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The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law

Patricia M. Muhammad Esq

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THE TRANS-ATLANTIC SLAVE TRADE: A FORGOTTEN CRIME AGAINST HUMANITY AS DEFINED BY INTERNATIONAL LAW

PATRICIA M. MUHAMMAD, ESQ.*

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* J.D., 2000, University of Baltimore School of Law, B.S.; 1996, Morgan State University. I would like to give a special note of appreciation to Professor Michael Meyerson, who encouraged me to express my views in a scholarly manner, and to Professor Higginbotham for all of his assistance in making this article a reality. This is for my parents Ethel M. Stewart and James E. O'Neal, Jr., and to my Godfather James Longus, Jr., for his unconditional love and support.

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This essay examines the Trans-Atlantic slave trade with a particular focus on its legal, financial, and governmental aspects. The author argues that despite the brutal treatment that slaves endured, including death, the international community could not resist the economic possibilities of participation in the slave trade. In so arguing, the author discusses the historical beginnings of the Trans-Atlantic slave trade, and the involvement of many nation-states in the implementation of guidelines, statutes, contracts, and treaties authorizing the unprecedented exploitation of African peoples. The author concludes that the exploitation of Africans through the Trans-Atlantic slave trade constituted an international crime against humanity.

INTRODUCTION

(One More River To Cross)
before I reach my journey's end
(One more river to cross)
Before I'll be free from sin
(One more mountain to climb)
before I finish this race
(One more river to cross)
before I see my savior's face
(One more river to cross)
Before I'll be free from fear
(One more river to cross)
before I'll be through shedding tears
(One more mountain to climb)

before I'll be with the blessed
 (One more river to cross)
 before I'll take my, my rest
 and I've got a one more river
 I've got a one more river
 I've got one more mountain before I take my, my rest
 (One more river to cross)
 Every burden's that down here, they all just one more One more
 river, trials is a one more river
 Disappointments, is a one more mountain
 before I can take my rest
 (One more river to cross)¹

The Soul Stirrers did not record the song entitled "One More River" until the year 1955, yet the lyrics capture much of the fear and agony that slaves experienced during the Trans-Atlantic slave trade.² The "river" the slaves crossed was not a river, but the Atlantic Ocean. Many who began this journey across the Atlantic Ocean were not successful, and died before reaching the Western Hemisphere.³

For those African slaves who survived the passage, nearly every aspect of the crossing was horrendous. Whether captured into the Trans-Saharan slave trade or the Trans-Atlantic slave trade, all slaves were subjected to unimaginable agonies.⁴ This essay examines the

1. SAM COOKE WITH THE SOUL STIRRERS, *One More River*, on THE COMPLETE RECORDINGS OF SAM COOKE WITH THE SOUL STIRRERS (Universal Recording Studios 1955).

2. See THOMAS P. FENNER, *Preface to Music of CABIN AND PLANTATION SONGS AS SUNG BY THE HAMPTON STUDENTS*, para. 5 (New York, G. P. Putnam's Sons 1877) (theorizing that slave music would rapidly vanish without a composer who could modernize the genre and heal the wounds of those who viewed the hymns as a vestige of slavery). Fenner included the slave hymn, "Oh, Wasn't Dat a Wide Riber," in his 1877 compilation. *Id.* at 194.

3. See David Eltis & David Richardson, *The 'Numbers Game' and Routes to Slavery*, in ROUTES TO SLAVERY: DIRECTION, ETHNICITY AND MORTALITY IN THE TRANSATLANTIC SLAVE TRADE 1, 9 (David Eltis & David Richardson eds., 1997) (stating that new data suggests that at least fifteen percent, or over 1.5 million slaves, died in the crossing). The loss of records and the difficulty in defining the Middle Passage make mortality rates difficult to calculate. *Id.*

4. See Patrick Manning, *The Slave Trade: The Formal Demography of a Global System*, in THE ATLANTIC SLAVE TRADE: EFFECTS ON ECONOMIES, SOCIETIES, AND PEOPLES IN AFRICA, THE AMERICAS, AND EUROPE 117, 117 (Joseph E. Inikori & Stanley L. Engerman eds., 1992) (challenging the tendency to

history of the slave trade and its complex legal status, as supported by legal and historical writings.⁵ Further, this essay contends that under international conventions and statutes, the slave trade was a crime against humanity.⁶

Part I of this essay traces the legal history of the Trans-Atlantic slave trade, tracing its origins in the African Trans-Sahara slave trade.⁷ Part II examines the Europeans' participation in the Trans-Saharan slave trade, specifically the Portuguese explorers, and critiques their practice of bartering with African monarchs for slaves.⁸ Part III analyzes how private contracts, international treaties, licensure, taxation, and other duty requirements on the import of slaves supported the Trans-Atlantic slave trade.⁹ Part IV examines accepted international conventions and statutes and asserts that under these international legal guidelines, nations that participated in the Trans-Atlantic slave trade committed specific crimes against humanity.¹⁰

associate slavery solely with the Americas and noting that millions were condemned to slavery in Africa).

5. See discussion *infra* Part I (discussing slavery's origin in European ideology and the evolution of the Trans-Atlantic slave trade from the Trans-Saharan model).

6. See discussion *infra* Part IV (suggesting that the international community could use the Slavery Conventions and the Rome Statute to declare the Trans-Atlantic slave trade a crime against humanity).

7. See discussion *infra* Part I (explaining the relationship between the Trans-Atlantic slave trade and the African Trans-Saharan slave trade).

8. See discussion *infra* Part II.C (recounting the various formal legal agreements established by European monarchs to finance and receive profits from the slave trade).

9. See discussion *infra* Part II.B (detailing how nations obtained revenue from the slave trade by entering into treaties with other nations, hiring professional slave merchants, and making concessions to acquire monopolies).

10. See discussion *infra* Part IV (arguing that few nations objected to slavery, and that past treaties make states liable for human rights violations that occurred during the slave trade).

I. THE HISTORY OF THE TRANS-ATLANTIC SLAVE TRADE

Historians have not fully addressed the specifics of the Trans-Atlantic slave trade.¹¹ While disagreement exists over the number of slaves transported and slave survival rates,¹² the beginnings of the Trans-Atlantic slave trade are clear.

A. THE JUSTIFICATION OF AFRICAN ENSLAVEMENT

For ethical reasons, France, Great Britain, the Netherlands, Scandinavia, Sweden, Denmark, Germany, and the other governments that authorized the slave trade¹³ adopted an ideology that could justify the forceful enslavement of Africans. European nations clearly had the military superiority to impose bondage on the natives of other countries, especially after Spain defeated the Moors in 1492.¹⁴ However, an ideological justification for using such force ensured unity and consistency.

Thus, in the landmark case *United States v. La Jeune Eugenie*¹⁵ the court found that slaves were incapable of ruling themselves, and

11. See Eltis & Richardson, *supra* note 3, at 1 (suggesting that “[d]espite a major research effort in the last few decades, less is known about the movement of African peoples to the New World than the much smaller movement of their European counterparts before the mid-nineteenth century.”).

12. See Colin A. Palmer, *The Middle Passage*, in CAPTIVE PASSAGE: THE TRANSATLANTIC SLAVE TRADE AND THE MAKING OF THE AMERICAS 53, 54 (Beverly C. McMillan ed., 2002) (declaring that although the exact number of slaves who endured the Middle Passage will never be known, historians estimate that between eleven and thirteen million people survived). This estimated number does not include those people who died while transported overseas or soon after they arrived in the Americas. *Id.*

13. See discussion *infra* Part II.A (detailing the European governments’ involvement in the slave trade).

14. See DAVID COLEMAN, CREATING CHRISTIAN GRANADA: SOCIETY AND RELIGIOUS CULTURE IN AN OLD-WORLD FRONTIER CITY, 1492-1600, at 2-3 (2003) (suggesting that Spain’s stature as an international power and territorial empire culminated in 1492). The conquest of Granada served as the last step in a ten-year military campaign by Christians to re-conquer Muslim Spain. *Id.* at 3.

15. 26 F. Cas. 832 (D. Mass. 1822) (No. 15,1551).

hence needed others, specifically Europeans, to govern them.¹⁶ Some Europeans were appalled to hear that Africans ruled themselves and possessed their own system of government.¹⁷ This disgust was justified by claims that Africans were barbaric and uncivilized. Non-Africans, particularly Europeans, exploited the savage stereotype and justified enslaving Africans based on a religious pretext, therefore in the name of God.¹⁸ However, the basis for this justification was unsound, for the history of ancient Africa demonstrates the complexity of Africa's government and civilization throughout its various empires.¹⁹

Notwithstanding the possibility of a narcissistic motive for enslavement, in reality, Europeans exploited Africans primarily because they believed that the so-called "Indians," "West-Indians," or "Native Americans" were unable to withstand the grueling work of the New World.²⁰ Moreover, Africans were more resistant to disease than their Native American counterparts.²¹

16. *See id.* at 836 (asserting that the slave trade actually benefited slaves, since foreign enslavement saved them from being customarily killed as prisoners of war and the savagery of their own religion).

17. *See* E. W. BOVILL, *THE GOLDEN TRADE OF THE MOORS* 95 (1958) (recounting the disgust of Ibn Battuta, a fourteenth century Muslim traveler to Mali, when he realized that the blacks, whom he had previously known only as slaves, were masters in their own country).

18. *See* HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440 – 1870*, at 147 (1997) (quoting Fray Francisco de la Cruz, a Dominican friar, as telling "the Inquisition in Lima, that an angel had told him that 'the blacks are justly captives by reason of the sins of their forefathers, and that because of that sin God gave them that color'").

19. *See id.* at 62-63 (illustrating the sophistication of the African people through their use of currency; breeding of animals; smelting of iron, steel, and copper; and establishment of cities as large as thirty thousand). In fact, Africans were more advanced than the natives that the Spaniards and Portuguese met in the New World. *Id.* at 63.

20. *See* Edward Reynolds, *Human Commerce*, in *CAPTIVE PASSAGE: THE TRANSATLANTIC TRADE AND THE MAKING OF THE AMERICAS*, *supra* note 12, at 13, 14 (stating that "the punishing work in mines, a form of toil previously unknown to Amerindians, took an often deadly physical toll."). Spanish settlers began advocating the use of African slaves instead of Amerindians, "reporting that in mining operations the work of one African was equal to that of four to eight Indians." *Id.*

21. *See id.* (suggesting that the growing labor needs of Spanish sugar mills, coupled with the high mortality rate of Amerindians from exposure to previously

From the fifteenth to the nineteenth centuries, many European nations participated in,²² and economically benefited from, the commerce in African slaves.²³ In order to understand the Trans-Atlantic Slave trade, however, it is necessary to become acquainted with the Trans-Saharan slave trade, which preceded the Trans-Atlantic slave trade and appears to represent its foundation.²⁴

B. THE TRANS-SAHARAN SLAVE TRADE

The Trans-Saharan slave trade predated the Trans-Atlantic slave trade by several centuries.²⁵ Tribal and cultural wars among the natives of North Africa resulted in Trans-Saharan enslavement, providing a source of slaves and trade routes that would later fuel Trans-Atlantic movement.²⁶ Successful parties in warfare captured

unknown diseases such as smallpox, typhus, measles, and influenza forced the crown to turn towards Africa as a source of slave labor); *see also* THOMAS, *supra* note 18, at 92 (highlighting the resiliency of Africans to disease). Whereas the native Indians declined rapidly from diseases brought over by the European settlers, Africans resisted disease much better. *Id.*

22. *See* JOHANNES POTSMAN, *THE ATLANTIC SLAVE TRADE* 3 (2003) (explaining the fluctuation of slaves from slavehood into society based on territorial expansion, but noting that slave markets thrived in many European societies); *see also* THOMAS, *supra* note 18, at 112-13 (stating that the institution of slavery was not limited to Portugal and Spain, rather slavery also flourished in Italy and Provence).

23. *See* Reynolds, *supra* note 20, at 24-25 (noting that colonial French planters owned few slaves before the growing enterprise of sugar production, which transformed the economies of France's island colonies, and made France the third most active slave trading nation); *see also* THOMAS, *supra* note 18, at 189 (contending that the elaborate "colonial system" of France made slavery inevitable because colonial "children" could not meet the demands of the fatherland for sugar, coffee, and indigo without slave labor).

24. *See* THOMAS, *supra* note 18, at 82-83 (indicating that Africa's slave trade was thriving well before the arrival of European merchants). Europeans discovered the major sources for the Trans-Atlantic slave trade five years prior to Columbus' famous 1492 voyage. *Id.* at 82.

25. *See id.* at 44 (approximating that the Trans-Saharan trade began as early as 1000 B.C. with the use of oxen and carts drawn by horses to transport slaves through the desert).

26. *See* THOMAS, *supra* note 18, at 145 (describing the battle of Tondibi and subsequent disputes, which created a daily increase in available slaves in Africa's interior). *See generally* HERBERT S. KLEIN, *THE ATLANTIC SLAVE TRADE* 103-05 (1999) (arguing that an internal and international slave trade existed in Africa before the arrival of the Europeans, and that often European trading simply deepened pre-existing markets and networks).

and enslaved the members of defeated tribes;²⁷ a policy similar to the Roman Empire's practice of enslaving conquered villagers. Ruling classes also punished subjects for criminal activity by selling them as slaves.²⁸ Oft-times the source of slaves would be based on raiding other African tribes or villages to either conquer the territory of another group of people or as a means of financial support for the individual.²⁹ In other instances, tribal or ethnic groups cast out members of the community and into slavery as a form of excommunication. Thus, although African enslavement originated with the Trans-Saharan slave trade and expanded into the Trans-Atlantic slave trade; in both cases, slave traders arbitrarily captured their victims and treated them as commodities³⁰ to be sold for manual, domestic, or field labor, as if they were another tool necessary for the cultivation of the New World.³¹

27. See KLEIN, *supra* note 26, at 116 (asserting that war often lead to slavery, since the victorious party likely killed only the elite and used captives as domestic slaves locally); see also THOMAS, *supra* note 18, at 132 (noting that slaves became the absolute property of their capturers, who subjected the slaves to death at their own whims). Frei Garcia Simões wrote that "...[a]fter his victories the king [gave] entire villagers over to his subalterns, with the right either to kill or to sell all the inhabitants."). *Id.*

28. See THOMAS, *supra* note 18, at 60 (citing specifically to a Wolof King's habitual use of slavery as "a punishment for even moderate offences"). The Ijo and Itsekiri people managed the Gulf of Benin's slave trading, also selling criminals from their own communities. *Id.* at 73.

29. See *id.* at 58 (stating that a poor African king supported himself by raiding his neighbors and selling his captives).

30. See *id.* at 83 (observing that slaves were quickly inserted into the established commercial network and that "[a]ll the black slaves traded in Portugal, Spain, and Africa were regarded then as just one more form of commodity, and though prized, not as a specially unusual one.").

31. See W. E. BURGHARDT DUBOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA: 1638 - 1870, at 8 (Dover Publications Inc. 1970) (1896) (recounting the argument of the English agent for Georgia settlers in support of slavery, who insisted that "[i]n Spight of all Endeavours to disguise this Point, it is as clear as Light itself, that Negroes are as essentially necessary to the Cultivation of *Georgia*, as Axes, Hoes, or any other Utensil of Agriculture."); see also 1 WILLIAM BACON STEVENS, A HISTORY OF GEORGIA, FROM ITS FIRST DISCOVERY BY EUROPEANS TO THE ADOPTION OF THE PRESENT CONSTITUTION IN MDCCXCVIII 310 (1847) (recounting the vigorous assertion of one South Carolina plantation owner on the success of his plantation through his use of slaves: "Georgia never can or will be a flourishing province without negroes are allowed.").

Slaves were marketed along routes of the Sahara in exchange for items varying from gold to clothing.³² Traders emerged from many areas, and included members of the Songhai and Mali empires,³³ the people of Ghana, and the Berbers of West Africa.³⁴ Additionally, Muslim-Arab merchants contributed to this trade throughout North Africa.³⁵ The Arabs' conquest of North Africa in order to spread the religion of Islam, as well as the development of caravan routes, also supported the Trans-Saharan slave trade.³⁶ The Trans-Saharan slave trade routes extended from the northeastern portion of Africa and continued westward to trade points in Nigeria.³⁷ Thereafter, the route continued into coastal regions, reaching capes in West Africa such as Santiago, Cape Verde, and those of the Senegambia, granting future explorers a coastal gateway to begin the Trans-Atlantic slave trade.³⁸

32. See THOMAS, *supra* note 18, at 73 (contending that the Portuguese traded slaves to Africans for gold ornaments, since they received more in value from this exchange than they would in Portugal).

33. See 2 LEO AFRICANUS, THE HISTORY AND DESCRIPTION OF AFRICA AND THE NOTABLE THINGS THEREIN CONTAINED 309 (Robert Brown ed., John Pory trans., Burt Franklin 1963) (1896) (describing a prince's gift of fifty men and women slaves to a king); see also THOMAS, *supra* note 18, at 42-43 (reiterating the story of this gift as occurring during the sixteenth century, when Songhai emperors engaged in the custom of presenting guests with dozens of slaves). The Mali monarchy also profited from the slave trade. *Id.*

34. See THOMAS, *supra* note 18, at 44 (noting the role Berber merchants played in slave trading, albeit a less important role than their Muslim counterparts).

35. See *id.* (emphasizing the important role Muslim merchants played as slave traders).

36. See *id.* (explaining that "[t]he Arab conquests of North Africa in the seventh century, though at first destructive, eventually contributed to the restoration and expansion of trans-Saharan trade.").

37. See *id.* at 114 ("Most of the black slaves bought in Sicily in the sixteenth century were Bornus, from what is now Nigeria, who had been carried to North Africa across the Sahara.").

38. See PHILIP D. CURTIN, THE ATLANTIC SLAVE TRADE: A CENSUS 101 (1969) (detailing that the vast majority of slaves from 1526-1550 were supplied from the Guinea of Cape Verde).

C. THE TRANS-ATLANTIC SLAVE TRADE

Some Europeans kidnapped³⁹ native Africans from Trans-Saharan slave traders before the Trans-Atlantic slave trade became an established form of commerce.⁴⁰ This practice diminished over time, but was later revived by the British.⁴¹ For the most part, nations formally accepted the barter for African slaves as a legitimate form of trade.

As the Trans-Atlantic slave trade became an established form of commerce, the process of capturing, stowing, torturing, and transporting the African slaves was intricately developed. Accordingly, the Trans-Atlantic slave trade evolved into an accepted norm of the international community. Europeans, primarily the Portuguese during the fifteenth and sixteenth centuries, explored various islands and waterways of Africa in search of new sources of slaves.⁴²

Since slaves were generally no longer captured without a price, the European explorers began negotiating the purchase of African slaves with African rulers.⁴³ Gold was an object of desire for the foreign explorers and it drove the slave trade. These explorers

39. See THOMAS, *supra* note 18, at 56 (illustrating through Zurara's history, from 1444 onward, how Portuguese captains kidnapped increasing numbers of Africans). The captures were not always simple, as depicted through Zurara's account of the challenges in capturing one man who resisted until assaulted with a boathook. *Id.* at 57.

40. See *id.* at 58 (noting how a captain named João Fernandes, under the explicit orders of Prince Henry, initiated the practice of the Portuguese buying rather than kidnapping slaves).

41. See *id.* at 156-57 (explaining how Captain John Hawkins, under the approval of Queen Elizabeth, seized three hundred slaves from the Canary Islands in his initial expedition, and later seized four hundred more African captives during his second voyage). These seizures were unpopular with the Portuguese, who, during that time, negotiated for their slaves. *Id.* at 157.

42. See *supra* note 30 and accompanying text (noting that slave trade in Portugal, Spain, and Africa was a normalized and profitable form of commercial trade).

43. See THOMAS, *supra* note 18, at 68 (citing how in 1458, Prince Henry sent Diogo Gomes to negotiate treaties with the Africans). Gomes assured rulers that the Portuguese would not steal slaves or anything else, but would barter for these commodities. *Id.*

simultaneously created an opportunity to exploit Africans, while demonstrating their belief that Africans were not human.⁴⁴

In the Trans-Atlantic slave trade system, Africans captured or kidnapped other Africans, and stored their captives until the trade or purchase of slaves by merchants or explorers.⁴⁵ This location was a type of warehouse where captors kept the slaves before they sold them to European merchants or explorers.⁴⁶ The Portuguese steadily built more warehouses, known as trading posts, on the African continent.⁴⁷

Slave traders bartered for African slaves and loaded them onto the slave ships. The ships' captains then decided the destination of these slaves. In the early centuries of the Trans-Atlantic slave trade, papal grants of a Portuguese monopoly in Africa required traders to stop in Portugal en route to pay a tax on slaves.⁴⁸ Before sailing to America, the Portuguese required that the Spanish, Italian, British, and later

44. See *id.* at 23 (arguing that Gomes Eannes de Zurara, chronicler and courtier attached to Prince Henry, "probably thought that the captives owed their fate to the sins of their supposed ancestor Ham, cursed by his father, Noah, after seeing him naked and drunk"). This myth, rooted in both Christian and Muslim traditions, states that the descendants of Ham were turned black. *Id.* Works by Egidio Colonna may have also influenced Zurara. *Id.* 23-24. Colonna argued that those without laws, and those who did not live civilly under any government, "were more beast than human, and therefore could legally be enslaved." *Id.* at 24.

45. See *id.* at 109-10 (describing how the Congolese, under the monarch's direction, realized the potential profit from the slave trade and began to supply slaves to the Portuguese). Later, other African peoples like the Pangu a Lungu started to raid the south bank of the River Congo specifically to obtain slaves for trade. *Id.* at 110.

46. See *id.* at 77 (citing specifically to the storerooms located in the Portuguese "castle," which held goods and slaves while the Portuguese bartered with the Africans); see also Nathan Irvin Huggins, *Pilgrimage for Black Americans: The Slave Castles of West Africa*, N.Y. TIMES, Oct. 29, 1972, at 1 (describing the "slave castles," which held African slaves "as commodities, merchandise waiting for shipment across the Atlantic"). The Portuguese, Dutch, French, and British built these warehouses to protect themselves against rivals and to defend themselves against hostile African tribes. *Id.*

47. See *id.* at 78 (stating that the Portuguese justified the building of these trading posts as assisting their gold exploration and "defeat of Spanish pretensions"). However, the trading posts quickly transformed into depots for captives. *Id.*

48. See *id.* at 155 (noting that there were difficulties in the enforcement of the prohibitions created by the papal monopoly).

the Dutch merchants stop in Portugal to pay a tax on their slaves.⁴⁹ However, the slaves' final destination was usually in the West Indies, South America, Latin America, or North America.

In the early Trans-Atlantic slave trading to the Americas, it appears that only a few African slaves boarded the slave ships. Instead, the European explorer Christopher Columbus⁵⁰ had sent natives of the West Indies to Spain.⁵¹ The natives that Columbus encountered during his first exploration were indigenous to the New World. However, these natives were not strong enough to withstand a voyage from the newly discovered West to the East, nor could they endure the harsh labor later required of them.⁵² As a result, Africans became the staple and foundation of the Trans-Atlantic slave trade. Thereafter, the slave trade flourished, with periods of fluctuating success throughout the centuries. As the demand for slave labor increased,⁵³ so did brutality toward the slaves. Europeans packed the slaves in the holds, as well as any other open places of their ships.⁵⁴

49. See THOMAS *supra* note 18, at 78 (describing measures that the Portuguese took as early as 1481 to enforce its monopoly).

50. 4 THE WORLD BOOK ENCYCLOPEDIA 857-64 (1999). Christopher Columbus was born one of five children in the Fall of 1451 in Genoa, Italy. Also known as Cristoforo Colombo, he gained fame for being one of the first explorers to attempt to find a sail route to India by going West. Although he failed in this exploration, on October 12, 1492, he arrived at the Carribean Islands. This exploration, which attained final approval by Queen Isabella was part of a fleet comprised of the Nina, the Pinta, and the Santa Maria.

51. See THOMAS, *supra* note 18, at 89 (noting that Columbus sent his friend in Seville "the first known cargo of slaves to cross the Atlantic").

52. See *id.* at 137 (explaining that although the Indians served the Portuguese well as soldiers, the Africans were far more effective in the cane fields); see also *supra* notes 20-21 and accompanying text (revealing the European perception that African slaves were more resistant to disease and more capable to perform hard labor than the natives transported east from the New World).

53. See THOMAS, *supra* note 18, at 139 (noting that by 1580 the only way to meet Spain's demand for precious metals was to secure a constant supply of black African labor). Further, while Indian slaves initially opened the mines, the increased demand for African slaves grew, for the Indian slaves lacked the same "endurance, commitment, and docility" as their African counterparts. *Id.* at 220-21.

54. See *id.* at 416 (describing the space where the slaves were held, which was usually "between the hold and the main deck of the ship"). The slave deck could be lowered or extended towards the bow or stern to allow more room for the slaves. *Id.*

This practice increased the likelihood of disease resulting from unsanitary conditions. Slaves were forced to lie in their own feces and urine and to endure lashings from the whips of the European slave-traders.⁵⁵

This journey, which comprised of shiploads of Africans engrossed with fear, chronicles the series of crimes imposed upon Africans who involuntarily embarked on this horrific journey. The Atlantic passage tells a story of what heartless creatures will do: derive profit from the labor and life of a human being. A life of whom is not calculated or bartered for in any civilized society.

The European slave traders docked the slave ships on the shores where they would herd slaves aboard the ship by force, usually by using a bullwhip.⁵⁶ Before boarding, European traders would examine their cargo, and literally brand the flesh of their human cargo with scorching hot iron tools.⁵⁷ The slave traders did this to prove receipt or to designate their ownership of the slaves. Slaves could therefore receive more than one branding, depending on how many times they were sold.⁵⁸ Branding was especially necessary for those slave-traders and owners who feared runaway slaves or slave insurrection. The mark would also indicate the monarch under which the African slaves were captured or the merchant citizens who had ownership rights.⁵⁹

55. See 2 THE HISTORICAL ENCYCLOPEDIA OF WORLD SLAVERY 436 (Junius P. Rodriguez ed., 1997) (noting that the treatment of slaves on the voyages was invariably harsh and that captors inflicted brutalities on slaves such as whipping, beating, shackling, dismemberment, and mutilation).

56. *Dictionary.com* ("a long, plaited rawhide whip with a knotted end.").

57. See 1 THE HISTORICAL ENCYCLOPEDIA OF WORLD SLAVERY 98 (Junius P. Rodriguez ed., 1997) (reporting that slave traders often branded slaves to indicate ownership and/or to punish them for misbehavior); see also THOMAS, *supra* note 18, at 396 (describing how in Arguin in the 1440s, the Portuguese began the practice of the *carimbo*, or branding of a slave with a hot iron, which left a red mark on the slave's body to make it evident that he or she was the King of Portugal's property).

58. See 1 THE HISTORICAL ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 57, at 98-99. "Slave traders and trading companies often branded slaves to indicate ownership, but as the slave changed hands among agents and shippers, others might add additional brands for various reasons." *Id.*

59. See THOMAS, *supra* note 18, at 396 (explaining that each European nation had special procedures for branding). For example, "slaves [who] landed at São

The initial transportation of slaves through what is now known as the Middle Passage⁶⁰ disrupted family and cultural ties,⁶¹ and caused irreparable emotional and psychological damage.⁶² The slave vessels themselves were unequipped to safely transport the multitude of slaves as passengers. On most ships, a shortage of headroom⁶³ forced slaves into huddled positions for a journey that lasted several weeks.⁶⁴

The lack of space often compelled slaves to lie in their own or others' bodily excrements without the opportunity to cleanse themselves.⁶⁵ Since the slave traders wanted to transport as many slaves as possible to ensure a higher profit, these slaves were hoarded in great numbers in the holds of ships.⁶⁶ This overcrowding forced

Tomé were branded with a cross on the right arm in the early sixteenth century; but, later, this design was changed to a 'G', the *marca de Guiné*." *Id.*

60. See 5 ENCYCLOPEDIA OF AFRICAN-AMERICAN CULTURE AND HISTORY 2476-77 (Jack Salzman et al. eds., 1996) (defining the term "Middle Passage" to refer to the Trans-Atlantic transportation of African bondspeople from the African coast to the Americas). The transit was a middle phase of the three-step voyage: from the interior of Africa to the coast; from the coast across the Atlantic; and then finally to their place of servitude in the Americas. *Id.*

61. See Huggins, *supra* note 46, at 1, 13 (asserting that as a result of the slave trade, men, women, and children were wrenched from their anchors of tradition and family, held captive with other Africans with different customs and who spoke alien languages).

62. See THOMAS, *supra* note 18, at 422 (noting that a surgeon in 1790 believed that "mortal melancholy" caused two-thirds of the deaths on the slave journey).

63. See *id.* at 416 (explaining that slave decks were usually five or six feet high, but that on some ships, the captors would place a second tier of wood within the deck so as to allow twice as many slaves to be carried in narrower compartments).

64. See *id.* at 411 (highlighting various travel times of the journeys from West Africa to Portugal in the fifteenth and sixteenth centuries). From Arguin to Lisbon, the journey would take approximately twenty days to a month. *Id.* From São Tomé to Lisbon, on the other hand, the time could have been as much as three to six months. *Id.*

65. See *id.* at 412 (describing overcrowding on slave ships as the norm; those who wanted to sleep would have to lie on top of each other). Frightened to lose their place on the ship, many slaves chose to not use the bilge places and instead relieved themselves where they stood. *Id.*

66. See *id.* at 416 (characterizing the slave decks as spaces between the hold and the main deck of the ship). Lowering the slave deck by extending it toward the

the Africans to endure unbearable heat and poor ventilation.⁶⁷ These conditions lead to excessive perspiration and consequently, dehydration. Furthermore, the African slaves who were not accustomed to sailing suffered from seasickness and vomiting, which exacerbated their water loss.⁶⁸ On some voyages, when the vessel was clear of the African coast, captors might bring the slaves up on deck to allow them to breathe some fresh air, but this was not common when seas were rough and when it rained.⁶⁹ As a result of these unsanitary conditions, the Africans became susceptible to disease.⁷⁰ Many slaves died from fever, measles, and scurvy while aboard the slave-ships, before they even reached the shores of the West.⁷¹

The Trans-Atlantic voyage provided no apparent route of escape for the captives, except in death, whether voluntary or involuntary. In a few instances, the captured slave demonstrated his or her preference to die, rather than suffer such inhumane treatment.⁷²

bow or stern not only made the space extremely uncomfortable for the slaves, but also reduced the storage area for food and water. *Id.*

67. See *id.* at 414 (referring to a slave's narrative, Olaudah Equiano, in which he described the climate of the overcrowded ships). Equiano recounted that "each [slave] had scarcely room to turn himself," and that the heat brought constant perspiration, so that the air soon became unfit for breathing. *Id.*

68. See Kenneth F. Kipple & Brian T. Higgins, *Mortality Caused by Dehydration During the Middle Passage*, in THE ATLANTIC SLAVE TRADE: EFFECTS ON ECONOMIES, SOCIETIES, AND PEOPLES IN AFRICA, THE AMERICAS, AND EUROPE, *supra* note 4, at 321, 325 (asserting that water loss from vomiting as a result of seasickness was not surprising as most of the slaves were not accustomed to being on a boat, and even if they were, the lack of fresh air would have produced similar nauseating conditions).

69. See *id.* (noting that mortality rates were systematically higher on ships that sailed during the rainy season, since the ships closed up and the slaves were trapped in the heat and humidity).

70. See ENCYCLOPEDIA OF AFRICAN-AMERICAN CULTURE AND HISTORY, *supra* note 60, at 2477 (stating that "[c]rowded and unsanitary conditions, poor food, inadequate supplies, insufficient drinking water, epidemic diseases, and long voyages conspired to make slave ships legendary for their foul smell and high death rate.").

71. See THOMAS, *supra* note 18, at 422-23 (listing dysentery and the dehydration caused by it as the most common cause of death during the slave trade). Smallpox was likely the second most common cause of death. *Id.*

72. See Olaudah Equiano, THE INTERESTING NARRATIVE OF THE LIFE OF OLAUDAH EQUIANO 56 (Robert J. Allison ed., 1995) (referring to an incident in

In addition to the physical constraints that extreme overcrowding imposed, iron shackles restrained the African slaves' ankles and wrists while aboard the slave ship, and also upon arrival in the New World.⁷³ In effect, these iron cuffs were extremely burdensome, and likely to cause additional physical injury. Along with the iron cuffs, the slave-traders also secured iron devices around the slaves' necks, and similar iron chains to secure their arms and legs. Some of these iron contraptions were secured in such a manner that one slave would be connected to the limb of another slave.⁷⁴ Therefore, the slave was not only constrained with the burden of his own motion, but also that of any other slave to which his bondage chains were linked.

The physical hardships were not the only causes of death for the Africans aboard the slave ships. The psychological impact was so great for many of the Africans that they died of depression. An English surgeon in 1790 estimated that two-thirds of the deaths on the slave journey were due to a "mortal melancholy" similar to an involuntary suicide.⁷⁵ Thus, while most people view severe mistreatment and unsanitary conditions as the primary causes of death aboard slave vessels, this common perception tends to miss one of the most important factors leading to this result.

In addition to extreme depression, African slaves suffered from other forms of physical and psychological harm. European sailors

which two slaves who were chained together, "somehow made it through the nettings and jumped into the sea"); see also THOMAS, *supra* note 18, at 420 (discussing how "[s]ometimes it was necessary to force slaves to eat to prevent them from committing suicide by self-starvation."). Some slaves would hit their heads against the ship and others would try to hold their breath to try and suffocate themselves. *Id.* at 412.

73. See JAMES A. RAWLEY, *THE TRANSATLANTIC SLAVE TRADE* 298 (W.W. Norton & Co. 1981) (explaining that "[m]en slaves . . . were bound together in pairs, left leg to right leg, left wrist to right wrist."). Some captors did not remove these chains even once before they had reached their destination. *Id.*

74. See THOMAS, *supra* note 18, at 407 (describing how captors chained slaves together to prevent mutinies and swimming to shore). Women and children, however, were not chained. *Id.*

75. See *id.* at 422 (presenting the findings of a 1790 English surgeon who found that "two-thirds of the deaths on a slave journey were due to 'banzo,' a mortal melancholy, . . . or involuntary suicide.").

raped African female slaves aboard the ship.⁷⁶ Since the captains, sailors, and ship's crew believed that the African slaves were mere captives, it was easily in the realm of consciousness for their captors to have coitus with the slaves as they desired. Other slaves aboard the ships were killed, and their corpses were thrown overboard to instill fear in the others and discourage them from insurrection.⁷⁷ At other times, the European crew would force the slave captives to eat the flesh of rebellious slaves.⁷⁸ Such an act was not only physical punishment for the actual victim, but also psychological torture for those forced to witness the barbaric treatment. The European slavers knew that for the most part, they would be met with little resistance because of the fear instilled in their captives after being kidnapped and stripped away from their native land. Moreover, physical restraints prevented the slaves from rebelling even if they wanted to.

The inhumane treatment did not cease once the ships reached the shores of the West Indies, South America, or North America.⁷⁹ After the slaves' primary kidnapping from Africa, they were subsequently sold to yet another participant in the slave trade.⁸⁰ At some points,

76. See *id.* at 408 (referring to Captain Newton, who recalled that one afternoon, "while we were off the deck, William Cooney seduced a woman slave down into the room and lay with her brutelike, in view of the whole quarter deck, for which I put him in irons.").

77. See *id.* at 427 (discussing specific slave uprisings and noting that the most brutal punishment for a slave rising seems to have been the punishment of the ringleader of a revolt on the Danish vessel *Fredericius Quartus* in 1709). This captor cut off the individual's right hand and showed it to every slave. *Id.* The next day, his left hand was cut off and it too was exhibited. *Id.* On the third day, the man's head was cut off, and the torso was on the mainsail yard for two days. *Id.* The captor whipped all the others who had taken part in the rebellion, and rubbed ashes, salt, and pepper into their wounds. *Id.*

78. See *id.* at 425-26 (describing how Captain Harding whipped and scarified two slaves and sentenced three abettors to cruel deaths, making them first eat the heart and liver of their fellow slave).

79. See Ronald Bailey, *The Slave(ry) Trade and the Development of Capitalism in the United States: The Textile Industry in New England*, in THE ATLANTIC SLAVE TRADE: EFFECTS ON ECONOMIES, SOCIETIES, AND PEOPLES IN AFRICA, THE AMERICAS, AND EUROPE, *supra* note 4, at 205, 210 (explaining that nearly two-thirds of slaves were sold in the West Indies, and thirty-one percent in various mainland North American markets).

80. See THOMAS, *supra* note 18, at 435 (stating that slave traders usually subjected the slaves to yet another careful examination before the sale). At times,

the slaves underwent a procedure that became standard in which their captors grossly injured, maimed, tortured, and otherwise killed the African slaves to force them to submit. Slave traders used this part of the journey to ensure the submission of the slaves before they reached the auction blocks of North America.⁸¹

The European slave traders and overseers devised a plan to ensure the physical dependence and psychological destruction of an entire people. One method that they used, characterized in the autobiographical epic *Roots* by Alex Haley, was the amputation of slaves.⁸² When a slave trader caught or recaptured a slave after his attempt to run away in search of freedom, the trader would amputate parts of the slave's limbs either to use him as an example to instill fear in the other slaves or as punishment for his attempt to escape.⁸³ Not only did amputation of slaves occur when the slaves were already on the shores of America, but it also occurred during the Middle Passage.⁸⁴

Even pregnant slaves endured horrendous injuries as a result of the Trans-Atlantic slave trade. Europeans valued pregnant slaves because they viewed the unborn babies as new property to sell.⁸⁵

slavers branded the Africans with a silver iron to show that the slave had been legally imported. *Id.*

81. See Tameka Norris, *The History of Slave Trade from Africa to Europe America* (asserting that even “[t]he Africans that remained healthy [after the voyage] were put on display at public auctions and examined in a ridiculous and humiliating manner.”), at http://wv.essortment.com/historyofslave_rmpw.htm (last visited Mar. 2, 2004)

82. See ALEX HALEY, *ROOTS* 150 (Doubleday & Co., Inc. 1976) (exposing the fury with which slave overseers lashed their whips at slaves after one slave beat several overseers to death). The overseers also forced the slaves to watch as they whipped the headless body of the rebellious slave. *Id.*

83. See A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The “Law Only as an Enemy”: The Legitimization of Racial Powerlessness through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1063 (1992) (relating that in the informal system of plantation justice slave masters would meet and agree upon punishments).

84. See THOMAS, *supra* note 18, at 425-26 (depicting the punishments after an insurrection on the slave ship Robert when Captain Harding hoisted a female slave up by her thumbs and whipped and slashed her with knives in front of the other slaves on the ship).

85. See *id.* at 117 (describing that when a merchant, Giambattista Veturino, visited the palace of the Duke of Braganza at Vila Viçosa, he said that the owners

Thus, a pregnant female slave increased the wealth of slave masters and slave traders involved in the Trans-Atlantic slave trade, further solidifying their view that slaves and their future progeny were merely forms of chattel and not human beings.⁸⁶

Slave masters would force pregnant women on their plantations to lie face down on the ground with their pregnant bellies in a hole.⁸⁷ Then, the master would beat the pregnant slave continuously, usually with a bullwhip, either as punishment or to instill fear not only in her, but also in her growing fetus. Slave owners whipped slaves into submission or until death to serve as an example to other slaves to remain dependent and obedient to the slave trader or the slave master. They intended to both dehumanize and exploit the African slave, as well as receive as much financial gain from his labor as was economically possible.

The threat of rape persisted throughout the lives of slaves. Slave owners and overseers not only raped slaves during the unsanitary sojourn west, they perpetuated this crime while they held slaves awaiting auction, and again after they purchased slaves.⁸⁸ Slave owners forced African slaves to perform strenuous labors throughout

treated slaves, “as herds of horses are [treated] in Italy,” with the objective of creating as many slaves as possible for the sale at thirty or forty scudi each).

86. See *id.* (illustrating how in the mid-sixteenth century, the trader Clenard noticed that slave masters greeted the births of slave children in Portugal with eagerness and that some masters encouraged female slaves to breed, “as they do pigeons, for purposes of sale . . .”).

87. See Interview with Madison Jefferson in England (1841), in *SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES* 217, 220 (John W. Blassingame ed., 1977) (discussing that when a slave driver punished a slave for complaining by throwing him down on his face with his arms and legs extended in anticipation of sixty to one hundred lashes on the slave’s bare back, he did not allow pregnant women to escape the same punishment). The slave driver would have a slave dig a hole for the belly of the pregnant women receiving punishment, seemingly to prevent injuries to the unborn fetus. *Id.*

88. See Interview with J.W. Lindsay in Canada (1863), in *SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES*, *supra* note 87, at 396, 400 (articulating how men will “buy a sprightly, good looking girl, that they think will suit their fancy, and make use of them in that way”). One such man, Ben Kidd, forced one of his female slaves to meet him at his barn and “used her whenever he saw fit” even though she had a husband. *Id.* He carried a white oak cane with which he would knock women down if they did not submit to his desires. *Id.*

excessive time spans, unbearable heat, and extremely poor living conditions.⁸⁹ They housed slaves in shanty shacks unfit for human habitation that were either near to, or part of, the slave masters' plantations.

Slaves endured several types of torture. Slave traders stole African children from their villages and away from their family and friends to sell them into the Trans-Atlantic slave trade.⁹⁰ Slave traders even kidnapped children whose mothers were already slaves and sold them to other slave traders, or purchasers.⁹¹ Other times, slave traders kidnapped parents, who were already slaves, from their children, and sold them to other slave masters.⁹² Rather than separate slaves from their families, traders sometimes burned slaves alive or hanged them from trees for reasons ranging from simple torture to punishment for attempting to secure their freedom.

The Trans-Atlantic slave trade was a crime against humanity in the humanistic realm as well as under international law. However,

89. See Letter from James L. Bradley (1835), in *SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES*, *supra* note 87, at 686, 687 (portraying the extensive hours that masters required their slaves to work in the field). "I was always obliged to be in the field by sunrise, and I labored till dark, stopping only at noon long enough to eat dinner." *Id.*

90. See OLAUDAH EQUIANO, *EQUIANO'S TRAVELS: THE INTERESTING NARRATIVE OF THE LIFE OF OLAUDAH EQUIANO OR GUSTAVUS VASSA THE AFRICAN 13* (Paul Edwards ed., Heinemann Educational Publishers 1996) (1789) (discussing how the constant threat of kidnappers forced children never to leave the sides of their parents or their neighbors when their parents were away). Often times, children spent numerous hours sitting in trees watching for kidnappers. *Id.* Olaudah Equiano, a slave who lived to describe his experience, explained that one day his parents had gone out to work, leaving Equiano and his sister alone in the house. *Id.* Two men and one woman climbed over the walls of his house and seized Equiano and his sister without allowing them time to cry out and resist. *Id.* They kidnapped Equiano and his sister, separated them, and sold them into slavery. *Id.* at 14.

91. See Bradley, *supra* note 89, at 687 (recounting the painful separation from his own mother at the age of either two or three years old).

92. See Interview by Gustavus D. Pike with Thomas Rutling (1872), in *SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES*, *supra* note 87, at 615, 616 (detailing the slave Thomas Rutling's earliest memory of his master selling his mother when he was two years old). Rutling said, "I can just remember how the steps looked to our sitting room door, where I was when she kissed me and bade me good by, and how she cried when they led her away." *Id.*

Europeans and Americans viewed Native Americans and especially Africans and their progeny as mere property.⁹³ Thus, for centuries slavery became a forgotten crime against humanity because the ruling classes and dominant nations did not consider slaves human during the Trans-Atlantic slave trade.

II. THE OPERATION OF THE TRANS-ATLANTIC SLAVE TRADE

A. THE TRANS-ATLANTIC SLAVE TRADE AND THE INTERNATIONAL COMMUNITY

The explorers' respective governments did not sanction the inception of the Trans-Atlantic slave trade. Instead, slave traders kidnapped Africans and traded them with the approval of European religious authorities, who heavily influenced their governmental counterparts.⁹⁴ Intriguingly, the monarchs of African kingdoms were the very first governments to sanction the earliest incidents of slave trading across the Atlantic Ocean.⁹⁵ This was the standard manner that slave traders acquired slaves during the fifteenth through seventeenth centuries.⁹⁶ Fueled by the overwhelming willingness of African monarchs to advance their own interests by supplying their

93. See THOMAS, *supra* note 18, at 117 (exemplifying the commodification of slaves in situations where slave masters treated female slaves as animals by encouraging them to breed so they could sell their babies as slaves).

94. See *id.* at 64 (revealing how Portugal secured approval from several popes for buying slaves and using them as workmen and entertainers). The Venetian Pope Eugenius IV approved Prince Henry's expeditions to Africa in 1442. *Id.* Pope Eugenius granted Portugal exclusive rights over her African discoveries because other European monarchs did not participate in the expeditions and because Portugal had already incurred many expenses. *Id.* In the 1450s, Popes Nicholas V and Calixtus III demonstrated their approval of the slave trade. *Id.* at 65.

95. See *id.* at 62 (depicting how the Portuguese entered into negotiations with local rulers and became allies with these rulers in their mutual attempts to profit from trade).

96. See *id.* at 168 (illustrating the three ways the Portuguese obtained the slaves they desired: (1) by trading with African chiefs and kings for slaves; (2) by acquiring slaves as a by-product of war; and (3) by attaining slaves as a tribute from an African leader). The first method was the most common. *Id.*

own natives as slaves, the Trans-Atlantic slave trade evolved into a legally sanctioned enterprise governed by the European nations.⁹⁷

European nations, especially Spain and Portugal, realized the benefit of free labor and the potential for large profits from obtaining African slaves within their boundaries.⁹⁸ Many European monarchs used the slaves as royal servants or gardeners.⁹⁹ Eventually, the focus of these nations evolved from obtaining revenue from free labor in domestic agriculture cultivation to the development of the lands overseas that European monarchs referred to as their extended empires.¹⁰⁰ Spain was one of the first nations to realize the potential for development in the West Indies and Central America. As a result, Spain and Portugal demonstrated on numerous occasions the great extent to which they influenced the Trans-Atlantic slave trade during its early centuries of existence.

B. THE GOVERNMENT REQUIREMENT: TAXES AND LICENSES

The import and export taxes that states imposed on slave traders for every slave purchased from the coasts of Africa created the earliest financial benefits for nation-states participating in the slave trade.¹⁰¹ Since the Portuguese possessed an early monopoly on the

97. *See id.* at 291-92 (disclosing that the Portuguese Crown regulated the slave trade by establishing check points, granting licenses to merchants, and taxing them for each slave they traded).

98. *See id.* at 103 (asserting that merchants could buy slaves in Africa or Europe and sell them in America for at least twice what they paid for the slaves).

99. *See THOMAS, supra* note 18, at 119 (explaining that “slaves were often bought almost as decorations, as continued to be the case throughout Europe till the eighteenth century. African slaves, however, still performed many more valuable services in sixteenth-century Portugal. King João III, father of the Brazilian empire, had a black slave as a jester; the naval foundry employed slaves; and so did the palace kitchens and gardens.”).

100. *See id.* at 182 (explaining that the regions of Lima, Pizco, and Ica depended on the tens of thousands of slaves to work in cornfields, vineyards, sugar mills, mines, and market gardens, as well as serving as the protective defenses for the fortresses of the Spanish empire).

101. *See id.* at 78 (detailing that the Portuguese Crown enacted a law in 1473 that merchants could not sell slaves that they brought from Africa elsewhere before they took them to Portugal in order to maximize profits for Portugal).

slave trade sanctioned by the Pope,¹⁰² the Portuguese could easily tax other nations' trade in African slaves. The Portuguese government required that any traders receiving or purchasing African slaves first register their ships in Portugal and pay a duty on the slaves.¹⁰³ At other times during the trade, the Portuguese government required slave traders to pay a tax in the Portuguese-owned Cape Verde, but traders often ignored this tax.¹⁰⁴ The tax, however, effectively raised revenue for the Portuguese monarch.¹⁰⁵ Many Portuguese merchants, who were the primary businessmen in the slave industry, paid their taxes to the Crown in order to transport African slaves to the West.¹⁰⁶ Thus, during the fifteenth and sixteenth centuries, the Portuguese monarchy realized a great financial benefit from the monetary duties imposed on all other nations who participated in the Trans-Atlantic slave trade.

Portugal was not the only nation-state to impose duties on the transport and purchase of African slaves. African monarchs also levied such taxes on their European counterparts who bartered for African slaves.¹⁰⁷ The Spanish government, too, imposed various taxes on the purchase, import, and export of African slaves.¹⁰⁸ The

102. *See id.* at 65 (relating that in 1454, Pope Nicholas V gave formal support for the Portuguese monopoly on trading slaves in Africa in all territories south of Cape Bojador).

103. *See id.* at 78 (suggesting that the law was needed because many Portuguese captains were selling slaves outside of Portugal, thus reducing Portugal's tax revenues from trading slaves).

104. *See id.* at 292 (describing that the Portuguese Crown appointed an official to collect taxes on the African River Cacheu because traders who went to West Africa often failed to pay the duties at Santiago, in the Cape Verde Islands).

105. *See THOMAS, supra* note 18, at 94 (relating that "the King of Portugal had made two million réis in 1506 from the slave trade, from taxes and duties . . .").

106. *See id.* at 83 (establishing the custom that Portuguese merchants paid their taxes to the Crown because the Crown only granted the right to carry slaves to select privileged merchants).

107. *See THOMAS, supra* note 18, at 109-10 (explaining that as a result of insatiable Portuguese demand for slaves, King Afonso of Congo modified his royal monopoly on supplying slaves merely to taxing slave exports). Subsequently, other African peoples followed the Congolese example and adapted to the new conditions of trade. *Id.*

108. *See id.* at 164 (illustrating that after much debate, the Council of the Indies in Madrid saw the slave trade primarily as an item in tax revenue and mandated that authorities in Seville would inspect all slaving ships destined for the Spanish

French government would, in its involvement in the latter part of the seventeenth century, impose a duty on each slave that traders transported through the Trans-Atlantic slave trade.¹⁰⁹

These taxes on slaves extended to the West Indies, Central America, South America, and eventually North America, where the Europeans continued their development of the New World.¹¹⁰ Spain and Portugal profited not only from receipt of taxes, but also from requiring merchants to obtain licenses and permits to participate in the slave trade.¹¹¹ Usually the reigning government would issue these licenses through agents to an approved merchant or entity who would then administer them.¹¹² This structure governed slave traders and voyagers transporting slaves over the Atlantic Ocean.

The authorities administering these slave trade licenses and recommending slave sales to merchants included various figures, ranging from the monarchy to the judiciary. For example, Charles V gave his new secretary, Francisco de los Cobos, a license to send two hundred black slaves to the Indies and the New Spain duty-free.¹¹³ In addition, to support hopes that Caminha would establish plantations, the Court granted Charles V a license to import more than one

overseas empire). Additionally, and despite numerous incidents of smuggling, the Crown in Madrid, who would still rule for a few more years as the united Crown of Portugal and Spain, in his concern for promoting slave trafficking, advised a new Governor of Angola that he should encourage the buying of slaves during his proconsulate so as to "swell the tax returns of the Royal Treasury." *Id.* at 166-67.

109. *See id.* at 228 (portraying how the French monarchy levied a duty of thirty-three and a third écus on nearly all the slaves, transported 3,000 slaves to the French Indies, and compelled whatever company performed these duties in France to pay the King of Spain 600,000 livres).

110. *See id.* at 92-93 (discussing the onset and regulation of slave traffic to the Americas, prompted by rumors of gold in Hispaniola and the need for slave laborers who were stronger than the America natives).

111. *See id.* at 93 (noting the Crown's requirement of tax payment at "two ducats per head" in exchange for slave trade licenses). The Portuguese Crown had an interest in all of these financial dealings concerning the slave trade, and collected taxes through a licensing mechanism arranged between traders and tax collectors. *Id.* at 133.

112. *See id.* at 133 (describing the Portuguese tax collection arrangement that took place on the African coast).

113. *See* THOMAS, *supra* note 18, 100-01 (describing Charles V's involvement in the slave trade).

thousand slaves over the course of five years.¹¹⁴ Governments of the international community issued hundreds of licenses granting Europeans the right to kidnap, exploit, and barter thousands of Africans as chattel, thus making the Trans-Atlantic slave trade a lucrative financial institution at the expense of an untold number of human lives.¹¹⁵

C. GOVERNMENTS' LEGAL AGREEMENTS AND FINANCING OF THE SLAVE TRADE

The European monarchs realized trade profits not only from taxes and licenses, but also from the establishment of legally binding agreements in connection with the Trans-Atlantic slave trade. For example, slave barter contracts between the monarchs of France and Portugal facilitated the Spanish merchants' slave transactions.¹¹⁶ These slaves then became the source of new workers in the West Indies, who would cultivate the mills and plantations across the Atlantic Ocean.¹¹⁷

The French government was not the only one that used formal legal agreements to facilitate the slave trade. The Spanish empire also granted contracts to private businessmen who financed the slave trade by paying a type of duty, and required all merchants and

114. *See id.* (noting the judiciary's involvement in supporting the commercial slave trade). A Spaniard, Judge Zuazo, recommended that a general license should be granted exclusively for importing Negroes to the King, who he thought were ideally suited for the difficult labor. *Id.*

115. *See id.* at 103 (noting, for example, that the Crown granted over three hundred licenses to carriers transporting slaves from Africa to Peru between the years 1529-1537).

116. *See id.* at 139 (explaining the supply and distribution agreement in 1568 between King Philip II and his cousin Sebastian, King of Portugal, whereby King Sebastian would deliver two thousand slaves per year to Spanish merchants in the Cape Verde Islands).

117. *See id.* at 140 (recounting King Philip II's use of contracts with experienced Portuguese merchants to supply the West Indies with slaves). Two merchants, Pedro de Sevilla and Antonio Mendez de Lamego, already involved in slave trading for the Portuguese Crown, contracted in 1587 to transport slaves annually to the Spanish Indies. *Id.*

seamen to acquire licenses to participate in the slave trade.¹¹⁸ The Spanish monarch also granted direct *asientos*¹¹⁹ to merchants so that they could obtain slaves without using a liaison.¹²⁰ Furthermore, the Spanish government approved loans to private Spanish citizens, thereby encouraging the barter of human life as a lucrative form of commerce.¹²¹ Those laymen who were interested in the slave trade but possessed no financial means to support and participate in it, were granted the opportunity to conduct a series of transactions furthering this crime against humanity with the support and encouragement of the government.

In the early eighteenth century, the British government also entered into contracts with other monarchs in order to supply Spain with slaves. In 1707, the British government formed a contract with Queen Anne and Archduke Charles, a candidate for the throne of Spain who enjoyed British support, to deliver slaves to the Spanish empire, thus illustrating the British government's involvement in this international crime against humanity.¹²²

In addition to general contracts, the governments of varying nations entered into legally binding treaties. One example was the Treaty of Sintra of 1509, which transferred a portion of Africa's coast from Spanish to Portuguese control, thus expanding Portugal's

118. See *id.* at 164 (describing Portuguese millionaire, Antonio Fernandes Elvas' contract agreement with Spain to supply 3,500 to 5,000 slaves per year into the Spanish colonies, while paying 120,000 ducats annually for the licenses).

119. See THOMAS, *supra* note 18, at 292 (explaining that an *asiento* is a Spanish term used to define a privilege or contract that the Spanish monarch grants in connection with the slave trade).

120. See *id.* at 214 (discussing the Spanish government's opposition to relying on the "heretic enemy" as the impetus for awarding an *asiento* in 1676 to a group of Seville merchants).

121. See *id.* at 115 (noting the Spanish Crown's encouragement to all those expressing the desire to carry slaves to the New World). A 1531 decree in Castille offered easy loan terms to settlers in the New World to facilitate their establishment of sugar mills through the use of slaves. *Id.* The Crown granted another individual, Bathasar Coymans, an *asiento*, but with qualifications; his firm had to make a large cash payment to the Spanish Ministry of Finance to cover his expenses. *Id.* at 215-16.

122. See *id.* at 230 (noting the British government's supply contract with Spain, most likely drawn up to satisfy the RAC).

rich participation in the slave trade.¹²³ In another treaty, the Congolese government agreed with the Portuguese to allow a great portion of slaves to be traded only through Congolese ports.¹²⁴ In 1493, the Portuguese and Spanish Crowns negotiated the Treaty of Tordesillas, in which Pope Alexander VI drew a vertical line distinguishing Portugal and Spain's territorial control in the Eastern and Western Hemispheres.¹²⁵ Although this treaty does not directly state the legality of the Trans-Atlantic Slave Trade per se, the distinction was made for both monarchs to honor trade routes that were already being used to transport slaves across the Atlantic Ocean.

In 1713, Spain granted an *asiento* to Great Britain in the name of the East India Company, which became a slave trading monopoly.¹²⁶ Spain ceased its slave trading with France and emphasized that only Great Britain could import slaves into India.¹²⁷ This treaty, which became effective on May 1, 1713, granted Great Britain a monopoly over the African slave exports to the new Spanish empire for a thirty-year period.¹²⁸

This particular pact included such extensive detail regarding the slave importation and expedition financing that it merits a brief discussion. Britain had to pay a duty to the Spanish crown for each

123. See *id.* at 106-07 (providing information regarding the new Treaty of Sintra of 1509). The treaty transferred a portion of the African coast previously in Spain's control to Portugal. *Id.* The treaty allowed Spain to continue to trade in the area. *Id.*

124. See *id.* at 131 (referring to the terms in the Congolese-Portuguese treaty declaring that those slaves obtained in raiding expeditions in Ndongo could only be traded through Mpinda, a port in the Congo).

125. See THOMAS, *supra* note 18, at 87-89 (describing the Treaty of Tordesillas in 1493, which defined Spain and Portugal's respective zones of influence).

126. See The Assiento between Spain and the East India Company (Great Britain), Mar. 26, 1713, Spain-Gr. Br., 27 Consol. T.S. 425, 439 [hereinafter Assiento] (establishing the *assiento* for thirty years).

127. See *id.* at 445 (prohibiting the French Guinea company or anyone else from introducing any Negro slave into India).

128. See *id.* at 439 (specifying the treaty's duration and noting the Queen of Great Britain's desire to become involved in this commercial activity).

slave that was imported to the West Indies.¹²⁹ The maximum number of slaves imported yearly could not exceed 4,800, and the maximum number of slaves the Spanish Crown taxed could not exceed 4,000.¹³⁰ The contract refers to this trade in slaves as commerce,¹³¹ while referring to the Africans as the commodity, with respect to which the traders have ownership rights. It provides: “[W]hereas experience has shewn it to be very prejudicial to the interest of his Catholick Majesty, and his subjects, that it hath not been lawful for the assientists to transport *their* negroes, into all the ports of India in general.”¹³² However, another clause within the treaty contains conflicting language. The Spanish monarch concedes that: “In order to the carrying and introducing of black slaves into the provinces of the South-Sea, liberty is to be granted, as it is hereby granted to the assientists, to freight either at Panama, or in any other dock or port of the South Sea.”¹³³ The treaty’s drafters used degrading terminology that indicated ownership when referencing the blacks, but simultaneously granted a type of liberty to those involved with the slave trade. These monarchs were therefore conscious of their oppression of the slaves, but still deemed the slaves as cargo, whose fate was determined by contracts and treaties. The standard for determining slave trading violations was the *asiento* itself.¹³⁴ A type of justice for the monarchs and slavers, and definitively none for those enslaved.

Within the same document, the contracting monarchs inserted a clause referencing the inevitable injuries and suffering that the African slaves would undergo as a result of the monarchs’

129. *See id.* at 440 (indicating the amount that the assientists would have to pay for each slave).

130. *See id.* (“That the payments of the said duties shall be made in the manner mentioned in the foregoing article . . . that the assientists shall not be obliged to pay the duties for more than four thousand negroes (*piezas de India*) yearly, and not for the remaining eight hundred[.]”).

131. *See id.* (referring to the slaves as commercial cargo).

132. *Assiento*, *supra* note 126, at 441 (emphasis added).

133. *Id.* at 442.

134. *See id.* at 443 (explaining that the judges’ conservators cannot demand greater salaries than what the assientists approve, and that there shall be recourse through the “Catholick majesty”).

merchants', and slavers' desire to barter them.¹³⁵ This identifies the monarchs' and other participants' actions as the proximate causation of the Africans' harm during the Trans-Atlantic slave trade. The *asiento* with its constant transference among the various nation-states of the international community, sustained the displacement, kidnapping, torture, and transportation of African slaves to the West.

Great Britain negotiated with Spain to control the *asiento*, or monopoly privilege in the slave trade, through the Treaty of Utrecht in 1713.¹³⁶ The Treaty of Utrecht comprised of multi-lateral treaties concerning different aspects of European treaty obligations, including the trafficking of African slaves. The treaty refers to Africans in the same terms that it refers to any other commodity in international trade that the contracting parties conducted:

That therefore this Rule may hereafter be observ'd with inviolable faith, and in a manner never to be broken, and thereby all causes of distrust and suspicion, concerning that matter may be prevented and removed, it is especially agreed and concluded, that no licence, nor any permission at all, shall at any time be given, either to the French, or to any nation whatever, in any name, or under any pretence, directly or indirectly, to fail, to traffick in, or introduce negroes, goods, merchandizes, or any things whatsoever into the dominions subject to the crown of Spain in America, except what may be agreed by the treaty or treaties of commerce aforesaid, and the rights and privileges granted in certain convention, commonly called *el Assiento de Negroes*¹³⁷

Spain's monarch required the signatory countries to secure its approval pursuant to the *Assiento*, which granted them the privilege to monopolize the Trans-Atlantic slave trade before they engaged in such commerce. A few decades later, Great Britain, France, Spain

135. See *id.* at 450 (acknowledging the negro slaves journey as "so long and painful" and thus recognizing the hardships, but refusing to acknowledge the slave trade as a crime in itself).

136. See Treaty of Peace and Friendship between Great Britain and Spain, signed at Utrecht July 13, 1713, Gr. Brit.-Spain, 28 Consol. T.S. 295, 325 [hereinafter Treaty of Utrecht] (granting Britain the *asiento* or contract to import slaves); see also THOMAS, *supra* note 18, at 231 (highlighting that "[t]he consequence was that, when the Treaty of Utrecht came to be drawn up in 1713, to conclude the War of the Spanish Succession, the British were able to insist on taking over the *asiento*.").

137. *Id.* at 328-29.

and Sardinia, Hungary, Modena, the Republic of Genoa, and the United Provinces signed the Aix-La-Chapelle treaty concerning the conquests of the New World, primarily the West and East Indies.¹³⁸ The Aix-La-Chapelle treaty reestablished Britain's monopoly in the international African slave trade by referencing the infamous *asiento* agreement.¹³⁹ This is evidence that the international community continued to acknowledge their participation in bartering the lives of Africans.

European countries also incorporated companies as an organized method to finance the slaving expeditions, reaffirming their participation in slave trade.¹⁴⁰ France formed the Company of the Isles of America to have slaves shipped to the Caribbean.¹⁴¹ Britain also formed companies to assist merchants with their dealings in the slave trade.¹⁴² Furthermore, several members of the royal monarchy in Britain supported a separate and distinct company to maintain

138. Treaty of Aix la Chapelle (Aix la Chapelle, Oct. 18, 1748), in 1 MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967, 269-72 (Fred L. Israel ed., 1967).

139. *Id.* at 282. The treaty of the Assiento for the trade of Negroes, signed at Madrid on the 26th of March, 1713, and for the four years during which the enjoyment thereof has been interrupted, since the commencement of the present war, and shall be executed on the same footing, and under the same conditions, as they have or ought to have been executed before the said war.

140. See THOMAS, *supra* note 18, at 292 (identifying companies created and sponsored by Portugal, Holland, Great Britain, Spain and France "to carry slaves from Africa to the New World"). Specifically, the Portuguese established the Cacheu Company and the Maranhão and Pernambuco companies in the seventeenth and eighteenth centuries, respectively. *Id.* Holland owned the West India Company, and Britain established the Royal Adventurers, the Royal African Company, and the South Sea Company. *Id.* In the eighteenth century, Spain possessed "many companies with a privileged status." *Id.* France founded a number of Guinea companies after the 1670s, when Colbert established the first one. *Id.*

141. See *id.* at 191 (indicating that the Company of the Isles of America contracted with a merchant for sixty Africans for delivery in Guadeloupe harbor at two hundred livres each).

142. See *id.* at 174 (stating that King James I in London granted control over British African trade to Robert Rich and thirty-six others through the formation of a Company of Adventurers to Guinea and Benin). A second company, Guinea Company, was founded in London in 1651 in the "face of what seemed the obvious need for Africans." *Id.* at 197.

aspects of the British monopoly¹⁴³ in the Trans-Atlantic slave trade.¹⁴⁴ During the seventeenth century, the Dutch also formed a company to enlist its participation in the slave trade from Africa to the so-called West Indies.¹⁴⁵ In 1651, Denmark joined the slave trade with the creation of the Glückstadt Company.¹⁴⁶ The Spanish monarch owned many shares in the South Sea Company in order to secure its participation in the slave trade and support its nation.¹⁴⁷ Many other countries founded companies from the sixteenth to eighteenth century in order to support and promote the Trans-Atlantic slave trade.¹⁴⁸

143. *See id.* at 158 (explaining that a defeated Portuguese king bestowed authority onto English ships, resulting in the 1588 issuance of “a charter to the so-called Sènègal Adventurers in London,” which was supposed to provide a ten-year English trade monopoly with the Sènègal region). The Sènègal Adventurers in London, however, did not really engage in the slave trade, and it “sank into obscurity.” *Id.*

144. *See id.* at 198 (stating that the Royal Adventurers into Africa, founded in 1660, represented a new company founded in London, which “was then thought the best economic course given a monopoly of the English African trade for one thousand years”). The investors in the Royal Adventurers into Africa included “four members of the royal family, two dukes, a marquis, five earls, four barons, and seven knights.” *Id.*

145. *See* THOMAS, *supra* note 18, at 160-61 (noting the 1607 founding of the Dutch West India Company, which was modeled after the successful East India Company). It failed, and was re-established in 1621, authorized with a monopoly for twenty-four years over trade to Africa and the West Indies. *Id.*

146. *See id.* at 223 (remarking that “Danish ships were recorded in Africa from 1649, and a charter for the Glückstadt Company was drawn up in 1651.”).

147. *See id.* at 235-36 (commenting that Spain exchanged “nine million pounds’ worth of unfunded government securities . . . for shares in the South Sea Company,” hoping that the abundant trade would eliminate the national debt).

148. *See id.* at 266-67 (discussing various licensing agreements made by the Spanish after the South Sea Company’s contract lapsed). The Royal Havana Company had a twenty-year license to introduce both merchandise and slaves to the port. *Id.* The Guipúzcoa (Caracas) Company was issued a similar agreement. *Id.* Further evidence supports the suggestion “[t]hat African slavery was regarded as the solution to all problems of labor in Brazil was confirmed by the formation of two new chartered companies in Lisbon: The Maranhão Company, established in 1755, and the Pernambuco Company, founded in 1759.” *Id.* at 277.

France,¹⁴⁹ Great Britain,¹⁵⁰ Holland,¹⁵¹ Sweden,¹⁵² Denmark,¹⁵³ and Germany¹⁵⁴ were among those European nations that participated in the Trans-Atlantic slave trade, demonstrating, at least, the extreme governmental entanglement in the enterprise,¹⁵⁵ and at most, the governmental monopoly of this exploitive industry.¹⁵⁶ These various nation-states all primarily financed and supported the Trans-Atlantic slave trade.

149. *See id.* at 148-49 (remarking that despite some contradicting authority, slavery did exist in France and “Frenchman were quite ready to participate in the international trade, if they could only find a way.”).

150. *See id.* at 155 (identifying Captain John Hawkins and his supporting network as responsible for initiating the English slave trade in 1562).

151. *See* THOMAS, *supra* note 18, at 159 (explaining that Dutch involvement in Africa followed that of the French and the English). The Dutch were interested in gold and ivory long before their interest in slaves. *Id.* The first Dutch entrance into the slave trade began with collaboration with German merchants from the Hansa ports. *Id.* Holland Captain Jons Bartelson, sailing under the Brandenburg flag, led an expedition that launched the involvement of Germans in the African slave trade. *Id.* at 224.

152. *See id.* at 222 (noting that the Scandinavians also got involved in the African slave trade). Sweden formed a company in 1649, copying the Dutch West India Company model, except that the company utilized Swedish ships, crews, and soldiers. *Id.*

153. *See id.* at 223 (describing the efforts of Jen Lassen, secretary to the exchequer in Copenhagen, in pioneering the first Danish vessel from Africa to the West Indies for the purpose of carrying slaves).

154. *See id.* at 224 (explaining that from the bases established by Dutch interloper, Benjamin Raule, German captains were prepared “to sell slaves to São Tomé and to the Dutch Guyana colony on the Berbice River, and even to bring them back for use in Berlin”). The Germans transported the majority of their slaves in the Caribbean to St. Thomas, a Dutch island. *Id.*

155. *See id.* at 291 (“The Atlantic Slave trade was, for much of its long life, a governmental enterprise in the countries concerned.”).

156. *See id.* at 291-93 (providing a discussion on various countries and the extent of their involvement in, and formalization of, the slave trade). The United States represented the smallest participant in the slave trade, “free from [the] curious mixture of capitalism and state management” that permeated the European monopoly driving the slave trade. *Id.*

III. THE LEGALITY OF THE TRANS-ATLANTIC SLAVE TRADE

A. ADDITIONAL LAWS LEGALIZING SLAVERY

To further advance international support of the Trans-Atlantic slave trade,¹⁵⁷ governments passed laws that permitted citizens to participate in the slave trade. As a result, governments granted citizens licenses to conduct slave expeditions and imposed taxes on slave trading. Slave trading across international¹⁵⁸ and domestic borders was legalized.¹⁵⁹ These legal actions reinforced the view that slavery was a legitimate institution, regardless of its nature as a crime against humanity.

The legislation agreed upon by the international community organized the slave trade in such a way as to make it a governmental operation.¹⁶⁰ The judiciaries would therefore base their decisions on whatever laws, contracts, or agreements were already in place, since it is their duty to execute the laws already established. Employing the standards of the legislative and judicial aspects of the international governments, each one of these departments played an important role in establishing the legitimacy of the Trans-Atlantic slave trade.

B. LANDMARK CASES

The case law dealing with the legality of the international slave trade is not extensive in number. However, it does demonstrate that many judiciaries did decree slavery legal in some respect. This is likely due to the fact that the international community had not yet

157. See THOMAS, *supra* note 18, at 292 (identifying how each country undertook various methods to regulate and monitor the slave trade, including taxation, licensing, sublicensing, and duties).

158. See *id.* at 218 (noting that an Order in Council in London authorized both Barbados and Jamaica to trade slaves with Spain in 1690).

159. See *id.* at 303 (stating that “Nantes had a large black population in 1780, including several hundred captives introduced as a result of recent laws making slavery legal in France.”).

160. See, e.g., Treaty of Utrecht, *supra* note 136, at 328-29 (bestowing onto Britain the *assiento* to import slaves).

established any international criminal courts or tribunals.¹⁶¹ A governmental desire to avoid interference in the management of the land and people within its borders was also a likely contributor. This legal permissiveness broadened the view that slavery was a legitimate institution, despite its nature as a crime against humanity.

The case law dealing with the legality of the slave trade is arguably inconsistent. One of the earliest international cases involving the slave trade is the *Amedie*¹⁶² case. The *Amedie*, a ship owned by Mr. Groves of Charlestown and managed by Mr. Scott, sailed for Africa's coast in September 1807.¹⁶³ Upon its return journey, 105 African slaves were aboard the ship and a dispute arose as to whom the slaves belonged.¹⁶⁴

A seaman named Mr. Johnson had to arrive at Charlestown before January 1, 1808 because of a change to U.S. law abrogating the slave trade after 1807.¹⁶⁵ Instead of following the planned course, Mr. Johnson set out for Cuba, where the ship was captured.¹⁶⁶

Counselor for the Captor, Stephen, argued that the *Amedie* had sailed for the port of Matanzas of Cuba, which was owned by Great Britain's enemy, in violation of British law.¹⁶⁷ Counsel also argued that the *Amedie* voyage violated a U.S. statute making the slave trade illegal.¹⁶⁸

161. See *Rome Statute of the International Criminal Court*, July 17, 1998, art. 1, U.N. Doc. A/CONF.183/10 [hereinafter *Rome Statute*] (stating the intention of the United Nations to establish an international criminal court), available at <http://www.un.org/law/icc/statute/final.htm> (last visited Mar. 3, 2004)

162. *The Amedie*, 12 Eng. Rep. 92 (1810).

163. See *id.* at 92 (recounting the ship's ultimate destination as the African coast).

164. See *id.* (commenting that there was some confusion as to the owner of the slaves).

165. See *id.* (noting that Mr. Johnson assumed command of the *Amedie* after the death of her former master on the homeward voyage).

166. See *The Amedie*, 12 Eng. Rep. at 93 (1810) (explaining that because Mr. Johnson could not reach Charleston before January 1, 1808, he steered the *Amedie* to Cuba).

167. See *id.* at 93-94 (emphasizing that in 1808, at the height of the Napoleonic wars, Cuba was a Spanish colony and Spain was at war with England).

168. See *id.* at 94 (explaining counsel's argument that the voyage violated American laws).

Counselors Dallas and Arnold, representing the claimants, argued that the seamen on the ship were sincerely attempting to avoid breaking the U.S. prohibition by making a return arrival to Charlestown before the effective date of the U.S. decree.¹⁶⁹

The Court held that the international slave trade at that time was solely outlawed by the United States, while Great Britain had no such legal prohibition.¹⁷⁰ Thus, America's law was considered only municipal and had no extraterritorial effect.¹⁷¹

However, by the time the parties brought the *Amedie* case to Great Britain's court system, England had abolished the slave trade;¹⁷² thus rendering the claimant's demand for restitution moot.¹⁷³ The Court interestingly declared that slavery was an "inhuman traffic,"¹⁷⁴ yet consciously recognized its illegality because *it* had finally outlawed the trade, not because America or any other nation abolished it.¹⁷⁵ Therefore, the court dictated that the African trade contravenes the principles of universal law, but that the violation is effective upon showing that a particular country or jurisdiction availed itself of such principle. Thus, in this case, the court begins to elucidate international law's influence on the eventual total abrogation of the Trans-Atlantic slave trade.

169. See *id.* at 95 (describing a letter displaying the good faith effort to avoid breaking the American laws).

170. See *id.* at 96 ("So far as respected the transportation of slaves to the colonies of foreign nations, this trade had been prohibited by the laws of America only . . . our law sanctioned the trade with it was the policy of the American law first to restrict and finally to abolish.").

171. See *The Amedie*, 12 Eng. Rep. at 96 ("It appeared to us therefore difficult to consider the prohibitory law of America in any, other light than as one of those municipal regulations of a foreign state of which this Court could not take any cognizance . . .").

172. See *id.* (noting that the slave trade had since become illegal in England as well).

173. See *id.* at 97 (concluding that under the circumstances, one did not have a right to be heard for "claims of this nature").

174. See *id.* at 93 (referring to the "disgraceful nature" of the slave trade).

175. See *id.* (commenting that although Great Britain had allowed the slave trade, or human trafficking, slavery itself was still permitted in some British colonies).

In the following year, Great Britain's court adjudicated an appeal case also involving the Trans-Atlantic slave trade, the *Fortuna* case.¹⁷⁶ Sailing under an American flag, the ship, *Fortuna*, arrived at Madeira in September, 1810.¹⁷⁷ An American, George Fowler Trenholm, was the initial owner of the *Fortuna*. After his arrival in Madeira, Mr. Trenholm sold his ship to Jao de Sauzo, received Portuguese papers, and continued his voyage under the Portuguese flag.¹⁷⁸ On October 6, 1810, the *Fortuna* sailed from Madeira. The British ship *Melampus*, sailed by Captain Hawker, subsequently captured the *Fortuna*.¹⁷⁹

The court initially focused on the sale, which occurred at Madeira, and determined it to be fraudulent. Mr. Trenholm received no real consideration for the ship's conveyance,¹⁸⁰ which after such transaction was still under the direction of the seller, Mr. Trenholm. After revealing the ship was under the charge of an American shipmaster, the court then asked whether Mr. Trenholm could be protected under the slave laws of his country. This inquiry stands in great contrast to the ruling in the *Amedie* case. In *Amedie*, the court explained that the United States had initially outlawed the slave trade while Great Britain had not.¹⁸¹ As a result, the U.S. law could only be viewed as municipal¹⁸² and could not affect the laws or decisions of other jurisdictions in the international community.

176. *The Fortuna*, 1 Dods. 81 (1811).

177. *See id.* (noting that the American registered ship made its way to Madeira).

178. *See id.* at 82 (relating the process by which the owner of the *Fortuna* attempted to conceal the true identity of his ship under the Portuguese flag, a method known today as flying a flag of convenience).

179. *See id.* (noting Captain Hawker's possession of the *Fortuna*).

180. *See id.* at 89 ("This is clear that a gross fraud had been practised upon the Portuguese government; for in order to obtain the documents under which she is adopted into Portuguese navigation, it is essential to be shown that the consideration money should have been actually paid.")

181. *See The Amedie*, 12 Eng. Rep. at 96 (stating that American law had prohibited the slave trade before the English likewise abolished the trade).

182. *See id.* (emphasizing that the laws of one nation do not make them international law or effect the prize law of Great Britain).

The court held that the *Fortuna* was an American vessel and that the sale secured at Madeira was fraudulent.¹⁸³ The *Amedie* decision shows that the court was aware of the U.S. prohibition on its citizens' participation in the Trans-Atlantic slave trade. Thus, by allowing Mr. Trenholm to shield himself under American law, the court determined under the totality of the circumstances that Mr. Trenholm was the true owner of the *Fortuna*.¹⁸⁴ Further, the court decided that Mr. Trenholm either participated or planned to participate in transporting slaves, contrary to the law of the United States.¹⁸⁵ Accordingly, the court condemned Mr. Trenholm's ship and cargo pursuant to the holding in *Amedie*.¹⁸⁶

In 1822, a U.S. Federal Court heard the *La Jeune Eugenie* case.¹⁸⁷ This case involved an appeal regarding the ship, *La Jeune Eugenie*, and the effect of a series of U.S. laws passed concerning the Trans-Atlantic slave trade. On March 2, 1807, the U.S. Congress passed a law that made the importation of slaves to any U.S. port illegal.¹⁸⁸ Congress passed another bill in 1818 requiring the accused to prove that he owned or captured slaves found in his possession for at least five years before the Act became effective.¹⁸⁹ Just prior to this Act, the U.S. passed an act which employed armed U.S. ships to seize any

183. See *The Fortuna*, 1 Dods. 81, 87 (1811) ("I think that no doubt, can be entertained that she is an American vessel, at present owned by Americans, and only colourably transferred to a Portuguese for purposes of deception.").

184. See *id.* at 88 (stating that the circumstances suggest Trenholm as the current owner).

185. See *id.* at 87-90 (extrapolating from the facts that Trenholm violated U.S. laws).

186. See *id.* at 90 ("The construction of the ship had all the accommodation necessary for the conduct of that trade . . . She had platform ready constructed; she had timbers fit for the construction of more; she had iron shackles and bolts, and running chains and collars—all adapted for the purposes of conveying slaves . . . The continuance of such accommodations prove the intended continuance in that trade . . . I can have no rationale doubt of her real character;—and, under the authority of the *Amedie*, I condemn her and her cargo.").

187. (No. 15,551) 26 F. Cas. 832 (C.C. Mass. 1822).

188. See *id.* at 833 (describing the illegality of importing slaves into any U.S. port).

189. See *id.* (explaining that recent laws required defendants to prove that a slave's importation occurred at least five years prior to prosecution).

vessel “engaged in the slave trade” by U.S. residents or citizens.¹⁹⁰ Congress passed yet another law regarding any U.S. citizen who was employed by a foreign ship involved in the slave trade.

The *La Jeune Eugenie* case involved Robert F. Stockton, Esq. who, in 1821, was sent to patrol Africa’s coast pursuant to U.S. laws and treaties prohibiting the slave trade.¹⁹¹ Stockton thus had federal authority to patrol the seas for such violations.¹⁹² During this patrol, Captain Stockton encountered the *La Jeune Eugenie* vessel at Galenas near Cape Mount on Africa’s west coast.¹⁹³ Stockton captured the ship on the suspicion of slave trade and brought it into a port in Boston to determine whether it was an American vessel engaged in the slave trade.¹⁹⁴ Evidence showed that although the ship’s papers said that it was French owned, the *La Jeune Eugenie* was supplied in Bassetre, Guadeloupe and built in the United States.¹⁹⁵ The lower court ruled in favor of the French claimants.¹⁹⁶

The U.S. government appealed and argued that the *La Jeune Eugenie* was a U.S. vessel and that there was no evidence that the ship was under French title or French ownership before the 1818 Act, thus shifting the burden to the accused to prove that they did not violate this Act.¹⁹⁷ The United States also argued that the captured ship sailed without an identified homeland while it engaged in the slave trade.¹⁹⁸ Lastly, the United States observed that most

190. *See id.* (describing the authority for U.S. ships to bring into port “any vessel engaged in the slave trade by citizens or residence of the United States . . .”).

191. *La Jeune Eugenie*, 26 F. Cas. at 833.

192. *See id.* (noting Federal authority granted under the authority of U.S. law).

193. *See id.* (stating that Captain Stockton “fell in with the schooner *La Jeune*” at Galenas).

194. *See id.* (explaining how, upon suspicion that the ship engaged in slave trade, the ship was “libeled” at the district court).

195. *See id.* (explaining that the evidence revealed that the ship was built in the United States).

196. *See La Jeune Eugenie*, 26 F. Cas. at 833-34 (noting that the court made this ruling despite testimony suggesting that the ship was involved in slave trade).

197. *See id.* at 834. (adding that the use of the French flag to evade U.S. laws was so common that it had only negligible probative value).

198. *See id.* (alleging that when the *La Jeune Eugenie* was captured, there were no signs as to what nation the vessel belonged).

governments of the international community had prohibited the slave trade, making it illegal under international law.¹⁹⁹

The appellees argued that the U.S. government did not have jurisdiction over *La Jeune Eugenie* because it was not a U.S. vessel, and unless it showed that the “slave trade was prohibited by the law of nations,” such violation had to be determined by international custom.²⁰⁰ Further, the appellees argued that there was no evidence of universal abolishment of the slave trade; thus the United States could not validly argue that the appellees violated international custom or usage.²⁰¹ As a result, the appellees urged that the U.S. government did not have valid jurisdiction of the *La Jeune Eugenie*.²⁰²

The court first considered whether or not the international slave trade had been abolished by international custom or usage. The court found that although no official treaty existed stating France’s position on slavery, France had made clear at a conference in Vienna that it would fight to abolish slavery.²⁰³ The court also held that France’s local law prohibited the slave trade as well.²⁰⁴

In its final holding, the court did not look to its own law passed by Congress which outlawed the slave trade, but instead held that the international community neither forbid or sanctioned any of the transactions which comprised the Trans-Atlantic slave trade.²⁰⁵

199. *See id.* (recounting the argument that the slave trade was contrary to the law of nations because it violated the law of nature due to its barbaric and inhumane nature).

200. *See La Jeune Eugenie*, 26 F. Cas. at 835 (noting that the appellees argued that the only way a court could determine national law would be to look at the custom or usage of such nations, but that there was not such a standard because nations had not expressed any opinion as to slavery).

201. *See id.* (recounting the argument that not enough countries had abolished the slave trade to conclude that such course of action amounted to custom).

202. *See id.* (restating the argument that because the vessel was not American, and slavery did not violate custom or usage of nations, the court did not have jurisdiction over the *La Jeune Eugenie*).

203. *See id.* at 846-47 (concluding from France’s intention to abolish slavery that slavery was then prohibited by universal law).

204. *See id.* at 849 (noting that the court found that the municipal regulations of France seemed to prohibit African slave trade).

205. *See id.* at 837. It is perfectly consistent with reason, common sense, the principles on which national law rests, and with the practice of all nations, that

However, the court did determine that the law of France prohibited the slave trade.²⁰⁶ The court did not assume final jurisdiction and released the ship and the slaves to French authority for final adjudication.²⁰⁷

These cases have thus far demonstrated the hesitancy of some courts in the international community to render their own municipal law enforceable on other nations or grant a particular court jurisdiction over a case involving foreign claimants. In each of the preceding cases, the courts recognized the slave trade as an inhumane institution, although such revelation did not occur in international judiciaries until several centuries after the slave trade's inception.

In 1825, in a case entitled *The Antelope*, the U.S. Federal Court once again adjudicated a case involving international claimants and the Trans-Atlantic slave trade.²⁰⁸ A Venezuelan ship known as the Arraganta sailed to the coast of Africa after it was manned in Baltimore.²⁰⁹ The Arraganta, comprised primarily of American officers, seized a number of vessels and their slaves off the coast of Africa, including an American vessel and its twenty-five African slaves on board, several Portuguese vessels and their Africans, and a Spanish ship, the Antelope.²¹⁰ Thereafter the Arraganta and the Antelope sailed to Brazil's coast where the Arraganta wrecked.²¹¹ The crew of Arraganta, and the seized Africans, were subsequently transferred to the Antelope ship, commanded by John Smith, a U.S. citizen.²¹² After this transfer, the total number of African slaves

neither the acquisition, the manner of holding, using, abusing, transferring, or transporting slaves, is either forbidden, commanded, permitted, or recognized by the law of nations.

206. *La Jeune Eugenie*, 26 F. Cas. at 851 (rejecting the French owners' claims and holding that slave trade is prohibited by both universal and French law).

207. *See id.* (holding that the final decision must be made by the King of France).

208. *The Antelope*, 23 U.S. 66 (1825).

209. *See id.* at 67 (noting that the Arraganta set off for Africa).

210. *See id.* at 67-68 (stating that the Arraganta took hold of a Spanish ship, the Antelope).

211. *See id.* at 68 (recounting that the Arraganta wrecked).

212. *See id.* (explaining that John Smith transferred the Africans to the Antelope).

aboard totaled about two-hundred and eighty.²¹³ Captain Jackson, a U.S. citizen, found the *Antelope* near the Florida coast.²¹⁴ The United States, Portugal, and Spain all claimed the Africans on board the ship.²¹⁵ The U.S. government claimed the Africans because the U.S. citizens were involved in slaving contrary to U.S. laws.²¹⁶

The Court dismissed all U.S. claims to the Africans, except for those taken from the U.S. vessel.²¹⁷ The U.S. government appealed, arguing that mere possession of Africans does not create a presumption that the Africans were the claimants' property.²¹⁸ The U.S. also argued that upon showing that the Africans were considered property, the appellees had the burden of proving to whom they originally belonged and failed to meet this burden.²¹⁹ The appellant lastly argued that the lower court's ruling was erroneous because some Africans were considered free and the claimants did not demonstrate which Africans fell in which particular category.²²⁰

The claimants sought restitution for the Africans found on the vessel because they were lawfully purchased from Africa's coast and were subsequently seized unlawfully by the United States.²²¹ The Court first declared that Africans were human beings and not

213. See *The Antelope*, 23 U.S. at 68 (noting that after the *Arraganta* wrecked, the *Antelope*, a vessel under the command of a U.S. citizen, took all the Africans that the *Arraganta* had captured previously).

214. See *id.* (explaining that Jackson came upon the ship off the Florida coast).

215. See *id.* (outlining that these unusual facts resulted in multiple claims over the same Africans).

216. See *id.* (explaining the legal theory underpinning the U.S. claim).

217. See *id.* at 69 (noting that the lower court also went on to divide the remaining Africans between the Spanish and Portuguese claimants).

218. See *The Antelope*, 23 U.S. at 70 (listing this possession argument as one of the reasons given by the United States as to why the lower court's decision should be overturned).

219. See *id.* at 70 (recounting the argument that the appellees had not met the burden of proving to whom the Africans belonged).

220. See *id.* (explaining the U.S. argument that some of the Africans were free and that no one had successfully separated those from the others).

221. See *id.* (recounting the U.S. argument that claimants were entitled to restitution because the Africans were acquired lawfully from Africa).

property under U.S. law.²²² Thus, the Court concluded that it could not grant the claimants restitution, which is a concept for compensation for lost or stolen property, labor, or services.²²³ The Court's basis for this was rooted in domestic maritime law, which mandated suppression of the slave trade, especially within the United States' territorial jurisdiction.²²⁴ The Court further determined that the claimants had the burden to show that they legally acquired the African slaves pursuant to Spain's municipal laws in order to maintain their title to the slaves.²²⁵

Similar to the *La Jeune Eugenie* case, the judiciary in *The Antelope* inferred that customary international law did not overtly and explicitly permit or prohibit the Trans-Atlantic slave trade.²²⁶ Thus, a showing that there was Spanish local law that provided claimants a basis for relief could not be applied internationally to redress the claimants' loss outside Spanish territory.²²⁷ To the contrary, the Court suggested that the international community's involvement in the slave trade was a more common practice that had become a part of the law of nations.²²⁸ Nonetheless, it found that at the time the claimant brought *The Antelope* case, public international

222. *See id.* at 72, 73 (finding that all men are free according to the laws of nature).

223. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining restitution as “[t]he act of restoring to the rightful owner something that has been taken away, lost or surrendered”).

224. *See The Antelope*, 23 U.S. at 72 (concluding that the Court cannot grant the appellants' justice claim for their property without “disregarding our own policy, endangering our own safety, infringing our own laws, and violating the plighted faith of the country”).

225. *See id.* at 74 (cautioning that operation of Spanish law would not have extra-territorial effect and would therefore not apply in the United States).

226. *See id.* at 75-76 (explaining that the question surrounding the legality of the slave trade remained since the international community had not yet established a rule of law explicitly sanctioning the conduct); *see also* *La Jeune Eugenie* (No. 15,551), 26 F. Cas. 832, 845 (C.C. Mass. 1822) (acknowledging that slavery may be lawful in some nations and may form a part of a nation's particular domestic policy).

227. *See The Antelope*, 23 U.S. at 75 (finding that the claimants have no legal support for their claim where the law of nations is silent on this issue and where municipal law alone is the only source governing their claim).

228. *See id.* at 75, 77 (suggesting that a case claiming Africans as property would be a more legitimate claim before a court of the law of nations).

law, determined by international norms and custom, had summarily abolished the Trans-Atlantic slave trade.²²⁹

The Court held that the seizure of the *Antelope* was illegal because Captain Jackson did not have federal authority to arrest or seize the vessel.²³⁰ Thus, one would reasonably conclude, based on the current actions of the international community, that the slave trade in Africans was illegal based on customary international law. However, the Court emphasized that there was no consensus, codified prohibition, or law against the slave trade among the international community.²³¹

The Court's focus on the lack of a codified international law seemingly deviated from its own realization that international law was not necessarily derived solely from treaties, but was also based on international custom and usage. The judiciary continued to note that just as Spanish municipal law may have made slaving currently legal, it was territorial. Similarly, U.S. law is municipal and the Court may apply it to U.S. territories and vessels, but cannot apply it internationally.²³²

This tribunal narrowly construed the application of its laws within these constraints. Here, the remaining claimants were Spanish and Portuguese. The lower court dismissed John Smith's claim.²³³

229. *The Antelope*, 23 U.S. at 76-77 (declaring that regardless of what the laws on slave trade were in the past, the international community's current position was to publicly and solemnly consent to the prohibition of slave trade and to declare it unjust, inhuman, and illegal).

230. *See id.* at 83 (noting that Jackson's actions exceeded the scope of protection by U.S. laws and that U.S. courts do not authorize U.S. cruisers to "rove" the ocean searching for and seizing objects upon which U.S. jurisdiction may be applied). Thus, the act was "lawless" to the extent that the case depended on the seizer's official character. *Id.*

231. *See id.* at 91 (highlighting that several international powers including reports of various committees in the U.S. Congress indicate that the international law does not inhibit slave trafficking).

232. *See id.* at 99 (maintaining that U.S. laws are "strictly municipal, confined to citizens of the United States to persons committing offences on board U.S. vessels of the United States, to foreigners seeking to introduce negroes into the United States").

233. *See id.* at 69 (describing the procedural history of the case, which included the Court's dismissal of the libel claim and John Smith's claim). The Court also

The Court determined that the nationality of a ship is assumed by the flag it sailed under at the time of capture. The *Arraganta* sailed under the *Artegas* (Venezuelan) flag although most of the crew was American.²³⁴ Accordingly, the Court determined that this was not a U.S. vessel.²³⁵

The Spanish and Portuguese were indeed foreigners, but arguably they did not seek to introduce Africans to the United States.²³⁶ Their ships were hijacked (pirated) and forced to sail to the New World.²³⁷ Thus, applying the standard of the Court to these facts, both the Spanish and the Portuguese lacked the requisite intent to avail themselves to the jurisdiction of U.S. laws. Under general jurisdiction principles, however, a person has merely to maintain minimum contacts with a territory for a court to obtain in personam jurisdiction.²³⁸ The Court did not consider this factor to determine the final outcome of this case.

After determining that the Portuguese and Spanish claimants did not intend for the United States to have jurisdiction over them, the Court further stated that the legality of the vessel's seizure was dependent upon the municipal law of the country who owned the ship.²³⁹ The applicable municipal law was determined by the flag under which the vessel sailed. Such position, unless rectified with the assumption that Portuguese or Spanish municipal law condoned the Trans-Atlantic slave trade, directly conflicted with the Court's earlier determination that it could only apply municipal law locally and not

dismissed the United States' claim except for the part with respect to the Africans taken from the U.S. vessel. *Id.*

234. See *The Antelope*, 23 U.S. at 83 (describing the crew as mostly American and that the ship flew an *Artegas* flag).

235. See *id.* at 123 (finding that the *Antelope* vessel "unquestionably" belonged to Spanish subjects).

236. See *id.* at 109-110 (explaining the process by which the slaves arrived in the United States and how such seizure of the vessel was in compliance with domestic and international law).

237. *Id.*

238. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that due process only requires the presence of minimum contacts in order to effectuate a judgment in personam for a defendant).

239. See *The Antelope*, 23 U.S. at 118 (explaining that the domestic law of the country who owned the ship determines the propriety of such acts).

internationally.²⁴⁰ The Court further held that some of the Africans were determined to be Spanish property while the remaining would be “disposed of” by the United States, and likely set free because the claimants did not show a proprietary interest in the Africans.²⁴¹

One of the landmark cases regarding the international slave trade is *United States v. Libellants & Claimants of the Schooner Amistad*.²⁴² The backdrop of this case concerns the waterways near Long Island. The subjects of the schooner *Amistad* were Spanish citizens who had purported documents detailing that the Africans on board were indeed their slaves.²⁴³ However, Spain was already party to a treaty outlawing the transport and barter in slaves at the time of the ship’s seizure.²⁴⁴ The U.S. government deemed the Africans kidnapped, in violation of an established treaty by those who participated in the Trans-Atlantic slave trade, and therefore free.²⁴⁵ As a result, the U.S. Supreme Court released the Africans who were on board and ordered their return to their native homeland.

The holding of the *Amistad* case illustrates that the slave enterprise was unlawful during this era among *some* nation-states of the international community. However, during these four centuries, governments often took actions that suggested that an African slave did not constitute the life of a human being, but was rather a mere commodity.²⁴⁶ This view and the subsequent acts that supported it were often validated by these governments’ acquiescence to, and participation in, this crime against humanity.

As discussed, between the fifteenth to nineteenth centuries the monarchs, merchants, and other government officials recorded their

240. See *supra* note 225 and accompanying text (discussing the international weight of a municipal law).

241. See *The Antelope*, 23 U.S. at 131-32 (stating the Court’s holding with respect to the African slaves).

242. 40 U.S. 518 (1841).

243. See *id.* at 587 (describing the occupants on board the schooner).

244. See *id.* at 592-93 (detailing the treaty provisions binding upon Spain and that prohibited slave trade).

245. See *id.* at 593, 596 (finding that the slaves were unlawfully kidnapped and henceforth deemed free).

246. See *infra* note and accompanying text (elaborating on the sale and trade of Africans as property).

participation in the legalized slave trade. These participants developed the Trans-Atlantic slave trade into an organized institution. The international treaties solidified the relationships among the nation-states and established the legality of the slave trade. Each treaty drafted, and every treaty signed by a governmental accomplice constituted an affirmation of the Trans-Atlantic slave trade as a lawful institution.

Each administration of a license, imposition of a tax or duty, governmental grant of a loan to merchants or lay citizens, and implementation of contracts to barter in African slaves further established the trade as a legitimate practice, yet to be accounted for. Thus, from the contributing nations' perspective, the slave trade was lawful and did not violate any of the international legal or customary norms during these centuries.

These acts manifested the legislative intent of the international community that bartering for African slaves was a legal norm used to enrich those nations and traders engrossed in the trade. One might argue that it is easier to criticize the governments and monarchs of that time in retrospect and that they may not have known the slave trade was a crime against humanity. In reality, the crime was generally perpetuated against Africans,²⁴⁷ and racism provided the justification for enslavement.

Some minor instances were recorded, in addition to the previously discussed cases, which regarded the Trans-Atlantic slave trade as illegal based on customary law or as a general moral objection. Regarding ethical principles, objections were witnessed, though there were few during the sixteenth century. In one instance, a Jesuit priest refused to hear confessions from anyone who possessed African slaves.²⁴⁸ One historian in the sixteenth century could not understand why it was easy to object to the enslavement of Indians, but not the

247. See THOMAS, *supra* note 18, at 117 (suggesting that eighty percent of slaves were African-born and the rest came from Spain of enslaved African parents). Like those on Cortés's property, three-quarters of those from Africa came from the 'Guinea of Cape Verde'-Senegambia and Guinea-Bissau. *Id.*

248. See *id.* at 147 (indicating that a Jesuit named Fray Miguel García was horrified when he arrived in Brazil about 1580 and found that the society owned Africans). He firmly believed that the Africans had been enslaved illegally. *Id.*

dehumanization of African slaves, when the only difference he saw was the arbitrary skin pigmentation of both peoples.²⁴⁹

During the later centuries, there were recorded instances of moral objections implemented in legal form to discourage enslavement of Africans. In one case, a captain involved in a slaving expedition in 1640 raided an African village, but the authorities arrested him upon his return to his homeland.²⁵⁰ The General Court ordered the Africans to be returned to their native land, due to the abhorrent crime of kidnapping in order to enslave them.²⁵¹

Additionally, the northern colonies described kidnapping and enslavement within their territorial confines, as a moral offense crime, or a violation of the rights that God made inherent in every human being.²⁵² Although limited objections were made during the period of the slave trade, the intent of most of governmental participants was to make the slave trade as lucrative as possible, regardless of whether the acts constituted crimes against humanity.

C. THE ABOLITION OF THE TRANS-ATLANTIC SLAVE TRADE

Ironically, throughout the sixteenth to nineteenth century the international community significantly participated in the Trans-Atlantic slave trade in Africans, amidst voices that protested the

249. *See id.* (describing the views of the historian Juan Suárez de Peralta expressed in 1580 and in his book: *Noticias Histórica de la Nueva España*, which criticized the lack of voices defending black Africans). Quite significantly, his book was not published until 1878. *Id.*

250. *See* DUBOIS, *supra* note 31, at 30 (asserting that the authorities arrested the Captain in accordance with the stern Puritanism ideals found in Massachusetts' Biblical codes, which limited the grounds for slavery).

251. *See id.* at 30 (ordering that the slaves be returned home at the colony's expense because good and just men would find the Captain's actions vile, odious, and abhorrent).

252. *See id.* at 32 (stating that the issue of kidnapping first arose with the sale of two black individuals in Salem who were captured on the high seas). The event resulted in a legislative resolution declaring that the selling and enslaving of the human species directly violates natural rights vested in all men by God. *Id.* Furthermore, the resolution declared that slavery contradicted the principles of the United States and its struggle for liberty. *Id.*

enslavement only of "Indians" or Native Americans,²⁵³ thus demonstrating the racist nature of the entire institution. However, artistic and scholastic Europeans, such as playwrights,²⁵⁴ intellectuals,²⁵⁵ and economists²⁵⁶ began their own individual campaign against the legitimacy of slavery. Furthermore, just as religious authorities, particularly the Pope, sanctioned the enslaving of Africans by validating the Asiento,²⁵⁷ religion ironically became a vital role in denouncing slavery as a just enterprise. Such religious groups included the Quakers,²⁵⁸ Catholics,²⁵⁹ Puritans,²⁶⁰ and others.²⁶¹

253. See THOMAS, *supra* note 18, at 451 (stating that "the proclamations by crown or pointiff continued to denounce the enslavement of the mild Indians rather than the competent Africans"). "The greatest preacher of the age, António Vieira, was the friend of Amazonian Indians-but not of African slaves . . . like Las Casas 150 years earlier, he urged solving the problem of shortage of labour in Brazil by importing more African slaves, in order to enable the Indians to live better." *Id.* at 452.

254. See *id.* at 464 (observing that "the playwright Marivaux, the great Voltaire, the brilliant Motesquieu, the assiduous Diderot, and the contributors to the *Encyclopédie* as well as Jean Jacques Rousseau, all condemned or mocked, or denounced, slavery . . .").

255. See *id.* at 490 (providing that even the eccentric rationalist, Thomas Day, composed a poem entitled *The Dying Negro*, "which denounced the inconsistency of the North Americans in fighting for liberty while maintaining slavery").

256. See *id.* at 491 (pointing out that Jacques Necker, a Swiss economist, provided a "scathing account of 'how we preach humanity' yet go every year to bind in chains twenty thousand natives of Africans").

257. See *supra* note 102 and accompanying text.

258. See *id.* at 451 (contending that the founder of the Quakers, George Fox, preached brotherhood to the slave owners of the West Indies and denounced slavery in Barbados, but owned slaves himself in Pennsylvania),

259. See *id.* at 451, 458, 466 (recounting the stance of the Vatican and the Catholic Church through the declarations of three Popes: Pope Clement XI, Pope Urban VIII (Barberini), and Pope Benedict XIV (Lambertini), who condemned slavery, called for its termination, and threatened those who practiced slavery with excommunication).

260. See THOMAS, *supra* note 18, at 454 (remarking that the Puritan Richard Baxter attempted to greatly insult English slaveholders by comparing them to Spanish conquistadors and further remarked that slave owners should be called demons and not Christians).

261. See *id.* at 453-54 (commenting that the Reverend Richard Saltonstall not only denounced the murder of black slaves in 1645 but also the very act of

Movements continued to evolve with the hopes of encouraging the abolition of the African slave trade. Such groups had to wait several decades to see their activism impact the slave trade. These movements existed in North America²⁶² and Great Britain.²⁶³ However, Spain and Portugal failed to acknowledge the devastation and inhumanity of the Trans-Atlantic slave trade.²⁶⁴ The international community would not consistently outlaw the Trans-Atlantic slave trade until the nineteenth century, granting this institution a life span of at least 400 years before it was “officially” eradicated.

Eventually, the international effort to eliminate the Trans-Atlantic slave trade became more of a reality than a cultural philosophy. Some nation-states abolished it on their own accord, while others entered into treaties declaring their abrogation of participation in the trade.

In 1792, Denmark passed a law that outlawed the traffic of Africans in Danish territories.²⁶⁵ France initially abolished slavery in its territories in 1794, but then reestablished it in 1799, only to abolish permanently the trade by decree in 1815.²⁶⁶

kidnapping on the Sabbath Day as being “contrary to the law of God and of this country”).

262. *See id.* at 487 (contending that although all the major nations involved in the slave trade did contain people discussing abolition, the abolition “concern seemed confined to unorthodox sects, such as the Quakers in Britain and North America, and intellectuals in France”).

263. *See id.* at 493 (describing the 1787 founding of the Committee for Effecting the Abolition of the Slave Trade in London).

264. *See id.* at 503 (commenting that apparently Portugal and Spain stood unaffected by the movements since no sign whatsoever of the spreading humane ideas could be found anywhere in their empires).

265. *See* DUBOIS, *supra* note 31, at 131 (proclaiming that Denmark was the first to respond to the anti-slavery and anti-slave trade movements of the Eighteenth century).

266. *See id.* at 131-32 (arguing that the principles of the French Revolution logically called for the end of slavery but the initial termination was the result of a whirl of enthusiasm). Napoleon finally abolished the slave-trade during the Hundred Days by decree, which was then confirmed by law in the Treaty of Paris. *Id.*

Additional countries abolishing their participation in the Trans-Atlantic slave trade included Brazil,²⁶⁷ England,²⁶⁸ Netherlands,²⁶⁹ Portugal,²⁷⁰ Spain,²⁷¹ and Sweden.²⁷² Thereafter, some nations bound themselves to treaties, which outlawed enslaving of Africans²⁷³ and adopted laws that criminalized the slave trade and recognized its inhumanity.

IV. THE TRANS-ATLANTIC SLAVE TRADE; A FORGOTTEN CRIME AGAINST HUMANITY

The Trans-Atlantic Slave trade was a lucrative international institution from which many nation-states benefited economically. As a result of its oppressive nature, it also caused notorious death and destitution. It was not until the twentieth century that the international community began its worldwide effort to define what acts constituted crimes against humanity and seek to prohibit such acts.

Upon reviewing the decisions made in the aforementioned cases, one can trace the evolution of international law. Generally, two sources of international law include a nation-state ratifying an

267. See *id.* at 141 n.1 (indicating that Brazil promised in 1826 to abolish the slave trade in three years but actually abolished it in 1830).

268. See *id.* at 133 (contending that in 1806 England abolished the slave trade with colonies acquired by conquest during the Napoleonic wars and completely abolished such traffic on March 25, 1807).

269. See *id.* at 134 (asserting that the Netherlands agreed by royal decree in 1814 to abolish the slave-trade).

270. See DUBOIS, *supra* note 31, at 134 (indicating that Portugal agreed in 1815 to abolish the slave trade north of the equator).

271. See *id.* at 134-35 (describing that Spain agreed in 1814 to restrain the slave trade to its colonies because Spain desired a loan with England who required as much; but Spain eventually abolished the slave "trade north of the equator in 1817, and promised entire abolition by 1820").

272. See *id.* at 133 (proposing that England signed treaties with Portugal, Denmark, and Sweden during the years 1810-1814 in order to move towards prohibiting slave traffic by international agreements).

273. See *id.* at 145-46 (summarizing a fourth conference on the slave trade held in London, which was England, France, Russia, Prussia, and Austria attended). England, Russia, Prussia, and Austria signed what became the Quintuple Treaty on December 20, 1841. *Id.* This Treaty denounced slavery and bound the signatories to submit to seizure and searches pursuant to a valid warrant. *Id.*

agreement or treaty, and the international community accepting a general practice of law deemed international custom. At times, the cases recognized laws issued primarily for municipal application. While the United Nations has made efforts to achieve uniformity in adjudicating international crimes, the obstacle of applying anti-slavery statutes with homogeneity to the international community still remains.

A. INTERNATIONAL CONVENTIONS AND STATUTES

1. *The Slavery Convention of 1926*

Generally, the Slavery Convention of 1926 states which acts comprise slavery and slave trading in Africans.²⁷⁴ Based on the intent of the signatories, the Slavery Convention was premised upon the Brussels Act, which intended to terminate the slave trading of Africans.²⁷⁵ The Slavery Convention represented the first international convention of its kind to focus on slavery and the African slave trade.

2. *The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*

Consequently, the United Nations executed the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which became effective

274. The Slavery Convention, Sept. 25, 1926, T.S. No. 778, 212 U.N.T.S. 17, amended by Protocol Amending the Slavery Convention, Dec. 7, 1953, T.I.A.S. No. 3532, 182 U.N.T.S. 51 (outlining that the slave trade includes all acts involving the capture, acquisition or disposal of a person with the intent to reduce him to a slave; all acts involved in the acquisition of a slave in order to sell him; all acts of selling or exchanging a slave with the intent that the slave be sold or exchanged; as well as acts involving the trade or transport of slaves).

275. Convention Revising the General Act of Berlin, Feb. 26, 1885, 8 L.N.T.S. 25, art. 11 annex (binding the signing powers to employ measures to end the slave trade and punish those engaged in the trade). Seeing that trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also the operations, which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo declare that these territories may not serve as a marked or means of transit for the trade in slaves.

April 1957.²⁷⁶ The signatories to this Convention acknowledged that slave trading and slavery failed to be eradicated throughout the international community and thus implemented additional guidelines regarding this inhumane institution.²⁷⁷

3. *The Rome Treaty Statute of the International Criminal Court*

In 1998, the United Nations General Assembly adopted Resolution F, which endorsed the Rome Statute of the International Criminal Court. The Rome Statute entered into force effectively July 1, 2002.²⁷⁸ Under Article 7, this statute bestows the responsibility of preparing proposals for a provision of aggression, including defining the elements of crimes against humanity.²⁷⁹

B. ANALYSIS

1. *The Slavery Convention of 1926*

The Convention specifically defines slavery as follows:

For the purpose of the present Convention, the following definitions are agreed upon:

276. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, T.I.A.S. No. 6418, 266 U.N.T.S. 3 [hereinafter *Supplementary Convention*](establishing the protocol for becoming a Party to the agreement).

277. *See id.* (recognizing that slavery, the slave trade and institutions, and practices similar to slavery had not yet been eliminated in all parts of the world). The Parties obligated themselves based on the decision that, "the Convention of 1926, which remains operative, should now be augmented by the conclusion of a supplementary convention designed to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery." *Id.*

278. Resolutions Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, G.A. Res. F, U.N. GAOR, Final Act, Annex 1, U.N. Doc. A/CONF.183/10 (1998) [hereinafter *Rome Treaty Statute*] (instituting a Commission to further the establishment of an International Criminal Court, but failing to permanently establish the rules of procedure and crimes with definitions).

279. *See id.* art. 7 (stating that the Commission also shall submit proposals regarding when the International Criminal Court shall have jurisdiction).

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching the right of ownership are exercised.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade transport of slaves.²⁸⁰

Many of the European governments, along with private merchants, explorers, and African monarchs satisfied the first prong of the definition of slavery by branding the Africans to ensure that others were aware to whom the slaves belonged.²⁸¹ Additionally, slave masters and explorers possessing documents purporting ownership of Africans, legally sanctioned by the international community, was another form of one attributing one's right to own Africans, which also satisfied the first condition of slavery as defined by the Convention. These documents included registration documents, contracts, as well as last will and testaments of slave owners, which frequently transferred ownership of slaves to succeeding generations.

The second prong specifies all of the actions constituting the slave trade, beginning with the acquisition and capture of slaves. Thus, the kidnapping or authorization of the kidnapping of slaves from Africa by the Portuguese, European nations and merchants satisfied the element of "capture." Intent represented another aspect required to satisfy the elements of slave trade. This element was fulfilled from the first act of kidnapping or purchase to the resale in the lands across the Atlantic Ocean, it required that those who acquired the Africans do so for the purposes of reducing them to slavery.

Thus, every transaction reducing the African to a slave, destroying his freedom, obliterating family ties, which encompassed the Trans-Atlantic slave trade constituted slavery and slave-trading. These acts perpetrated by slavers included the involuntary capture and transport of Africans, any form of restriction that prevented Africans from

280. Slavery Convention, *supra* note 274, art. 1.

281. See 1 THE HISTORICAL ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 57, at 99 (explaining the process of branding a slave as a way to signify ownership).

freely moving about or living his or her daily life, the fastening of chains and shackles about the Africans' bodies, the shipment of the African captives involuntarily across the Atlantic Ocean, the display for sale on various lands, the branding, the purchase, the lashings from the bullwhip, and dismemberment and lynching of Africans by the slaver to instill fear in the other Africans.²⁸² Likewise, every contract²⁸³ and treaty²⁸⁴ signed in the barter of African slaves, issuance of licenses,²⁸⁵ imposition of taxes²⁸⁶ and governmental lending of loans to private citizens to continue the exploitation of the slave trade²⁸⁷ demonstrates the intent of the parties to transport and trade African slaves. These acts definitively satisfy the element of slave traders selling people and fulfilling the definition of slavery and slave trading as defined by the Slavery Convention of 1926.²⁸⁸

2. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

Sections II and III of the Supplementary Convention on the Abolition of Slavery, the Slave trade and Institutions and Practices Similar to Slavery also addresses the institution of the slave trade and slavery. In defining the slave trade, Section II, Article 3 states:

The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being

282. See generally THOMAS, *supra* note 18, at 426-33 (providing a recount of acts of the slavers that were inhumane).

283. See *supra* notes 102- and accompanying text (describing the arrangements in which the Portuguese royalty engaged in order to control the business of slave trading across the Atlantic Ocean).

284. See *supra* notes 123-124 and accompanying text (detailing the treaties between slave trading countries like Spain and Portugal, that divided continents and coast lines thereby preventing the countries from infringing on the other's slave trade business).

285. See *supra* notes 118-122 and accompanying text (explaining that the rulers' issuance of trading licenses served not only as a way to manage the slave trading market but also as a political tool).

286. See *supra* Part II.B (outlining how the monarchs changed aspects of the slave trade in order to increase tax revenue resulting from the industry).

287. See *supra* note 98 and accompanying text (noting that Spain and Portugal were early adopters and encouragers of the slave trade).

288. Slavery Convention, *supra* note 274, art. 1.

accessory thereto shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.²⁸⁹

According to documented history, many European merchants and slavers captured and thereafter transported Africans by means of sailing to other countries in the Trans-Atlantic slave trade. Article 3 of the Slavery Convention holds these merchants and slavers criminally liable. The Article further states that one who acts as an accessory is a criminal under this Convention.²⁹⁰ The criminal intent in this context would most likely be the kidnapping, transport and barter in African slaves, deemed an unlawful offense by the Slavery Convention. Several nation-states purposely aided slave merchants and citizens by granting loans, and funding companies' slaving expeditions, as well as negotiating with African monarchs in order to acquire more Africans. In doing so, these governments supported slavery and all transactions involved in the slave trade, thereby satisfying the intent element. By issuing regulatory licenses,²⁹¹ these nation-states not only officially sanctioned acts of the Trans-Atlantic slave trade, but also made great profits from the enterprise.

The Slavery Convention applies both to those directly involved in the acts of capturing, transporting, and selling slaves as well as accomplices to those acts.²⁹² The crowns of these monarchs and their subordinate governmental entities were not physically present when slave traders captured and transported the slaves. Yet each time a monarch granted loans to laymen and merchants, and contracted agreements with other monarchs to continue the slave trade, they financially contributed to and aided in this crime. Thus, these nation-states are accessories to this crime against humanity and are liable under the Supplemental Slavery Convention. Consequently, the

289. Supplementary Convention *supra* note 275, sec. II, art. 2.

290. See Slavery Convention, *supra* note 274 (imposing criminal liability for slave trading).

291. See *supra* Part II.B (describing the licensing arrangements between the governments and trading).

292. See Supplementary Convention, *supra* note 275, art. 3(1) (mandating liability for accessories to slave trading). The Supplementary Convention further imposes an affirmative duty on state parties to ensure that ships and aircraft operating under their flag are not involved in slave trading. *Id.* arts. 3(2)(a) and (b).

managerial participants—the slavers, overseers, raiders and merchants—along with some members of the international community are also accessories, and are therefore guilty of perpetrating a crime against humanity.

Under Section III, Article 5, the “act of mutilating, branding or otherwise marking a slave or a person of servile status in order to indicate his status, or as a punishment, or for any other reason, or of being accessory thereto, shall be a criminal offence. . .”²⁹³ Throughout the Trans-Atlantic slave trade, participants branded Africans in order to illustrate their ownership of the captives.²⁹⁴ Thus, all slavers, slave-owners, monarchs and other participants who actually branded or supplied such materials with the knowledge that such materials would be used as tools for branding are criminally liable under Article 5.

Article 6 of the Convention is, to some extent, repetitive, stating:

The act of enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery, or of attempting these acts, or being accessory thereto, or being a party to conspiracy to accomplish any such acts, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment.²⁹⁵

Like Article 5, Article 6 emphasizes that all acts causing another human being to be reduced to slavery are criminal offenses, including but not limited to trickery.

One may argue that, similar to evolving case law, the trend in international custom or usage would universally bind nation-states to the Slavery Conventions regardless of whether these entities officially ratified them. However, the Supplemental Slavery Convention only applies to those State Parties who signed or ratified it.²⁹⁶

293. *Id.* art. 5

294. *See supra* notes 5759- and accompanying text (describing the process of branding slaves by marking them with a hot iron).

295. Supplementary Convention, *supra* note 275, art. 6

296. *See id.* art. 13 (explaining that the Convention will enter into force for signatory states when that state formally ratifies or ascends to it).

Because it was adopted years after most international slavery's abolishment,²⁹⁷ it is difficult, but not impossible, to use the Supplemental Slavery Convention as a standard of liability for past acts. To overcome this difficulty, one may argue that the 1926 Convention focuses on present or possible future breaches of its terms. Specifically, under the Convention, the Contracting Parties vow to "prevent and suppress the slave trade" and "to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms."²⁹⁸ Further, the Convention is silent as to retroactively penalizing involvement in the slave trade. Thus, it is possible that the International Criminal Tribunal will interpret the silence of the Slavery Convention of 1926 such that past acts could be adjudicated retroactively.

Both the 1926 Slavery Convention and the 1956 Supplemental Slavery Convention state that the "Convention will come into operation for each State on the date of the deposit of its ratification or of its accession."²⁹⁹ One may validly argue that once a nation-state ratifies the Slavery Convention, it has availed itself to the standards and legal implications outlined in the convention. This argument is reasonable, especially given the likelihood of international opposition to, and the United States' express prohibition of, *ex post facto* laws.³⁰⁰ Conversely, it can be argued that the present ratification merely subjects a state to the Slavery Convention's

297. See THOMAS, *supra* note 18, at 786-87 (recalling the thirty year period over which slavery was abolished beginning in 1840).

Britain had already just abolished the institution [slavery], France would do so in eight years, and the United States in twenty-five. To own a slave became an offence in British India in 1862 . . . A new law of 1870 in Madrid of Segismundo Moret provided . . . for the liberty of children born to slave families; and it also conceded liberty to all slaves over the age of sixty-five (later amended to sixty). Slaves who fought for Spain in the war against the Cuban nationalists were also proclaimed free . . . In 1869 Portugal finally abolished slavery

Id.

298. Slavery Convention, *supra* note 274, art. 2.

299. *Id.* art. 12; see also Supplementary Convention, *supra* note 275, art. 13 (using language similar to that of the 1926 Convention to explain when the Convention will enter into force).

300. See U.S. CONST. art. I, § 9, cl. 3.

jurisdiction, at which point, a state can then be held for past violations of the Convention.

Another concern is that the status of governments and monarchs during the centuries of the Trans-Atlantic slave trade changed over time. One instance is that Portugal was under Spanish control until it gained independence in 1668.³⁰¹ Therefore, to charge Spain as one government regime for the fifteenth and sixteenth centuries would be legally incorrect, although practically simple.

Despite these concerns, the standard put forth by the Slavery Convention is still applicable, because no other international law was in effect to measure what constituted a crime against humanity at that time. Additionally, since the Slavery Convention specifically mentions the Trans-Atlantic slave trade in its purpose for existence,³⁰² it is an exacting measure that holds the slave trade and subsequent slavery as a crime against humanity.

The Slavery Convention holds the governments who signed and ratified it accountable for the implementation of justice and elimination of the slave trade and slavery.³⁰³ Therefore, the Convention is consistent with the author's argument that the governmental entities should be held liable for their intricate, legal entanglement in the Trans-Atlantic slave trade.

3. *The Rome Statute of the International Criminal Court*

Article 7 of the Rome Statute categorizes acts that constitute crimes against humanity, several of which are applicable to the acts committed by the perpetrators of the Trans-Atlantic slave trade. Generally, the acts of the slave trade fall under the Rome Statute's

301. See THE NEW ENCYCLOPEDIA BRITANNICA 25 (15th ed. 2002) (recalling that, although Portugal was given its own regime, it did not finally secure its independence until the signing of the Treaty of Lisbon in 1668).

302. See Slavery Convention, *supra* note 274 (stating that the Convention is created with the "intention of putting an end to the traffic in African slaves").

303. See Supplementary Convention, *supra* note 275, art. 3 (making states responsible for holding Convention violators criminally liable and imposing an affirmative duty on parties to make sure state vessels are not used for slave trading).

definition of a “crime against humanity.”³⁰⁴ The Trans-Atlantic slave trade was a systematic attack against the African population. It flourished into an organized, financial institution, and was encouraged, financed, and otherwise participated in by various nation-states, seeking to enslave Africans.³⁰⁵

More specifically, the acts constituting the slave trade directly violate several provisions of the Rome Statute.³⁰⁶ The African slaves were enslaved primarily by their European counterparts, in violation of Article 7(1)(c).³⁰⁷ Like the Slavery Convention, the Rome Statute highlights the exercise of ownership rights in the definition of enslavement.³⁰⁸ The slavers raiding, possession of ownership documents, and branding of captured Africans manifest these participants’ exercise of ownership towards Africans.³⁰⁹ Regardless if the procedure to capture these human beings was ensured by kidnapping or purchase, the result was the enslavement of millions of Africans.

As a result of the kidnapping and sale of Africans from varying ethnic groupings and cultural distinctions, many were forcibly deported to the Western lands in continuance of the Trans-Atlantic

304. See generally Rome Statute, *supra* note 161, art. 7 (defining a “crime against humanity” as one of several acts listed in the Rome Statute when it is part of a widespread or systematic attack against a civilian population).

305. See *supra* Part II (describing the operation of the Trans-Atlantic slave trade and the ways in which some nations encouraged merchants to participate in the slave trade); see also Treaty of Utrecht, *supra* note 136, at 332 (contracting between Britain and Spain to introduce slaves into America).

306. See *infra* notes 306- and accompanying text (describing the ways in which the acts constituting the Trans-Atlantic slave trade violate provisions of the Rome Statute).

307. See Rome Statute, *supra* note 161, art. 7(2)(c) (defining enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children . . .”).

308. Compare Slavery Convention, *supra* note 274, art. 1(1) with Rome Statute, *supra* note 161, art. 7, para. 2(c).

309. See *supra* notes 59- and accompanying text (describing the methods used by slavers to mark slaves as a show of ownership).

slave trade, another act prohibited by the Rome Statute.³¹⁰ Further, the African slaves were forcibly imprisoned at forts on the coasts of Africa. Their shackled bodies, forced stowage aboard ships, and sale to other merchants and slave-masters in the Western lands constitutes imprisonment and a severe deprivation of physical liberty.³¹¹

One may argue that these acts, while in violation of the Rome Statute, were lawful because they did not violate the international law of the time, which had no universal standard. Because many nation-states contracted, participated in, encouraged, and profited from the Trans-Atlantic slave trade, one may even argue that international custom, if not international law, permitted the deportation of millions of Africans at the time. If the Slavery Convention is deemed applicable to the past acts of the Trans-Atlantic slave trade, however, perhaps the definitions and standards of the Rome Statute should serve as guidelines for adjudging those crimes.³¹²

Also applicable is the crime against humanity known as torture, defined by the Rome Statute as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”³¹³ Such routine sufferings endured by African slaves were the lashings of the bullwhip,³¹⁴ the burden of heavy chains, shackles and other imprisoning iron devices,³¹⁵

310. See Rome Statute, *supra* note 161, para. 2(d) (defining deportation and forcible transfer as a means of displacing persons from a place where they are lawfully present).

311. See *id.* art. 7(1)(e) (prohibiting imprisonment or other severe deprivations of liberty).

312. See discussion *supra* notes 302308- and accompanying text (arguing that the Slavery Convention, while signed in 1926, is applicable to acts that occurred during the Trans-Atlantic slave trade).

313. Rome Statute, *supra* note 161, para. 2(e).

314. See *supra* note 55 and accompanying text (noting that slaves were routinely lashed with a bull whip).

315. See *supra* note 73 and accompanying text (noting the shackling of African slaves).

branding of flesh,³¹⁶ lynching by rope or other material and physical dismemberment or amputation.³¹⁷ All of these acts were imposed by those in authority or “ownership” of slaves with the intent to cause severe physical pain and suffering, and as a result of continuous impending harm, great fear amongst the Africans.³¹⁸ Rape and other sexual assaults occurred aboard ships during the Trans-Atlantic sojourn, and after arrival and settlement in the West. Other unusual punishments, like setting slaves on fire so they burn to death or physically lashing pregnant slave women, would undoubtedly satisfy the condition of other inhumane acts which caused great suffering or serious injury to one’s physical or mental health.

In contrast with the Slavery Conventions, the inherent anomaly of the Rome Statute is that it specifically cannot be applied retroactively,³¹⁹ although it provides an excellent standard, thus far, for defining crimes against humanity. Therefore, the Rome Statute of 1998 apparently would not apply to the Trans-Atlantic slave trade, as a crime against humanity, which occurred over several centuries. However, the Statute also states that crimes within the jurisdiction of the International Criminal Court, as defined by the Rome Statute, are not subject to any statute of limitations.³²⁰

At first glance, this article conflicts with Article 11 of the Rome Statute because the statute is not to be applied retroactively, yet the crimes are not subject to any statute of limitations. The likely interpretation is that since the passage of the Rome Statute as of July 1, 2002, any crimes accruing after this date, yet to be adjudicated, will not be subject to any statute of limitations. This is due to the

316. See *supra* notes 59- and accompanying text (describing the methods used by slavers to mark slaves as a show of ownership).

317. See *supra* notes 7887- and accompanying text (recalling various forms of punishment such as cutting off the hands of a slave as a warning to the other slaves, and forcing those being punished to cannibalize another slave).

318. See *supra* note 80 and accompanying text (noting the slave traders’ goal of instilling fear into the slaves).

319. See Rome Statute, *supra* note , art. 11 (“The Court has jurisdiction only with respect to crimes committed after the entry into force of this statute.”); see also *id.* art. 24 (“No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”).

320. See *id.* art. 29 (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”).

nature of the statute, in which jurisdiction can only be gained after a nation has ratified and submitted to the Rome Statute.³²¹ Additionally, most slave merchants, ship captains, laymen and governments of the international community who participated in the Trans-Atlantic slave trade are not physically present for the Rome Statute to be imposed upon them.

However, the Rome Statute, as distinguished from the Slavery Conventions, only applies to natural persons and not to governments.³²² This is yet another difficulty in using the Rome Statute as a measure of the Trans-Atlantic slave trade as a crime against humanity; almost all of these individuals are deceased although many of the governmental entities still exist. These limitations prevent the prosecution of the Trans-Atlantic slave trade under the Rome Statute by the International Criminal Court, but nevertheless do not necessarily limit the possible adjudication of the institution of the slave trade under the Slavery Conventions. Despite the existence of obstacles in officially and universally adjudicating the Trans-Atlantic slave trade as a crime against humanity, the standards of International Criminal Tribunals rectify these hurdles because of their ability to apply retroactively. One example is the United Nations' establishment of International Criminal Tribunal for the Former Yugoslavia. This tribunal was established in 1993 as a response to the crimes against humanity that were perpetrated against citizens in this region during the early 1990's.³²³ This tribunal applies retroactively to perpetrators of these crimes, but the tribunal is similar to the Rome Statute because it also only affects natural persons.

321. *See id.* art. 12 ("A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.")

322. *See id.* art. 25 ("The Court shall have jurisdiction over natural persons pursuant to this Statute.")

323. *See* S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) (stating that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991). The Security Council Resolution does not, however, indicate how such an international tribunal is to be established or on what legal basis. *Report of Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, Item 18, U.N. Doc. S/25704 (1993).

Another example of an International Criminal Tribunal is the International Criminal Tribunal for Rwanda, which was established by the Security Council of the United Nations. This tribunal has jurisdiction over certain violations of international humanitarian law committed during 1994.³²⁴ Thus, this tribunal also has retroactive jurisdiction, but is also similar to the Rome Statute and the International Criminal Tribunal for the Former Yugoslavia because it only applies to natural persons.³²⁵

Based on the legal principles set forth in the International Criminal Tribunals, the Rome Statute, and the Slavery Conventions, the international community may acknowledge the Trans-Atlantic Slave trade as a crime against humanity. More specifically, under the Slavery Conventions the governments and monarchs involved may be held accountable for their involvement in the Trans-Atlantic Slave trade. This legal objective can be realistically achieved by using the previously mentioned International Criminal Tribunals as prototypes for developing an International Criminal Tribunal on the Trans-Atlantic slave trade and slavery.

324. See S.C. Res. 955, Annex, 3453d mtg., U.N. Doc. S/RES/955 (1994).

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Id.

325. See *id.*

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Id.

CONCLUSION

Despite lingering arguments disputing the applicability of these Conventions and Statute as the appropriate mechanisms to decree the Trans-Atlantic slave trade as a crime against humanity, these agreements show that the principles involved are generally recognized under international law as crimes against humanity. The Trans-Atlantic slave trade comprised of a series of transactions in which individuals and governments of the international community benefited from the sale of other humans' lives. The development of this inhumane enterprise evolved over the years to maintain the participants' greed and wealth.

Many individuals entered into contracts allowing slave expeditions and the use of ships to circulate human cargo. Several nation-states rigorously supported the enterprise with financial contributions and legal sanctions through lawfully-binding treaties and other contractual agreements. Millions of African lives were subjected to forced labor, displacement, rape, brutal treatment and general torture by those who purchased and sold them. The Slavery Conventions clearly defines slavery;³²⁶ while the Rome Statute includes general enslavement as a crime against humanity.³²⁷ Further, the Rome Statute delineates additional acts that constitute crimes against humanity that were also implemented during the course of the Trans-Atlantic slave trade. The whole of the slave trade demoted African existence to that of an inanimate object, subjugated to the whims, desires, and control of mostly European individuals and monarchs. Ironically, crimes against humanity intrinsically refer to natural human beings of the earth and imply a significant objection to the maltreatment of human beings by others. Yet, the participants of the trade did not perceive Africans as humans;³²⁸ they were commodities to be kidnapped, used, tortured and executed as deemed by the perpetrators of these crimes.

326. See *supra* note 274 and accompanying text (presenting the definition of slavery as set forth in the Slavery Convention).

327. See Rome Statute, *supra* note , art. 7 (setting forth acts classified as crimes against humanity).

328. See *supra* notes 142143- and accompanying text (describing African slave treatment as nothing more than the treatment of a commodity).

Therefore it is necessary to hold the international community accountable for this great crime against humanity. It has been said:

SLAVERY: Africans and African Descendants share a common history shaped by the slave trade, slavery, conquest, colonization and apartheid, all of which constitute crimes against humanity, and a common experience of anti-Black racism. We acknowledge that people of African descent live all over the world, although in many instances they have been renamed, suppressed and marginalized. On every continent African and African Descendants continue to suffer from racism . . . We affirm that the Trans-Atlantic Slave Trade and the enslave-meant of Africans and African Descendants was a crime against humanity and a unique tragedy in the history of humanity, and that its roots and bases were economic, institutional, systemic and transnational in dimension . . .³²⁹

There are some who have recognized the brutal nature of the Trans-Atlantic slave trade. From its inception, throughout its flourishing years and to its known end, this enterprise has killed and effected millions of Africans' and African descendants' lives. This essay demonstrates that when considering the historical reality of the Trans-Atlantic slave trade and analyzing the international norms for classification of crimes against humanity, the slave trade was definitively a crime against humanity.

The Trans-Atlantic slave trade is one of the greatest horrors in the annals of world history, yet it has never been adjudicated. There has been no compensation to the victims or their progeny, and for the most part there have been no apologies from the participants, nor from their successors who sit in the same seat of governments that sanctioned this institution. The faces of those who suffered because of the economic greed of slave traders are yet to be remembered in such a forgotten crime against humanity. This crime, even in the presence of modern treaties, statutes, and international recognition, has yet to bring those entities to account for their participation in the Trans-Atlantic slave trade.

329. *The NGO Forum's Declaration on Zionism and Slavery*, AL-AHRAM WEEKLY, Sept. 13-19 (2001), <http://weekly.ahram.org.eg/2001/551/in6.htm>.