Evidence Requirements before 19th Century Anti-Slave Trade Jurisdictions and Slavery as a Standard of Treatment

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I. Introduction: Treatment as a key component of 19th century legal instruments for the international suppression of the slave trade

The intensity of 19th century state practice relating to the suppression of the slave trade[1] inevitably raises the question of how international law actors defined this phenomenon. A cursory glance at declarations made by state representatives and legal scholars of the period, seem to confirm Howard Hazen Wilson's formalistic definition of the slave trade as:

> [a] business of moving human chattels from a land where prisoners of war were slaves, to a land where slaves were *res*.[2]

For instance, in a memorandum addressed to the Quai d'Orsay in 1854, the French minister of the Navy, Théodore Ducos (1801-1855), defined the slave trade as:

> [t]he buying and exportation of slaves intended for transportation to colonies where slavery exists, and where they must become the property of settlers, with all the consequences which the right of ownership entails.[3]

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1 See in particular J. Allain, The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade, 58 BYIL (2007), 1, 342-388. Reprinted in: J. Allain, The Law and Slavery: Prohibiting Human Exploitation (2015), 46-100.

2 H. H. Wilson, Some principal aspects of British efforts to crush the African slave trade, 1807-1929, 44 AJIL (1950), 1, 505-506.

3 "L'achat et l'exportation d'esclaves destinés à être transportés dans des colonies où l'esclavage existe, où ils doivent devenir la propriété des colons, avec toutes les conséquences du droit de possession". Quoted by: C. Flory, De l'esclavage à la liberté force: Histoire des travailleurs africains dans la Caraïbe française au XIXe siècle (2015), 46.

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In his *Dictionnaire de droit international public et privé* published in 1885, the Argentine publicist Carlos Calvo (1824-1906) gave an almost identical definition.[4] This formalistic view does not hold up to actual state practice as derived from domestic legislation and international treaties. As a matter of fact, once it came to identifying and prosecuting individual cases of slave trading, considerations based on the legal status of the trade's victims – whether past, present, or future – were much less decisive than references to a concrete standard of treatment.

Definitions contained within domestic legislation outlawing the slave trade were not, in fact, explicitly premised on the existence of slavery as a legal status. The British Slave Trade Act of 1807 defined the slave trade as:

> [a]ll manner of dealing and trading in the purchase, sale, barter, transfer of Slaves, or of Persons intended to be sold, transferred, used, or dealt with as Slaves, practiced or carried on, in, at, to or from any part of the Coast of Countries of Africa.[5]

This definition, which was confirmed and further broadened by the subsequent acts passed in 1811,[6] 1815,[7] and 1824,[8] includes a double reference to a standard of treatment. First, it recognizes that it is not only possible to purchase, sell, barter, and transfer slaves (whose legal status was that of chattels), but also persons that were legally free.[9] Second, the 1807 definition requires that persons purchased, sold, bartered, or transferred in such a way must be "intended to be sold, transferred, used, or dealt with as

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4 Evidently considering it a thing of the past, Calvo defined the slave trade as "the buying and selling of negroes that used to take place on the coasts of Africa with the purpose of transporting these negroes to the colonies or to a country in the new world where slavery existed, and selling them there as slaves" ("l'achat et la vente des nègres qu'on faisait autrefois sur les côtes d'Afrique pour les transporter aux colonies ou dans les pays du nouveau monde où l'esclavage existait, et les y vendre comme esclaves"). C. Calvo, Dictionnaire de droit international public et privé, vol. 2 (1885), 265.

5 An Act for the Abolition of the Slave Trade (47 Geo. III, Sess. 1, cap. 36), s. 1.

6 An Act for Rendering More Effectual an Act Made in the 47th Year of His Majesty's Reign, intituled 'An Act for the Abolition of the Slave Trade' (51 Geo. III, cap. 23), s. 1.

7 An Act to Provide for the Support of Captured Slaves during the Period of Adjudication (55 Geo. III, cap. 172), s. 1.

8 Slave Trade Act 1824 (c.113, 5 Geo. IV), s. 2.

9 It should be noted that section 1 of the abovementioned Slave Trade Act of 1811 characterized the victims of the slave trade as "any native or natives of Africa, held and treated as slaves, or other person or persons held or treated as slaves", supra note 6.

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Slaves". While the sale or transfer of a person "as a slave" might refer to the existence of a legally recognized contract or deed, and, accordingly, imply the existence of slavery as a legal institution within the jurisdiction where the sale or transfer takes place, one does not see why this should necessarily be the case where one person accomplishes the material acts of "using" or "dealing with" another person "as a slave". Defining the slave trade as an operation premised not so much on the transportation of human chattels rather than on the deportation and treatment of individuals *as if they were chattels*, was hardly a British idiosyncrasy. Thus, despite her initial reluctance to give any precise definitions in its legislation, where the slave trade was referred to as "la traite des noirs", and its victims as "les noirs de traite",[10] France eventually resorted to a standard of treatment in order to allow its cruisers to free Christian prisoners of war who had been enslaved by Muslim rulers on the Barbary Coast, in Egypt, and in the Levant. Under an 1823 ordinance, French ship-owners and captains were forbidden from using and fitting out ships in order to transport slaves, "irrespective of the origin of said slaves and the nation into whose hands they have fallen" ("quelles que soient l'origine desdits esclaves et la nation au pouvoir de laquelle ils sont tombés"), while French naval officers were instructed to arrest "any French ship on board of which passengers are treated as slaves" ("tout navire français à bord duquel des passagers traités comme esclaves se trouveroient").[11]

Treaties for the suppression of the slave trade also included references to the treatment of its victims, even if most of them did not provide any definition of the slave trade. The Anglo-Dutch treaty of 1814 merely stated that "no Inhabitants of that Country [Guinea, i.e. West Africa] shall be sold or exported as Slaves",[12] whereas the Anglo-Portuguese treaty of 1817 bound

10 See in particular Ordonnance du roi qui pourvoit au cas où il serait contrevenu aux ordres de Sa Majesté concernant l'Abolition de la Traite des Noirs, 8 January 1817, Bulletin des lois, ser. 7, vol. 4, 105; Loi qui prononce des Peines contre les individus qui se livreraient à la Traite des Noirs, 15 April 1818, Bulletin des lois, ser. 7, vol. 6, 234; Loi relative à la Répression de la Traite des Noirs, 25 April 1827, Bulletin des lois, ser. 8, vol. 6, 377; Loi concernant la Répression de la Traite des Noirs, 4 March 1831, Bulletin des lois, ser. 8, vol. 2, part 2, 35.

11 Ordonnance du Roi qui défend, sous les peines y exprimées, à tout armateur et capitaine français d'employer et d'affréter les bâtiments qui leur appartiennent ou qu'ils commandent, à transporter des esclaves, 18 January 1823. Bulletin des lois, ser. 7, vol. 16, 18.

12 Convention relative to the Dutch Colonies, Trade with the East and West Indies, etc. (Great Britain, Netherlands), signed at London on 13 August 1814, 2 BFSP (1814-1815), 370, Article. 8.

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its parties to "ensure that their respective subjects do not engage in the illicit traffic in slaves" ("de veiller mutuellement à ce que leurs sujets respectifs ne fassent pas le Commerce illicte d'Esclaves").[13] The Anglo-Spanish treaty signed that very same year forbade Spanish subjects "to purchase slaves, or to carry on the slave trade, on any part of the coast of Africa, North to the Equator".[14] Only three treaties, all of which were signed with states that still recognized slavery as a legal institution, included an express definition of the slave trade. The Anglo-Venezuelan treaty of 1839 and the Anglo-Ecuadorian treaty of 1841 noted that:

> [f]or want of a proper explanation of the real spirit of the phrase 'Traffic in Slaves,' [the parties to the treaty in question] do here mutually declare to be understood by such traffic, such only which is carried on in negroes brought from Africa, in order to transport them to other parts of the world for sale;

as opposed to purely internal transportation of slaves.[15] In a similar spirit, the Anglo-Portuguese treaty of 1842 defined the slave trade as:

> [t]he infamous and piratical practice of transporting the natives of Africa by sea, for the purpose of consigning them to slavery.[16]

Taken out of context, this definition could be read as a vindication of Minister Ducos' restrictive approach. However, Article. 5 of the same treaty added that the prohibition of the slave trade did not question the right of Portuguese subjects "to be accompanied, in voyages to and from the Portuguese possessions off the coast of Africa, by slaves who are *bona fide* household servants". In order to prevent abuses, the treaty provided a criteria allowing for an effective distinction between household slaves and victims of the slave trade. In addition to a formal criterion (household slaves had to be issued passports by the highest civil authority at the port of em-

13 Additional Convention for the prevention of the Slave Trade (Great Britain, Portugal), signed at London on 28 July 1817, 4 BFSP (1816-1817), 85, Article. 1. Editor's translation. The original Portuguese version also mentions the "commercio illicito de escravos".

14 Treaty for the Abolition of the Slave Trade (Great Britain, Spain), signed at Madrid on 23 September 1817, 4 BFSP (1816-1817), 33, Article. 2.

15 Treaty for the Abolition of the Slave Trade (Great Britain, Venezuela), signed at Caracas on 15 March 1839, 27 BFSP (1838-1839), 669, Article. 1. Treaty for the Abolition of the Traffic in Slaves (Great Britain, Ecuador), signed at Quito on 24 May 1841, 30 BFSP (1841-1842), 304, Article. 1.

16 Treaty for the Suppression of the Traffic in Slaves (Great Britain, Portugal), signed at Lisbon on 3 July 1842, 30 BFSP (1841-1842), 527, Article. 1er.

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barkation), it mostly relied on a standard of treatment: household slaves had "to be found at large and unconfined in the vessel; and clothed like Europeans in similar circumstances"; moreover, there could be no other slaves on board the vessel, nor could there be any equipment characteristic of a slave ship.[17]

References to this kind of equipment had become a key component of the law of evidence applicable before Mixed Commissions[18] and domestic courts[19] assigned with the task of implementing treaties for the suppression of the slave trade. They are further proof of the role treatment played in the latter's legal definition. From the 1820s onwards, it had become possible to condemn ships as slavers despite the fact that no victims of the trade had been found aboard. Courts could now rely on the mere presence of signs showing that a vessel had been actually used, or merely equipped, for the purpose of confining hundreds of men and women under inhumane conditions, deporting them to foreign lands against their will, and subjecting them to various abuses in order to ensure their submission. As slavers were aware that the first treaties for the suppression of the slave trade only allowed for the detention of ships actually having slaves on board;[20] they had often reacted to the presence of British cruisers by putting their slaves ashore, or, more alarmingly, by throwing them overboard. States adapted by agreeing on new rules of evidence in two stages. At first, courts were allowed to take into account the presence of slaves on

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17 Ibid., Article. 5. A comparable although less detailed rule could already be found in the Anglo-Portuguese treaty of 1815: Treaty for the restriction of the Portuguese Slave Trade and for the annulment of the Convention of Loan of 1809 and Treaty of Alliance of 1810 (Great Britain, Portugal), signed at Vienna on 22 January 1815, 2 BFSP (1814-1815), 348.

18 On these Mixed Commissions, or Mixed Courts, see in particular L. Bethell, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century, 7 Journal of African History (1966), 1, 79-93; J. Martinez, The Slave Trade and the Origins of International Human Rights Law (2012).

19 On a particularly important British court, see T. Helfman, The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade, 115 Yale Law Journal (2005-2006), 1, 1122-1156.

20 Thus, pursuant to Article.10 of the Anglo-Spanish treaty of 1817, "No British or Spanish Cruizer shall detain any Slave Ship not having Slaves actually on board; and in order to render lawful the detention of any Ship, whether British or Spanish, the Slaves found on board such Vessel must have been brought there for the express purpose of the Traffic". Article. 7 of the Anglo-Portuguese treaty of 1817 and Article. 2 of the Anglo-Dutch treaty of 1818 contained similar rules.

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board a ship during a stage of its voyage preceding its capture.[21] In practice, this meant that, given the extreme conditions on board slave ships and the catastrophic sanitary situation resulting thereof, the presence of a characteristic pestilential smell was deemed *prima facie* evidence of slave trading.[22] During the second phase, "equipment clauses" were added to slave treaties:[23] from now on, proving that a ship had been built or equipped for the purpose of transporting, sequestrating, and feeding hundreds of captives was sufficient to have it detained as a slaver.[24]

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21 See the supplementary clauses signed by Spain on 10 December 1822: BFSP, vol. 10 (1822-1823), 87. The Netherlands signed a similar instrument on 31 December 1822, ibid., 554; Portugal did the same on 15 March 1823: 11 BFSP (1823-1824), 23.

22 Bethell, supra note 18, 86.

23 Equipment clauses can be found in almost all treaties for the repression of the slave trade negotiated between Britain and other Western powers after 1823. The Netherlands was the first country to agree to such a clause: Explanatory and Additional Articles to the Treaty between Great Britain and the Netherlands, for the Prevention of the Traffic in Slaves (Great Britain, Netherlands), signed at Brussels on 31 December 1822 and 25 January 1823, 10 BFSP (1822-1823), 554.

24 For example, Article. 9 of the Anglo-Portuguese treaty of 1842 (supra note 16) contained the following equipment clause: "Any vessel, British or Portuguese, which shall be visited by virtue of the present Treaty, may lawfully be detained, and may be sent or brought before one of the Mixed Commissions established in pursuance of the provisions thereof, if any of the things hereinafter mentioned shall be found in her outfit or equipment, or shall be proved to have been on board during the voyage in which the vessel was proceeding when captured, namely:

> (1) Hatches with open gratings, instead of the close hatches which are usual in merchant-vessels.
> (2) Divisions or bulk-heads, in the hold or on deck, in greater number than are necessary for vessels engaged in lawful trade.
> (3) Spare plank fitted for being laid down as a second or slave-deck.
> (4) Shackles, bolts, or handcuffs.
> (5) A larger quantity of water, in casks or in tanks, than is requisite for the consumption of the crew of the vessel, as a merchant- vessel.
> (6) An extraordinary number of water-casks, or of other vessels 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 quantity of casks, or of other vessels, should only be used for the reception of palm oil, or for other purposes of lawful commerce.
> (7) A greater quantity of mess tubs or kids, than are requisite for the use of the crew of the vessel, as a merchant-vessel.

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Treaties for the suppression of the slave trade were also based on the premise that states had the obligation to guarantee the effective freedom of the slaves they had liberated. Almost all instruments for the repression of the slave trade concluded after 1817 included an express provision obliging state parties to guarantee the freedom of any African found on board a condemned slave ship.[25] It was usually added that liberated slaves were placed at the disposal of the government on whose territory adjudication had taken place, and that the government in question had the right to employ them as servants or free labourers.[26] Recruitment into the armed forces was also an option. Great Britain, for instance, enrolled almost

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(8) A boiler, or other cooking apparatus, of an unusual size, and larger, or fitted for being made larger, than requisite for the use of the crew of the vessel, as a merchant-vessel; or more than one boiler, or other cooking apparatus, of the ordinary size.
(9) An extraordinary quantity of rice, of the flour of Brazil manioc, or cassada, commonly called farinha, of maize, or of Indian corn, or of any other article of food whatever, beyond what might probably be requisite for the use of the crew; such rice, flour, maize, Indian corn, or other article of food, not being entered on the manifest, as part of the cargo for trade.
(10) A quantity of mats or matting, larger than is necessary for the use of the crew of the vessel, as a merchant-vessel.

Any one or more of these several things, if proved to have been found on board, or to have been on board during the voyage on which the vessel was proceeding when captured, shall be considered as prima facie evidence of the actual employment of the vessel in the transport of negroes or others for the purpose of consigning them to slavery; and the vessel shall thereupon be condemned, and shall be declared lawful prize, unless clear and incontestably satisfactory evidence, on the part of the master or owners, shall establish to the satisfaction of the Court, that such vessel was, at the time of her detention or capture, employed on some legal pursuit, and that such of the several things above enumerated, as were found on board of her at the time of her detention, or had been on board of her on the voyage on which she was proceeding when captured, were needed for legal purposes on that particular voyage".

25 The only exception to this rule was the Anglo-French treaty of 1845: Convention for the Suppression of the Traffic in Slaves (Great-Britain, France), signed at London on 29 May 1845, 33 BFSP (1844-1845), 4.

26 This clause first appeared in Article. 7 of the Regulations for the Mixed Commissions annexed to the 1817 Anglo-Portuguese and Anglo-Spanish treaties, as well as in Article. 6 of the Anglo-Dutch treaty of 1818. Another example of it can be found in Article. 11 of the Anglo-French treaty of 1833 which was later joined by six other countries. Supplementary Convention for the more effectual Suppression of the Traffic in Slaves (Great Britain, France), signed at Paris on 22 March 1833, 20 BFSP (1832-1833), 286.

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12,000 "recaptives" as soldiers or sailors between 1808 and 1840.[27] It was understood that the new vocations of the former slaves must not give rise to treatment characteristic of slavery. As this was often not the case, Britain persuaded Spain, Portugal, and several Latin American states to agree to regulations fleshing out the meaning of the effective liberation clause. These regulations took two forms. A short version, comprising eight articles, obliged its signatories to ensure the "permanent good treatment" of liberated Africans, as well as their "full and complete emancipation" (after 1839, this expression was replaced by "full and complete freedom"), adding that this should be done "in conformity with the humane intentions of the High Contracting Parties".[28] The second collection of regulations can be found as annexes to the Anglo-Uruguayan treaty of 1839 and the Anglo-Portuguese treaty of 1842.[29] Comprising 33 articles, they organized a transitional regime during which the former slaves were to familiarize themselves with salaried work, based on coercion and protection against abuses characteristic of slavery.[30]

Whilst internal legislation and treaty provisions both implied that acts of slave trading could be proved by having recourse to a standard of treatment, ultimate proof of the existence of such a standard can be found in the case law of international and domestic jurisdictions favouring treatment over legal status in order to condemn individual ships as slave traders. As a matter of fact, several emblematic cases show that *de jure* considerations, such as the emancipated status of passengers (ii), or even the fact that slavery no longer existed in the country of destination (iii), did not prevent judges from holding, based on a *de facto* standard of treatment, that acts of slave trading had been committed.

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27 Flory, supra note 3, 32.

28 Titled 'Regulations for the good treatment of liberated negroes', this kind of regulation was introduced by Article 13 and Annexe C of the Anglo-Spanish treaty of 1835. Such an Annex C was equally mentioned in Article 12 of the Anglo-Chilean treaty of 1839, in Article 11 of the Anglo-Argentinean treaty of 1839, in Article 12 of the Anglo-Bolivean treaty of 1840, and Article 12 of the Anglo-Mexican and Anglo-Ecuadorean treaties of 1841.

29 See Annexe C of these treaties, titled 'Regulations in respect of the treatment of liberated negroes'.

30 Ibid.

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II. The preeminence of treatment over individual emancipation certificates

As the "Regulations for the good treatment of liberated negroes" had already indicated, emancipated slaves, despite their status as free persons, were at a particular risk of remaining in practical slavery. Nineteenth-century antislavery courts acknowledged this risk; thus, in the *Uniao* case of 1844, the Anglo-Portuguese Mixed Commission at the Cape used a standard of treatment to hold that emancipated individuals treated as servants and sailors were not slaves (A). In the 1840 case of the *Sénégambie*, British judges in the Gambia and Sierra Leone had already decided that emancipated individuals deported overseas against their will could be considered slaves (B).

A. Emancipated individuals treated as servants and sailors are not slaves: the Uniao case (1844)

Decisions issued by Mixed Commissions for the repression of the slave trade confirm that treatment was indeed a key factor for the purpose of identifying individual cases of trade in slaves.[31] The case of the *Uniao*, judged on 4 November 1844 by the Anglo-Portuguese Mixed Commission at the Cape, is particularly striking in this regard.[32] On 29 July 1844, while anchoring off Quelimane, in Mozambique, the Portuguese brig *Uniao* was captured by two Royal Navy sloops. Their commanders had decided to act after making two observations. First, they had found various fittings on board the *Uniao* which they deemed unusual for a ship engaged in legitimate trade, and rather evocative of the items listed by the 1842 Anglo-Portuguese treaty's "equipment clause".[33] Second, during their inspection of the *Uniao*, the British naval officers had found "six negroes, supposed to be slaves". Stating that they feared for their safety on board the *Uniao*, they had

31 The Foreign Office transferred the decisions issued by these Mixed Commissions to the House of Commons which published them within the special series of its Blue Books dedicated to the suppression of the slave trade. This series was later reedited by the Irish University Press: British Parliamentary Papers – Slave Trade, Shannon, Irish University Press, 1968-1971 (hereafter BPP: Slave Trade). For the decisions issued by Mixed Commission, see 9-51 BPP: Slave Trade (1823-1869).

32 For all essential documents relating to this case (correspondence, judgments, witness statements, expert reports, etc.), see 29 BPP: Slave Trade (1846), Class A, No. 260, 611-663.

33 Ibid., 618.

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been transferred to the *HMS Bittern*.[34] However, once the alleged slaver had been brought to the Cape for judgment by the local Anglo-Portuguese Mixed Commission, the facts soon proved more complex than in the captor's version. The discussion of the facts by the parties shows that, in case of doubt, the only efficient way to prove an act of slave trading was to prove the existence of a certain standard of treatment with regard to its alleged victims. This applied both to the ship's equipment and the condition of the Africans found aboard.

Thus, a commission of survey appointed by the Mixed Commission found that most fittings described by the captors as "suspicious" (e.g. a large main hatchway, additional partitions on a second deck, a fireplace larger than necessary for the crew) were actually quite compatible with those of a ship engaged in legitimate trade.[35] The commission itself determined that the ship's cargo, which included large quantities of rice, was legitimate.[36] The rice's inferior quality had initially raised suspicions: one witness had claimed that it was inedible for Europeans, and only fit to be fed to slaves.[37] This account was later challenged by other witnesses on two grounds: first, this type of rice was apparently quite commonly exported to London, where it was used as soup-rice; second, rice found on slavers was actually "rather more weevil-eaten" than the one found aboard the *Uniao*.[38] Since neither the ship's fittings nor its cargo were clearly indicative of an act of slave trading, the commission eventually concentrated on another piece of equipment mentioned by Article 9 of the 1842 treaty, namely, the presence of shackles, bolts, and handcuffs. Quite strikingly, the captor's declaration did not list any of these items, only "several iron bars".[39] Eventually though, once the ship had been brought to the Cape, various bolts were retrieved from it. One witness who had examined them at the Queen's warehouse stated that they could have been used to confine several men.[40] Convinced that a close examination of these bolts would provide decisive proof of the *Uniao*'s true nature, the Mixed Commission had the equipment brought before them, and they were subjected to the scrutiny of a shipwright and a commission of survey. All eventually agreed that only

34 Ibid., 618-619.
35 Ibid., 636-637.
36 Ibid., 618.
37 Ibid., 630.
38 Ibid., 632-633.
39 Ibid., 618.
40 Ibid., 629-630.

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one bolt could have been used as a shackle.[41] Now, as noted by one witness, having an instrument "for the purpose of confining refractory people" was rather common for a merchant vessel at that time.[42] Eventually, not even the attorney-general, speaking on behalf of the captors, was ready to declare that there had been slave shackles on board the *Uniao*.[43] Accordingly, the Mixed Commission concluded that no slave-trading equipment within the meaning the 1842 treaty had been found.[44]

Irrespective of its equipment, the *Uniao* could have been lawfully detained and judged had its captors proved that the Africans found aboard had indeed become the victims of the slave trade. Here, too, unforeseen difficulties emerged. The first obstacle was the Africans' legal status. Contrary to their earlier declarations, the six Africans found aboard the *Uniao* were no longer slaves, at least according to Portuguese domestic law. One of them, who went by the name of "Joze Mozambique", was very likely a free man, and served as a personal attendant to one of the passengers.[45] As for the five remaining Africans, they had been manumitted by the *Uniao*'s captain shortly after entering his service as sailors. The corresponding deeds of manumission, bearing the signature of a notary in Mozambique, had been given to the captors, who transferred them to the Mixed Commission.[46] Furthermore, the five Africans in question were listed as crew members on the *Uniao*'s manifest.[47] It should be noted that in the eyes of the Mixed Commission, authentic documentary proof of legal status under domestic law was clearly not sufficient to dispel doubts about the Africans' possible status as traded slaves under the 1842 treaty. As mentioned earlier, this treaty defined the slave trade as:

> [t]he infamous and piratical practice of transporting the natives of Africa by sea, for the purpose of consigning them to slavery.

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41 Ibid., 616 and 636-637.
42 Ibid., 633.
43 Ibid., 617-618.
44 Ibid., 618.
45 Documents provided by the Mixed Commission give little information about "Joze Mozambique", apart from the fact that he was the only African who had embarked on the Uniao of his own free will. It should also be noted that he was also the only African who refused to re-embark on the ship after its release. The commissioners' report adds that Joze Mozambique's master "[offered] no opposition to his leaving his service", ibid., 613, 626.
46 Ibid., 622-623.
47 Ibid., 619-620.

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This definition could very well apply to persons who, under domestic law, were not anymore, or not yet, considered as slaves. In the case of the *Uniao*, the captain's attitude toward his African crew members was hardly irreproachable. When called before the Mixed Commission, all of them testified that they had boarded the *Uniao* against their will. All of them appeared to have been sold to the captain, including those who had stated that they had been free men until then.[48] However, for the attorney-general before the Mixed Commission, legal status, rather than concrete treatment, seemed to be the key factor. In his view, the mere fact of embarking slaves already constituted an act of slave trading:

> With regard to the negroes, he observed, that one of them Sabino, had not been manumitted till a month after he was shipped, and that two others, named Izidoro and Joze Maria, had also been on board as slaves; whence he contended that the vessel had been employed in the Slave Trade within the meaning of the Treaty, the negro sailors being all purchased, shipped, as they informed the captors, clearly against their will, and made free on the voyage.[49]

The attorney-general's formalistic reasoning was very likely not meant to provide an authentic interpretation of the 1842 treaty, but rather to produce an authoritative argument in order to secure the *Uniao*'s condemnation and the liberation of all Africans found aboard, irrespective of whether they had been manumitted before or after embarkation.[50] The Mixed Commission rejected this approach, favouring reasoning more in line with the 1842 treaty's references to a concrete standard of treatment. The identical questions submitted to the Africans found on the *Uniao* were quite telling in this regard. Apart from the circumstances of their embarkation, the following questions related to their subsequent treatment. Did they consider themselves to be free men? Had they been informed of their manumission? What clothes did they wear? Were they subjected to physical abuse? Did they receive remuneration for their work? And if so, how much? Did they want to re-embark on the ship? All of the Africans had an-

48 Two of the five sailors stated that they had embarked on the Uniao as free men, but that they had been ordered to do so by their "employer". However, owing to the circumstances described by them and other witnesses, it seems pretty straightforward that they had, in fact, been sold to the ship's captain, ibid., 625-626.

49 Ibid., 617.

50 The attorney-general's formalism appears even more specious with regard to his earlier statement that "all [the Africans] were slaves, or recently so", which clearly implied that their status under Portuguese law was not decisive in his eyes, ibid.

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swered that they considered themselves to be free men and felt treated as such; that they wore normal clothes; that they had agreed on a salary although not all of them had yet been paid. As to physical abuse, their answers differed: two stated that they had been unfairly beaten; two others declared they had suffered no bodily harm; a fifth declared that he had only been punished for disciplinary offences, as any sailor would have been. Two of the men stated their desire to return on board; whilst the two who had been subject to beatings said that they would prefer to remain at the Cape. A fifth African remained hesitant.[51] The statements were confirmed by a Portuguese passenger, who had reported that all of them had been treated, fed and clad "in the same manner as the white sailors on board".[52] The commission inferred that the Africans of the *Uniao* had indeed been employed as sailors, and were not meant to be "consigned to slavery". Thus, they had not been the victims of an act of slave trading. Upholding the applicant's claims, the commission ordered the ship and its cargo to be released, and its owners to be compensated. All African sailors eventually reembarked on the *Uniao*.[53]

While the *Uniao* case was decided mainly with regard to objective treatment factors such as clothing and food, an earlier case showed that the subjective element of consent, or rather the lack thereof, could also be a criterion for determining that emancipated Africans were, in fact, treated as slaves.

B. Emancipated individuals deported overseas against their will are slaves: the Sénégambie case (1840)

Between France and Great Britain, the question of treatment of emancipated slaves sparked a controversy that would last more than twenty years. France, lacking Britain's naval strength, could not rely on similar numbers of "recaptives" to provide its colonies with labourers and soldiers. In the 1820s, French authorities came up with an alternative solution: the government would buy captives from African chiefs, emancipate them, and deport them to French colonies as indentured labourers. As France knew that her policy of "redemption" ("rachat") was likely to contravene both her

51 Ibid., 625-626.

52 Ibid., 626-627. It should be noted that this assessment might however be questionable, coming from Joze Mozambique's master.

53 Ibid., 613 and 618. The commissioners' report does not provide any information on their subsequent fate.

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own legislation for the suppression of the slave trade and the bilateral treaties signed with Britain, she had taken a number of formal precautions. For instance, the French government would only act through foreign intermediaries, who were specifically asked not to transport the slaves bought from African rulers by sea, instead only by land and on internal waters. More characteristically of France's formalistic approach, the intermediaries were ordered to draw up "provisional deeds of future liberation" ("acte provisoire de libération à temps") at the location of the exchange, in order to clarify that the persons bought as slaves would not be resold nor re-enslaved in the future.[54] Despite these precautions, the dreaded diplomatic crisis eventually materialized in 1840, with the capture of the French schooner *Sénégambie*. Under a contract signed with the French authorities in Senegal, the owner of the *Sénégambie* had agreed to provide the colony with "one hundred indentured Blacks intended to form a company of military pioneers at Cayenne" ("cent Noirs, engagés à temps, destinés à former à Cayenne une Compagnie de Pionniers militaires"). In turn, the French authorities had agreed to provide a warship as an escort to the *Sénégambie* from the location where the Africans had been bought to the place where they were to be disembarked. Before they were to disembark, a government official was to draw up deeds of manumission.[55] After entering Gorée with a first shipment of Africans bought in Bissau, the *Sénégambie* embarked on a second voyage. Having called at the port of Bathurst, the main British colony in the Gambia, she was seized by a British cruiser as a slave trader.[56] The owner of the *Sénégambie* was brought before a grand jury at Bathurst and indicted for slave trading.[57] The ship and its crew were transferred to Freetown, and tried by the local British courts.[58] The Vice-Admiralty Court at Freetown decided to condemn the *Sénégambie* as a ship

54 Flory, supra note 3, 39-40.

55 Marché pour le rachat de cent Noirs destinés pour Cayenne, 21 October 1839, 20 BPP: Slave Trade (1841), Class C, 6-7.

56 Messrs. Forster and Smith to Viscount Palmerston, 9 May 1840, 20 BPP: Slave Trade (1841), Class C, 1-2.

57 Regina v. Marbeau, 13 February 1840, 20 BPP: Slave Trade (1841), Class C, 19. After he was formally indicted before the local Court of Session, Marbeau chose to ignore the summons issued by the British authorities in the Gambia. He left the colony and resumed executing his contract with the French government. Flory, supra note 3, 39-40.

58 The French authorities tried to challenge the British courts' jurisdiction by invoking the Anglo-French treaties of 1831 and 1833 which declared that slave ships should be judged by the flag state. M. Dagorme to Lieutenant-Governor Ingram, 14 February 1840, 20 BPP: Slave Trade (1841), Class C, 13-14. The British govern-

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fitted for the slave trade.[59] As for the crew, they were handed one-month prison sentences by the local Court of Session.[60] The discussions before all three courts essentially focused on the treatment given to the "redeemed" slaves. In order to distinguish the latter from victims of the slave trade, the French authorities had ordered their contractor to provide the indentured Africans with a certain standard of treatment. As a result he was prohibited from chaining them up,[61] and legally bound to provide them with European-style clothes and the native soldier's food ration.[62] In their statements, several of the accused stressed that the "redeemed" Africans, not being in chains, had been free to move about the ship.[63] The court at Bathurst expressly rebutted this argument. Not only did the French policy of "redemption" openly run counter to the letter of British domestic legislation, which outlawed any act of buying slaves, even with the intention of freeing them; it was also manifest that it was ultimately based on coercion. For the court, this was apparent in two ways. In a more general sense, French authorities had made no mention of the captives' prior consent to their serving as indentured labourers at Cayenne. More specifically, with regard to the Africans' treatment on board the ship, the court noted that the French navy had provided the *Sénégambie* with a code of signals that included a flag to be hoisted in the event of a passenger revolt. In the judges' opinion, this treatment was impossible to distinguish from that inflicted on victims of the slave trade, as they concluded that "Such compulsory employment of persons bought at a price for the purposes of labour [constituted], to the best of our judgment, an act of slavery".[64]

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ment rebutted this argument, since the 1831 and 1833 treaties did not question the signatories' competence to seize and judge slavers found within their respective internal waters. "Acting Lieutenant-Governor Ingram to Governor Dagorme", 17 February 1840, ibid., 15.

59 Vice Admiralty Court of Sierra Leone, 4 March 1840, 20 BPP: Slave Trade (1841), Class C, 31-32.

60 Memorandum containing an abstract of the communication from the Colonial Department on the case of the French schooner 'Sénégambie', 10 June 1840, 20 BPP: Slave Trade (1841), Class C, 39.

61 Flory, supra note 3, 41.

62 Supra note 55.

63 See in particular the witness statement by Sénégal, the captain of the Sénégambie. When asked by the court how the redeemed slaves were treated on board his ship, he declared that they "were not ironed or handcuffed when they came on board, or in any way treated as slaves; they had as much liberty on board as he". The Queen v. Marbeau, 10 February 1840, 20 BPP: Slave Trade (1841), Class C, 17.

64 Regina v. Marbeau, 13 February 1840, 20 BPP: Slave Trade (1841), Class C, 19.

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The Foreign Office endorsed this analysis. In a letter addressed to French Prime Minister Adolphe Thiers, the British ambassador to France stressed that the main reason why France and Great Britain were fighting the slave trade was that

> [i]t is an unjustifiable cruelty to seize the natives of Africa, and to carry them away by force from their own country to other parts of the world, in order there to make them perform labour and engage in occupations not of their own choice.[65]

Therefore, hiring "redeemed" slaves against their will was nothing but another form of the slave trade, since

> [t]hese negroes do not enlist, of their own accord, into the French service, but are handed over to the French Authorities by force; they are to be kept down by force during the voyage, and instead of being free agents, when they arrive at the end of their voyage, they are then to be compelled by force to labour. The condition, therefore, of these negroes, notwithstanding the pretended certificate of emancipation, is in all respects that of slavery.[66]

None of the July Monarchy's successive governments endorsed Britain's views on the forcible deportation of "redeemed" slaves: although they somewhat reduced the amount of slaves that were purchased and subsequently freed by France (especially in the vicinity of British colonies), they persistently refused to assimilate "redemption" to the slave trade.[67] France's position would only change with the advent of the second French Republic in 1848, when France's leading abolitionist politician, Victor Schœlcher (1804-1893), became Under-Secretary of the Navy. Schœlcher not only declared that slave "redemption" was counterproductive as it encouraged the slave trade within Africa, but also that it was tantamount to a temporary form of slavery.[68] As a result, the abolitionist decree of 27 April 1848, authored by Schœlcher, abolished both colonial chattel slavery and "the system of temporary indentures established in Senegal" ("le système d'engagement à temps établi au Sénégal").[69]

65 Lord Granville to M. Thiers, 16 June 1840, 20 BPP: Slave Trade (1841), Class C, 19.
66 Ibid.
67 Flory, supra note 3, 43-45.
68 Ibid., 44.
69 Décret relatif à l'abolition de l'Esclavage dans les Colonies et Possessions françaises, 27 April 1848, Bulletin des lois, ser. 10, vol. 1, p. 321, Article 2.

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However, as subsequent French governments refused to enforce the abolition of slave "redemption",[70] anti-slavery courts were soon confronted with the question of determining whether a state whose domestic law no longer recognized slavery as a legal institution could nevertheless be found in violation of international treaties against the slave trade.

III. The preeminence of treatment over legal abolition

One might have expected that mutual accusations of trading in slaves between European nations would have ceased after most of them had erased the institution of slavery from their domestic legislations. As a matter of fact, in as early as 1839 the Anglo-Portuguese Mixed Commission at Freetown had briefly raised this question in an *obiter dictum* without providing an answer.[71] Subsequent international practice would show that an abolitionist country could very well be accused of trading in slaves. Indeed, accusations of slave trading made during two prominent cases involving French ships would eventually persuade France to replace her practice of forcibly recruiting African labourers for deportation overseas,[72] by a policy

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70 Even the Second French Republic (1848-1852) put an entire end to the policy of immigration by "redemption". The Second French Empire (1852-1870) resumed this policy on a massive scale after 1857, before negotiating treaties with Great Britain for the immigration of Indian coolies in 1860 and in 1861. Flory, supra note 3, 44-45, 59-81.

71 In December 1838, the Portuguese schooner Aurelia Feliz was captured by the Royal Navy as a slaver because it carried a young boy bought on the island of Bolama, in present-day Guinea-Bissau, which was at that time disputed between Great Britain and Portugal. The Mixed Commission at Freetown, before releasing the ship on the ground that the young slave was employed on board as a cabin-boy, and had therefore not been shipped "for the purposes of the traffic", noted that it was "unnecessary to enter upon the questions, whether the Island of Bulama [sic] be British or Portuguese territory, or whether we can presume the possibility of any person existing in a state of slavery whilst under the nominal protection of British law". Report of the case of the Portuguese Schooner Aurelia Feliz, Manoel de Jesus Silva, Master, 14 February 1839, 18 BPP – Slave Trade (1840), Class A, 98-99 (emphasis added).

72 Based on a decree of 1852, the French system for the recruitment of African labourers theoretically ensured that government officials verify the consent of the indentured African emigrants and their humane treatment on board the ships that carried them to the Americas. France, Décret sur l'émigration d'Europe et hors d'Europe à destination des Colonies françaises, 27 March 1852, Bulletin des lois, ser. 10, vol. 9, 1018, in particular Article 8. In practice, the emigrants' consent was often doubtful, since they were either "redeemed" slaves or had been encour-

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of voluntary Asian immigration regulated in such a way as to ensure the humane treatment of the workers concerned.[73] Although these cases did not result in trials, they saw the use of evidence similar to that of the *Uniao* and *Sénégambie* cases (A). In 1872-1875, Japan used the *Maria Luz* case to show that the international legal notion of slavery could also be used for the suppression of practices relating to the exploitation of indentured workers that were not Africans (B).

A. *Even an abolitionist state can be found guilty of treating people as slaves: the Regina Cœli and Charles-et-Georges cases (1857-1858)*

The first case that attracted international attention to the French labour recruitment system in Africa was that of the *Regina Cœli*.[74] In April 1858, the French consul at Monrovia had requested the assistance of his British homologue in order to recapture the *Regina Cœli*, a French ship whose passengers, all of which were "emigrants" recruited on the coast of Liberia, had revolted against the crew, slaughtering almost everyone. The mission was entrusted to a captain of the British mail steamer *Ethiope*, who ensured the peaceful surrender of the "pirates".[75] The British authorities soon discovered the reasons behind the revolt: most of the 170 passengers had been bought as slaves; only a minority had embarked of their own free will as labourers bound for the French colony of Réunion; all of them, "redeemed" slaves and free labourers alike, had been put into chains immediately after embarking (their wrists and ankles still bore the marks of this treatment).[76] Once it had been towed back to Monrovia, the *Regina Cœli* was handed over to a Liberian Admiralty Court for adjudication of its salvage.[77] Rather than risking a discussion of the circumstances of the capture, France decided to put an end to the procedure by having one of its warships illegally secure the vessel. Liberia's president solemnly protested this unilateral action, adding that the French ship had been guilty of trad-

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aged to board the emigration ships under false pretenses. As for the conditions on board these ships, they resulted in a mortality rate almost as high as that observed during the final years of the legal slave trade. Flory, supra note 3, 151-214, 241.

73 Ibid., 68-103.

74 For the facts at hand and the parties' arguments, see 49 BFSP (1858-1859), 1011-1014, 1019-1024.

75 Consul Campbell to the Earl of Malmesbury, 30 April 1858. Ibid,. 1022-1024.

76 Mr. Croft to Consul Newnham, 15 April 1858, ibid., 1011-1014.

77 Mr. Moore to Consul Newnham, undated, ibid., 1022.

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ing in slaves.[78] Several months earlier, the French Minister of Foreign Affairs, who was aware that his country might face this kind of accusation, had already denied all British accounts of Africans having been put in chains and mistreated on board the *Regina Cœli*.[79]

From December 1857 to October 1858, a second case, that of the *Charles-et-Georges*, almost resulted in a war between France and Portugal.[80] The facts at hand closely resembled those of the *Regina Cœli* case. The *Charles-et-Georges* had received written instructions by French authorities to sail to Mozambique, where she was to embark African indentured workers bound for the island of Réunion. The Portuguese authorities in Mozambique had marked their disapproval of this venture. The *Charles-et-Georges* moved off the colony, but subsequently re-appeared at another point of the coast, where it embarked 110 Africans. The Portuguese governor-general, who had expected such a move, had the ship seized and appointed a commission to investigate the circumstances which had given rise to the capture.[81] In its report, the commission not only addressed the ship's equipment, which it held to be that of a slave ship, but also the condition of the Africans found aboard it. While it recognized that none of the Africans had been found imprisoned, it immediately added that "this was owing to the greater part being old men and children". All declared that they had been sold and forced to embark against their will. As an additional formal criterion, it was also noted that the captain had not been able to present passports or labour contracts for his passengers. From these facts, the commission concluded that the *Charles-et-Georges* had been in violation of the Portuguese decree of 10 December 1836 against the slave trade.[82] The Governor-general decided to transfer the case to the local court which confirmed the commission's report and condemned the vessel and her captain, while the remaining crew members were released, together with the French government official found aboard the ship.[83] The French government was infuriated by this decision, even though the Por-

78 Message of the President of Liberia, on the Opening of the Legislature, 9 December 1858, ibid., 81-82.

79 Earl Cowley to the Earl of Malmesbury, 22 June 1858, ibid., 1040.

80 For a rather complete account of the case, see, 49 BFSP (1858-1859), 599-697.

81 Mr. Howard to the Earl of Clarendon, 17 February 1858, ibid., 600-602.

82 Report of the Commission appointed by the Governor-general of Mozambique to investigate the circumstances under which the French barque Charles-et-Georges was captured on the coast of Quitangonha by the Portuguese man-of-war Zambesi, 1 December 1857, ibid., 617-619.

83 Sentence, 8 March 1858, ibid., 630-632.

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tuguese had made it clear that the French official was not to blame in any way. For France, condemning a ship with a French state agent on board as a slaver was all the more intolerable as it implied that an abolitionist government could in fact be accused of slavery.[84] When the owners of the *Charles-et-Georges* appealed the decision of the Mozambique court before the Court of *Relaçao* in Lisbon,[85] France demanded the ship's immediate release,[86] and backed up its demand by sending a naval squadron into the Tagus estuary.[87] Confronted with the threat of having their capital subjected to naval bombardment, the Portuguese government eventually gave in, handing over the vessel and her captain to the French authorities.[88] The case of the *Charles-et-Georges* sparked considerable unease amongst other European governments[89] and international law scholars such as Paul Pradier-Fodéré (1827-1904).[90] Napoleon III himself concluded from it that the forced recruitment of Africans, which was impossible to distinguish

84 In a note of 14 September 1858 addressed to the Portuguese prime minister, the French ambassador stressed that the Charles-et-Georges had operated with the assent of the French government and under the supervision of a French government agent. As this "[excluded] the very possibility of accusing, or even suspecting, [the ship of having committed an act of] slave trading, the Government of the Emperor [could] not tolerate that the Charles-et-Georges be considered a slaver and judged accordingly". ("[C]es actes incontestables émanés d'une autorité française [excluaient] jusqu'à la possibilité d'une accusation ou même d'un soupçon de traite, le Gouvernement de l'Empereur n'admet pas que le Charles-et-Georges ait put être considéré et jugé comme négrier"). The Marquis de Lisle to the Marquis de Loulé, 14 September 1858, ibid., 627.

85 Mr. Howard to the Earl of Malmesbury, 16 August 1858, ibid., 610.

86 Earl Cowley to the Earl of Malmesbury, 2 October 1858, ibid., 624.

87 Mr. Howard to the Earl of Malmesbury, 4 October 1858, ibid., 642.

88 Extract from the Diario do Governo, 25 October 1858, ibid., 682-684.

89 As noted by H. F. Howard, the British ambassador to Portugal, "the conduct pursued by the French Government in sending a squadron here to intimidate the Portuguese Government, before even the answer of the latter had been taken into consideration, is very generally blamed by the foreign diplomatists here, and more particularly by the Representatives of the weaker Powers". Mr. Howard to the Earl of Malmesbury, 8 October 1858, ibid., 656.

90 Pradier-Fodéré, who authored the 19th century's most comprehensive French-language manual of international law, deplored that the question whether the Charles-et-Georges was indeed a slaver (which, in his eyes, was a perfectly legitimate one) had not been "resolved according to principles, but […] settled by force, as is all too often the case when a weak state is in conflict with a powerful state" ("résolue d'après les principes, mais […] tranchée par la force, comme cela n'a lieu que trop souvent, lorsqu'un État faible se trouve en conflit avec un État fort"). P. Pradier-Fodéré, Droit international public européen et américain, vol. 5 (1891), 1065-1067.

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from the slave trade, and, therefore, "[contrary] to progress, humanity, and civilization", should be replaced by "free Indian coolie labour".[91] Less than three years later, France abandoned her policy of "redemption" by signing a treaty with Britain allowing her to recruit Indian contractual workers[92] for all of her colonies.[93]

91 In a letter to his cousin Prince Jérôme, Louis-Napoléon Bonaparte explained his policy change as follows: "I demanded that Portugal restitute the Charles-et-Georges, because I will always maintain the integrity of the national flag. In regard to this matter, only my deep conviction that I was in my right could persuade me to jeopardize the friendly relations I gladly maintain with the King of Portugal. However, as regards the principle of indenturing blacks, my mind is hardly made up. If, indeed, workers are recruited against their will on the shores of Africa, if this recruitment is nothing but a form of slave trade in disguise, I will not have it, not at any price. For most certainly I shall nowhere encourage any venture contrary to progress, to humanity, to civilization. I therefore urge you to seek out the truth, using the same zeal and intelligence you apply to all matters you deal with. And since the best way of putting an end to these continual causes of conflict would be to replace black labour with free Indian coolie labour, I ask you to come to an understanding with the Ministry of Foreign Affairs in order to resume negotiations with the British government [to that end]". ("J'ai réclamé énergiquement auprès du Portugal la restitution du Charles-et-Georges, parce que je maintiendrai toujours intacte l'indépendance du drapeau national; et il m'a fallu dans cette circonstance, la conviction profonde de mon bon droit pour risquer de rompre avec le Roi du Portugal les relations amicales que je me plais à entretenir avec lui. Mais, quant au principe de l'engagement des noirs, mes idées sont loin d'être fixées. Si, en effet, des travailleurs recrutés sur la côte d'Afrique n'ont pas leur libre arbitre, et si cet enrôlement n'est autre chose qu'une Traite déguisée, je n'en veux à aucun prix. Car ce n'est pas moi qui protégerai nulle part des entreprises contraires au progrès, à l'humanité, et à la civilisation. Je vous prie donc de rechercher la vérité avec le zèle et l'intelligence que vous apportez à toutes les affaires dont vous vous occupez; et comme la meilleure manière de mettre un terme à des causes continuelles de conflit serait de substituer le travail libre des coolies de l'Inde à celui des nègres, je vous invite à vous entendre avec le Ministre des Affaires Étrangères, pour reprendre, avec le Gouvernement Anglais, les négociations [en ce sens]"). "The Emperor to his Imperial Highness the Prince in charge of the Ministry of Algeria and the Colonies", 30 October 1858, Le Moniteur universel du soir, 8 November 1858.

92 Convention relative to the Emigration of Labourers from India to the French Colonies (France, Great Britain), signed at Paris on 1 July 1861, 51 BFSP (1860-1861), 35. The treaty was followed by a unilateral declaration in which Napoleon III, abandoning his former reference to the consent of workers in favour of a purely formalistic criterion, underscored that France's former policy of "redeeming" slaves had not been, in fact, tantamount to trading in slaves: "It should be recognized that his form of recruitment is entirely different from the slave trade; as a matter of fact, whereas the [slave trade] originated and resulted in

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However, replacing African migrant workers with Asians did not put an end to the question of whether some of these non-European workers were subjected to a treatment prohibited under international legal rules against the slave trade.

B. Toward freedom from slavery as a universal human right: the Maria Luz case (1872-1875)

The Anglo-French convention of 1861, with her detailed regulations on workers' consent,[94] conditions of transportation,[95] and working conditions,[96] did everything to ensure that Indian coolies would not be subject-

slavery, [slave "redemption"], on the contrary, leads to freedom. The negro slave, once he becomes an indentured labourer, is free, and not bound by any obligations save those contained within his contract. However, doubts have been raised about the consequences that these indentures might have upon the African populations. It was asked whether the price paid for redemption did not in fact encourage slavery. […] We must [now] find in India, in the French possessions of Africa, and in those lands where slavery is prohibited, all the free workers that we need." ("Ce mode de recrutement, il faut le reconnaître, diffère complètement de la Traite; en effet, tandis que celle-ci avait pour origine et pour but l'esclavage, celui-là, au contraire, conduit à la liberté. Le nègre esclave, une fois engagé comme travailleur, est libre, et n'est tenu à d'autres obligations que celles qui résultent de son contrat. Toutefois, des doutes se sont élevés quant aux conséquences que ces engagements peuvent avoir sur les populations Africaines. On s'est demandé si le prix de rachat ne constituait pas une prime à l'esclavage. […] Nous devons [désormais] trouver dans l'Inde, dans les possessions françaises de l'Afrique, et dans les contrées où l'esclavage est proscrit, tous les travailleurs libres dont nous avons besoin"). "The Emperor of the French to the Minister of Marine and of the Colonies", 1 July 1861, ibid., 48.

93 One year before, the two powers had already signed a similar convention restricted to workers bound for the island of Réunion: Convention relative to the Emigration of Labourers from India to the Colony of Réunion (France, Great Britain), signed at Paris on 25 July 1860, 50 BFSP (1859-1860), 86.

94 Article 6 of the treaty bound the parties to ensure that the emigrant "that his engagement is voluntary, that he has a perfect knowledge of the nature of his contract, of the place of his destination, of the probable length of his voyage, and of the different advantages connected with his engagement". Moreover, Article 9 limited the duration of the contracts to five years, supra note 92.

95 Pursuant to the treaty of 1861, emigrants were entitled to clothes and a double blanket in winter (Article 13), access to a "European surgeon" and an interpreter (Article 14). The size of their cabins was also regulated (Article 15). Ibid.

96 Thus, the working time was limited to nine hours and a half day over six days a week (Article 10), ibid.

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ed to a treatment which international and domestic courts had identified as a characteristic of slavery. Other agreements relating to Asian migrant workers contained comparable provisions.[97] As early as the 1840s, the practice of recruiting Asian workers on long-term indentures in order to ship them off to the Mascarene Islands, Africa, and the Americas, had sometimes been described as "coolie trade".[98] Scholars regularly raised the question whether it could degenerate into slavery.[99] Elements of state practice confirmed that the boundaries between slave labour and coolie labour may be fleeting: thus, during the US Civil War, Congress had passed a bill prohibiting the "coolie trade",[100] using the same wording the US Constitu-

97 Great Britain concluded another treaty for the regulated emigration of Indian workers with the Netherlands: Convention relative to the emigration of labourers from India to the Dutch Colony of Surinam (Great Britain, Netherlands), signed at the Hague on 8 September 1870, 60 BFSP (1869-1870), 22. The end of the 1870s also saw the conclusion of conventions regulating the emigration of Chinese workers: Convention for regulating the emigration of Chinese subjects to Cuba (China, Spain), signed at Peking on 6 December 1878, 69 BFSP (1877-1878), 362; Treaty for the Regulation of Chinese immigration into the United States (China, United States), signed at Peking on 17 November 1880, 71 BFSP (1879-1880), 103. Hawaii also concluded two conventions guaranteeing the individual freedom and good treatment of immigrants from Japan and Portuguese colonies: Convention for regulating, temporarily, commercial relations and emigration (Hawaii, Portugal), signed at Lisbon on 5 May 1882, 73 BFSP (1881-1882), 561; Convention respecting Emigration (Hawaii, Japan), signed à Tokyo on 28 January 1886, 77 BFSP (1885-1886), 941.

98 See in particular F. M. Farley, The Chinese Coolie Trade 1845-1875, 3 Journal of Asian and African Studies (1968), 1, 257-270, and H. Tinker, A New System of Slavery: The Export of Indian Labour Overseas 1830-1920, 2nd ed. (1993).

99 In a first phase, critics of the "coolie trade" focused on recruitment and transportation conditions. At the end of the 19th century, it was the coolies' labour conditions that persuaded prominent figures like Victor Schœlcher and Paul Leroy-Beaulieu (1843-1916) to brand it as a form of slavery. J. Weber, L'émigration indienne à la Réunion: 'contraire à la morale' ou 'utile à l'humanité'? (1829-1860), in E. Maestri (ed.), Esclavage et abolitions dans l'océan Indien (1723-1860) (2006), 327-328.

100 Act to Prohibit the 'Coolie Trade' by American Citizens in American Vessels, 18 February 1862, 68 BFSP (1876-1877), 441-443. Pursuant to this Act, "no citizen or citizens of the United States, or foreigner coming into or residing within the same, shall for himself or for any other person whatsoever, either as master, factor, owner, or otherwise, build, equip, load, or otherwise prepare any ship or vessel, or any steam-ship or steam-vessel, registered, enrolled, or licensed, in the United States, or any port within the same, for the purpose of procuring from China, or from any port or place therein, or from any other port or place, the

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tion had used to refer to slaves.[101] The realization that the use of Asian migrant labour might lead to new forms of slavery called for a reform of the international legal vocabulary against slavery, which since the 1815 Vienna Declaration had been largely focused on the suppression of the "trade in African negroes" ("la traite des nègres d'Afrique").[102] In 1879, the German legal scholar Carl Gareis (1844-1923) took up this challenge by sketching out a broader theoretical framework for international antislavery law.[103] For Gareis, the transatlantic slave trade and the worst forms of coolie trade were both particular manifestations of the slave trade (*Sklavenhandel*), a term which he suggested be replaced by the more universalist "trade in human beings" (*Menschenhandel*).[104] Although Gareis himself believed that his conception of slavery did not entirely correspond to 19th century positive international law,[105] the outcome of a recent dispute between Japan and Peru proved that his views were, on the contrary, validated by elements of state practice.

On 10 July 1872,[106] the Peruvian bark *Maria Luz*, while engaged in the transportation of Chinese coolies from the Portuguese colony of Macao to Peru, had pulled into the port of Yokohama under stress of weather.[107] After one of the coolies had jumped overboard and sought refuge on a British warship, the British *chargé d'affaires* decided to make an unofficial inquiry into conditions on board the *Maria Luz*. Having found that the coolies were showing signs of ill-treatment, he requested the Japanese au-

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inhabitants or subjects of China, known as 'coolies,' to be transported to any foreign country, port, or place whatever, to be disposed of, or sold, or transferred, for any term of years or for any time whatever, as servants or apprentices, or to be held to service or labour" (emphasis added).

101 United States, Constitution, signed at Philadelphia on 17 September 1787, Article IV, Sect. 2, paragraph 3: "No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due" (emphasis added).

102 Déclaration des Puissances sur l'abolition de la traite des Nègres (Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, Sweden-Norway), signed at Vienna on 8 February 1815, 3 BFSP (1815-1816), 971-972.

103 C. Gareis, Das heutige Völkerrecht und der Menschenhandel (1879).

104 Ibid., 5-8.

105 Ibid., 26-34.

106 In the Sabansho, before his Excellency Oye Tak, Governor, this day, 18 September 1872, Foreign Relations of the United States (hereafter FRUS), 1873-1874, vol. 1, 544.

107 Mr. Watson to Soyeshima Tane-omi, 3 August 1872, ibid., 529.

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thorities to detain the ship and interrogate the crew.[108] The request was granted, and the Chinese passengers were brought ashore.[109] Since they did not want to return on board, and the Japanese authorities refused to force them back, the ship's captain sued them individually for breach of contract before a local judge at Kanagawa.[110]

As in earlier proceedings dealing with African indentured labourers, discussions before the Kanagawa court largely focused on the passengers' treatment, including their informed consent to their contracts, rather than simply acknowledging their status as free individuals under Peruvian law (Peru had formally abolished slavery in 1854[111]). The claimant's version was, in substance, that the Chinese had embarked by their own free will after signing valid contracts whose terms they had fully understood.[112] Their accommodation and food were allegedly better than those of the crew.[113] All had been happy before entering Japanese waters; none had been flogged or chained up, except those guilty of disciplinary offences.[114] These declarations contrasted with those made by the coolies themselves,[115] a Chinese doctor,[116] and the British *chargé d'affaires*.[117] Even the claimant's account contained enough contradictions to make it seem

108 Ibid., 530.

109 Mr. De Long to Mr. Fish, 3 September 1872, ibid., 524-525.

110 For a copy of the court proceedings and judgment in the matter of Heriero vs. Chinese (sic): supra note 106, 533-553.

111 Peru, Decreto de la Abolición de la Esclavitud, 3 December 1854, available at http://www.ensayistas.org/antologia/XIXE/castelar/esclavitud/peru.htm (last visited on 29 September 2018).

112 Supra note 106, 535-536.

113 Ibid., 539.

114 Ibid., 535.

115 Several of the coolies mentioned that food was insufficient and that they had been beaten. In addition, "Coolie No. 8" said that the captain had ordered him to beat "Coolie No. 5" with a stick, and that he had been "forced to sign [his own indenture] by a foreigner". "Translation from Japanese minutes of visit to ship, return, and report of Hayoshi Gontenji and Geo. Hill", 15 August 1872, FRUS, 1873-1874, vol. 1, 594-595.

116 The doctor, Chum Ping Him, stated that those who had revolted against the captain had been "beaten very hard with rattans, and then with a bull's hide". Generally, he thought that the coolies "would be better off in their villages than on the ship, as they would be free and not confined", supra note 106, 542-543.

117 During his short visit aboard the Maria Luz, the British chargé d'affaires in Japan, R. G. Watson, had "found many of the coolies debilitated, emaciated, and suffering, and all apparently in a very melancholy and unhappy condition". He took measurements of their space, and found it to be too small. He also "observed marks about the legs of the men and scrofulous marks", ibid., 543-544.

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rather dubious. Thus, the captain recognized that he had embarked twelve boys, taken from their parents in exchange for money. He added that he had done this in his personal capacity, since the charter-party disapproved of this practice.[118] He also confessed that those flogged and chained had been punished either for secretly selling tea to the other passengers (which called into question his earlier declaration that passengers had permanent access to tea),[119] or for conspiring twice to "make a revolution on board".[120] Worse still, several members of the crew recognized that three passengers had committed suicide by jumping overboard and that others had collected straw to set fire to the ship.[121] In its judgment, the court at Kanagawa dismissed the captain's claim. Its essential holding was that the long-term indentures signed by the coolies of the *Maria Luz* had effectively reduced them, "[s]ubstantially", to the "practical status" of "slavery", as they could be assigned from one employer to another against their will, and had been left ignorant of the law that would govern their indentures (as had the court). Thus, enforcing these contracts – which, in any case, had been rendered void by the abuse later inflicted upon the coolies – would have been contrary to Japanese public policy.[122]

Peru, infuriated by this decision, sent a plenipotentiary to Japan, entrusting him with the mission to obtain reparations before establishing formal treaty relations between both countries.[123] According to the Peruvian minister, the Kanagawa court had lacked impartiality in assessing the coolies' condition: far from being a new form of the slave trade, the "so-called coolie trade" was in fact "nothing else but the free and spontaneous emigration of a very small part of the exuberant population of the celestial empire, which is frequently subject to the horrors of hunger, wars, and pestilence, unavoidable among so an immense an accumulation of people". Their attempts to escape from the ship had merely been caused by "the *ennui* which life on board always causes to those who are not accustomed to it". In any case, the passengers of the *Maria Luz* were no slaves, as "slaves [could] not exist" in abolitionist Peru.[124] The Japanese Minister of Foreign Affairs gave a biting reply to these arguments. He clarified that his govern-

118 Ibid., 537.
119 Ibid., 536-537.
120 Ibid., 537.
121 Ibid., 539-542.
122 Ibid., 548-552.
123 Mr. De Long to Mr. Fish, 9 March 1873, FRUS, 1873-1874, vol. 1, 572-582.
124 Minister of Peru to Minister of Foreign Affairs, 31 March 1873, FRUS, 1873-1874, vol. 1, 586-594.

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ment's inquiry into the situation on board the *Maria Luz* had been triggered by "the beating, maiming, and imprisonment of persons whom to the last hour, Captain Heriera designated as passengers". Quoting extensively from the accounts made by individual coolies (whom he referred to by their names, rather than assigning them a number), he concluded that "[i]t was unmistakably shown that [they] were dissatisfied with their treatment, and alarmed about the prospects for their future". He reminded the Peruvian minister that they had been preparing "to sacrifice their lives by setting fire to their ship at sea", hardly a usual occupation for "free passengers" plagued by *ennui*. In any case, for Japan, it was out of the question to "drive them outside of the protection to which they were entitled […] by the laws of humanity […]".[125]

Japan and Peru eventually agreed to refer the matter to the arbitration of the Russian Czar, who ruled in favour of Japan.[126] Although the arbitrator did not specify the reasons for his decision, prominent legal scholars of the period acknowledged the award as an important legal development, especially with regard to the notion of public policy in private international law.[127] In my view, the *Maria Luz* case should also be seen as an early attempt to extend the international fight against slavery and the slave trade; so as to encompass the worst forms of unfree labour, even those practiced by states that no longer recognized slavery as a legal institution, and, irrespective of the origins of its victims. As a matter of fact, in his 1883 international law manual, the presumed author of the Russian award of 1875, Fyodor Martens (1845-1909),[128] gave a very broad definition of slavery in international law. In his view, slavery was first and foremost a question relating to "human rights" (*droits de l'homme*), because "[all] civilized states agree that man is a person" ("[tous] les États civilisés s'accordent sur ce point que l'homme est une personne"), endowed with "imprescriptible rights [which states] must respect in their relations with each other" ("des droits imprescriptibles [que les États] doivent respecter dans leurs relations

125 Mr. De Long to Mr. Fish, 19 June 1873, FRUS, 1873-1874, vol. 1, 607-616.

126 For the two protocols signed by the parties on 19 and 25 June 1873, as well as the award of the Russian Czar, given on 17 (29) May 1873: H. La Fontaine, Pasicrisie internationale (1902), no. LIX, 197-199.

127 See in particular L. Strisower, Affaire des navires Creole et autres: note doctrinale, in A. La Pradelle, N. Politis (eds.), Recueil des Arbitrages Internationaux, vol. 1 (1905), 706. Several manuals also mentioned the case: A. Rivier, Principes du droit des gens, vol. 1 (1896), 150-151. H. Bonfils, P. Fauchille, Manuel de droit international public (1914), 667.

128 C. G. Roelofsen, International Arbitration and Courts, in B. Fassbender, A. Peters, The Oxford Handbook of the History of International Law (2012), 163-164.

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réciproques").[129] Thus, fighting slavery did not merely mean to abolish it as a legal status, but to guarantee "the absolute respect of the human person" ("le respect absolu de la personne humaine"), which had now become the "guiding principle for European nations in their external relations" ("le principe dirigeant des nations européennes dans leurs relations extérieures").[130] However, it would take Western states another 65 years to formally recognize this principle, by proclaiming the international human right to freedom from slavery.[131]

129 F. de Martens, Traité de droit international (1883), 428.

130 Ibid., 430.

131 Pursuant to Article 4 of the Universal Declaration of Human Rights, 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.' Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly on 10 December 1948, A/RES/3/217A.

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