

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 on the basis of having had slaves on board on the same voyage; 2) they should guarantee that a Brazilian commissioner of arbitration and a judge were always present in the mixed commission in Sierra Leone; 3) in case of condemnations resulting from decisions handed down by the British commissioners of arbitration, reports should be sent to the Brazilian diplomatic representatives for solemn complaints to be presented to the British government; 4) a complaint against a specific British commissioner should be filed with British representatives.[58]

After these episodes, the Earl of Aberdeen used the Queen's Advocate's own precise wording to formulate new instructions to the commissioners: 'clearly understand that you are to resist no further than by remonstrance and reason, and not by an absolute refusal'.[59] Reading this statement, one might get the impression that the Foreign Office was clearly acting to contain the interpretative leaps. In the long run, though, the British condemnations for equipment ended up being implicitly endorsed by the British government, since Brazilian complaints about decided cases were always refused on the ground of non-appeal (as we will see later).

Brazilian attempts to resist this view lasted until the termination of the treaty in 1845 (see Chapter 5). Marques de Lisboa restated Brazilian opposition to another case of apprehension justified by the presence of slave trafficking equipment on board off the African coast, namely the *Felicidade* (1845), not to mention the protests in the case of *Imperador Dom Pedro* (1844), which was condemned for equipment in Sierra Leone.[60] In addition to the formal complaints, he added a further point regarding the condemnations for equipment: a 'letter of repentance' issued by a Brazilian commissary judge who 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 the instructions

58 *CE.* Consultation of 25 January 1845, pp. 291–297.

59 *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 in Rio de Janeiro, *HCPP, Class B*, 1846. Viscount Canning to Mr. Hamilton, 3 September 1845.

60 *HCPP, Class B*, 1845. M. Lisboa to the Earl of Aberdeen, 30 June 1845, pp. 306 et seq.; *HCPP, Class B*, 1845. M. Lisboa to the Earl of Aberdeen, 7 October 1845, pp. 322–323.

provided by the Brazilian Minister of Foreign Affairs, which he had taken to endorse condemnations for equipment. In the cases of the *Isabel* (1844), the *Aventureiro* (1844), the *Virginia* (1844) and the *Esperança* (1844), the Brazilian commissioner stated that he was unaware of the protests by the Imperial government regarding condemnations of vessels equipped for the slave trade but not actually holding captives. He wished to retract his opinions in these cases, since he should have voted for condemnation only in cases in which slaves were found on board or when it could be established that they had been on board prior to capture. He asked for his statement to be included in the book of minutes as well as sent to the Brazilian envoy.[61] It seems as if Marques de Lisboa wanted to document a counter-narrative to the overall impression mentioned by historian William Ward, namely, that the Brazilian government actually agreed to allow any vessels to be captured without slaves on board.

Detention (and consequent condemnation) for equipment was indeed a very divisive matter, both among British and Brazilian representatives. In addition to the revelation that even a Brazilian judge had voted in favour of condemnation based on the presence of equipment, Brazilian representatives usually rejected this position. Implicit in the Brazilian protests was the claim that the right of detention for equipment was only possible with consent, as stated in the *Louis* doctrine (see Chapter 1). They also claimed that the Anglo-Brazilian treaty differed from other anti-slave trade regimes that contained express provisions on the matter such as the treaty with the Netherlands, referred by British commissioners very early on to be an ideal model for the Anglo-Brazilian regime.

British commissioners in Sierra Leone who advocated for a reading of the Anglo-Brazilian regime that treated possession of equipment as a just reason for detention and condemnation mobilised prize law in favour of their argument. This interpretation was never passed on as a guideline to the British representatives; in fact, the Law Officers rejected it outright. At the same time, the cases decided on these grounds were never reversed (due to the barring of appeal).

These cases would join a series of other instances in which British interpretations defied the language of the treaty, as per the Brazilian coeval view.

61 *HCPP, Class B*, 1845. M. Lisboa to the Earl of Aberdeen (enclosure), 5 August 1845, p. 324.

Once cases entered the third step of the triple formula, references to the literal meaning of the treaty were also joined by multiple references to both general international law – as in the case of the Brazilian reading of the imperial seal – and to prize law – as in the case when British commissioners in Sierra Leone argued for the detention of vessels despite no captives being on board. As we will see in the next section, they reveal not only the range of interpretative choices but also hint at the meaning of the respective legal positions of Brazil and Britain.

C. Flags under adjudication

Commissions and prize experience

By the time Brazil acceded to the system of slave trade suppression, Britain had accumulated significant experience in this area 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. In the different interpretational contexts (the navy's work,[62] mixed commissions and diplomatic dynamics), the legal standards for suppression were being transformed to meet new demands and advance the objective of slave trade abolition.

The experiences Brazil acquired after having gained independence certainly expanded the rather brief encounter with the Anglo-Portuguese treaties. Other types of mixed commissions, for instance, were also part of the reality of the Brazilian diplomatic life. Derived from a provision of the Treaty of Independence signed with Portugal in 1825,[63] a mixed commission was established on 8 October 1827. This Brazilian-Portuguese commission was meant to resolve claims by private individuals and by the respective states[64] arising from the damages incurred during what the treaty called the 'war of independence'.[65] The ongoing developments of this commission were

62 See the Introduction.

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

64 This was an interpretation given to the treaties after some discussion, as registered by Antonio Pereira Pinto: Pinto (1864) 319.

65 This mixed commission was created under article 8 of the Treaty of Peace, Alliance and Friendship, where the independence of Brazil was recognized. It would deal with the

included in the Foreign Office reports presented annually to the Brazilian Parliament, accompanied by a section reserved for another set of mixed commissions of which the country was a member. The purpose of these commissions was to deal with the vessels from neutral states captured by the Brazilian navy in the blockade of Río de la Plata during the Cisplatine War (1825–1828).

These commissions dealt with prize law, which is another plausible explanatory hypothesis for the content Brotero included in his book (mentioned at the beginning of this chapter). The cases handled by these commissions concerned the property nationals from the Netherlands, Switzerland, Sweden, Britain, the United States, Chile, Denmark and France.[66] They were established to decide claims against decisions handed down by Brazilian courts regarding prizes and to carry out their sentences. These coeval commissions dealing with the warfare regime not only temporally coincided with anti-slave trade mixed commissions, but they also came to serve as a point of reference for Brazilian officials and diplomats seeking to situate the latter within their bilateral prize practice, along with the British admiralty courts' case law and general international law.

Two versions of mixed commissions

The 1817 Anglo-Portuguese additional convention, reinstated by the Anglo-Brazilian convention of 1826, provided for the creation of 'two commissions, formed of an equal number of individuals of the two nations, named for this purpose by their respective Sovereigns'.[67] Their purpose was 'to bring to

claims under article 6 and 7, regarding seized property or vessels. For an example of a report of the commission's activity, see *MRE* 1830, p. 4.

66 See *MRE* 1830, pp. 5–7; *MRE* 1831, pp. 2–4; *MRE* 1832, pp. 7–9; *MRE* 1833, pp. 8–10; *MRE* 1834, pp. 8–10; *MRE* 1835, pp. 6–18.

67 *OHT, Anglo-Portuguese additional convention 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,

adjudication, with the least delay and inconvenience, the vessels which may be detained for having been engaged in an illicit traffic of slaves'.[68] In cases of *disagreement* between the *commissary judges* of each state, one of the commissioners of arbitration (either the Brazilian or the British appointee) would be *drawn by lot* to take the final decision.[69] In other words, they were classic 'British system' (see Chapter 1 and 2) mixed commissions.

The regulation that provided for the operation of both mixed commissions also set general criteria for succession or *replacement* of commissioners when there were vacancies. In the Anglo-Brazilian treaty, the original 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 rules stipulated in the 1817 additional convention: 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

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 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.'

68 *OHT, Anglo-Portuguese additional convention of 1817*, Article VIII.

69 *OHT, Anglo-Portuguese additional convention of 1817 (Regulation)*, Article III: '[…] The Commissary Judges of the two nations shall, in the first place, proceed to the examination of the papers of the vessel, […], 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 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.'

> the above-mentioned Commission shall be equally *authorized to proceed to the judgement*'.[70]

Parties had a specified duty to 'supply, as soon as possible, every vacancy [...] in the above-mentioned Commissions, from death or any other contingency'.[71] At first, the British viewed these provisions as permission to operate without Portuguese representatives, regardless of whether the vacancy resulted from death.[72] This practice, as we have seen in Chapter 3, was later formalised by Article II of the additional articles of 1823, providing for the authorisation for the work to proceed in the event of any Portuguese (and later Brazilian) absences.[73]

70 *OHT, Anglo-Portuguese additional convention 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 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 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.'

71 *OHT, Anglo-Portuguese additional convention of 1817 (Regulation)*, Article XIV, *supra*.

72 See Chapter 2.

73 *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

The practical implications emerging from this provision escaped no one. As Farida Shaikh claims in her study of mixed commissions, '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*'. This assessment was also shared by 19th-century British representatives.[74]

The Brazilian perspective on the matter was that the absence of Brazilian commissioners inevitably disadvantaged 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 on 23 November 1826; *finally, a candidate presented himself*, who was then nominated;

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.'

74 Turnbull, for instance, 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 (2012) 51. Further evidence of British expectations is found in a correspondence between the British commissary judge in Rio and Viscount Canning. After the disagreement between the Brazilian and British judges in the *Dous Amigos* case (1843), the British commissioner of Arbitration concurred with the Brazilian commissary judge, instead of agreeing with the British commissary judge. The British commissary judge felt the need to report the unusual result to the Foreign Office: 'As that decision may seem remarkable, I venture to afford to your Lordship all possible explanation […]. Mr. Grigg [the British commissioner of arbitration] […] 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 my 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 Queen's Advocate, Viscount Canning responded indicating that the commissioner of arbitration '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).

> and his presence, whenever it comes about, *will re-establish in favour of the Brazilian subjects the safeguard emerging from the balance of votes*.'[75]

Although the seat would remain empty for a couple of years,[76] 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 Sierra Leone deliberations was perceived as the *cause of condemnations*, especially when no evidence against the Brazilian ships had been presented.[77]

This imbalance would repeat itself over the duration of the Anglo-Brazilian commission's work in Sierra Leone. Addressing the one-sidedness of commissions in Freetown, Jenny Martinez cites the Anglo-Brazilian commission as a significant example: of the 109 cases decided there, 81 judgements were entered by an exclusively British commission. For the 28 remaining cases, tried with participation of at least one Brazilian commissioner, the British and Brazilian commissary judges did not reach consensus in ten of them. In all of these cases, the commissioner of arbitration affirmed the opinion of his nation's commissary judge, as was often the case in all mixed commissions.[78]

These numbers are a reflection of both the intermittent absences of Brazilian commissioners in Sierra Leone and the variety of the commission's caseload.[79] 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 one Brazilian was present in the Sierra Leone commission.[80] 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.[81]

75 *MRE* 1831, p. 2, emphasis added.

76 The report of 1833 indicated that Mateus Egidio da Silveira, the Brazilian arbitrator in the mixed commission of Sierra Leone, had finally filled its position there. *MRE* 1833, p. 6.

77 *MRE* 1832, p. 5.

78 Martinez (2012) 70–76.

79 Martinez (2012) 197–198 (notes 13–14).

80 Ibid.

81 MRE (1830–1846).

The frequent vacancies of one or both Brazilian seats opened up space for British commissioners to take advantage of the proceedings under the 1826 treaty. The toss of the coin was often unnecessary to reach a final judgement; much of the time the process stopped short of being referred to the commissioner of arbitration, since no foreign commissary judge was there to disagree with the opinion of the British judge.

Form of the process

The general instructions regarding the mixed commission's procedures can be found in one paragraph of the regulation annexed to the Anglo-Portuguese additional convention of 1817. Accordingly, the commissary judges had only to follow the steps laid out in the 'form of the process'.[82] First, they should 'proceed to the 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 (if necessary), '[receive] the declaration on oath of the Captain.' These steps aimed 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'.[83]

Early on in their implementation, the rules on admissible evidence and hearing – which, to be fair, were certainly not sufficiently detailed in the

82 *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 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 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.'

83 *Anglo-Portuguese additional convention of 1817 (Regulation)*, Article III, *supra*.

treaty to be put into practice – became part of recurrent disagreements among Brazilian and British representatives. For instance, the Brazilian commissary judge in Sierra Leone, José de Paiva, took several actions which can be seen as strategies to compensate for the vacant seat belonging to the Brazilian commissioner of arbitration (for only one year of his four-year term did he have a Brazilian commissioner of arbitration).[84] Among other things, José de Paiva demanded the captor be present before the proceedings of a case to continue (*Ismenia*, 1831). In reaction to the Brazilian commissioner's insistence, the British commissioners in Sierra Leone complained to the Foreign Office. When consulted on the complaint, the King's Advocate agreed with the Brazilian commissioner that it was his right to require the presence of the captor.[85]

Another short-lived dispute regarding procedure arose in 1842, when the Brazilian commissioners in Rio de Janeiro demanded that instead of the registrar that the commissioners examine the witnesses. The British commissioners disagreed with the Brazilians and submitted a consultation on the matter to the British Law Officer. The Queen's Advocate responded that the examination of witnesses by the registrar was an *established general practice since the Instructions of 1819*.[86] As discussed in Chapter 2, there was indeed a general practice in mixed commissions of registrars examining witnesses.[87]

Another contentious point arose amongst other state representatives regarding admissible evidence. When the Brazilian Chargé d'Affaires wrote to the British Foreign Office about the claims for indemnities (explored later in this chapter) in the cases of the *Interdora* (1827), the *Eclipse* (1827) and the *Venturoso* (1827), he questioned the legality of the proceedings. Evidence had been produced by the captors that went beyond the vessels' papers and crew depositions, a practice he claimed went against the *prize law* as established in the British High Admiralty Court's case law. When consulted on how to respond to this point, the King's Advocate agreed that this was indeed the practice of the High Admiralty Court. Nevertheless, the fact that captors were permitted to submit further evidence in addition to the witness depositions in those cases *was not a violation* of the *proper legal regime* applicable in

84 See *MRE* 1830–1833.
85 FO 83/2345, Herbert Jenner to Viscount Palmerston, 4 December 1830, p. 237.
86 FO 83/2350. John Dodson to the Earl of Aberdeen, 12 June 1842, p. 180.
87 See Chapter 2.

those cases. The proceedings of mixed commissions were not just any proceeding under the *general law of nations*, he argued; they were rather a proceeding '*under a treaty, entered into for a particular purpose*'. According to 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*'.[88]

This debate regarding evidence also emerged in the Rio mixed commission. In the case of the *Eliza* (1830), 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 the ruling on that case, further evidence submitted to the commission showed that crew affidavits and the vessel's papers had been falsified with regard to the date of the voyage, thus countering a crucial basis for acquittal. The British commissioners insisted on admitting further evidence, which favoured condemnation of the vessel.

Lots were drawn, and the British arbitrator affirmed the opinion of the British judge. Yet Brazilian commissioners were not put off by this process; instead, they took advantage of the procedural rule of *decision by lot* and sometimes got lucky. The Brazilian position at that time was that an arbitrator should be chosen *whenever* a new point of disagreement arose. In this specific case, they insisted that the decision on the admissibility of 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 (drawn again by lots) to resolve the disagreement between the judges. Having convinced the British commissioners to acquiesce to the drawing of lots once more for the final decision, the Brazilian commissioner of arbitration was chosen, and the Brazilian interpretation prevailed.

Following this case, the King's Advocate was asked for his view on the matter of admissible evidence. He reiterated his previous opinion on the interpretation of Article III of the regulations: although the ship's papers as well as depositions of the captain and principal individuals aboard were indeed primary evidence, *further evidence was not prohibited*. To assume otherwise would contradict '[t]he constant practice of mixed commissions

88 FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 15 November 1830, pp. 197 et seq.

courts'.[89] 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'.[90] 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'.[91] But it was too late, and as the King's Advocate pointed out, all he could do was advise the Foreign Secretary to send instructions to the British commissioners to prevent similar results in the future.[92]

Regarding the provisions for the 'form of the process', we have mentioned the disputes regarding the presence of the captor for adjudication, the use of evidence beyond witnesses and the examination of witnesses by commissioners. These are significant examples of topics about which disagreement over the rules of adjudication by mixed commissions erupted. On the point of admissibility, we have seen Brazilians assimilate the treaty regime using prize law as their model, while British representatives saw the matter as unique to the anti-slave trade regime and dissociated from the case law of admiralty courts. When it came to the matters of the presence of the capturer for adjudication and of the examination of witnesses, the difference in interpretation among commissioners were soon resolved by reference to the general practice of anti-slave trade commissions. In general, claims under the 'form of the process' provisions seems to have been an effort to compensate for the disadvantage arising from the British predominance in the Sierra Leone commission, and definitely contributed to the curtailment of both threats to Brazilian independence and to advances in slave trade abolition.[93]

89 FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 30 April 1831.

90 Ibid.

91 Ibid.

92 Ibid.

93 About the connections between Brazilian independence and the abolition of the slave trade, see Chapter 3.

Jurisdiction and nationality

A couple of months before the 1826 treaty entered into force, and after the recognition of Brazilian independence, King's Advocate Christopher Robinson received a consultation from the Foreign Office. How should British representatives deal with the claim that Brazil had no obligation 'not to receive slaves imported in Portuguese vessels'? Robinson started by noting that, under domestic regulations, it was possible to read the Alvará of 1818 (enacted under the Kingdom of Portugal, Brazil and Algarves to implement the Anglo-Portuguese additional convention of 1817) as still applicable to Portuguese vessels even after Brazilian independence. It was unclear, however, whether Brazil would enforce the pre-existing Alvará.

Turning to the future obligations under the Anglo-Brazilian treaty, he contended that Brazil could read the treaty in one of two ways. The first option was a reading informed by the 'spirit' of the 1817 additional convention, reinstated by the 1826 treaty, which meant it would apply to Brazilian as well as Portuguese vessels suspected of engaging in the slave trade. Per this interpretation, vessels belonging to nationals of both states would be subject to the steps of the triple formula that were reinstated following the Anglo-Portuguese model. According to the other reading, the 1826 treaty would apply exclusively to Brazilian vessels.[94]

At first glance, it might seem that the list of cases adjudicated by the Anglo-Brazilian mixed commission in Rio de Janeiro (see appendix for details) indicates that the commission and the Brazilian navy supported the understanding that Portuguese vessels were covered by the 1826 treaty. After all, most of the cases judged from 1830 to 1840 concerned vessels flying Portuguese flags, and, contrary to what typically happened during the years of suppression (1827–1845), almost all the vessels brought before the mixed commission in Rio in the years immediately following the implementation of the 1826 treaty (from 1830 to 1835) were captured by the Brazilian navy.[95]

The significant number of cases involving Portuguese ships during that period did not necessarily represent the actual proportion of vessels of Brazilian or Portuguese nationality. Captors 'could choose whether to proceed on

94 FO 83/2344. Christopher Robinson to Mr. Secretary Canning, 15 January 1827, p. 128.
95 See the Appendix.

the basis of the captured ship's genuine or colourable nationality'.[96] This was no different for Brazilian vessels. 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.'[97] As we will see in Chapter 5, the matter of Portuguese vessels and the difficulty of distinguishing them from Brazilian ones lasted until the end of the Anglo-Brazilian triple formula itself, taking different shapes along the way. It first came as a matter of jurisdiction of mixed commissions.

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 § 4 of the 1818 Alvará.[98] The brig *Africano Oriental* (1830) was released *and* had its captives liberated, under Article III of the 1817 additional convention in conjunction with § 1 of the Alvará of 1818. The Alvará provided for the 'loss of slaves'[99] in cases of illegal slave trade (from all ports of the African coast north of the equator). Though a Portuguese vessel, the Alvará was nevertheless enforced in this case – a partial response to the doubts expressed in 1827 by King's Advocate Christopher Robinson.

As was commonly done when a new commission began its work, the Foreign Office sent the record of the *Africano Oriental* to the Law Officer for evaluation. A new officer, Herbert Jenner, had just filled the seat of King's Advocate. After receiving the papers of the case, the new King's Advocate confirmed the correctness of the decision. According to Jenner, the jurisdiction of the mixed commission as regulated by the 1826 treaty did not cover Portuguese vessels: '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.'[100] This interpretation, according to the King's Advocate, 'tend[s] to

96 Haslam (2019) 75.

97 Bethell (1970) 135.

98 As mentioned above, the Alvará was a Brazilian domestic regulation, enacted before Brazilian independence proscribing slave trade to north of the equator. According to § 4 of the Alvará, cases of slave trade would be brought before judges of contraband, i. e. Brazilian judicial bodies, and thereafter referred to mixed commissions if one of the parties made such a request.

99 As we will see in the coming sections, this was yet another instance in which, paradoxically, the language of abolition reinforced the representation of slaves as property.

100 FO 83/2345. Herbert Jenner to Viscount Palmerston, 9 February 1831.

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'.[101]

The circumstances and corresponding decisions were the same in the cases that followed: the *Destemido* (1830), the *Dom Estevão de Atayde* (1830) and the *Camila* (1832).[102] In the case of the *Maria da Gloria* (1833), however, everything changed.

Maria da Gloria, a Portuguese-flagged vessel, was captured by a British ship in 1833 while carrying more than 400 captives, mostly children under twelve years of age.[103] That tragic scenario notwithstanding, the Rio mixed commission – Brazilian and British representatives in full agreement – eventually released the vessel. The grounds for its release were that the commission lacked jurisdiction to rule on a Portuguese vessel. In a second attempt to condemn the vessel, the captors then decided to try again and brought the case before the mixed commission in Sierra Leone. The mixed commission judged it bad prize, as the capture had been performed south of the equator. Under the Anglo-Portuguese regime, however, the right of capture only covered the area north of the equator.[104] By the time of the second decision had been reached, more than 100 captives had died, 64 had to be disembarked in Sierra Leone due to illness and the few survivors suffered from various diseases and malnutrition. The *Maria da Gloria* came to be known as 'a floating charnel house', a symbolic case of the cruelty of slave trade.[105]

The *Maria da Gloria* proceedings in Rio generated a number of disagreements. 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 had been an 'anomaly', since refraining from condemning the ships and leaving it to Brazilian authorities to free the slaves meant that they in fact 'perpetrated the crime'. During the proceedings, the British judge also referred to a point

101 FO 83/2345. Herbert Jenner to Viscount Palmerston, 30 April 1831.

102 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.

103 See the registered number of slaves liberated in the cases ruled by the Anglo-Brazilian Commissions in the Appendix.

104 We will return to this case in connection with a discussion of battles over colours in a following section.

105 Bethell (1970) 135–136. See also Brito (2022).

raised by the Brazilian judge, namely, that the Act of 1831 superseded the Alvará of 1818. The British commissioner provided further context regarding this issue when he voted with his Brazilian colleagues. He pointed to the provision of the 1831 Act regarding the 're-exportation' of captives brought illegally to Brazil. The act was the domestic regulation attending to Article I of the 1826 treaty providing for prospective total abolition. Among the sanctions for those engaging in the slave trade, the Act established liability for the costs of repatriating people brought as slaves – as we will further explore in Chapter 5. The Act was still pending implementation in 1833, delayed by a lack of agreement not only on how this 're-exportation' should occur but also where those liberated should be sent.[106] According to the British judge, these were uncertain times for the process of liberation, as the destiny of the liberated people remained open under Brazilian domestic law.

In order to apply the 1826 treaty to the case, he argued, the discussion among the judges necessarily shifted to the issue of whether the owner, a man born in Portugal but residing in Brazil, could still be considered Portuguese.[107] Despite relying on flags as an *a priori* indication of a ship's nationality, the Anglo-Brazilian regime referred to the *subjects* of the state-parties as those who were barred from involvement in trafficking.[108] After considering the evidence presented in the case, however, both the British judge and the Brazilian judge concurred that the owner of the vessel could not be considered Brazilian. Thus, the commission concluded that a case involving Portuguese property belonging to a Portuguese subject did not fall within its jurisdiction.[109]

106 See *MRE* 1832–1835. We will explore this further in this section.

107 *HCPP, Class A,* 1835, His Majesty's Commissioners to Viscount Palmerston, 26 December 1833, p. 121.

108 *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.'

109 *HCPP, Class A,* 1835, His Majesty's Commissioners to Viscount Palmerston, 26 December 1833, p. 121.

Even prior to the case of the *Maria da Gloria*, British commissioners in Rio had anticipated the potential legal difficulties presented by Portuguese-flagged vessels. In 1830, they submitted a hypothetical question to the Foreign Office regarding the matter, which was then redirected to the Law Officer:[110] how should the Anglo-Brazilian Treaty be applied to Brazilian traders who managed to get Portuguese papers to carry on trafficking slaves north of the equator?[111] The request reasoned that the treaty rendered any slave trade trade carried out by Brazilians illegal as of 1830.[112] Portuguese vessels, however, could continue the slave trade south of the equator, since no further agreements had been established with Portugal to secure the universal proscription of the slave trade carried out by Portuguese subjects and granting the right of visit, capture and adjudication to Britain both north and south of the equator. Responding in November 1830, King's Advocate Herbert Jenner limited his answer to stating that under Article I of the Anglo-Portuguese additional convention of 1817 (reinstated by the Anglo-Brazilian treaty of 1826, as we have seen), Brazilians were barred from any slave trade, even if they chose to use Portuguese vessels or vessels flying a Portuguese flag.[113] The opinion made no mention of vessels owned by Portuguese residing in Brazil.

By the mid-1830s, when the case of the *Maria da Gloria* was decided in Rio, the number of cases involving Portuguese-flagged vessels had increased substantially. In fact, the sheer number of these cases meant that they became the de facto main target of British anti-slave trade efforts. By 1839, the number of slave traders flying under the Portuguese flag had mushroomed. Shortly thereafter, this practice started to decline, and eventually fell sharply after the enactment of the Palmerston Act – which will be discussed in Chapter 5.[114]

Perhaps already influenced by the increase in Portuguese-flagged slave-trading vessels, Viscount Palmerston requested the opinion of the Law Offi-

110 FO 83/2345. Foreign Office to His Majesty Advocate General, 22 June 1830, p. 142.

111 *HCPP, Class A*, 1830. W. Smith, Esq. to the Earl of Aberdeen, Sierra Leone, 17 April, 1830, p. 58.

112 See Chapter 3 for an explanation of how the 1826 treaty was supposed to operate and how the total prohibition of slave trade came into force in Brazil.

113 FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 19 November 1830, p. 216.

114 See the chart at Martinez (2012) 89.

cer on the *Maria da Gloria* case in 1834.[115] Contrary to the Rio commissioners' assessment, the King's Advocate Herbert Jenner claimed that the ship's nationality should have been considered Brazilian, despite its Portuguese flag, Portuguese papers and its owner having been born in Portugal. He argued that other elements should have been given more weight in this case, such as the fact that the vessel had been equipped in Rio de Janeiro and was to return to Brazil, the owner's place of residence. The King's Advocate based his opinion on a principle of the law of nations: '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 of *Maria da Gloria* a Brazilian subject, according to Jenner, and should have satisfied the Rio mixed commission's test of jurisdiction.[116]

Acknowledging the Foreign Office's instructions to the British commissioners to use the specified interpretation in future cases, Brazilian Secretary of State for Foreign Affairs, Manoel Alvez Branco, informed the British representatives that the Brazilian Regency opposed this approach and would not issue a directive to the Brazilian commissioners to comply with it. 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.[117]

Called upon by the British Foreign Officer to address the matter, King's Advocate John Dodson agreed with his predecessor on the criteria of residence when it comes to determining nationality. Concerning Brazilian opposition, he insisted that a merchant residing in Brazil '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'.[118]

115 FO 83/2346. Foreign Office to the King's Advocate, 31 March 1834, p. 154.

116 The King's Advocate admitted, regarding the Sierra Leone decision, that the commissioners could not have reached any other decision. As the capture had occurred south of the equator, restitution should follow. The refusal to award costs or damages was also correct, in the opinion of the King's Advocate. FO 83/2346. Herbert Jenner to Viscount Palmerston, 29 September 1834, p. 209.

117 *HCPP, Class B*, 1835. Enclosure n. 76, Senhor Branco to Mr. Fox, Palace of Rio de Janeiro, 7 February 1835, p. 73.

118 FO 83/2346. John Dodson to Viscount Palmerston, 23 June 1835, p. 275.

After the *Maria da Gloria* case, Brazilian and British commissioners continued to rethink their jurisdiction over vessels flying Portuguese flags. Although the Brazilian position generally kept the criterion of residence out of the deliberations, both Brazilian and British judges were able to reach consensus in the majority of cases that followed, usually resulting from unanimous findings of fraudulent papers.

In 1836, the issue of Portuguese-flagged vessels once again emerged. Given the increase in the practice of transferring Brazilian vessels to Portuguese subjects and outfitting them with Portuguese flags for the purpose of trafficking slaves, Viscount Palmerston consulted the King's Advocate to see if anything else could be done under the treaties to counter this activity.[119] John Dodson responded that nothing could be done except to 'urge' the Brazilian government 'in the strongest manner' to take measures against the practice by suggesting that laws be enacted prohibiting the equipment of vessels in its territory and the departure of equipped vessels from its ports.[120]

Meanwhile, even though Portugal had committed itself to the abolishment of the slave trade by a decree signed on 10 December 1836, the British had their hands tied by the Anglo-Portuguese treaty with respect to suspected vessels navigating south of the equatorial line. The British *right of visit and search* – conferred *only by treaty*[121]– was restricted to the cases of prohibition established in 1815 and 1817. Therefore, the Queen's Advocate concluded, captures should still be performed only within the scope of the treaty.[122]

In the years that followed, most cases of Portuguese-flagged vessels were condemned by the Anglo-Brazilian mixed commissions, which by then had accepted that any ship – regardless of flag or nationality – could be captured south of the equator.[123] Notwithstanding the incentives to condemn Portuguese vessels at the Rio commission, the number of vessels brought for adjudication did not increase significantly. Perhaps the Queen's Advocate

119 FO 83/2347. Foreign Office to the King's Advocate, 5 April 1836.
120 FO 83/2347. John Dodson to Viscount Palmerston, 9 April 1836, p. 39. See also John Dodson to Viscount Palmerston, 15 August 1836, p 91.
121 As established in the *Louis* case, 165 English Reports (1817) 1475 et seq.; see Chapter 1.
122 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.
123 Bethell (1970) 136–138.

was right and the captors did not want to risk capturing vessels flying Portuguese flags. As we have seen in Chapter 2, prospective captors probably weighed their potential earnings (heavily dependent on captures) against their personal liability in the case of unlawful detention when deciding whether seizing a suspected vessel was worth the risk.[124]

A significant change in British legal policy came two years later, in 1838. After consulting with the Queen's Advocate and receiving a response on the legality of the measure, Viscount Palmerston sent new instructions to the Rio commissioners. 'I have recently received from various quarters, [information] 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 began. As the number of vessels flying the Portuguese flag approached its peak, he continued, Portugal passed a decree on 16 January 1837 concerning the conditions under which a vessel should be regarded Portuguese.[125] In the letter, Palmerston instructed British commissioners in Rio to start applying the new regulation to Portuguese-flagged vessels.

In practice, the decree restricted the weight assigned to the flying of the Portuguese flag in determining whether a vessel was Portuguese. According to the decree, vessels could be considered Portuguese only if they had been navigating under a Portuguese flag prior to its enactment, they had been built in Portuguese dominions or, in the case of steam-powered vessels, 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 the Queen's Advocate regarding the rightful implementation of the decree, Palmerston's letter directed commissioners to apply the *Anglo-Brazilian treaty of 1826* to vessels suspected of engaging in the slave trade that were either owned by Brazilian subjects *or by Portuguese subjects residing in Brazil who failed to comply with the Portuguese decree's criteria for claiming Portuguese nationality.*[126] In other words, a domestic Portuguese law that downgraded the significance of the Portuguese flag in determining

124 Ward (1969) 102–103; Scanlan (2014) 125–126; Shaik (2012) 48; Lloyd (2016) 71. See also Chapter 2.

125 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.

126 FO 84/241. Viscount Palmerston to Commissioners, 30 April 1838.

whether or not a vessel was Portuguese was now to be applied to all cases brought before Anglo-Brazilian commissions. In practice, this facilitated the classification of Portuguese-flagged vessels as non-Portuguese and applied to cases that would otherwise have depended on the disputed nationality of the owners. As a result, the new directive to the British commissioners was that vessels non-compliant with the Portuguese decree became Brazilian by exclusion.

Before this interpretative novelty could raise any disagreement, the matter of determining nationality in connection with establishing jurisdiction came to a turning point with the enactment of the Palmerston Act in 1839. As we will see in Chapter 5, the passing of this British domestic regulation extended from that point onward jurisdiction over Portuguese-flagged vessels to the British admiralty courts. It deflated interpretative disputes entailed by the British push to expand the jurisdiction of the Anglo-Brazilian mixed commissions through criteria of nationality.

In a nutshell, British interpretations prior to this act mobilised general international law (principles of the law of nations concerning commerce) and even Portuguese domestic law to articulate the meaning of the prohibition of Brazilian subjects from engaging in the slave trade when cases came up for adjudication. The Brazilian resistance we have thus far analysed was based on the specificity of the treaty against general international law (pertaining to commerce).

Restitution without indemnities

The remedies for *illegal detention* of ships were provided for in Article V of the 1817 additional convention, reinstated by the 1826 treaty: 'the two High Contracting Parties engage[d] mutually to make good any losses which their respective subjects may incur unjustly'.[127] This meant that, if the detained vessel was acquitted by one of the mixed commissions, its proprietor would

127 *OHT, Anglo-Portuguese additional convention 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

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 responsible for the above-mentioned damages'.[128]

Annexed to the 1817 additional convention, the *Regulation for the mixed commissions* established that commissions had jurisdiction not only to declare vessels good and bad prizes but also to judge claims for compensation in cases of vessels not condemned as good prizes. Article VIII of the *Regulation* specified what was included under 'just and complete indemnification'.[129] This article stipulated that, in cases of 'total loss', commissions should consider items such as the ship's apparel, cargo and slaves on board –

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.'

128 *OHT, Anglo-Portuguese additional convention 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.'

129 *OHT, Anglo Portuguese additional convention 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

'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*'.[130]

Even a quick reading makes clear the extent to which the abolition legal regime's provisions reinforce the commodification of humans. As Emily Haslam argues: 'Prize […] facilitated slave trade repression but still allowed for slaves (and recaptives [those found on board a captured ship] to be treated and / or represented as property.' When it came to indemnities and the value connected to illegal captures of ships, she adds: '[i]n the attempt to reduce damages, the slaves were represented as a set of depreciating assets.'[131]

The language used in these provisions reveals a great deal about the underlying ethos of the anti-slave trade system. In that prize law-inspired treaty, there was a clear 'analogy of people and goods: it applied the same legal processes to people as it applied to the capture of contraband'.[132] This came to pose a significant difficulty in practice. The provisions were at odds

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. […]'

130 *OHT, Anglo Portuguese additional convention of 1817 (Regulation)*, Article VIII, *supra*.

131 Haslam (2019) 109.

132 Scanlan (2014) 115.

with the humanitarian terms of the regime, and they certainly posed substantial disincentives to the goal of liberation. To address this incongruence, actors involved in the implementation of the treaty resorted to new readings of restitution and indemnities over time. Yet these innovative readings by no means resolved the paradox. The fact they 'minimized some of the fallout – at least for captors – of illegal seizures', as we will see, does not mean they improved the 'precarious legal position' of captives.[133] This is visible in the British innovation of interpreting cases as 'unworthy of indemnities'.

One type of case deemed *unworthy of indemnities* concerned situations of captives escaping after illegal seizure of vessels. In practice, case law developed the argument that situations in which captives 'voluntarily escaped' to British colonies should not be viewed in the same light as when the 'loss of slaves' came from the illegal capture per se. 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 deemed a voluntary act of the captured people to recover their freedom.[134]

In addition to cases of escape (which highlight the role of slave resistance in liberation[135]), some decrees that declared vessels bad prize due to illegal captures did not establish indemnities even though they determined restitution (of goods and slaves). In other cases, Britain simply adopted the 'unworthy' interpretation and refused to pay indemnities despite illegal capture. The matter of restitution without indemnities gave rise to some of the central interpretative disputes surrounding the Anglo-Brazilian treaty as soon as it was implemented.

In his report of January 1828, the King's Advocate analysed a suggestion made by the British Treasury, arguing that the owners of vessels captured while engaged in the slave trade – *in patent violation of the law of their own countries* – might *not* be entitled to indemnities even when the capture does not lead to a condemnation of that vessel or its cargo.[136] As we have seen in Chapter 1, the law of other countries had been considered in cases of slave trade suppression once before, namely, in the reasoning of prize law cases during the Napoleonic Wars. At that time, owners were thought to have a

133 Haslam (2019) 66.
134 See FO 83/2346. Herbert Jenner et al to Viscount Palmerston, 9 April 1834, p. 164.
135 Haslam (2016, 2019).
136 FO 83/2344. Christopher Robinson to the Earl of Dudley, 26 January 1828, pp. 241 et seq.

right to claim restitution only when the law of their countries permitted the slave trade.[137]

The cases that led to this suggestion by the British Treasury were that of the *Activo* (1826) and the *Perpetuo Defensor* (1826). In both cases, the capture had occurred south of the equator, in breach of the regime of partial abolition. Captives on board both ships had been landed and could not be returned by local authorities, despite the illegality of the ship's capture.[138] With future cases in mind, the King's Advocate cautioned against *generalising this rule*, as decisions should be 'compatible with the Articles of the Instructions and Regulations' and counselled on a case-by-case basis. If this construction was to be maintained as a principle, he added, it *should be declared as such to the Brazilian authorities*, just as it did with Portugal in the case of the *Sinceridade*.[139]

In the case of the *Sinceridade* (1823), a Portuguese vessel had been captured in a location not covered under the Portuguese treaty; at the same time, it was clear the ship had been engaging in illicit traffic of slaves under the 1817 additional convention. 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'. To remove the 'ambiguities of the treaty', he added, Portugal should be 'induced to extend, by an Explanatory Article or Declaration, the penalty of confiscation to all Vessels found trading in Slaves'.[140] It was only in the Anglo-Portuguese treaty of 1842 that Portugal explicitly acquiesced regarding the point of indemnities. Accordingly, in cases in which the vessel had been found equipped for the slave trade, no compensation should be paid for its detention, even if no decree condemning the practice was entered by the mixed commission.[141]

Herbert Jenner, the new King's Advocate, and two of his colleagues responded to a similar question to the one that had already been answered[142] – namely, could costs and damages be claimed by vessels

137 See e.g. *The Amedie*, 165 English Reports (1810).

138 Haslam (2019) 93–95.

139 FO 83/2344. Christopher Robinson to the Earl of Dudley, 26 January 1828, pp. 241 et seq.

140 *HCPP, Class B,* 1824. Mr. Secretary Canning to Sir Edward Thornton, 25 October 1823, p. 9.

141 *Anglo-Portuguese treaty of 1842*, Article X.

142 FO 83/2344. Foreign Office to Her Majesty's Law Officers, 7 February 1828, p. 244.

engaged in illegal trading but the capture of which was unwarranted? Their answer was 'no'.[143] They offered '*the true object and spirit of the Treaties*' as the basis for their decision. Accordingly, 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. *Violations of its provisions should not be construed as creating a legal entitlement to indemnity.* Nonetheless, the Law Officers recommended that no general instructions be sent to Sierra Leone commissions on the subject – it was the commissioners who had consulted the Foreign Office on this matter in the first place. The Law Officer advised the Foreign Office to make it a matter of representation between the governments or subject of additional articles, in '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*'.[144]

The Foreign Secretary instead preferred to stand by the unilateral interpretation of the treaty provisions. In his communication with the British Chargé d'Affaires in Rio, he noted that, under the Anglo-Portuguese regime ratified by Brazil, Portugal had been notified of the British views on the matter. Moreover, the Foreign Secretary argued, Brazilian authorities had been made aware of that interpretation by the British envoy at Rio in 1827. 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'.[145]

The matter would again become part of diplomatic discussions in the following year in connection with the case of the *São João Voador* (1828), the first Brazilian vessel to be declared bad prize after the treaty of 1826 entered into force. The justification for detention was that the ship carried equipment for slavery and was suspected of awaiting a delivery of slaves at the time of its capture.[146]

São João Voador was brought before the mixed commission of Sierra Leone – the Anglo-Portuguese commission, as the Anglo-Brazilian one had not yet

143 FO 83/2344. Herbert Jenner et al. to the Earl of Dudley, 23 May 1828, pp. 275 et seq.

144 Ibid., p. 277, emphasis added.

145 *HCPP, Class B,* 1841. Viscount Palmerston to Mr. Ouseley, 6 July 1840, p. 158.

146 Ward (1969) 123.

been established at that point.[147] 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 absence of palm oil in Keta, the port from which the Brazilian vessel had departed. The defence then brought forward a different expert to affirm that, albeit rare, palm oil could in fact be obtained there. Although the vessel was eventually declared bad prize, because the capture was considered illegal, the commission rejected the claim for indemnities, stating that a vessel intended for legal trade should not have been carry slaving equipment.[148]

The same decision was handed down by the Sierra Leone mixed commission in the case of the *Vencedora* (1828). The vessel sailed to the coast of Africa with the declared aim of procuring palm oil, ivory and gold (among other goods) when it was captured and the case brought before the Sierra Leone mixed commission. Despite a decree of restitution, the owners were denied indemnities.

To answer protests raised by Brazilian Chargé d'Affaires, Chevalier de Mattos, about the *Vencedora*, the Foreign Office requested an opinion from the King's Advocate. The Law Officer simply advised the Foreign Office to remind Chevalier de Mattos that commission rulings could not be appealed, thereby rejecting his claim that the decision should be reconsidered.[149] The position of the King's Advocate was that the same answer should be applied to the case of the *São João Voador*,[150] as reported by Viscount Palmerston to Chevalier de Mattos.[151]

As discussed earlier in this chapter, the case of the *Empreendedor* (1839) inaugurated a line of interpretation in the Sierra Leone mixed commission that led to the condemnation of vessels captured based on the possession of equipment. The reading we are discussing now, of restitution without indemnities, seems to have preceded condemnations for equipment in the Anglo-Brazilian practice. It was a more conservative reading of the treaty, in the sense that it did not challenge the conditions for capture – indemnities

147 See Chapter 3.
148 WARD (1969) 123.
149 FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 19 November 1830.
150 FO 83/2345. Herbert Jenner to Viscount Palmerston, 30 November 1830.
151 *HCPP, Class B,* 1831. Viscount Palmerston to the Chevalier de Mattos, 10 December 1830, p. 64.

were refused despite the recognised illegality of the captures. Yet this line of interpretation took a step in the same direction, that is, toward expanding incentives for capture.

As we have seen in Chapter 2, accountability for payment fell both to the captors' state of origin and to the commander of the vessel. The risk of being held liable for wrongful captures significantly discouraged seamen from detaining ships under doubtful circumstances.[152] Since illegal captures did not necessarily entail indemnities, however, the effect was an incentive for capture regardless of regulatory restrictions.

In addition to the case law of the Sierra Leone mixed commission, more or less developed under *de facto* British control of the seats on the commission and strengthened by the rule of *decision by lot*, Britain adopted a unilateral policy. Accordingly, the British representatives used this to justify their refusal to pay indemnities whenever a decree of bad prize involved the capture by the British navy of a vessel clearly engaged in the slave trade. In one noteworthy example, this was the rationale offered by the British for not paying any indemnities relating to the *Maria da Gloria* case (1833), the 'floating charnel house'.[153]

Over the years, indemnities were transformed into a central issue of Anglo-Brazilian relations. In February 1840, a letter from M. Lopes Gama concerned two questions 'many years pending between the respective Governments'.[154] One dealt with special civil and criminal jurisdiction for British citizens (see Chapter 5), and the other involved 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'.[155]

Viscount Palmerston responded that such claims concerned only Brazilian vessels 'which had been detained by British cruizers, because they were

152 Shaikh (2012) 48.

153 Bethell (1970) 135–136. See the previous section of this Chapter.

154 *HCPP, Class B,* Extract of a Letter from M. Lopes Gama to Mr. Ouseley, dated Rio de Janeiro, 26 February 1840, p. 157.

155 Ibid.

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'.[156] According to Palmerston – who recapitulated an 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'.[157] He pointed out that the Portuguese offered no resistance to this declaration. According to Palmerston, this same statement was made in 1827 to Brazilian representatives, so there was no point in continuing the discussion.[158]

In 1841, in the case of the *Pompeu* (1839), the question was raised in the Rio commission again. Examining the British commissioner's opposition to the arbitration of indemnities, the Queen's Advocate John Dodson responded to Viscount Palmerston. Although indemnities were already part of the sentence in that case, and nothing could be changed at this point, he nevertheless went on to claim that there were grounds for refusing to arbitrate indemnities in similar cases. To substantiate his claim, Dodson quoted from the declaration to the Portuguese government in 1823, the 1827 declaration to Brazil and the precedent established in the *Maria da Gloria* case in 1834.[159]

The implementation of the rule of indemnities for illegal captures was hampered by the starkly divergent readings by Brazilian and British representatives. The language of the treaty resembled the wartime regulations against contraband, commodifying both goods and the enslaved aboard captured ships. Where it established indemnities for illegal seizure, the treaty not only provided for indemnities relating to total and partial loss of goods, but also 'loss of slaves'. Over time, British representatives made sense of this provision by detaching the declaration of bad prize from indemnities. Accordingly, indemnities did not follow condemnation whenever there was a clear involvement of the captured vessel in the slave trade (established either by the equipment on board or other evidence). While the Brazilian protests against this reading kept the prize-law rationale in mind, British

156 *HCPP, Class B,* 1841. Viscount Palmerston to Mr. Ouseley, 6 July 1840, p. 158.
157 Ibid.
158 Ibid.
159 FO 83/2349. John Dodson to Viscount Palmerston, 7 January 1841, p. 4.

interpretation prioritised the objective of the treaty (slave trade suppression) as a way of justifying a reading that minimized economic risks of capturing suspected ships.

The shield of non-appeal

Under the Anglo-Brazilian regime, as per the system of adjudication by the mixed commissions, commissioners were to 'bring to adjudication, with the least delay and inconvenience as possible [to the mixed commissions], the vessels which may be detained for having been engaged in an illicit traffic of slaves [...] [so that the commissions] shall judge the causes submitted to them *without appeal*'.[160] The meaning and extent of the *no-appeals clause* of Article VIII of the 1817 additional convention (reinstated by the 1826 treaty) was discussed at various points over the course of the Anglo-Brazilian relations.

As early as the transition from the Anglo-Portuguese to the Anglo-Brazilian treaty regime, Brazil had expressed an interest in reassessing the commission's rulings. 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 from 1822 to 23 November 1826 (the date of the signature of the treaty), so they could be examined and submitted for imperial approval.

160 *OHT, Anglo-Portuguese additional convention of 1817*, Article VIII, emphasis added: '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.'

After receiving that 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 apply the same provisions of the additional convention 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'.[161] As would later be relayed to the Brazilian representatives, the British reading (from the Law Officer) was that it followed from this provision that none of the previous decisions, from 1822 to 23 November 1826, required further Brazilian validation to be executed.[162] In other words, before the Anglo-Brazilian treaty entered into force, the execution of the Anglo-Portuguese treaty was definitive for Brazilians – even after its declaration of independence.[163]

The no-appeals clause came to be a central feature of subsequent controversies surrounding the decrees of the Sierra Leone mixed commission (explored above) claimed to be unjust by Brazilian representatives. Debates about the no-appeals clause involved the most fundamental aspects of mixed commission design, its rules of composition, succession and deliberation. We will examine these points by considering how they were employed by both Brazilian and British actors within legal interpretative disputes.

In his early efforts to address 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 appointment by trying to include formal protests against previous cases in the written records of the proceedings. British commissioners objected, and

161 *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.'

162 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.

163 See Chapter 3.

the King's Advocate, who had been consulted on the matter, joined this objection:

> '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.'[164]

In making this statement, the British relied on the mixed commissions' procedure (of decision by lot) and the simple lack of Brazilian participation through the appointment of commissioners.[165]

A number of Brazilian diplomatic complaints followed, taking aim at the overall injustice of the system as well as in individual cases decided in the absence of Brazilian representatives. The British Foreign Office repeatedly dismissed Brazilian protests based on the provisions of the treaty that mixed commissions would judge cases *without appeal*[166] and on the *res judicata* principle.

In the 1830 report, 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'.[167] He was referring to the cases emerging from the blockade of the Río de la Plata mentioned earlier;[168] coeval to the anti-slave trade mixed commissions, these other commissions dealt with prizes by the Brazilian navy during the blockade of the Río de la Plata in the Cisplatine War. That connection was also present in the Brazilian Foreign Office's report the following year. The report mentioned unjust sentences issued by the Sierra Leone mixed commissions, including condemnations of vessels without slaves on board. The British argument 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 down by Brazilian prize courts.[169]

164 FO 83/2345. Herbert Jenner to the Earl of Aberdeen, 28 November 1829, p. 84.

165 See section 'Two versions of mixed commissions' above.

166 *Anglo-Portuguese additional convention of 1817*, Article I, II and VIII.

167 *MRE* 1830, p. 4.

168 See 'Commissions and prize experience'.

169 *MRE* 1831, p. 10.

At one point, Foreign Secretary Viscount Palmerston requested – as did his successors – the opinion of the King's Advocate with respect to the appropriate way to respond to recurrent claims of injustice by Brazilian representatives.[170] In August 1831, the King's Advocate Herbert Jenner gave his advice on the best way to respond to the most recent requests by the Brazilian Chargé d'Affaires in London, Chevalier de Mattos. He contended that the Brazilian government was completely aware that under the treaty of 1826, there was no longer any right of appeal, and that this point should be once again brought to their attention.[171]

The Brazilian Foreign Office acknowledged that the regulation of mixed commissions did *not* provide for the right of appeal *per se*, but insisted that the decisions be reconsidered on the grounds that they flagrantly violated the treaty and should be declared *null*.[172] By April 1831, Chevalier de Mattos wrote to the British Foreign Secretary pursuing yet another strategy. The fact that state-parties' subjects could not appeal the sentences of mixed commissions, he argued, did not 'prevent the Government from complaining of those decisions when they interfere with *national interests*, and from demanding *adequate reparation* for them'.[173] 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.

The ideas underlying Chevalier de Matos' claim resonate with the way prize courts worked in the 19th century. Andrés Bello explains that prize court decisions constituted undisputable titles that are to be executed in foreign countries even if based on domestic laws incompatible with the law of nations.[174] Claims of illegality or injustice were only admissible in civil claim discussions if those illegalities or injustices were *explicit* in the prize courts' *sentences*.[175] Notwithstanding these 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 *claim-*

170 FO 83/2345. Foreign Office to the King's Advocate, 20 April 1831, p. 281.
171 FO 83/2345.
172 *MRE* 1831, p. 10.
173 *HCPP, Class B*, 1833. The Chevalier de Mattos to Viscount Palmerston, 9 April 1832, p. 27.
174 Bello (1844) 232.
175 Ibid.

ing reparation for damages emerging from the injustice or illegality of prize courts' decisions.[176]

Regarding the new type of claims put forward by the Brazilian government, the King's Advocate was again consulted and once more based his opinion on a literal reading of Article VIII, which provided for the creation of the mixed commissions to 'judge the causes submitted to them *without appeal*'. This 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, he argued, the parties decided to refer decisions to a tribunal to which they were able to appoint judges from their *own nationality*, so it would be 'almost absurd' that they also held a right of appeal. Accordingly, all regulations annexed to the treaty had been conceived with the aim of preventing subsequent objections to the ruling of the mixed commissions, *including* claims of compensation emerging from illegal captures. From the point of view of the Law Officer, the Anglo-Brazilian treaty of 1826 and its respective regulations only provided for one means of correcting injustices committed by commissions: the *removal of individual commissioners*.[177]

At this point, we should recall the motivation cited by Lord Castlereagh for adopting the model of mixed commissions as a means to suppress the slave trade that informed the 1818 Parliamentary debates over ratification of the Anglo-Portuguese additional convention of 1817.[178] The choice of mixed commissions was linked to a desire to maintain uniformity in case law and to prevent certain matters from being judged by foreign tribunals, as happened in prize courts. This resonates with the point made by the King's Advocate that any revision

> 'would render the Mixed Commission Courts worse than useless, and would, necessarily, lead to *endless disputes and discussions*, between the two Governments, in

176 Bello (1844) 234.

177 *Anglo-Portuguese additional convention of 1817 (Regulation)*, Article XII. The article literally provided for the removal of commissioners in cases of 'evident injustice'. Yet expulsion was meant to address cases of corruption or the actual involvement of commissioners in the slave trade.

178 *The Parliamentary Debates from the year 1803 to the present time*. House of Commons, v. 38, London, 1818, p. 997. See Chapter 2.

> every case, founded upon the different representations, which each would receive from its own subjects'.[179]

The next proposal offered by the Brazilian representatives to reverse decisions by mixed commissions was to submit patently unjust cases to *arbitration by a third state* – in accordance with *ius gentium*.[180] In an opinion concerning that proposal, the King's Advocate reaffirmed the position formulated in his 1833 correspondence with the British Foreign Office.[181] Consulted on the matter, the Brazilian Council of State agreed with the unfavourable opinion of the King's Advocate and unanimously decided to set aside this particular claim, as 'the law was completely on the British side'.[182]

Yet the continuous disputes around the non-appeal clause did not end there. In the Rio mixed commission, attention soon turned to *embargos*, that is, petitions requesting that a mixed commission not carry out sentences. The aim was to allow claimants to receive an extension so that further evidence could be submitted for consideration within the context of the proceeding. If the new information was deemed relevant to the sentence, then the commissioners would revisit their judgement, which was to be subsequently executed.

The practice of *embargos* in the Rio commission was first brought to the attention of the King's Advocate in 1835, regarding the cases of the *Angelica* (1835) and the *Amizade Feliz* (1835). His report indicated that, as a form of appeal, British commissioners should refuse this practice. Despite subsequent instructions from the Foreign Office to the British commissioners in Rio, the Brazilian government refused to instruct its commissioners to abandon the practice. Brazilian representatives argued that *embargos* were a part of the custom and laws of Brazil.

In February 1839, the topic of *embargos* was once again brought before the Rio mixed commission, this time intertwined with another significant point of dispute: the deviation of vessels from the Brazilian coast, which will be explored in Chapter 5.[183] In the cases of the *Diligente* (1839) and the *Feliz*

179 FO 83/2345. Herbert Jenner to Viscount Palmerston, 15 August 1831, emphasis added.
180 *MRE* 1832, p. 6.
181 FO 83/2346. Herbert Jenner to Viscount Palmerston, 25 February 1833.
182 *CE*. Records, Session No. 116, 27 August 1833.
183 See Chapter 5.

(1839), the British Chargé d'Affaires in Rio addressed the conflict between the positions of British and Brazilian commissioners regarding cases in which *embargos* were requested: while the British commissioners followed the instructions they were given to refuse *embargos*, Brazilians members were in favour of admitting them.

In a long letter to Maciel Monteiro, Ouseley criticised Brazilian willingness to maintain *embargos* as a sign, among 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 for retaining *embargos*, he stated: 'it must be remembered that the Mixed Commission is not a Brazilian tribunal' and that for that same reason 'peculiar forms of British Jurisprudence' were not admissible either. Accordingly, 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.'[184]

Ouseley even referred to other mixed commissions then in operation.[185] He mentions the Brazilian-Portuguese commission, 'to which no *embargos* are admitted', and the Anglo-Brazilian mixed commission's decision to liquidate the prize claims concerning Río de la Plata:[186] '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 added a final observation that he was ready to use the two captured ships (with almost 500 slaves on board) for blackmail: should the Brazilian government not cease its acceptance of *embargos*, the ships would be sailed by the British to Demerara.[187]

In a Portaria issued on 14 February 1839, Brazilian commissioners were ordered to stop admitting *embargos* in the mixed commissions' proceedings. This did not mean, however, that the Brazilian government was convinced by the British interpretation of the mixed commission regime. Instead, in a

184 *HCPP*, *Class B,* 1839. Mr. Ouseley to Senhor M. Monteiro, 15 January 1839, p. 119; Ouseley's note was approved by the Foreign Secretary in April 1839. See *HCPP*, *Class B,* 1840. Viscount Palmerston to Mr. Ouseley, 1 April 1839, p. 127.

185 As mentioned before, Brazil participated in other kinds of commissions at the time, such as the Brazilian-Portuguese commission of independence and the coeval prize law commissions of the Río de la Plata.

186 See section 'Comissions and prize experience' above.

187 Mamigonian (2009) 43. We will explore similar threats of deviation in Chapter 5.

report explaining the events leading up to the Portaria, Brazilians came up with their own reasons for not accepting embargos, claiming that embargos were incompatible with mixed commission proceedings for two reasons. First, mixed commissions were *ad hoc* tribunals (regulated by treaties) and thus fell outside the category of domestic courts – which did admit embargos in Brazil. Second, once the trafficking of slaves had been *prohibited domestically* by the Act of 1831, the justifications for embargoes ceased to exist.[188] As was mentioned earlier, the Act of 1831 was the first Brazilian law to prohibit the slave trade. In his report, however, the Brazilian Foreign Minister, Candido Baptista de Oliveira, had failed to notice that the act had already been subject to a boycott for several years at that point.[189]

By April 1839, Marques Lisboa had sent Viscount Palmerston a letter assuring him that *embargos* would no longer be admitted in the Rio commission.[190] Yet another set of discussions about the no-appeals clause appeared in British complaints about the delay in enforcing mixed commission sentences in Brazil. The issue of delay in execution was first raised in 1842 by British commissioners in Rio (regarding the *Maria Carlota*, which had been decided in 1839[191]), and continued to be raised in protests by British representatives. Contrary to the general rule discussed in Chapter 2,[192] the execution of the sentences issued by the Rio mixed commission fell under the jurisdiction of domestic courts – the judges of contraband. This entailed a series of procedural hurdles, which frequently contributed to delays.[193]

188 *MRE* 1839, p. 5.

189 Parron (2009) 66–67. See Chapter 5.

190 *HCPP*, *Class B*, 1840. Marques Lisboa to Viscount Palmerston, 8 April 1839, p. 128.

191 *HCPP*, *Class A*, 1845. Her Majesty's Commissioners to Mr. Hamilton (and enclosures), 18 July 1844, p. 311.

192 See Chapter 2.

193 *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 Commission 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.'

The protests by British representatives resulted in a consultation by the Minister of Justice to the Brazilian Council of State in September 1842, the aim of which was to set clear limits on the enforcement of the mixed commissions' sentences. The Council of State starts the report with legal reasoning that is noteworthy for the relation it draws between the warfare prize law and the anti-slave trade regimes: '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' – in the latter, 'it is for the signatory powers to establish courts which shall rule on them'. According to the Council of State, mixed commissions are ad hoc bodies in any case, and 'their actions, the way of proceedings, and the means of execution are regulated administratively and are subject to direct governmental actions'. As a result, 'no one [not even the judges of contraband] can annul, alter or in any way obstruct the enforcement and the effects of the Anglo-Brazilian mixed commission sentences'.[194]

The report continued with the counsellors asserting that the provision of § 4 of the Alvará of 1818, the domestic regulation originally arising out of the 1817 additional convention, gave Brazilian judges of contraband jurisdiction (i. e. domestic jurisdiction) only over the *enforcement* of the sentences of mixed commissions. This meant that the sole possibility of appeal at that point would be against the proceedings of the *execution per se*.[195] This is the reason why in the case of the *Maria Carlota*, which the report specifically addressed (and had been decided by the mixed commission years before), any discussions about the destination of the prizes should cease. The State Council argued that the shipowners' criminal conduct created the right of the captor to the prize. The shipowners' creditors could not claim any part of it, since 'they cannot redeem something that had been lost forever, as in a wreck, fire or any other similar events.'[196]

In 1844, discussions resumed when the British commissioners complained about the delay in the enforcement of the sentence of the *Dous Amigos* (1843).[197] The commissioners suggested that the 1826 treaty, by itself, did not provide for the enforcement of sentences by local authorities. For

194 *CE*. Consultation of 9 September 1842, in: Rezek (ed.) (1978) 108–111.
195 See *BDLB*, *Alvará of 1818*, § 4, *supra*.
196 *CE*. Consultation of 9 September 1842.
197 *HCPP*, *Class A*, 1845. Her Majesty's Commissioners to Mr. Hamilton, 31 July 1844, p. 313.

this reason, it remained under the jurisdiction of the mixed commissions to guarantee enforcement, a position confirmed by the Queen's Advocate.[198]

In November 1844, the Brazilian Council of State presented a draft decree to the emperor most likely intended to address British claims against its domestic jurisdiction over the enforcement of the mixed commissions' sentences. Its stated objective was to adjust the meaning of § 4 of the Alvará of 1818. To make the interpretation compatible with Article 7 of the regulations of the Anglo-Portuguese additional convention of 1817, the judges of contraband – and municipal judges, in accordance with the Act of 3 December 1841 – were directed to enforce sentences issued by mixed commissions limiting themselves to coordinate the auction of ships and their cargos, without any further opposition or manifestation by the parties which might lead to delay.[199] Probably as the result of the proximity of the events of March 1845 – explored in the next chapter – the decree was never enacted.

The non-appeal clause was at the centre of all three sets of disputes, claims of unjust decisions, *embargos* and delays in execution. Over the years, interpretative attempts by Brazilian representatives included some strategic changes and concessions. They also resorted to general international law, prize law and even domestic law to ground their readings. On the British side, the literal interpretation of the clause prohibiting appeal was frequently presented in relation to the particular function of mixed commissions, which would have otherwise been irrelevant.

In each set of disputes explored above – all emerging from rules concerning the right of visit and search, capture and adjudication – the issues at stake involve particular clauses of the Anglo-Brazilian treaty regime. In trying to understand them, as well as imbue them with normative force, Brazilian and British representatives drew on frameworks designed to deal with both war- and peacetime conditions. What gave the treaty its meaning was not just the provisions it contained but also its place within the entire sphere of international regulation. By laying claims to the meaning of its provisions, the parties to the treaty were searching for their own understanding of what *was* and *should be* possible in the context of a war against the slave trade waged during peacetime.

198 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.

199 *CE*. Consultation of 29 November 1844, in: Rezek (ed.) (1978) 281–282.

Parallel to disputes that constructed the very meaning of that anti-slave trade regime, another set of readings kept searching for the exit. As we will see in the next chapter, both parties increasingly resorted to ways of retreating from the field of disputes once created by the Anglo-Brazilian treaty.

Chapter 5
Interpreting their Way out: A Dismantled Triple Formula

> '[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. […] Had England considered herself authorized* by Article I. *to capture and adjudicate in her courts*, Brazilians and their vessels engaged in the traffic, *she would not have sought to obtain* by the said Articles *a special authority to visit, search, and capture* those vessels, to carry them for *adjudication before Mixed Commissions*, and other measures adopted in the same sense.'[1]

The final chapter of the triple formula was clearly authored by both the Brazilians and British. Counting down the days until the expiration of the treaty, Brazilian representatives viewed it as an instrument allowing the British authorities to seize not only ships but also Brazilian autonomy. Also dissatisfied with the bilateral regime, British authorities pointed to the lack of implementation and took measures outside the treaty regime to expand its power of capture.

The quotation opening this chapter was written by a Brazilian representative who was protesting the last interpretation of the Anglo-Brazilian treaty ever issued. At this point, the triple formula was no longer considered in force. Nevertheless, Britain saw in the sole acquiescence to abolish the slave trade and declare it piratical (Article I of the Anglo-Brazilian treaty still in force) sufficient international legal grounding for its future actions.

Next, we will follow the steps that eventually led to the end of the triple formula, replaced by the well-known Aberdeen Act, a British domestic reg-

1 *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, emphasis added.

ulation inspired in the Palmerston Act against Portuguese ships, which authorised unilateral measures against Brazilian ships.

Though written by a Brazilian, the same critique found in the quotation above, about a 'desire to elude', was shared by all parties involved in the application of the triple formula. At a time when 'jurists put their faith'[2] in treaties and the power of consent, professionals who interpreted the Anglo-Brazilian bilateral regime often cried foul. In doing so, they also presented their own readings and justifications of the terms of the treaty and other sources used to help establish their 'true meaning'.

From the British perspective, the treaty, which formalised consent in the service of a humanitarian goal, rendered a series of practices legal that would otherwise have been illegal. Mechanisms designed to enforce visitation, capture, and adjudication opened up the possibility, however limited in scope, for Britain to use force in the name of the slave trade abolition. For its part, Brazil had acquiesced to the anti-slave trade treaty with its recognition in mind, which led to the paradoxical situation of being a slaveholding country legally committed to abolishing the slave trade. By using the language of the triple formula to fend off the British effort to expand the scope of its actions, Brazil did not have to argue against the goal of abolishing the slave trade; it merely presented a position opposing British interference. Paradoxically, the prize law-based regime aimed at suppressing the slave trade actually served to reinforce the treatment of humans as property.[3]

During the implementation of the bilateral treaty to abolish the slave trade, British representatives pointed to the Brazilian insistence on continuing the horrific trade in human beings through bureaucratic hurdles and vague protests. For their part, Brazilians saw themselves mobilizing the treaty provisions to somehow protect their independence from the use of force legitimised through expanding readings of the treaty. Notably, in the two 'versions' of mixed commissions under the Anglo-Brazilian treaty (see Chapter 4), British representatives in Sierra Leone were able to inaugurate interpretations not only with luck on their side, but also the advantage of not having to flip a coin. The tension was also readily apparent in the overall

2 Koskenniemi (2011) 62.

3 See Chapter 4 and Haslam (2019) 109. I pointed to a similar direction, connecting to other literature, in Brito (2021).

dynamics of interpretation: on many occasions, the Queen's Advocate had the final word on the meaning of Anglo-Brazilian treaty provisions. The complex dynamic of this agenda translated into disputes over the particularity of the Anglo-Brazilian treaty in relation to general international law and prize law.

Of course, even though signing the treaty involved the express consent of the states, not everything that happened under the treaty can be considered state policy. The British navy openly disagreed with many of the Foreign Office measures, and seamen often acted out of personal conviction. Commissioners occasionally applied interpretative approaches not approved by their governments. Moreover, diplomatic interactions certainly reflected personal styles, which did not always prioritise legal rigour. Yet the bilateral treaty maintained both the battlefield and the weapons for the interpretive disputes that occurred in the day-to-day professional life of the actors charged with implementing and controlling the implementation of the treaty.

Despite their difference in power – or matters of 'superiority', as Brotero argued[4] – equality under international law was the background against which most argumentative disputes under the bilateral treaty played out. Nevertheless, the underlying equality was constantly challenged by power impositions and interpretative approaches that attempted to move the boundaries for the use of force.

The cases in the previous chapter illustrated how both parties invested in the technologies of the bilateral treaty to relate to each other and to seek their own goals. In doing so, they disputed the limits between war and peace set out by that new hybrid legal regime. Yet another set of disputes, running parallel to the other cases, were interpreted by British and Brazilian representatives in such a way that the treaty did not apply, i. e. they interpreted their way out of these problems. These cases not only accelerated the decay of the treaty regime that was already ending, but they also served as a prelude to the well-known British unilateral measures against the slave trade in the middle of the century. The fall of the Anglo-Brazilian triple formula was accompanied by a rise of disbelief in the power of the bilateral regime weapons both against interference and against the slave trade.

4 See Chapter 4.

A. Changing jurisdiction

Colourable nationality returns

By 1839, British Foreign Secretary Viscount Palmerston asked the Queen's Advocate to delineate objective criteria for the British navy and commissioners when evaluating the true nationality of a ship. If it could be shown that a ship actually belonged to certain legal regimes, then Britain could legally exercise the rights of capture and adjudication. As we have seen in Chapter 4, Portuguese vessels were the main target of the British anti-slave trade campaign at that time. While the number of Portuguese-flagged ships dramatically increased, Britain failed to expand its rights of visit and capture by means of a new treaty with Portugal. By that point, the abolition of the slave trade was one among many intertwined questions connected with the Anglo-Portuguese relations: political disputes over Portuguese colonies by France and Britain; foreign interference in Portugal by Spain, France and Britain; and commercial relations between Portugal and Britain.[5] In Leslie Bethell's words, 'Portugal was a particularly hard nut for Britain to crack'.[6]

Responding to Palmerston's question, the Law Officer affirmed that it sufficed to prove 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 on the grounds of carrying fraudulent papers, something which could only be established after a ruling by the mixed commissions, was risky and could lead captors to 'incur a serious responsibility'.[7] He clearly had in mind Portuguese-flagged vessels, whose papers could not easily be confirmed as fraudulent at the time of visitation and capture. As we have seen in Chapter 2, illegal capture often resulted in seamen being held liable and forced to pay indemnities, along with ensuring restitution of the vessel and captives found on board.[8]

After unsuccessful British attempts to sign a treaty with Portugal to establish a right of search and detention of Portuguese ships involved in the slave trade south of the equator, Lord Palmerston presented the 'Slave Trade Bill' to the British Parliament in 1839 to solve that problem. The bill facilitated

5 Tavares (1988) 110.
6 Bethell (1965) 116.
7 FO 83/2348. John Dodson to Viscount Palmerston, 19 August 1839, p. 179.
8 Shaikh (2012) 48.

capture of Portuguese ships trafficking south of the equator by extending the British domestic law provisions to apply to Portuguese-flagged vessels.[9]

The bill prompted two significant objections by the British Parliament. The criteria established in the *Louis* cases (1817) were used 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 for by treaty (meaning that a bill under British domestic law could not be used to this end). Another objection was that, since a declaration of war often represented the next political step following failed negotiations, Parliament should not entertain the bill, as so doing implied a usurpation of royal prerogative.[10] Despite those objections, the Palmerston Act passed as a regulation aimed at protecting Britain from any claims brought before British courts by private individuals seeking reparation.[11]

To understand the rationale behind the Palmerston Act, we must first recall the conditions under which capture was permissible before.[12] Once the captor had evidence in hand regarding the nationality of the ship (with or without a visitation), the circumstances of the ship were to be classified into one of three categories: (1) *under the regulation of a treaty* (that either did or did not provide for the right of search); (2) *clearly out of the purview of any treaty* (which would prevent any right of visit or search beyond the essential inspection of sufficient papers to confirm nationality under the British interpretation); and, finally, (3) *under suspicion of being a vessel that cannot 'justly claim' the protection of a flag*.

The Palmerston Act dealt with the third scenario. The Instructions of 1844 did not mention Portuguese-flagged vessels, because by then the part of the Palmerston Act mentioning Portuguese vessels had already been revoked due to the Anglo-Portuguese treaty of 1842. In 1839, the Palmerston Act passed as a regulation governing the visitation and capture of '*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

9 See Chapter 1.
10 Bethell (1965) 779.
11 Bethell (1965) 780–781.
12 See Chapter 2.

vessels and the cargoes thereof were the property of *British* subjects'.[13] Accordingly, they should be brought for adjudication in the *High Court of Admiralty of England, or in any vice-admiralty court within British dominions*. During the proceedings, it fell to the proctor of the captured vessel to prove it was *not British or Portuguese* and thus 'establish 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*'.[14] In other words, suspicion that a vessel was Portuguese was sufficient for its capture, and the burden of proof would then lie with the captured vessel to establish its nationality. If the owner succeeded in proving 'to the satisfaction of the court' that the vessel was under the protection of any other flag (whether inside or outside the network of treaties), then the vice-admiralty court was to proceed with the restitution of the vessel and its cargo (captives included) to the owners.[15] Adopting all significant innovations of the anti-slave trade regulations up to that point (see Chapter 1), the Palmerston Act further provided for an equipment clause, which enabled detention of ships fitted for the slave trade,[16] and a breakup clause, which provided for the dismantling of condemned ships that the British chose not to incorporate into British service.[17]

Three years after the Palmerston Act had entered into force, in July 1842, Portugal and Britain finally exchanged ratifications at Lisbon for a new treaty establishing rights of mutual visit and search,[18] which would thereafter govern the adjudication by the Anglo-Portuguese mixed commissions (established by the 1817 additional convention).[19] The treaty also included both a ten-article equipment clause[20] and a breakup clause, which was applied when neither of the parties to the treaty wished to acquire the ship after its declaration as good prize. Later, the provisions of the Palmerston Act concerning Portuguese vessels were repealed by an act on 12 August 1842.

13 *CPGS, 1839, Palmerston Act*, Article I.
14 Ibid.
15 *CPGS, 1839, Palmerston Act*, Article III.
16 *CPGS, 1839, Palmerston Act*, Article IV.
17 *CPGS, 1839, Palmerston Act*, Article V.
18 *BPR, Anglo-Portuguese treaty of 1842*, Article II.
19 *BPR, Anglo-Portuguese treaty of 1842*, Article VI, VII.
20 *BPR, Anglo-Portuguese treaty of 1842*, Article IX.

While in force, the Palmerston Act of 1839 greatly expanded the number of captured vessels that were adjudicated in British dominions such as St. Helena and the Cape of Good Hope.[21] The quantitative relevance of the act for the adjudication by British vice-admiralty courts with respect to the reported number of slave trade voyages is significant. In practice, British policy trended toward abandoning mixed commissions in favour of British admiralty courts.[22]

This is where the Palmerston Act becomes directly relevant to the history of the Anglo-Brazilian regime. It formed the backdrop for a drastic shift away from the legal policy Britain had pursued prior to the act under the Anglo-Brazilian treaty. As we saw in Chapter 4, the more severe the problem of Portuguese-flagged vessels, the further the British interpretation was stretched – ultimately far enough to include cases of Portuguese-flagged vessels under the jurisdiction of Anglo-Brazilian mixed commissions. Initially, they employed criteria to determine nationality from general international law and from Portuguese domestic law. Now, British domestic law legitimates a focus on bringing ships suspected of being Portuguese before British vice-admiralty courts.

As we have seen in Chapter 4, at that time, Brazilian and Portuguese nationalities were more or less interchangeable among slave traders.[23] After the Palmerston Act was passed, it was likely that Brazilian vessels were captured under suspicion of being Portuguese and condemned beyond the jurisdiction of Anglo-Brazilian mixed commissions. Such captures may have occurred even after the Palmerston Act ceased to apply to Portuguese-flagged vessels, and adjudication was transferred to Anglo-Portuguese mixed commissions under the Treaty of 1842 (which prohibited Portuguese subjects from engaging in any kind of slave trade).

Over the course of the final years of the Anglo-Brazilian regime, the provision set out in Article III of the instructions to the 1817 additional convention was the main legal limitation raised by Brazilians against British arbitrary captures that occurred between 1840 and 1845. This provision

21 See Bethell (1965) 783.

22 For a comparison of the percentage of known slave voyages adjudicated in mixed commissions with the number of known slave trading voyages ending in adjudication, see Martinez (2012) 81.

23 Bethell (1970) 135.

stipulates, in line with the general practice under the anti-slave treaties (see Chapter 2), that 'no merchantman or slave-ship can, on any account or pretence whatever, be visited or detained within cannon-shot of the batteries on shore'. Debates on the application of this clause took up a sizable share of legal arguments during the final phase of Anglo-Brazilian regime, since most Brazilian protests related to captures allegedly performed within the cannon-shot perimeter.[24]

In fact, from the beginning of the 1840s, British interventions on the open seas increased in quantity and severity with respect to all vessels; Brazilian and foreign ships were visited, seized and destroyed by the British navy[25] with increasing regularity. Part of this upswing in activity was due to the fact that British cruisers began to take vessels captured off the coast of Brazil to British colonies to be adjudicated.

It is clear from his correspondence with the Law Officers that Viscount Palmerston envisioned the Palmerston Act as connected to a systemic policy of redirecting freedmen to British colonies.[26] A system of 'deviation' of vessels *suspected of being Portuguese* would be legitimised, in practice, under the Palmerston Act of 1839. The next section will examine how ongoing discussions about the conditions of liberated Africans in Brazil were linked to the trend of how jurisdiction of Anglo-Brazilian mixed commissions emptied into admiralty courts.

Liberation and deviation of vessels

Soon after Brazil passed the 1831 Act on the Abolition of the Slave Trade, tensions between Brazilian and British representatives mounted over the issue of the destination of liberated Africans. The act was a response to the Brazilian commitment to abolish the slave trade within three years, as per

24 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, pp. 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.

25 Almeida (1998) 13.

26 Mamigonian (2009) 44.

Article I of the 1826 treaty.[27] As we have seen in Chapter 3, the article entered into force in September 1830 and inaugurated a new 'version' of the treaty-regime, which prohibited Brazilian subjects from engaging in the trafficking of slaves.[28]

The Act of 1831 would eventually come to be known as the 'Law for British eyes only' and was considered 'totally inoperative'.[29] Although Brazilian and international historiography generally regard the 1831 Act a complete non-starter, some studies identify at least two points indicating that this general indictment does not tell the whole story: first, the act was a frequent subject of legal argumentation among abolitionists, British officials pressing for the abolition of slavery, for a civil society (including slave movements) and for politicians.[30] Second, the act was quite effective in its first three years, a period in which slave trafficking dropped considerably.[31] These points, however, do not go against the fact that the act was frequently boycotted.[32]

The Act of 1831 declared that all slaves coming from outside Brazil[33] were to be freed, and imposed sanctions on slave importers, including sentences laid out in the 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 no less than one and one third the duration of the unjust captivity. Further sanctions included fines and full

27 *OHT, Anglo-Brazilian treaty of 1826*, Article I: 'At the expiration of three years, to be reckoned from 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.'

28 See Chapter 3 on the 'three versions' of the triple formula.

29 As mentioned e. g. in Lloyd (2016) 45. For a comment on the general historiography of the 1831 Act, see Parron (2009) 66.

30 In her social history of its implementation, Beatriz Mamigonian offers a detailed account of the various ways the 1831 Act was employed by abolitionists and anti-abolitionists alike: Mamigonian (2017); on this point, see also Parron (2009) 72–73.

31 Parron (2009) 91.

32 The original expression in Portuguese ('*lei para inglês ver*') roughly translates as the 'just-for-show law' or the 'law for British eyes', which suggests that the law existed only for the sake of keeping up appearances among the British. See Parron (2009) 92 et seq.; Mamigonian (2017) loc. 970 et seq.; ch. 2. See also Chalhoub (2012).

33 *CLI*, *Act of 1831*, Article 1.

restitution of the expenses arising from the transportation of enslaved people back to Africa. The Brazilian government would, according to the act, arrange with African authorities for the liberated Africans to be *granted asylum*.[34]

In Brazil, the main domestic concern, however, was far from humanitarian. The openly racist discourse of that time linked enslaved persons to diseases and many other social harms.[35] With the increase in the number of slaves in the country – a result of the exploding slave trade that started in the 1820s – fear of a 'Haitian revolution' occurring in Brazil emerged among the elites. In the years that followed, the response to several slave insurgencies made use of increasingly violent measures, including repression, increased surveillance, and censorship of abolitionist publications.[36]

Naval officers would sometimes refuse to command Brazilian schooners charged with searches and apprehensions because of the social risk attached to their duties.[37] The lack of judicial support for the abolition of slavery is evident in other accounts; by then, for instance, most slaves designated as potential beneficiaries of freedom at that time had to await judicial decisions 'under the protection' of their masters.[38]

The humanitarian side of abolishing the slave trade was rarely addressed as a topic in its own right. In parliamentary debates that culminated in the 1831 Act – as well as on other questions related to the slave trade in the subsequent two decades – liberals and conservatives discussed the slave trade in terms of *public security*, *economic stability*, *national development*, *foreign interference*, *and the 'dignity of the nation'*. There were those, however, who favoured more urgent measures for the abolition of slavery on the grounds of it being a *humanitarian necessity*, or called for actions deemed key to maintaining the *autonomy* of the recently independent state. Others combined justifications to defend a *slower pace in its implementation*.[39]

34 *CLI*, *Act of 1831*, Article 2. *These provisions were to be applied in cases in which Brazilian forces apprehended vessels 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 freed by the law were liable for the costs of their return to Africa.*

35 See Graden (1996).

36 Mamigonian (1995) 29.

37 Mamigonian (1995) 27.

38 Mamigonian (1995) 26.

39 See Rodrigues (2005b) 69–93.

The provision stipulating the return of captives back to Africa was without precedent within the context of the regime that had been in place since the first Anglo-Portuguese treaties. Under the previous rules (the *Regulation* annexed to the additional convention of 1817, reinstated by the 1826 treaty),[40] those liberated by the Rio mixed commission were issued certificates of emancipation to work as servants or free workers, under the curatorship of judges of orphans.[41]

The first British response to the new regulation of 1831 was a formal protest by the British Chargé d'Affaires in Brazil, in which he observed that returning the Africans would only expose them to further risk, as they would once more suffer the harsh conditions of the voyage and might suffer ill treatment at the hands of disappointed slave traders.[42] Since the very beginning of the British project of abolishing the slave trade in Brazil, British diplomatic representatives and commissioners stationed in Brazil kept the Foreign Office informed regarding any significant legal or social matters associated with the issue of slavery.[43] At times, the correspondence instructed the officials to adjust their reporting or their conduct as circumstances required.

A change in instructions happened in this case. Despite the earlier rejection of the 're-exportation' idea, in 1835 (when Brazilian trafficking resumed despite the 1831 Act),[44] the British legation in Rio was instructed to change its position regarding the clause in the 1831 Act devoted to the transportation of freedmen and women back to Africa. Since the act served as evidence of the declining Brazilian interest in receiving free Africans in its territory, they argued, Britain should start assigning destinations to them. Their destination should not be their place of origin, as stated in the 1831 Act; instead, the British colony of Trinidad, which was willingly to receive them under the condition that the Brazilian authorities covered all transportation costs, was considered a viable option.[45]

40 *BDLB*, *Alvará of 1818*.
41 Mamigonian (1995) 28.
42 Mamigonian (1995) 29.
43 Mamigonian (2017), ch. 5
44 See Parron (2009) 92 et seq.; Mamigonian (2017) loc. 970 et seq., ch. 2.
45 Mamigonian (1995) 41.

By September 1836, in response to a request by the Foreign Office,[46] King's Advocate John Dodson contended that the re-exportation measure contained in the Law of 7 November 1831 *directly affronted* the Anglo-Brazilian treaty of 1826. His objection did not concern all cases of re-exportation provided for by Brazilian law, only those of slaves liberated by decisions of the mixed commission. According to the Law Officer, slaves arriving in Brazil in violation of domestic law would *not* violate the treaty *per se.* It was up to the British government whether to call on Brazilian authorities to 'abstain […] from the Re-exportation 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'.[47] The British proposal of removal to the Island of Trinidad would probably 'prevent any further misunderstanding', the Law Officer added.[48]

It was common knowledge in Brazil that Britain needed a workforce for plantations in its colonies. A similar agreement concerning emigration had been made with Spanish authorities in Cuba.[49] The commodification of the labour of liberated Africans was a further layer of the injustice created by the abolition system.[50] As we have seen, the legal framework set up to stop the slave trade did not establish legal standing for the enslaved, who were rarely heard and whose destiny depended on the legality of the apprehension of the ships they were trafficked on. Moreover, those who were liberated by mixed commissions or other courts faced, in the best-case scenario, the commodification of their labour in the form of compulsory *apprenticeships* on plantations or other work for the Crown.[51] A 'market' had developed around the Sierra Leone admiralty courts even before the conclusion of the Napoleonic Wars and became a source of revenue for British nationals.[52]

In 1836, Brazil refused the British offers to send the enslaved people found on board captured ships to British dominions.[53] Several years had passed since the first attempts by the British to pressure the Brazilian author-

46 FO 83/2346. Foreign Office to His Majesty's Advocate General, 6 May 1833, p. 114.
47 FO 83/2347. Dodson to Viscount Palmerston, September 1836, p. 126.
48 Ibid.
49 Mamigonian (1995) 41.
50 Haslam (2019) 3.
51 Haslam (2019) 37, 87.
52 Scanlan (2014) 116–135.
53 Mamigonian (1995) 41.

ities to secure the conditions of freedom to liberated Africans had failed,[54] so British representatives inaugurated a new policy based on this point. They also relied on an interpretative shift in the assessment of suspected vessels colours. In 1841, the Foreign Office openly implemented the 'Brazilian branch of the African emigration scheme', according to Beatriz Mamigonian.[55] The first case in which this practice was employed involved the *Dois de Fevereiro*.

Dois de Fevereiro was a Portuguese-flagged vessel sent to the British colonies for adjudication instead of being brought before the Rio commission. Writing to Viscount Palmerston, Ouseley commented on how the circumstances corroborated his opinion on 'the expediency of *taking this step* [sending the *Dois de Fevereiro* to the British colonies], *instead of bringing the case before the Mixt Court*, under the present peculiar circumstances of this country'.[56] He reported ongoing delays of mixed commission proceedings due to fraudulent evidence in domestic institutions and the bribing of those charged with the administrative proceedings of slave trade vessels and liberated Africans.

By disposing of the slave traders' vessels, he further testified that Britain could effectively combat the 'defective execution' of the treaty – meaning the proscription of the slave trade under Article I, which was relatively ineffective under the Brazilian Act of 1831. His letter implies that he thought the mixed commission in Rio had already accomplished its mission by demonstrating to the Brazilians the power of its measures.

He concluded that, '[i]ndependent, therefore, of the advantages to the Africans[57] 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'.[58] Ouseley believed that sending captured vessels under Portuguese colours to be adjudicated in British dominions should be adopted as policy from then on: 'I am prepared for

54 See Mamigonian (2017), ch. 5–6.

55 Mamigonian (2009).

56 *HCPP, Class B*, 1842. Mr. Ouseley to Viscount Palmerston, 30 April 1841, p. 641.

57 Ouseley was even more emphatic in later correspondence that his intention was to secure 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).

58 *HCPP, Class B*, 1842. Mr. Ouseley to Viscount Palmerston, 30 April 1841, pp. 641 et seq.

the opposition that must be expected to this plan, as every effort will be made to continue, if possible, the old system'.[59]

In Palmerston's response to Ouseley in 1841, the British Foreign Secretary acknowledged the measure and reported the following:

> '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.*'[60]

He also instructed the British Chargés d'Affaires to notify the Brazilian government that the same procedure would also 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'.[61]

In that same year, Palmerston instructed the British commissioners in Rio to offer liberated Africans the possibility of relocating to British colonies, where slavery had been abolished and they would live in freedom.[62] Viscount Palmerston's plan included investigating the circumstances of all previously liberated Africans and offering them passage to the British colonies.[63] This 'recruitment' was later extended to liberated Africans who had not been declared so by the mixed commission, as in the case of the *Flor de Loanda* (1838).[64]

In 1843, the threat by British representatives to bring all liberated Africans to British colonies drew a response from Brazilian Foreign Secretary, Paulino Soares de Souza, who asserted these measures would violate of the Anglo-Brazilian treaty regime. He claimed, without effect, that the 1817 additional convention (reinstated by the 1826 treaty) assigned the role of supervising liberated Africans to the Brazilian government.[65]

According to the policy practiced by Britain at that time, Portuguese vessels that would have otherwise been brought before mixed commissions

59 Ibid., p. 641.

60 *HCPP, Class B,* 1842. Viscount Palmerston to Mr. Ousely, 23 July 1841, p. 648, emphasis added.

61 Ibid., p. 648.

62 Mamigonian (1995) 42

63 Mamigonian (2009) 46.

64 Mamigonian (2009) 49.

65 Mamigonian (2017), ch. 5.

were now sent to admiralty courts in British dominions. '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.'[66] Deviation helped support British plantations, which inaugurated a new mode of commodification of the liberated African's labour.[67]

Attempt to extinguish mixed commissions

Discussing French reluctance to adhere to the British triple 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.'[68] It is safe to assume that the motivation behind this statement had less to do with sentiment and more with the consequences of having the rights of their subjects adjudicated by foreigners. As we have seen in Chapter 2, this was one of the reasons explicitly cited by the British Foreign Office for implementing 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, though we know from the historical record that commissions mostly judged subjects of the other state-parties. In fact, by appointing British commissioners to the commissions in the dominions of foreign states and especially by virtue of commissions in Sierra Leone – often manned exclusively by the British – Britain was able to secure a potentially wider adjudicative (and political) presence than it otherwise would have had under the system of adjudication in domestic courts as defined by the prize practice (see Chapter 2).

One last set of disputes between Brazilian and British representatives surrounding the jurisdiction of mixed commissions was ignited by the Brazilian attempt to extinguish mixed commissions. From the moment Brazil was bound by these rules (which were adamantly rejected by the United States and France as incompatible with the protection of their sovereignty[69]), it also began negotiating an exit from them. One of the most

66 Mamigonian (2009) 52. See the list of vessels that disembarked Africans in British colonies coming from Rio de Janeiro in Mamigonian (2017), ch. 5 (table 3).

67 Haslam (2019), ch. 6.

68 Ward (1969) 80.

69 See Chapter 1.

troubling practical consequences of the treaty of 1826 was the very existence and work of mixed commissions.

In an 1830 report to the Brazilian parliament, the Brazilian Foreign Office recorded its first attempts to negotiate a new treaty to eliminate the Rio and Sierra Leone mixed commissions, portrayed as ‘anomalous courts’ and ‘too heavy a burden on the treasury’, which moreover might ‘disrupt the administration with inappropriate questions and subject our citizens to heavy penalties’.[70] Again and again, these attempts to negotiate met with strong British resistance.[71]

In addition to negotiation, Brazilian representatives pursued another path to get rid of the Anglo–Brazilian mixed commissions: legal interpretation. Chevalier de Mattos, Brazilian Chargé d’Affaires, in his correspondence with the Earl of Aberdeen in October 1830, requested he carry out the measures necessary to ensure a ‘concerted dissolution of the mixed commissions’. De Mattos argued that mixed commissions were rendered superfluous as of 13 March 1830,[72] after which suspected vessels could then be brought to the respective ordinary courts of the parties, in accordance with the stipulations of the 1826 treaty.[73] The Brazilian Chargé d’Affaires was referring to Article I, providing for the *total prohibition of the slave trade* by Brazilians and the treatment of the slave trade as piracy within *three years from the exchange of ratifications* (i.e. 13 March 1830). In connection with this, Article II did state that the engagements of the additional convention of 1817 – the entire triple-formula structure – was ‘bound to provide for the regulation of said trade, *till the time of its final abolition*’.[74]

70 *MRE 1830*, p. 4.

71 Ibid.

72 See Chapter 3 regarding the deadline for the total abolition of the slave trade.

73 *HCPP, Class B,* 1831. The Chevalier de Mattos to The Earl of Aberdeen, 4 October 1830, p. 51.

74 *OHT*, *Anglo-Brazilian treaty of 1826*, Article I and II: ‘I– At the expiration of three years, to be reckoned from 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

Viscount Palmerston rejected what he apparently perceived as a solely political proposal, and responded that dissolution would be of '*much and serious inconvenience*', as it would take some time to arrange other courts to exercise the jurisdiction of piracy cases (see next section) under the terms of the treaty.[75] 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 also marked *the period at the end of which the system of mixed commissions expired*. He argued that these *commissions were temporarily created* to rule on the *legality of the activity as per the treaty.* Only during this 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 the regime of only *partial* abolition was replaced by *total abolition* for Brazilian citizens, the reason for the mixed commissions ceased to exist.[76]

The Foreign Office asked the British Law Officer for advice on how to respond to Chevalier de Mattos' claim. Palmerston would answer the Brazilian diplomat in a note from July 1831, which adopted much of the wording found in the report of Queen's Advocate. He countered that the deadline declared in 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' work was the one provided by the 'Separate Article of 1817'.[77]

The 'Separate Article' was part of the Anglo-Portuguese regime that Brazil had renewed under Articles II and III of the treaty of 1826.[78] It provided for

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.'

75 *HCPP, Class B,* 1831. Viscount Palmerston to the Chevalier de Mattos, 10 December 1830, p. 65.

76 *HCPP, Class B,* 1832. The Chevalier de Mattos to The Earl of Aberdeen, 30 March 1831, p. 86.

77 *HCPP, Class B,* 1832. Viscount Palmerston to the Chevalier de Mattos, 16 August 1831, p. 161.

78 *OHT*, *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

the expiration of the *Anglo-Portuguese additional convention of 1817* after *15 years from the date of total abolition of slave trade*, assuming no further agreements were established between Portugal and Britain to update the convention's provisions.[79] Since the entirety of the 1817 additional convention had been reproduced by Article II of the 1826 treaty with Brazil, the British Law Officer reasoned – and the Foreign Secretary repeated the argument to the Brazilian Chargé d'Affaires – that 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.[80]

Accordingly, absent further agreements between Britain and Brazil, the *Anglo-Brazilian mixed commissions would exercise their functions for 15 years after the date of 13 March 1830*, i. e. until 13 March 1845. Moreover, the note added that the continuing involvement of the mixed commissions in the abolishment of the slave trade *was not unique* to the Anglo-Brazilian regime; mixed commissions were *adjudicating Spanish ships in that same matter*.[81] The interpretative dispute ended at this point in 1831. Yet the question of the

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.'

79 *OHT, Anglo-Portuguese additional convention 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 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.'

80 FO 83/2345. Herbert Jenner to Viscount Palmerston, 28 July 1831, p. 328.

81 *HCPP, Class B,* 1832. Viscount Palmerston to the Chevalier de Mattos, 16 August 1831, p. 161.

expiration of the Anglo-Brazilian triple formula re-emerged in an entirely different context.

B. Piracy revisited

Expiration of the triple formula

Fast-forward 14 years later, a Brazilian diplomatic note was sent to the British government on 12 March 1845 conveying that the next day would mark *fifteen years since the date of exchange of ratifications* to the Anglo-Brazilian treaty of 1826. This meant that the provisions of the additional convention of 1817, in force among the parties under articles II and III of the 1826 treaty, were set to 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.[82]

This was not the first such communication Britain had received from Brazilian diplomats over the years. The Anglo-Brazilian Treaty of Commerce of 1827 – signed in the same context as the treaty for the abolition of the slave trade – was declared by Brazil to have expired on 9 November 1844.[83] 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 who died *ab intestato* against creditors and legal heirs, all in accordance with the British law.[84] Having arisen in conjunction with claims of injustice within the suppression of the slave trade, the question of the special jurisdiction had been at issue for over a decade and remained one of the most prominent pending questions between the two governments (see Chapter 4).[85]

Before the British received a letter regarding the expiration of a second Anglo-Brazilian treaty (now the 'anti-slave trade' treaty), the Brazilian Coun-

82 *HCPP,* Papers relating to the convention between Great Britain and Brazil on the slave trade. Senhor França to Mr. Hamilton, 12 March 1845, p. 4.

83 Pinto (1865) 279–282. On the application of such privileges, see e. g. *CE*. Consultation of 27 October 1843 and Consultation of 8 November 1844, in: Rezek (ed.) (1978) 145, 277–280.

84 Pinto (1865) 286–287

85 *HCPP, Class B,* Extract of a Letter from M. Lopes Gama to Mr. Ouseley, dated Rio de Janeiro, 26 February 1840, p. 157.

cil of State had issued a report – on a Sunday – regarding the question of whether the British government should be informed of the expiration of the convention.[86] The Council invoked Palmerston's 1831 correspondence.[87] The Council also suggested a six-month extension for the mixed commissions to finalise their cases before the triple formula ceased to be in force. It was the same amount of time Britain had granted Brazilian vessels to return to their ports before total abolition (provided by Article I) was implemented – instead of 13 March 1830, the total abolition actually entered into force on 13 September 1830 (see Chapter 3).

The Council issued a report two months later dealing with the more complex question as to which steps should be taken by the Brazilian government once the communication has been received. Among their recommendations was that Brazil should wait for a proposal from Britain; any further agreement should follow the Anglo-French model of the 1831 and the 1833 treaties of *domestic adjudication*, and should try to prevent captures of vessels leaving Brazilian ports or vessels transporting foreign migrants.[88] The report stated that '[t]he right of visit, search, and capture' was 'so *oppressive by its own nature*, even when exercised with the greatest loyalty and good faith' and 'so liable to abuses' that 'the Imperial Government shall employ all efforts, and even no small sacrifices, in that it is not re-established'.[89]

During the Council's deliberation, three members dissented from the final text of the report. Two of them thought it was essential for Brazilian interests to seek new agreements with Britain, and felt that the advice to wait for a British proposal was not in Brazil's best interests. One of them, Lopes Gama, even argued that it would be better to reach an agreement before the expiration of the treaty. Since the slave trade was to be considered piracy – as per Article 1 still in force – he argued *it was easy to foresee the problems Britain could cause now that it was no longer bound by any rules*.[90]

The Earl of Aberdeen and George Canning had been collecting ideas about how to proceed in the eventuality that the Brazilians had kept track

86 *CE*. Consultation of 9 March 1845, approved in 7 May 1845, in: Rezek (ed.) (1978) 309.
87 See the previous section on the first Brazilian attempt to extinguish the mixed commissions.
88 *CE*. Consultation of 9 March 1845, approved in 7 May 1845, in: Rezek (ed.) (1978) 321–326. See Chapter 2.
89 Rezek (ed.) (1978) 322.
90 *CE*. Consultation of 18 April 1845, in: Rezek (ed.) (1978) 324, emphasis added.

of the date of expiration mentioned in their correspondence 15 years before. Aberdeen had first suggested proposing a new treaty, similar to the Anglo-Portuguese treaty of 1842, and, if this proposal was declined, informing Brazil it would be treated in the same manner as Portugal.[91] Some years later, Aberdeen himself would come up with another idea: to use the unexpired Article I of the 1826 treaty and the wording on *piracy* to ground a new policy without exceeding British rights under the treaty and thus bypassing the same political problem that in the past resulted in massive opposition to the Palmerston Act.[92]

This was not the first time Aberdeen showed interest in the piracy clause. On 17 October 1829, he had requested King's Advocate to weigh in on the matter. The Earl of Aberdeen contemplated '[w]hether it 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, *weren't the other provisions in force only up until the formal abolition of the slave trade*?[93] Surprisingly, this consultation was never addressed by the Law Officers. There was no further correspondence on the matter, and in 1845 (more than 15 years later), Viscount Palmerston himself mentioned that no report had been presented responding to his question.[94]

The Law Officers partially addressed the matter of the piracy clause in January 1835, replying to 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, Queen's Advocate John Dodson and his colleagues thought that the mixed commissions were *not authorised* by the 1826 treaty *to determine the penalties for the practice of the slave trade 'deemed as piracy' under Article I*; it was for the municipal court of Rio de Janeiro to try the offender under domestic laws against piracy.[95]

91 Bethell (1970) 244.
92 See FO 83/2352. Foreign Office to Her Majesty's Advocate, Attorney and Solicitor General, 13 May 1845, p. 325.
93 FO 83/2345. Foreign Office to the King's Advocate, October 17, 1829, p. 71, emphasis added.
94 See FO 83/2352. Foreign Office to Her Majesty's Advocate, Attorney and Solicitor General, 13 May 1845, p. 325.
95 FO 83/2346. John Dodson et al. to the Duke of Wellington, 26 January 1835, p. 237.

Five years later, called upon to offer an opinion on how to respond to the Brazilian note of 12 March 1845, the Law Officers prepared one of their longest reports on matters involving the slave trade. They reviewed all prior correspondence, including Viscount Palmerston's letter of 1831, which indicated the date of 13 March 1845 as the possible expiration date of mixed commissions.[96] The Law Officers had to respond to the question of whether Britain should agree to the expiration of any of the treaty's provisions, report on any rights remaining in force and, if necessary, propose legal regulation enabling Britain to act upon them.[97]

They responded that, first, the dispositions of the 1817 additional convention were definitely *no longer applicable*, and this point should be conceded to the Brazilian government. Consequently, all articles referring to the triple formula in the 1826 treaty through the reinstatement of the 1817 provisions should be considered expired. The only exception was Article I, the sole innovation of the 1826 treaty over the 1817 provisions.[98] The British Law Officers reasoned, under Article I of the Anglo-Brazilian treaty of 1826, that 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 would be needed to carry it into full effect.[99]

Meanwhile, following the Brazilian acknowledgement that most of the 1826 provisions had expired, both the British squadron and the British commissioners held fast to their positions, refusing to leave their posts until an explicit order was given.[100] In the words of Leslie Bethell, '[i]t was already beginning to look as though Lopes Gama might be right'.[101] Gama, the Brazilian Council member mentioned in the quote above, had opposed the Brazilian move to declare the expiration of the treaty without another agreement being established beforehand. He feared the actions the British might

96 See the previous section on the extinction of the mixed commissions.

97 See FO 83/2352. Foreign Office to Her Majesty's Advocate, Attorney and Solicitor General, 13 May 1845, p. 325.

98 See the final section of Chapter 3.

99 FO 83/2352. John Dodson et al. to the Earl of Aberdeen, 30 May 1845, p. 349.

100 Bethell (1970) 252–253.

101 Bethell (1970) 252.

take once a piracy provision was in force but no other rules constraining them.

The Aberdeen Act was enacted a little later, on 9 August 1845. Before being submitted to the British Parliament, the bill was prepared by Stephen Lushington, a judge of the High Court of Admiralty, and Herbert Jenner (who had served as Advocate General in the 1830s),[102] and sent to Queen's Advocate John Dodson for consideration.[103] Not without opposition, the British Parliament passed the Aberdeen Bill five months after the Brazilian communication regarding the deadline of the Anglo-Brazilian triple formula.[104]

After the Aberdeen Act

One of the strongest objections to the Aberdeen Bill in the British parliament was that *Britain did not have a right to pass a law that enabled it to punish subjects of a foreign nation*.[105] Given that the slave trade was not deemed piracy under the law of nations, no other state could enforce it. Contemporary doctrine generally agreed.

The North American international lawyer Henry Wheaton and the British lawyer William Edward Hall both mentioned in their textbooks that states could declare certain offenses piracy and punish their own citizens for committing them, 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.'[106]

Brotero (the Brazilian lawyer mentioned earlier) also saw a *clear difference* between piracy understood in terms of a civil offence versus a *jus gentium* offence: the former could only be judged by domestic courts and under domestic laws; the latter could be adjudicated by a capturer court of any

102 Bethell (1970) 256.
103 FO 83/2352. John Dodson to the Earl of Aberdeen, 2 July 1845, p. 365.
104 See Mathieson (1929) 22; Bethell (1970) 260–263.
105 Bethell (1970) 263–265.
106 Hall (1890) 264, emphasis added. This idea is also found in Wheaton/Calvo (1861) 289–290.

nationality.[107] As Antonio Pereira Pinto (another central Brazilian author) observed in 1865, British use of the Aberdeen Act was in violation of

> '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'.[108]

Robert Phillimore (the most prominent British international law scholar of the era[109]) did not expressly address this point when writing in 1854. He stated, in general terms, that pirates were 'justiciable everywhere', as the pirate is *hostis humani generis*,[110] so could not claim immunity from trial in the tribunal of the captor.[111] In fact, he noted, *the pirate does not have a national character*.[112] By that time, he conceded, British law did not yet consider the slave trade *jure gentium* piracy. Yet when he addressed the Aberdeen Act, Phillimore linked it to the *Felicidade* case to justify the need for the act.

The *Felicidade* was a Brazilian schooner captured by a British ship in July 1845. Once the British had taken control of the ship, the crew decided to retake the vessel and killed the British seamen aboard. They stood 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, as the only grounds for the capture was the fact that the ship was equipped for the slave trade.[113] Phillimore underscored that even though *lives of British subjects* were concerned in the case of the *Felicidade*, Brazilian seamen convicted of murder had their sentences 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'.[114] Taking this notion into consideration,

107 Brotero (1836) 162.
108 Pinto (1865) 286.
109 See Gaurier (2005), ch. 1.
110 Phillimore (1854) 281.
111 Bello (1844) 365.
112 Phillimore (1854) 281.
113 Bethell (1970) 274–275.
114 Phillimore (1854) 282.

'jure gentium, the Slave Trade was not Piracy, and that unless it were so, the British Courts had, under the circumstances, no jurisdiction over an offence committed on board of Felicidade'.[115]

The *Felicidade* case was actually very telling of how reluctant British courts – both domestic and admiralty courts – were to convict foreigners of piracy in general,[116] as Lauren Benton and Lisa Ford show. Their analysis of the British colonial governance point to many instances in which, until the 1850 Piracy Act, admiralty courts usually refused to declare piracy – even though in some cases bounty was authorised for capturing pirates.[117] Only in rare instances, in which British subjects were the victims, was piracy considered as a charge. British officials seemed to be worried about how to supervise naval aggression.[118] '[F]ailed efforts to convict pirates in Southeast Asia suggest that Britain and its European rivals were eager to avoid universal claims to piracy jurisdiction well into the nineteenth century', as Lauren Benton and Lisa Ford affirm. The practices followed by British colonials and courts aligns with most of the scholarship in denying that piracy was a universal crime that could be tried in any domestic court.[119]

When it came to slave trading, the reluctance to classify events as piratical was no different; it was a further limitation to the adjudicative power of mixed commissions.[120] Against this background, Lord Palmerston's Act (1839) and Lord Aberdeen's Act (1845) were extraordinary in expanding the British domestic jurisdictions.[121]

That the slave trade was not considered piracy under international law became the focus of Brazilian and British representatives immediately prior to the enactment of the Aberdeen Act – even though it had briefly appeared in 1839 (see Chapter 4).[122] In a 25 July 1845 note sent to the British Foreign Secretary, M. Lisboa discusses the soon to expire system of commissions and the new strategy Britain was entertaining under its domestic law. Mixed commissions, the Brazilian representative claimed, had served to enable

115 Phillimore (1854) 254.
116 Benton / Ford (2016) 131–147.
117 Benton / Ford (2016) 140.
118 Benton / Ford (2016) 139.
119 Benton / Ford (2016) 134.
120 Benton / Ford (2016) 126–127.
121 Benton / Ford (2016) 146.
122 FO 83/2348. Dodson to Viscount Palmerston, 20 August 1839, p. 188.

the British government *to expand, arbitrarily, the right of visit, both by its commissioners and British cruizers*. Now the Aberdeen Bill was poised to *flagrantly violate* the principles of international law by imposing *sanctions on Brazilian subjects, who were exclusively the prerogative of the Brazilian Crown*.[123] Lisboa's view of the Aberdeen Bill seemed to resemble John Dodson's opinion of January 1835 (mentioned above). Both affirmed that, while the mixed commissions were working, they were *not authorised* to determine the penalties for *piracy* under Article I of the Anglo-Brazilian Treaty, precisely because *to rule on piracy was under the domestic jurisdiction*, which was to be established *under domestic laws*.

To respond to Mr. Lisboa's points levelled against the regime of mixed commissions – which was about to expire – and against the emerging Aberdeen regime, the Earl of Aberdeen had the task of evaluating the past and addressing the most serious critique of the British legal strategy for the future. The Earl of Aberdeen started by arguing that, to the degree Brazil was dissatisfied with the work and the role of mixed commissions, Brazil should have engaged in equal measure in new negotiations – though he did not mention the years of Brazilian attempts to extinguish the commissions. Aberdeen also pointed to the disrespectful behaviour by the Brazilian government – probably a reference to the many entreaties and complaints of British representatives concerning the treatment of liberated Africans that went unheeded.[124]

The Earl of Aberdeen also contended that while Brazil had the right to pursue the extinction of the mixed commissions – and Britain, he noted, 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'*. This was a right Britain 'possessed ever since the expiration of three years from the ratification of the treaty of 1826'.[125] He continued stating that the situation changed when the Brazilian government created a *necessity* for it. As for 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*

123 *HCPP, Class B*, 1846. M. Lisboa to the Earl of Aberdeen, 25 July 1845, p. 314.

124 See Mamigonian (2017), ch. 5.

125 *HCPP, Class B*, 1845. Earl of Aberdeen to M. Lisboa, 6 August 1845, p. 320, emphasis added.

absolute prohibition of slave trade 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'.[126]

Had the intention been otherwise, he claimed, Brazil, as the interested party, should have insisted on *different wording.* 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'. Permitting both parties of the treaty to regard the slave trade as piracy meant they could *establish as their penalties those that, under the law of nations, 'every nation may inflict upon pirates*'.[127] That was, he added, the position of Great Britain regarding Article I of the Anglo-Brazilian Treaty, the only provision of the treaty to remain in force.

In September 1845, the Brazilian State Council was once again called upon to examine the matter.[128] The resulting report affirmed most of the points made in the Brazilian note of October 1845. The Brazilian position regarding Article I of the bilateral treaty was that it *required Brazil take two measures*: first, proscribing the slave trade within three years of the exchange of ratifications (i. e. 13 March 1830); second, treating the slave trade as piracy. With respect to the second point,

> 'the intervention of the British Government with reference to trade carried on by subjects of the Empire, ought to be restricted to *demanding from the Imperial Government the exact and timely observance of the Treaty*'.[129]

This was the extent to which Britain could have acted upon that provision, according to the Brazilian view. Any alleged delegation of powers to Britain should have been expressly established and '*to assume, under pretence of inter-*

126 Ibid., p. 318.

127 Ibid.

128 *CE*. Consultation of 20 September 1845, pp. 432–448.

129 *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), pp. 385 et seq., emphasis added.

pretation, the delegation of a sovereign power which is not expressly declared, would be an infringement of the first principle in the art of interpretation'.[130] In the opinion of the Brazilian State Council, Article I had the implication of binding the parties to establish the implementation of laws equating the slave trade to piracy, as in many other treaties for the suppression of the slave trade Britain established with the Argentine Republic (1839), Bolivia (1840), Chile (1839), Haiti (1839), México (1841), Texas (1841), Uruguay (1839) and Venezuela (1839).[131]

Based on the State Council's report, and recapitulating the arguments presented above, the next diplomatic note sent by the Brazilian representatives also refers to the difference between *piracy per se* and *piracy as a fiction of law*. According to the note, the former should apply only for that which it was originally intended. The Brazilian note proceeds to deploy a notion resembling Lord Stowell's distinction between piracy and the slave trade (see Chapter 1): 'In truth, the traffic is not so easily carried on as robbery on the high seas. […] [T]he traffic does not menace the maritime commerce of all people, as piracy does.'[132] That was why, the note continues, its penalties cannot be the same as those imposed on pirates. It is then claimed, recalling quotes from the *Louis* case, that unless the right of visit was estab-

130 *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, emphasis added.

131 The language of those treaties is clearer in their provisions concerning piracy. For example, the treaty with Bolivia states '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.

132 *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.

lished by consent, incalculable evils would come, even universal war.[133] Finally, the note stated that if the understanding of piracy in Article I of the treaty was the one Britain now endorsed, there would be no need for the dispositions of Articles II, III and IV,[134] that is, special authority to visit, search, capture or adjudicate Brazilian vessels. The note concludes with protests against the Aberdeen Act: the Brazilian government considered it a violation of its sovereign rights and independence, and was thus 'not recognizing any of its consequences except as the effect and result of power and violence'.[135]

All in all, the Brazilian interpretation was that, once the contents of the Treaty of 1826 relating to the additional convention of 1817 had expired, the right of visit and search was revoked along with the other elements of the triple formula. The expiration meant that Britain could do little more than press the Brazilian government to implement the remaining dispositions of Article I *domestically in Brazil* and within its own (Brazilian) jurisdiction.[136]

In contrast, the British position was that inclusion of the word 'piracy' itself entitled Britain to a *new kind of right of visit and search, of capture and of adjudication* related to the *nature* of the practice. The expiration of the consented triple formula resulted merely in the need to invoke *another set of rights derived from piracy that Brazil had also consented to yet never enforced.* Accordingly, that interpretation did not break with the rule of consent established in Lord Stowell's principle; nor would it be bound to any of the limitations of the previous triple formula imposed through the provisions on visit, capture and jurisdiction.

As Howard Wilson has observed, by the end of the century, there were two notable results (or failures) of the British policy against the slave trade. First, notwithstanding British efforts to advance the status of slave trade as piracy *jure gentium*, this view would not find general support and would

133 Ibid., p. 391.

134 See Chapter 3.

135 *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.

136 The Brazilian position concerning 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), pp. 340–341.

remain outside general international law.[137] Second, the British claim to an unquestioned right to verify foreign vessels' flags (see Chapter 2) remained unheeded by general international law, due to the broad recognition of the freedom of the seas.[138]

As we recount the history of the emergence of this new British interpretation in the course of its relations with Brazil, based on the long-present spectre of piracy,[139] we also witness the demise of the general belief in the triple formula as a way of abolishing the slave trade. After 1845, only seven other cases of non-Brazilian vessels were heard in Sierra Leone mixed commissions before the final discontinuation of the commissions in 1871.[140] Along with the innovation in legal interpretation towards unilateralism, a new phase of British abolitionism was itself starting to take shape. It ended up reinforcing the link between the suppression of the slave trade (as a humanitarian goal) and the practical gains of creating new conditions of work, including forced labour. This 'civilizing mission' against slavery was eventually transformed into the domination and occupation of Africa by Britain and other great powers.[141] Once more, the limits of peace, violence and what liberation meant were reimagined.

137 Wilson (1950) 524; Grewe (2000) 562–563.
138 Wilson (1950) 524.
139 See Chapter 1.
140 Allain (2015) 68.
141 Regarding those chapters on the history of anti-slavery international law, see Erpelding (2017); on the role humanitarianism, arising from interventions carried out in the name of abolishing the slave trade, had on legitimating colonial imperialism, see Klose (2019) 237–418.

Conclusion

> 'Whatever England's motives were, it is certain that only a limited international Right of Visit on the high seas could suppress or greatly limit the slave-trade. Her diplomacy was henceforth directed to this end. On the other hand, [...] if nations [...] had just cause to complain of violations by England of their rights on the seas, might not any extension of rights by international agreement be dangerous? It was such considerations that for many years brought the powers to a dead-lock in their efforts to suppress the slave-trade.'[1]

The suppression of the slave trade was a project of international scale, usually depicted as a humanitarian crusade relying heavily on the politics of British diplomacy and on its naval power. Having waged a successful campaign in the Napoleonic Wars, the mighty British navy was sent on a new mission, in which the 'navy's work' would have the support of a different kind of weapon, constructed with familiar legal material and supplemented with the capacity of mobilising states in peacetime: triple formula treaties. This book explored the starting point of that legal technology as well as the design endowed by their normative production in Chapter 1.

The triple formula model was analysed in great detail in Chapter 2, addressing each of its three steps and how they were supposed to operate. Delving into general rules and regulation of the right of visit (and search), the right of capture and the adjudication by mixed commissions, this chapter showed the mechanisms of enforcement used in the abolition of the slave trade as a set of tools for the legal use of force.

This triple formula for the abolition of the slave trade was accepted by key states engaged in the practice – Brazil being one of them. Chapter 3 focused on this complex scenario that informed the Brazilian adherence to the anti-slave trade system of treaties. At that time, Brazil was trapped in a paradox that reflected its debut in international law as an independent state. As a

1 Du Bois (1904) 136.

slavery-based state, Brazil acquiesced to the Anglo-Brazilian treaty for the suppression of the slave trade (1826) as a way to affirm its recent independence by conserving the political and legal ties with Britain – in line with prior Portuguese-British relations. In doing so, Brazil was also seeking recognition of its separation from the Portuguese Crown.

Following the legal structure carried over from wartime prize law, the triple formula offered criteria for evaluating the legality of visitation of suspected vessels and their eventual capture. Accordingly, the legal spheres of the triple formula interpretation concerned the limits of the use of force against foreign ships. Yet, upon closer inspection, the core battles under the triple formula of the Anglo-Brazilian treaty dealt with adjudication proceedings, criteria of nationality and jurisdiction, indemnities – as we have seen in Chapter 4. These cycles of interpreting and reinterpreting treaty provisions resulted in changes that could have an impact at the most practical level for traffickers. Whether the ship sailed under a Brazilian or a Portuguese flag, the details of the licenses and passports, the nature and quantity of goods transported aboard, all became central factors for determining what made a vessel suspicious of engaging in an illegal voyage and therefore prone to capture. The questions about the law to be applied persisted: at sea, where was it legal for Brazilian vessels to be captured? Could capture follow from a search finding the ship to be equipped for slave trading, or was capture legal only when enslaved people were actually on board? In practice, liberation was dependent on all these matters: capture of ships, deviations, proceedings. Despite the stated goal of abolishing the slave trade, these issues paradoxically kept ships in the protagonist role of the legal regime and reinforced the representation of humans as property.

The constant reconstruction of these legal meanings culminated in interpretative extensions under unilateral dominance, procedural law and even bureaucratic hurdles. Ultimately, interpretation also served to dismantle the triple formula regime, as recounted in Chapter 5. Avoiding issues related to the jurisdiction of the mixed commissions, claiming its lack of effectivity and creating alternatives to the triple formula, both parties interpreted their way out of the bilateral treaty up to its demise.

The history of the Anglo-Brazilian triple formula provides more detail into the anti-slave trade legal technologies and its very own battlefield in the first half of the 19th century. It also reveals complex legal translations of

abolition and slavery, war and peace, humanitarianism and violence between the pixels of colourful images in global scale.

Du Bois's account, quoted above, emphasized the political dilemma of the triple formula system: the ultimate goal of liberty relied on rights of visitation that was seen as dangerous by other states, due to its potential to turn Britain into a powerful maritime police force. Du Bois focused his analysis on the United States, one of the countries that mostly refrained from signing treaties with Britain. However, the history of the Anglo-Brazilian treaty also reveals further inherent constraints of such legal arrangements in action.

Britain constantly pushed to expand the legal use of force and possibilities of capture within the spaces of the treaty regime. Brazil actively engaged in the dynamics of interpretation, and in so doing created an argumentative onus that would later continue to transform British legal approaches and the very expectations about the content of the law the two parties were applying. By advocating for limitations of the treaty, Brazilian representatives were slowing down the process of abolishing the slave trade and conserving the perverse practice of slavery, while also protecting its independence against the expansion of British interference. Though the interpretative processes show the influence of policy changes, a key feature of the legal common ground from which disputes arose is the nature of the regime. Whether reading the bilateral treaty clauses as analogous to or differently from prize law or general international law, day-to-day interpretation forged anti-slave trade rules that kept ships protagonists of slave trade suppression mechanisms and carved out a space between the limits of war and peace.

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, 25 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', 10 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 in Brussels, 2 July, 1890

Additional articles of 1823 – Additional Articles between Great Britain and Portugal. Signed in 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 in 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 in Rio de Janeiro, 19 February 1810

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

Anglo-Portuguese additional convention 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 in London, 28 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

CGB – Collection of the Public General Statutes of Great Britain

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 in 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

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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 in London, 28 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

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Appendix

A. Bilateral treaties for slave trade suppression (1815–1845)

Results based on the online database *Oxford Public International Law – Oxford Historical Treaties* on the topic of slave trade in the 19th 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 25 Jan. 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
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
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

B. Multilateral treaties for slave trade suppression (1815–1845)

Results based on the *Oxford Collection of International Law Treaties* on the topic of slave trade in the 19th century and additions from mentions in secondary documents (*).

Treaty
Definitive Treaty of Peace between Austria, Great Britain, Prussia and Russia and France, signed at Paris, 20 Nov. 1815 (*)[1]
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
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 Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade, signed at London, 20 Dec. 1841
Protocol of Conference relative to the Slave Trade between Austria, Great Britain, Prussia and Russia, signed at London, 3 Oct. 1845

1 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.

C. Brazilian cases under mixed commissions

The following tables present data collected by the author from the *House of Commons Papers, Class A, Correspondence with the British Commissioners* (1822–1845).

I. Vessels adjudicated by the Anglo-Portuguese Mixed Commission at Sierra Leone since 1822

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[2]	BR	30 Jan. 1824	16 April 1824	Restitution	0
Schooner Bella Eliza	BR	23 Nov. 1824	31 Jan. 1825	Condemned for being engaged in slave trade	359
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	22 Nov. 1825	10 Jan. 1826	Condemned for being engaged in slave trade	385

2 Not admitted in the Rio Mixed Commission for appeal (17 May 1825).

Type and name of the vessel	Flag	Date of capture	Date of decree	Decree	Slaves emancipated
Brigantine San Joao / Segunda Rosalia	BR	25 Nov. 1825	21 Mar. 1826	Condemned for being engaged in slave trade	186
Brig Activo	BR	11 Feb. 1826	9 May 1826	Restitution	---
Sloop Esperança	BR	4 Mar. 1825	8 June 1826	Condemned for being engaged in slave trade	4
Brigantine Netuno	BR	4 Mar. 1825	8 June 1826	Condemned for being engaged in slave trade	84
Brig Perpetuo Defensor	BR	18 April 1826	Restored by captors		0
Ship Sam Benedito	BR	11 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	21 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

Type and name of the vessel	Flag	Date of capture	Date of decree	Decree	Slaves emancipated
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	22 Mar. 1827	15 May 1827	Condemnation (for irregular license)	0
Brigantine Creola	BR	11 April 1827	9 June 1827	Condemned for being engaged in slave trade	289
Brig Bahia	BR	3 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	23 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 engaged in slave trade	74

II. Vessels adjudicated by the Anglo-Brazilian Mixed Commission at Sierra Leone from 1828 (establishment on 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	3 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	3 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	23 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

Type and name of the vessel	Date of capture	Date of decree	Decree	Slaves emancipated
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 Emprehende-dor	23 June 1839	3 Aug. 1839	Condemned	---
Brigantine Simpa-thia	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 Pam-peiro	?	30 Oct. 1839	Condemned	---

Type and name of the vessel	Date of capture	Date of decree	Decree	Slaves emancipated
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	---	---	---

Type and name of the vessel	Date of capture	Date of decree	Decree	Slaves emancipated
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	---

Type and name of the vessel	Date of capture	Date of decree	Decree	Slaves emancipated
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	---

Type and name of the vessel	Date of capture	Date of decree	Decree	Slaves emancipated
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	---

III. 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	Slaves emancipated
Schooner Emília	PT	GB	14 Feb. 1821	31 July 1821	Condemned for being engaged in slave trade	---

IV. 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[3] 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
Brig Dom Este-vão de Atayde/ d'Athaide	PT	BR	6 Oct. 1830	10 Dec. 1830	Restitution and liberation	50
Schooner Desti-mida(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

3 The number of enslaved persons emancipated by the Rio mixed commission sometimes diverge from those presented in Mamigonian (2017), based on different primary documents from the series consulted for this table.

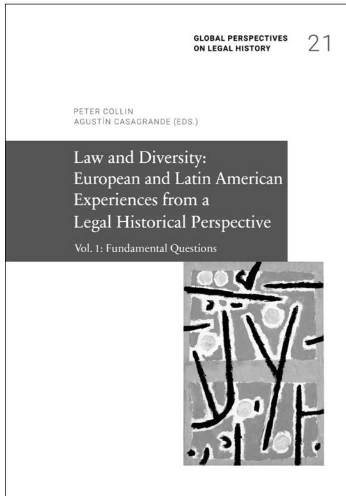
Type and name of the vessel	Flag	Seizor	Date of capture	Date of Decree	Decree	Slaves emancipated
Patacho Dois de Março	PT	BR	May 1834	27 Aug. 1834	Lacking jurisdiction	0
Patacho Santo Antonio	PT	BR	May 1834	4 Sept. 1834	Condemned for being engaged in slave trade	91
Brig Rio da Prata	MV-D	GB	28 Nov. 1834	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	PT	GB	8 Jan. 1836	7 Mar. 1836	Restitution	0
Schooner Flor de Loanda	PT	GB	13 April 1838	15 May/ 10 June 1838	Lacking jurisdiction	0
Brigantine / Patacho Cesar	BR	GB	13 April 1838	26 May/ June 26 1838	Condemned for being engaged in slave trade	202
Brigantine Brilhante	PT	GB	13 May 1838	25 June 1838	Condemned for being engaged in slave trade	245
Brig-Schooner Diligente	PT	GB	1 Dec. 1838	10 Jan./ 15 Feb. 1839	Condemned for being engaged in slave trade	246

Type and name of the vessel	Flag	Seizor	Date of capture	Date of Decree	Decree	Slaves emancipated
Brig Felix(z)	PT	GB	27 Dec. 1838	30 Jan. 1839	Condemned for being engaged in slave trade	229
Brig-Schooner Carolina	PT	GB	27 Mar. 1839	16 April 1839	Condemned for being engaged in slave trade	211
Patacho Especu-lador	PT	GB	25 Mar. 1839	4 May 1839	Condemned for being engaged in slave trade	268
Brig Ganges	PT	GB	7 April 1839	31 May 1839	Condemned for being engaged in slave trade	386
Brig Leal	PT	GB	11 April 1839	17 June 1839	Condemned for being engaged in slave trade	319
Barque Maria Carlota	PT	GB	29 May 1839	13 Sept. 1839	Condemned for being engaged in slave trade	0
Patacho Recuper-ador	PT	GB	28 May 1839	24 Sept. 1839	Restitution	0
Brig Pompeo(u)	PT	GB	28 Aug. 1839	26 Oct. 1839	Restitution	0
Brig Dom João de Castro	PT	GB	17 Oct. 1839	28 Jan. 1840	Condemned for being engaged in slave trade	0
Patacho Provi-dencia	PT	BR	July 1839	4 May 1840	Lacking jurisdiction	0
Patacho Africano Atrevido	PT	BR	---	6 April 1840	Lacking jurisdiction	0
Patacho Paquete de Benguela	PT	GB	29 Aug. 1840	28 Sept. 1840	Condemned for being engaged in slave trade	274
Galliot Alexandre	BR	GB	2 Sept. 1840	10 Sept. 1840	Restitution	0
A canoe 40 feet long/launch	---	BR	24 Sept. 1840	29 Oct. 1840	Lacking jurisdiction	---
Brig Asseiceira	PT	GB	31 Dec. 1840	8 Mar. 1841	Condemned for being engaged in slave trade	323

Type and name of the vessel	Flag	Seizor	Date of capture	Date of Decree	Decree	Slaves emancipated
Brig Nova Aurora	BR	GB	26 Feb. 1841	15 April 1841	Restitution	0
Patacho Castro	BR	GB	1 June 1841	25 July 1841	Restitution	0
Brig Convenção	BR	GB	3 Dec. 1841	30 Dec. 1841	Restitution	0
Brig Schooner Aracaty	BR	BR	18 Mar. 1842	16 July 1842	Condemnation	0
Brig Dous Amigos	BR	GB	14 June 1843	22 July 1843	Restitution	0
Polacca Bom Destino	BR	GB	7 Sept. 1844	7 Oct. 1844	Condemnation	0
Brigantine Nova Granada	BR	GB	8 Nov. 1844	---	---	---

About the Author

Adriane Sanctis de Brito's research focuses on the international histories of legal imagination related to peace, humanitarianism, and the suppression of the slave trade. Currently, she is a visiting scholar at the Institute for Global Law and Policy at Harvard Law School. She received her PhD from the University of São Paulo and previously served as an adjunct professor at the university's International Relations Institute. As a co-founder of the Brazilian think tank LAUT, she leads projects examining how contemporary reactionary movements reimagine and reconfigure legal language and human rights. The research for this book was made possible by scholarships that supported research stays at the University of São Paulo, the University of Melbourne, the Max Planck Institute Luxembourg for Procedural Law, and the University of Helsinki.



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Law and Diversity: European and Latin American Experiences from a Legal Historical Perspective.

Vol. 1: Fundamental Questions

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