ARTICLE

ECHOES OF THE ZONG: CONFRONTING LEGAL REALISM IN THE ARGUMENTS FOR REPARATIONS FROM THE ATLANTIC SLAVE TRADE AND MODERN-DAY HUMAN TRAFFICKING

*Glenys P. Spence**

When they eat chocolate, they eat my flesh.[1]

ABSTRACT

T*his Article is based on the premise that modern day human trafficking, like the transatlantic slave trade, violates jus cogens norms,*[2] *and thus the practice was and still is a violation of US laws under customary international law.*[3] *The analysis will examine the*

* Glenys Spence, J.D., LL.M., Admiralty and Maritime Law, Assistant Professor of Law, Dwayne O. Andreas, School of Law (Barry University). Special thanks to Research Assistants, Colin Nakagawa, Tanya Hawkins, Emma Floyd, Shaina Yost, Joyce Zabala, Alycia Araj, and Barry School of Law Librarian, Jason Murray for their efforts in finding sources and for providing moral and emotional support for this Article.

1. Brief for Human Trafficking Legal Center, Washington, D.C. et al. as Amici Curiae Supporting Respondents, Nestle USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (Nos. 19-416 and 19453).

2. *See* The Vienna Convention on the Law of Treaties, art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679 [hereinafter Vienna Convention](For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community o from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) ("[a] *jus cogens* norm, also known as a "peremptory norm" of international law, "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (citing the Vienna Convention)); *see also*, United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995) ("Jus cogens norms, which are nonerodable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and cannot be preempted by treaty.").

3. *See Siderman*, 965 F.2d at 715 ("Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus*

laws that were applied to chattel slavery in England and her colonies through the lens of some seminal slavery cases to unearth the tyranny of interpretation in human trafficking reparations and liability claims under the current Supreme Court jurisprudence and the Alien Tort Statute ("ATS").[4] *The featured cases will reveal that the same philosophies undergirding the jurisprudence of the slave trade still informs the US Supreme Court's application of liability for human trafficking in the global supply chain.*

cogens transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II.").

4. *See* 28 U.S.C. § 1350 (1948); *see also* Kurtis A. Kemper, Annotation, *Construction and Application of Alien Tort Statute*, 61 A.L.R. Fed. 2d 171 (2012) ("Under the Alien Tort Statute, United States district courts have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."); Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that lawsuits under the ATS can proceed for any harm resulting from a violation of international law, no matter where the harm occurred, or who inflicted the harm, as long as the plaintiff serves process in U.S. Territory); *but cf.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (finding that ATS claims can proceed against both natural persons and legal persons but claims against state governments are precluded by sovereign immunity).

I. INTRODUCTION

This Article examines different legal and philosophical principles in the historical development of chattel slavery law and its relationship to contemporary jurisprudence that informs their legal application to modern day slave labor in the form of human trafficking, which includes child labor. The analysis will examine the laws that were applied to chattel slavery in England and her colonies through the lens of some seminal slavery cases to unearth the tyranny of interpretation in human trafficking reparations and liability claims under the current Supreme Court jurisprudence and the Alien Tort Statute ("ATS").[5] The analysis will take into consideration the historical and theoretical developments, problems with court implementation and application, and the procedures and rules regarding liability for modern-day forms of slavery viewed through the historical lenses and practice of chattel slavery and commercial law.

In the British slavery cases, natural law principles and commercial law collided within the space surrounding the debate on the legality of the transatlantic slave trade. Lord Mansfield's opinion in the 1800 case of *Somerset v. Stewart,*[6] where natural law principles seemed to triumph over property interests, was later subjugated in *The Zong Case*[7] in which the murder of African slaves was compared to "horses thrown overboard."[8] Principles of

5. *See* 28 U.S.C. § 1350 (1948); *see also* Kurtis A. Kemper, Annotation, *Construction and Application of Alien Tort Statute*, 61 A.L.R. Fed. 2d 171 (2012) ("Under the Alien Tort Statute, United States district courts have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."); Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that lawsuits under the ATS can proceed for any harm resulting from a violation of international law, no matter where the harm occurred, or who inflicted the harm, as long as the plaintiff serves process in U.S. Territory); *but cf.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (finding that ATS claims can proceed against both natural persons and legal persons but claims against state governments are precluded by sovereign immunity).

6. Somerset v. Stewart (1772) 98 Eng. Rep. 499.

7. Gregson v. Gilbert (1783) 99 Eng. Rep. 629.

8. *See* JAMES WALVIN, THE ZONG: A MASSACRE, THE LAW AND THE END OF SLAVERY 1, 3 (2011); *see also* Jeremy Krikler, *A Chain of Murder in the Slave Trade: A Wider Context of the Zong Massacre*, 57 INT'L. REV. SOC. SCI. 393–415 (2012); Jane Webster, *The Zong in the Context of the Eighteenth-Century Slave Trade*, 28 J. LEGAL HIST. 285–98 (2007); Anita Rupprecht, *'A Very Uncommon Case': Representations of the Zong and the British Campaign to Abolish the Slave Trade*, 28 J. LEGAL HIST. 329–46 (2007); Nick J. Sciullo, *Richard Sherman, Rhetoric, and Racial Animus in the Rebirth of the Bogeyman Myth*, 37 HASTINGS COMM. & ENT. L.J. 201, 211–12 (2015) (citations omitted) ("Indeed, 'blacks entered the modern Western

natural law were at the heart of the *Somerset* decision and helped ignite the abolitionist movement. But the *Zong* opinion provided commercial justification for the continuation of the slave trade and fueled the abolitionists' cause. This Article revisits these cases to demonstrate how the commercial interests that animated the transatlantic slave trade is still the driving force that fuels modern-day human trafficking in the global supply chain. This Article also explores the crime of human trafficking within the current legal framework to reveal how the current patchwork of laws mirror the dualities at work in chattel slavery jurisprudence. The law, then, still rests on old foundations strengthened by commercial and philosophical alibis.

The official abolition of the slave trade did not fully end slavery and the issue of transatlantic slave trade's reparations is not confined to the United States. The European powers, including Great Britain, should not escape liability for this heinous crime against humanity. The historical record shows that European Powers provoked the enslavement of Africans for economic gain.[9] Indeed, the European demand for sugar and other commodities fueled and prolonged the trade in African bodies.[10] In addition to providing free labor, the slave trade bolstered the British efforts to maintain order in its Caribbean colonies and to retain its hegemony over European foes in the region. [11] Notwithstanding

world as devalued human beings.' This means that blacks were and are always already unequal, always already less than, and always already other.").

9. *See generally*, DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823 41, (1999) ("It is obvious that the various colonizing nations, whatever their domestic traditions of servitude, seized upon Africans as the cheapest and most expedient labor supply to meet the immediate demands of mining and tropical agriculture."); *See also, id.* at 52 ("The period between the end of the seven years' war, when England acquired new colonies in the Windward Islands, and the onset of the American Revolution, was a golden age for the British planter, who could look forward to high sugar prices, lowered transportation costs, and an ample supply of labor.").

10. *Id*. at 51; *See also* LUDWIK A. TECLAFF, ECONOMIC ROOTS OF OPPRESSION 151 (1984) (" . . . [slavery] may have served Europe well, since the land-labor ratio of the European world economy was thereby increased, enabling Europe to sustain continuous economic growth.").

11. Between 1650 and 1700 sugar production, which depended on African slave labor, shifted to the Caribbean islands. By the mid-eithteenth century, Britain dominated the slave trade. The growing European demand for sugar and tobacco fueled a highly profitable commerce in African slaves to work on sugar plantations in the West Indies and to a lesser extent on tobacco plantations in Virginia and other British colonies in North America. *See* NORMAN S. POSER, SLAVERY AND THE SOMERSET CASE, *in* LORD MANSFIELD, JUSTICE IN THE AGE OF REASON 286 (2013). *See also* Peter Coclanis, *The Economics of Slavery*, *in* THE

laws abolishing the trade on paper, European powers continued to develop their economies fueled on slave labor in the Caribbean, Latin and Central America, and the United States.[12] Although the slave trade ended, European powers continued to wield power over the Caribbean inhabitants through imperialism and colonialism vehicles.[13]Many years after the slave trade was outlawed, slave labor in the American South, Brazil, and the Caribbean produced cotton and sugar for consumption in Britain and Continental Europe, although British abolitionists decried the products use.[14]

Some of the same drivers in the extra-legal practice of slavery can be found in the current global economy. Today, individuals are being forced to work in inhumane conditions to satiate desires for luxury items and commodities such as cocoa, coffee, and seafood. In October 2019, thirty-nine Chinese citizens were discovered in a refrigerated truck trailer in Essex, United Kingdom.[15] One news

---

OXFORD HANDBOOK OF SLAVERY IN THE AMERICAS 489, 491 (Mark M. Smith & Robert L. Paquete, eds., 2010) ("Chattel slavery whereby slaves were defined legally as personalty and thus as moveable property soon came to be seen as . . . the most pervasive and enduring option in areas where some 'unfree labor' made economic sense. The chance for profits more than anything else constituted economic sense in slavery times."), *see also* MARK M. SMITH & ROBERT L. PAQUETE, THE OXFORD HANDBOOK OF SLAVERY *in* THE AMERICAS 4 (2010).

12. DAVIS, *supra*

. note 9, at 51-54. *See also*, Paul Finkelman & Seymour Drescher, *The Eternal Problem of Slavery in International Law: Killing the Vampire of Human Culture*, 2017 MICH. ST. L. REV. 755, 775–76 (2017)

("From its inception, the Atlantic slave trade emerged as one of the great engines of capital accumulation and the creation of wealth . . . Some of this new wealth returned to Europe, some remained in the hands of European settlers in the New World, and some ended up in West Africa.").

13. *See generally* Franklin W. KNIGHT, THE CARIBBEAN: THE GENESIS OF FRAGMENTED NATIONALISM 164-65 (Oxford University Press, 2d ed., 1990) ("Colonies, by virtue of subordinate status, could not operate independently of the metropolises. Crucial decision concerning the colonies were resolved outside the area in the metropolitan decision-making bodies.").

14. During the eighteenth century, when England has hatched various schemes for dismembering the Spanish empire, she had also been happy to supply the Spanish colonies, legally or illegally, with slaves. *See* DAVIS, *supra* note 9, at 65.

15. Danica Kirka & Jill Lawless, *Thirty-nine People Found Dead in Essex truck were Chinese Nationals,* ASSOCIATED PRESS, (Oct. 25, 2019), https://www.9news.com.au/world/essex-truck-deaths-39-people-lorry-chinese-nationals-uk-news/4e4c76dd-8399-4287-be1f-5f621fd1830b [https://perma.cc/U8UE-58P4] ("The tragedy recalls the deaths of 58 Chinese migrants who suffocated in a truck in Dover, England after a perilous, months-long journey from China's southern Fujian province. They were found stowed away with a cargo of tomatoes after a ferry ride from

report stated the deaths of these individuals was the worst tragedy in the United Kingdom caused by human trafficking.[16] The British Prime Minister, Boris Johnson, vowed to hold the perpetrators responsible.[17] Prime Minister Johnson's reaction to this tragedy, and the greater crisis has dawdled, as human rights scholars have tried to alert the world to the resurgence of chattel slavery in the global supply chain for several years.[18]

This discovery is not the first time in the modern era that human beings were transported to England, the United States, and some Middle Eastern countries for different forms of labor.[19] Our own State Department estimates that thousands of children in the Ivory Coast's cocoa industry work under the worst forms of child

---

Zeebrugge, the same Belgian port that featured in the latest tragedy. British Prime Minister Boris Johnson vowed in Parliament that people smugglers would be prosecuted to the full extent of the law.").

16. Miriam Berger, *What We Know About the Tragic Case of 39 People Found Dead in a Truck in England*, WASH. POST, (Oct. 29, 2019) ("Thirty-nine people were found dead in a refrigerated container truck in Essex, southeastern England, last Wednesday. The case is one of the United Kingdom's deadliest human-trafficking disasters.").

17. *Id.*

18. *See generally* Dr. Dana Raigrodski, *Economic Migration Gone Wrong: Trafficking in Persons Through the Lens of Gender, Labor, and Globalization*, 25 IND. INT'L & COMP. L. REV. 79 (2015) (The last decade brought much needed attention to the global plight of human trafficking, as numerous members of vulnerable populations are trafficked all over the world to be enslaved in a broad range of industries including, but far from limited to, commercial sex. Yet, the global community's efforts to successfully mitigate trafficking and protect those most likely to fall victim to it continue to fall short.); *see e.g.*, Janie Chuang, *Beyond A Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 138–39 (2006). *See also, Id*. (citing, Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 464 (2004)); Shima Baradaran, Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 2–5 (2011) (citing to Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 403 (1995).

19. *See, e.g.*, CHERYL TAYLOR PAGE & BILL PIATT, HUMAN TRAFFICKING 8–9 (2016) ("The top venues for forced labor trafficking in this country involve domestic work, traveling sales, restaurant and food services, agriculture, and health and beauty . . . It is critical to realize that forced labor issues exist throughout much of our economy."); *see also Id*. at p. 16-, Slavery in the International Food Market, discussing the Chocolate Industry (This billion-dollar industry is saturated with child labor and slavery) *Accord*; *Child Labor and Slavery in the Chocolate Industry*, FOOD EMPOWERMENT PROJECT, www.foodispower.org/slavery-chocolate/ [https://perma.cc/U38Y-NAHD] (last visited Mar. 25, 2023) ("The farms of Western Africa and Brazil supply cocoa to international giants such as Hershey's, Mars, and Nestlé as well as many small chocolate companies—revealing the industry's direct connection to the worst forms of child labor, human trafficking, and slavery.").

labor.[20] The practice of human trafficking challenges domestic and international law. Specifically, these heinous practices implicate the global shipping industry, which falls under domestic, maritime jurisdiction, and international law.[21] The time has come for the international legal system to confront the resurgence of slavery in the global supply chain.

According to the latest statistics from the International Labor Organization ("ILO"), at any given time an estimated 49.6 million people globally are in modern slavery, which includes 27.6 million in forced labor.[22] The global shipping industry is particularly susceptible to the risk of modern slavery given that seafarers often come from nations with human rights, labor rights, and corruption challenges.[23] The fragmentation of regulatory oversight among flag

---

20. *See* Kemi Mustapha, *Taste of Child Labor Not So Sweet: A Critique of Regulatory Approaches to Combating Child Labor Abuses by the US Chocolate Industry*, 87 WASH. U. L. REV. 1163, 1164 (2010). *See also*, Richard Morin, *Indentured Servitude in the Persian Gulf*, N.Y. TIMES **(**Apr. 12, 2013), https://www.nytimes.com/2013/04/14/sunday-review/indentured-servitude-in-the-persian-gulf.html [https://perma.cc/N5CZ-VL5B] **(**Perhaps a million foreign workers are expected to arrive in the next few years to help build nine new stadiums and $20 billion in roads needed by 2022, when Qatar will host the World Cup. Many of these workers will labor under near-feudal conditions that Human Rights Watch has likened to "forced labor."); *see also Human Rights Watch Report on the 2022 FIFA World Cup in Qatar*, HUM. RTS. WATCH (2022), https://www.hrw.org/sites/default/files/media_2022/11/202211mena_qatar_worldcup_reportersguide_2.pdf [https://perma.cc/4QXJ-BG66].

21. *See* CHERYL TAYLOR PAGE & ROBERT WILLIAM PIATT, HUMAN TRAFFICKING, 8-10, (2nd ed. 2022) (At sea, vessels can operate without scrutiny, depending upon their flag and nationality and whether they operate in areas with limited monitoring, control, surveillance, and enforcement such as the high seas). *See also 2022 Trafficking in Persons Report, Accountability in Supply Chains*, US DEP'T OF STATE, www.state.gov/reports/2022-trafficking-in-persons-report/ [https://perma.cc/Y8EP-95RF] (last visited Mar. 25, 2023) Forced labor is well documented in the private economy, particularly in agriculture, fishing, manufacturing, construction, and domestic work; but no sector is immune. Sex trafficking occurs in several industries as well. Most well-known is the hospitality industry, but the crime also occurs in connection with extractive industries where activities are often remote and lack meaningful government presence.

22. *See Global Estimates of Modern Slavery: Forced Labor and Forced Marriage* INT'L LAB. ORG., REPORT https://www.ilo.org/global/topics/forced-labour/publications/WCMS_854733/lang—en/index.htm [https://perma.cc/6WXA-7BCK] (last visited Mar. 5, 2023).

23. *See generally* Ryan Schubert, *Trapped at Sea in A Pandemic: International Law's Impact on Seafarers' Rights*, 36 MD. J. INT'L L. 112, 120 (2021) (citing *Standing up for Stranded Seafarers on UN Human Rights Day*, INT'L MARITIME ORG. [IMO] (Dec. 10, 2020), https://www.imo.org/en/MediaCentre/PressBriefings/pages/45-Human-Rights-Day.aspx [https://perma.cc/6WWS-JPW9] (identifying some of the legal challenges seafarers face). "Flag of convenience" are notoriously relaxed on enforcement of MLC provisions aboard vessels flying their flag. K. Russel Lohse, *The Rise of African Slavery*, *in*

states and the practical limitations on effective enforcement of acceptable living conditions on vessels exacerbate the problem.[24]

Like the transatlantic slave trade, current laws are impotent to wipe out these crimes against humanity. Part of this legal inertia can be attributed to the United States Supreme Court's reluctance to propound liability onto multinational corporations. The Court's current reluctance to offer victims of human trafficking redress under the ATS harkens back to when the law justified and sustained the illegitimacy of the transatlantic slave trade.

Despite the plethora of international human rights legal instruments such as treaties and US domestic legislation like the Traffic Victims Protection Act and the British Modern Slavery Act, human beings are still being trafficked or forced into peonage around the globe and reaching US shores, either through our immigration labor laws or by the effects of forced labor in the global supply chain.[25] The ILO asserts that forced labor is "a serious violation of fundamental human rights and labor rights, the exaction of forced labor is a criminal offence."[26] But the philosophy of law that helped sustain and legitimize the slave trade for centuries remains central to jurisprudence regarding reparations

THE OXFORD HANDBOOK OF SLAVERY IN THE AMERICAS, 49-51 (Mark M. Smith & Robert L. Paquette ed. 2010); *See generally* Brian Wilson, Human Rights and Maritime Law Enforcement, 52 Stan. J. Int'l L. 243, 248–49 (2016) (Discussing the is freedom enjoyed by shipping and the potential for criminal activity on the high seas and the exploitation of this freedom by ships carrying illicit cargo and facilitating transnational criminal organizations.).

24. *Id.* (26 percent in Eastern and South-Eastern Asia., 22 percent in Latin America and the Caribbean, 12 percent in Central and Southern Asia, 12 percent in sub-Saharan Africa, and 9 percent in northern Africa and Western Asia); s*ee also* Ryan Schubert, *Trapped at Sea in A Pandemic: International Law's Impact on Seafarers' Rights*, 36 MD. J. INT'L L. 112, 118 (2021) (implying that flagstates do not practice enforcement of the seafarers' rights); *see generally* Wilson, *supra* note 23, at 246–47 (Stating the key maritime enforcement concept is exclusive flag state jurisdiction which "provides that vessels sail under one country's flag, and are subject to the exclusive jurisdiction of that country.").

25. *Id.*; s*ee also* Amy D. Lauger & Matthew R. Durose, *Human Trafficking Data Collection Activities, 2021*, BUREAU OF JUST. STATISTICS (Oct. 2021), https://bjs.ojp.gov/library/publications/human-trafficking-data-collection-activities-2021 [https://perma.cc/YR5U-XWGC].

26. *What Is Forced Labour, Modern Slavery and Human Trafficking*, INT'L LAB. ORG., https://www.ilo.org/global/topics/forced-labour/definition/lang—en/index.htm [https://perma.cc/MAP7-GY5T] (last visited April 16, 2022).

and the resurgence of slavery-like practices in modern human trafficking and forced labor.[27]

The Author holds the view that when enforcement of the law comes into conflict with commercial interests, natural rights theory is often subjugated in favor of private interests. Maintaining harmony in international trade coupled with the policies of economic liberalization counsel against holding corporations liable for these human rights violations. Indeed, this same view justified and legitimized chattel slavery in the transatlantic slave trade. Viewed in this light, it is not surprising to see the lines running from chattel slavery to modern day slavery in the global supply chain.

The focus of this Article is how to address and combat this problem by looking through jurisprudential relics, which sustained the transatlantic slave trade. The Article will revisit two seminal Slavery cases that were decided ten years apart to show how the commercial interests that animated the transatlantic slave trade is still the driving force that fuels modern-day human trafficking in the global supply chain. (See the map below).[28]

II. HISTORICAL FOUNDATIONS OF LAW AND JUSTICE IN THE PRACTICE OF CHATTEL SLAVERY

Just like the issues regarding human trafficking today, chattel slavery has its genesis in internecine rivalry, religious and political conflict, and environmental degradation.[29] Chattel slavery in the

27. *Id.* ("The forced labour definition encompasses 'traditional practices of forced labour, such as vestiges of slavery or slave-like practices, and various forms of debt bondage, as well as new forms of forced labour that have emerged in recent decades, such as human trafficking.'"). The ILO report also uses the term "modern-slavery" to shed light on working and living conditions contrary to human dignity.

28. *See 21 million people are now victims of forced labour*, INT'L LAB. ORG., (June 1, 2012), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_181961/lang--en/index.htm [https://perma.cc/8WTN-QZQ2].

29. Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 SANTA CLARA L. REV. 721, 725 (2016) ("The primary source of African slaves sent to North America were captured in religious and tribal wars, kidnapped in village raids, or paid as tribute. In the eighteenth century the west-central region of Africa experienced political and social instability due to civil war, European slave raiding and native warlords. No central authority existed to enforce law and order or to punish the persons who cost thousands of Africans their freedom or their lives.") *see also* DAVIS, *supra* note 9 at 11. ("[The] fact that Africans were enslaved by other Africans, transported to the coast, and

transatlantic slave trade stemmed from a political and economic rivalry between Spain and Portugal.[30] The Dutch, British, French, Spanish, Portuguese, and even the Danes were all slave holding nations.[31] These nations exploited slave labor in the Americas leaving chasms of poverty and other social ills in the region that needed to be addressed and redressed.[32] The interconnection between Caribbean slave plantations and other commodities and the wealth of these European nations cannot be understated.[33] The need for labor to revive the anemic countries in Europe whose blood was totally drained from years of wars and religious strife was the driving force behind chattel slavery.[34] Slave labor, then, was absolutely necessary to maintain these colonies and in turn, develop imperial power.[35]

---

sold to Europeans or Americans should in no way mitigate the evil and horror of this trade in human beings, but most antislavery writers had difficulty in facing the truth regarding African participation.").

30. *See generally* SMITH & PAQUETE, *supra* note 11.

31. *See* ERIC WILLIAMS, FROM COLUMBUS TO CASTRO: THE HISTORY OF THE CARIBBEAN 136-55 (1984) ("Europe has seldom been as unanimous on any issue as it has been on the value of Negro slave labour . . . . The Negro slave trade became one of the most important business enterprises of the seventeenth century . . . The British incorporated the Royal African Company from 1663-1672, The monopoly of the French slave trade was at first assigned to the French West India Company incorporated in 1664, and later transferred to the Senegal Company, The monopoly of the Dutch Slave trade was given to the Dutch West India Company, incorporated in 1621. Sweden organized a Guinea Company in 1647. The Danish West India Company, chartered in 1671, with the royal family among its shareholders, was allowed in 1674 to extend its activities to Guinea . . . The Negro slave trade begun about 1450 as a Portuguese monopoly, had, by the end of the seventeenth century, become an international free-for-all.").

32. *See* Coclanis, *supra* note 11, at 505.

33. *See generally id.* at 156 ("Seventeenth century Caribbean history saw a perpetual war . . . between Holland, England and France for Caribbean commerce."); *see also* HERBERT S. KLEIN & JACOB KLEIN, THE ATLANTIC SLAVE TRADE 103–39 (1999) ("The major Atlantic slave-trading nations, in order of trade volume, were Portugal, Britain, Spain, France, the Netherlands, and Denmark. Several had established outposts on the African coast, where they purchased slaves from local African leaders.").

34. *See* WILLIAMS, *supra* note 31, at 107–09 ("White labor was up against three difficulties: The basic one was that its supply was too inadequate to serve the needs of sugar. The second was that the whites were too expensive . . . The third was that the sugar latifundia left no scope for the servant at the end of his term . . . The decisive question was a labor supply that was, first, adequate and even in excess of the need; secondly, cheap; thirdly, docile or that could be whipped into docility; finally, that could be degraded to the point which sugar cultivation required. The white servant satisfied none of these desiderata. The Negro slave seemed to satisfy all.").

35. *See generally id.* at 88 ("The Anglo-French rivalry, begun in 1700, lasted until 1815. Merging with other dynastic and territorial questions in Europe, as marked by European campaigns of four of the world's greatest commanders, the Duke of

Once European farmers moved to the colonies, they no longer felt compelled to be serfs as they were in the feudal societies of Europe.[36] The former feudal masters could no longer demand labor from these farmers.[37] In short, the creation of the New World had equalized the relationship between poor European farmers and their former feudal overlords. Choosing to farm for themselves, these former servants deserted their masters to eke out a living for themselves in the New World.[38] Bereft of cheap labor, the masters solved their labor problem by first enslaving the native peoples.[39] Once the natives proved to be an unreliable source of labor either through contracting diseases from the Europeans or through fierce resistance, the answer was African slavery.[40]

Spurred on by internecine rivalries in the West-Central hinterland of Africa, the climate was ripe for the slave trade.[41] Just

Marlborough, Frederick the Great, Napoleon Bonaparte, and the Duke of Wellington . . . The vital issue was . . . whether Britain or France should dominate the Spanish colonies and be supreme in the Caribbean.").

36. *See* WILLIAMS, *supra* note 31, at 103-09 ("By the end of the seventeenth century, the system of white labor, under whatever name, was on its last leg. It marked a further stage in the degradation of labor in the Caribbean. The lack of squeamishness shown in the forced labor of whites was good training for the forced labor of blacks. The transportation of white servants established a precedent for the transportation of negro slaves.")

37. *See generally id.*

38. *See id.*

39. *See id.* at 31 ([C]olumbus . . . adopted the view that the real riches of the West Indies lay in their Indian population . . . The slave trade thus began as outward and not inward cargoes, taking the form of Indians transported from the West Indies to Spain rather than of Negroes transported from West Africa to the Caribbean . . . In order to protect the Indians from excessive labor imposed on them, . . . every effort should be made to bring to Hispaniola many Negroes from Guinea. The rationalization of Negro slavery and the Negro slave trade had begun.").

40. SHELDON J. WATTS, EPIDEMICS AND HISTORY: DISEASE POWER AND IMPERIALISM630 (1997) (Epidemics of smallpox were known for causing a significant decrease in the indigenous population of the New World.).

41. *See Benin Officials Apologize for Role in U.S. Slave Trade*, CHICAGO TRIBUNE (May 1, 2000, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-2000-05-01-0005010158-story.html [https://perma.cc/5D2B-623W] ("Officials from the West African nation Benin apologized . . . for their country's role in once selling fellow Africans by the millions to white slave traders.") Benin, a country of 4.7 million people, was called Dahomey in the 17th Century, when it was a major supplier of slaves for white exporters shipping from what was called the Slave Coast.); s*ee also* JOHN THORNTON, A CULTURAL HISTORY OF THE ATLANTIC WORLD 1250–1820 64 (2012) ("African leaders who allowed the continuation of the slave trade likely derived an economic benefit from selling their subjects to Europeans. The Kingdom of Benin, for instance, participated in the African slave trade, at will, from 1715 to 1735.").

like today, environmental disasters wrought by climate change, coupled with plague and other diseases in 16th century Europe were major factors that led to the slave trade.[42] Ironically, environmental issues are one of the drivers of the current problem of human trafficking today. According to US State Department, the demand for clean energy has given rise to an increase in forced labor among certain vulnerable populations.[43] Like modern human trafficking, indentured servitude was a precursor to chattel slavery. Back then, indentured servitude was facilitated by the maritime powers in which poor citizens from England and Europe were transported via ships to the colonies to work as indentured servants. The record is replete with accounts of women and children being captured by sailors for transportation to the colonies.

The West Indian author and statesman, Sir Eric Williams, famously wrote that "slavery was not born of racism; rather racism was a consequence of slavery."[44] However, several accounts weaken the assertion that slavery was not born of racism.[45] As profound as this statement is, and very widely accepted in some academic circles, it begs the question of to what degree did the African body drive the enslavement of so many people from that continent. What stereotypes about the African existed in the European mind?

In modern era human trafficking, Third World persons and migrants are the race of choice to work in the sex trade and forced labor. The same ideology that informed the transatlantic slave

42. *See* DAVID E. STANNARD, AMERICAN HOLOCAUST 57 (1992).

43. *See e.g.*, Off. to Monitor & Combat Trafficking in Persons, *Forced Labor and the Clean Energy Transition: Finding a Responsible Way Forward*, US DEP'T OF STATE (2022), https://www.state.gov/wp-content/uploads/2022/07/Forced-Labor-and-the-Clean-Energy-Transition-Finding-A-Responsible-Way-Forward.pdf [https://perma.cc/DH75-7F67] ("Direct use of forced labor in the solar industry appears concentrated in the raw material mining and silicon metal production processes, increasing the risk that downstream component producers (e.g., solar cells and solar modules) are using tainted supplies . . . small-scale mining of cobalt has been associated with forced child labor and other abuses."); *See* Janie Chuang, *Beyond A Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 140–41 (2006).

44. Seymour Drescher, *Eric Williams: British Capitalism and British Slavery*, 26 HISTORY AND THEORY 180, 184 (1887).

45. *See* ERIC WILLIAMS, CAPITALISM AND SLAVERY 4 (1994).

trade drives today's forced labor.[46] The importation of African slaves was largely a response to the New World" pandemic crisis which was new creation by old-world Europe. As Europeans decimated native populations in the Americas, reformist laws issued by Emperor Charles V in 1542 and the subsequent Encomienda system sought to legally protect the native peoples. To answer this task, the African population provided the remedy to the labor crisis. Thus, a legal tool designed to save one population led to the forced labor of another. In addition, the Catholic Church was instrumental to buttressing slavery in the Americas. The "de-humanizing" mission of the Church legitimized and justified the continuation of slavery far into the Nineteenth Century.[47]

The Papal Bull of 1455 claimed that Portugal authorized him to reduce all infidel people to servitude. The Papal Arbitration of 1493 and the Treaty of Tordesillas permitted Portuguese ownership of Brazil, causing a power struggle between the Iberian axis powers and Britain, France, the Netherlands and Denmark.[48] After carving up the New World, these powers needed labor to sustain and maintain their newly won colonies.[49]

The union of Spain and Portugal in 1580 expanded the slave trade through a legal device called the Portuguese Asiento, which lasted from 1580 to 1640.[50] The Asiento was a contract granting Portuguese merchants a monopoly on bringing slaves to Spanish America.[51] In 1596, the slave ship, Buen Jesus, arrived from Angola with 210 captives. For the next fifty years, over half of the slaves imported to the New World arrived at Mexican ports. According to historians, by 1600, people of African descent outnumbered

46. *See* Shelby Stephens, *Show, Don't Tell: How Thailand Can and Must Make Advancements in the Fight Against Human Trafficking in the Thai Fishing Industry*, 31 EMORY INT'L L. REV. 477, 479–80 (2017) ("In Thailand, the labor market's imbalance—the supply of labor being outweighed by the demand for labor—has had a detrimental consequence: high rates of human trafficking in the country's fishing industry. Upon examining relevant statistics, the seemingly counterintuitive correlation begins to make sense. The economic boom Thailand has experienced "since the late 1980s has seen a decline in the available Thai workforce needed to meet labour demand[,]").

47. SMITH & PAQUETE, *supra* note 11, at 27 ("If the Church accepted African slavery, it was allegedly because the Church needed to rescue the slave from pagan darkness and through baptism elevate him to the category of a human being.").

48. *See id*.

49. *See id.*

50. *See id*

51. *See id.*

Spaniards in Mexico and Central America. Under the Asiento system, a black market of slaves developed. The high taxes on slaves at Mexican ports led to a diversion of the supply chain from the port of Vera Cruz to Costa Rica and Nicaragua. After Portugal's revolt for independence from Spain in 1640 ended the Portuguese Asiento, the Spanish Crown halted trade to Portuguese colonies, paving the way for the Dutch, British, and French.[52]

The Asiento system of slave contracts led to an increase in the African population of Cuba. The Spanish Crown was the single largest slave holder in Cuba during the 17th and 18th centuries. At the end of the War for Spanish Succession, the South Sea Company, a British firm, was formed to facilitate the British trade in African slaves. This company increased the population of slaves in Cuba and led to the British seizure of Havana from the Spanish in 1762. The Spanish then refocused its control over its Caribbean colonies.

After the official abolition of slavery, there was a resurgence of the Puerto Rican slave trade. This was spearheaded by intermediaries in the Danish and French Islands in the Caribbean. In the 16th century, Juan Ponce de Leon revived Spain's economy with the establishment of sugar mills in Puerto Rico where African slaves were imported exponentially to fill labor demands. The increase in the importation of African slaves was so drastic that one historian declared that "blacks were tantamount to sugar."[53]

III. THE LEGAL FINANCIAL INSTRUMENTS THAT FACILITATED THE SLAVE TRADE

A. Commercial Paper

The genesis of commercial law and commercial legal instruments lie in the slave trade going back to the ancient world.[54] Thus, when chattel slavery arrived in the modern age of commercial law, human transactions were acceptable. Commercial legal instruments like the bills of sale, bills of lading, and negotiable instruments all facilitated the transactions in human beings.[55]

52. *See id.*
53. *Id.*
54. *See* Finkelman & Drescher, *supra* note 12.
55. *See id.*; *see also* Lewis Andrew Lewis, *Martin Dockray and the Zong: A Tribute in the form of Chronology*, 28 J. Legal Hist. 357, 360 (2007).

The historical use of these financial instruments offends our sense of morality today. However, in the ancient world of maritime law and chattel slavery, the trade could not have survived for so long without the power of these legal instruments.[56] The idea of commercial law as a facilitator of human trafficking is not so repugnant to our modern palate. For example, in the 1963 Bay of Pigs incident, the United Stated used a letter of credit to facilitate the ransom of prisoners from Cuba.[57]

To understand the position of a slave as a commercial instrument, an understanding of the law of chattels is necessary.[58] Slavery in the ancient Mediterranean city states was a different concept from what is now understood as chattel slavery in the Americas.[59] A slave in the ancient city states enjoyed some semblance of personhood compared to a slave in the Americas who were classified as personal property in a sale of goods transaction.[60] Chattel slavery in the Americas, divorced the slave from personhood and installed him into the realm of property

56. *See e.g.*, Coclanis, *supra* note 11, at 496 ("Slaves were bought and sold in sophisticated markets, marked by relatively good information, shrewd bargaining strategies and tactics . . . Moreover, as time passed, risk-reduction instruments such as warranties and insurance were often available in such markets . . . The manner in which slave sales were financed adds further support for the view that slave-labor markets were well developed and relatively sophisticated . . . Government helped, too, by establishing and/or supporting institutions needed for efficient capital mobilization: the provision of clear titles to land (and thus the facilitation of mortgage markets); support for debt instruments such as bonds and promissory notes; the establishment of state banks and agricultural banks; and the licensing of private banks and insurance companies . . . In light of the fact that slave-labor markets and slave financing were both well organized and smoothly functioning, it is not surprising that slave labor itself, generally speaking, was reasonably well organized and smoothly functioning *in situ*.").

57. *See* Gerald T. McLaughlin, *Remembering the Bay of Pigs: Using Letters of Credit to Facilitate the Resolution of International Disputes*, 32 GA. J. INT'L & COMP. L 743, 761 (2004).

58. *See* PATRICIA TUITT, RACE, LAW RESISTANCE 33 (2004) ("[T]he whole idea of the slave as property a whole system of laws was built up. [T]he slave was the premise for the very creation of modern law).

59. *See Generally* Antony Honore, *The Nature of Slavery*, *in* THE LEGAL UNDERSTANDING OF SLAVERY, 9-16 (Jean Allain Ed. 2014).

60. *See, e.g.*, Willy E. Rice, *"Commercial Terrorism" from the Transatlantic Slave Trade to the World Trade Center Disaster: Are Insurance Companies & Judges "Aiders and Abettors" of Terror?—A Critical Analysis of American and British Courts' Declaratory and Equitable Actions*, 6 SCHOLAR 1, 51 (2003) ("In fact, the massive and prolonged slave trade as well as the terrorism that it produced would not have occurred but for ship owners' and slavers' ability to purchase marine insurance. The financial risks and potential losses associated with voyages from England to Africa and then to the Americas were just too great. Without a doubt, slavers needed insurance.").

where the slave became at once a tangible and quasi-intangible good.[61] The dictionary meaning of the word "chattel" is an object that represents documents or embodies a right to payment or performance of an obligation.[62] A slave in the transatlantic slave trade was treated more as quasi-intangible because they belonged to anyone to whom a debt was owed.[63] The role of slaves as chattel paper was the engine that served to demolish the familial structure of Africans imported into the Americas.[64] The term "chattel paper" as defined in the Uniform Commercial Code ("UCC") and other commercial laws promotes an understanding of how slaves were viewed as commercial transactions.[65] As in the era of the transatlantic slave trade, there is a high demand for chattel paper today. For example, car dealerships use chattel paper to refinance future loans for new cars. When buyers sign promissory notes and grant dealers a security interest in the purchased vehicle, they sign a security agreement that the dealer can use in the event of a default on payment of the promissory note. Together, the note and the security agreement represent chattel paper.[66] Thus, the dealer

61. *See* ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS 19 (Rutledge-Cavendish, 2d ed. 2008) (noting that slaves were property and that trading in slaves was a recognized and legal activity).

62. *See* ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS 19 (2d ed. 2008) ("Traditional contract and commercial law supported the Atlantic trade while the American colonists adapted well-understood concepts of property, contract, personal injury (trespass at the time, which was before the invention of tort law), and criminal law to support slavery. In the non-English colonies, Roman and civil law traditions made the legal transition even easier. As one scholar has noted, "The Spanish and Portuguese came from slaveholding cultures, and simply expanded existing law to the New World. France, Holland, Sweden, and Denmark also easily adapted their civil law traditions and Roman law heritage to accommodate New World slavery.")

63. *See id.* ("[The slave] could be inherited and willed. If the slave-owner owed debts, they could be used as security or could be levied upon. They could be mortgaged and rented out, all facilitated by the law.").

64. *Id.* at 775 ("[When] Africans arrived in the New World, they came as merchandise—often with paperwork that constituted a transferrable title to this chattel property that was being sold in a legitimate and legally recognized form of commerce. No one questioned the provenance or legitimacy of the paperwork. Courts in Europe saw the slave trade as just one more form of economic activity conducted under traditional and established notions of commercial law.").

65. U.C.C. § 9-102 (a) (11), (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS & THE A.L.I.) (defining chattel paper as "a record or records that evidence both a monetary obligation and a security interest in specific goods.").

66. *See* Uniform Commercial Code 9-102 (a) (11) ("Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific

can either sell the chattel paper outright or use it as collateral for floor plan financing. This was the process by which Africans were sold away from the family unit on slave plantations and in some cases, were *mortgaged* even before reaching plantations in the Americas. If the plantation owner defaulted, then the individuals whose bodies represented the collateral were either sold to repay the loan or were repossessed by the holder of the chattel paper. The African body, then, was also a form of a negotiable instrument transferred from one holder to the next.[67]

B. Maritime Law as the Law of the Slave Trade

Today, the heinous practice of human trafficking is facilitated by maritime law regarding shipowner liability for forced labor in the fisheries sector and human trafficking in containers as discussed in UK cases at the beginning of this Article.[68] Because maritime law is jettisoned by a wave of international treaties and conventions, it is loaded down with complex procedures and practices.[69] This complexity needs to be understood before the judicial mind can effectively enforce liability against the purveyors of modern-day slavery. The first step would be for maritime nations, such as the United States to unmoor human rights law from the "homeward trend" interpretations that continue to muddy the waters of international law.[70] When it comes to issues of forced labor in the global commons, the maritime nations must

goods . . . If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.").

67. *See, e.g.*, Lewis, *supra* note 55, at 360; Rice, *supra* note 60, at 98 ("English and American judges certainly recognized, permitted, and supported the terrorization of innocent Africans under the guise of protecting one's right to form contracts and engage in commerce. Even more remarkable, those learned jurists endorsed the systematic deprivation of human rights in the name of commerce . . . ").

68. *See* Kirka & Lawless, *supra* note 15.

69. *See* Wilson, *supra* note 23, at 246–47 "harmonizing human rights with the inherent challenges of high seas maritime law enforcement interdictions is an urgent issue today because no consistent approach to harmonizing human rights obligations with operational exigencies necessary in maritime law enforcement exists.").

70. *See generally*, Bruno Zeller, *Analysis of the Cultural Homeward Trend in International Sales Law*, 10 VICTORIA UNIV. L. & JUST. J. 131 (2021) ("'The term 'homeward trend' has been coined to describe the introduction of domestic principles in the application of the Vienna Convention on Contracts for the International Sale of Goods ('CISG'): 'a behavioural bias in favour of domestic law.'").

engage in a concerted effort to harmonize these laws through improved systems of transparency in international maritime law.[71]

Interestingly, the Fugitive Slave Act was modeled on the Merchant Seamen's Act of 1790.[72] Today, the Department of Labor's ("DOL") regulations for H1B workers mirror the coercive rules that were applied to seamen in the 19th century. These rules are now being interpreted to labor issues involving maritime and global supply chain workers.[73]

Maritime law is uniquely global, and the legal framework is important in solving problems in the shipping industry. Maritime law is an ancient branch of law which continues to intersect not only with several practice areas but also with human rights. Commercial shipping, a creature of private law, dominates international business, but increasingly, the shipping business collides with public international law because of human rights abuses both at sea and in the global supply chain. At this critical intersection of private and public law is the resurgence of modern-day slavery facilitated by human trafficking in the global supply chain.

Meanwhile, the *Zong* case, which will be discussed in greater detail below, involved an insurance lawsuit about a "cargo" claim on slaves that were intentionally thrown overboard. The English court decided the case based on maritime insurance law and disregarded the heinous human rights abuses, including mass murder.

---

71. *See* Wilson, *supra* note 23, at 246–47 ("Moreover, a question that surfaced in past generations-whether human rights apply on the water-is no longer the salient issue. Rather, courts, governments, and deployed naval forces are now confronting the issue of harmonizing human rights with the inherent challenges of high seas maritime law enforcement interdictions. It is an urgent issue today not just because of increased judicial attention or because certain terms that have no uniformly, internationally accepted definition are populating bilateral and multinational documents. It is an urgent issue because no consistent approach to harmonizing human rights obligations with operational exigencies necessary in maritime law enforcement exists.").

72. *See* Jonathan M. Gutoff, *Fugitive Slaves and Ship Jumping Sailors – The Survival and Enforcement of Coerced Labor*, 9 J. Bus. L. 87 (2006).

73. *See id.* at 92 ("The beneficent rules for seaman were balanced by the coercive ones.").

IV. NATURAL LAW AND SLAVERY – LORD MANSFIELD'S INFLUENCE ON THE SLAVE TRADE IN THE UNITED STATES AND BRITISH COLONIES

A. The Slave Cases Under Lord Mansfield – The Past is Prologue

During the transatlantic slave trade, natural law theory and commercial law collided within the space of chattel slavery. Principles of natural law were at the heart of the *Somerset* case and helped to ignite the abolitionist movement. [74] In that case, natural law principles seemed to triumph over property interests. In Somerset, the issue was whether an enslaved person who was present on English soil could be forcibly removed the colony of Jamaica for sale.[75] An an enslaved African by the name of James Somerset was purchased by Charles while he was in Boston, Province of Massachusetts Bay, then a British crown colony. Stewart brought Somerset brought to England in 1769. Two years later, Somerset escaped from Stewart in October 1771 and was recaptured in November. Upon recapture, Somerset was imprisoned on the ship *Ann and Mary* (under Captain John Knowles), bound for the British colony of Jamaica where Somerset would be sold to a plantation. Three individuals acting as Somerset's godparents petitioned the Court of King's Bench arguing that Somerset was baptized as a Christian in England, and therefore could not be a slave while on English soil. They made an application for a writ of *habeas corpus* to determine whether Somerset's imprisonment was lawful. Lord Mansfield held that Somerset could not be enslaved while he was on English soil.[76]

However, ten years after the *Somerset* decision, Lord Mansfield's opinion in the *Zong* case subjugated natural law to the then existing commercial practices. The *Zong* opinion was analyzed under the lens of maritime law, specifically marine

74. *See* Somerset v. Stewart, 98 Eng. Rep. at 499, (The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore, the black must be discharged.").

75. *See id.*

76. *See id.*

insurance law, which provided commercial justification for the continuation of the slave trade, but the case also fueled the abolitionists' cause.[77]

Mansfield's decisions in the slave cases influenced American maritime and commercial law, the two bodies of law that strengthened the practice of slavery. In the 18th century, the legality of slavery was front and center in the courts of France, Britain, and Scotland. In *Somerset v. Stewart* and the *Zong* case, the English Jurist, William Murray, the Earl of Mansfield, served to prolong the justifications for the African slave trade.[78] Contrary to popular belief, Mansfield did not denounce the trade in the *Somerset* case. Rather, the case was narrowly decided on grounds of *habeas corpus* to determine whether the status of the slave in question was grounded in property or contract law.[79] Mansfield could not declare the system of slavery as illegal because that decision would have offended the slave-owning colonial legislators to whom Mansfield owed his political and legal career.[80]

By finding that the relationship between master and slave in *Somerset* was a contractual right and not a property right, the case stands for the proposition that the slave was a person and not property.[81] The weightier question was whether the laws of the

77. *See* Sciullo, *supra* note 8 (citing Ian Birrell, *Massacre of the Slaves Who Did Not Die in Vain*, DAILY MAIL (Sept. 15, 2011)), https://www.dailymail.co.uk/home/books/article-2030135/Massacre-slaves-did-die-vain-THE-ZONG-BY-JAMES-WALVIN.html [https://perma.cc/CD6X-AYZU]); Michel Marriott, *Remembrance of Slave Ancestors Lost to Sea*, N.Y. TIMES, (June 19, 1994) at 25.

78. *See generally* Gregson v. Gilbert (1783) 99 Eng. Rep. 629; Somerset v. Stewart (1772) 98 Eng. Rep. 499.

79. *See* POSER, *supra* note 11 (At that time in in England, the writ of habeas corpus required that any person who had detained another bring the prisoner before a judge along with an explanation called a "return." If the judge was not satisfied by the return that the detention was legal, the prisoner would be released. In the case of slavesif there was no break in the chain of title, then the slave remained the property of his owner. However, in *Somerset*, Mansfield observed that the sale contract for *somerset* was good in England. But this case was different because it was brought under a writ of habeas corpus, and the person of the slave himself was the object of inquiry and the question became whether Captain Knowles "return" which stated that Somerset was Stewart's slave was sufficient justification for his detention.).

80. *See id. at* 299 (To placate the concerns of the West Indian and North American planters and merchants, Mansfield made clear that the case did not involve the legality of the slavery trade; it was authorized by the laws of Virginia and Jamaica, and slavers "are goods and chattels; and as such saleable and sold.

81. *See id.* (The decision made the important point that habeas corpus protected blacks as well as whites).

British colony of Virginia could be enforced in England.[82] However, the *Zong* case decided eleven years after *Somerset*, Mansfield's argument was no less than duplicitous and structured in favor of commercial interests rather than the protection of human lives.[83] The problem caused by the *Zong* decision revealed that, notwithstanding the *Somerset* decision, Britain had no intention of emancipating her slaves on American and Caribbean plantations. In fact, Britain did not abolish the slave trade until 1807 and the practice of slavery in its colonies in 1834, sixty-two years after the *Somerset* decision.[84]

At the heart of Mansfield's decisions concerning the legality of slavery in British Colonies was the issue of extraterritorial jurisdiction.[85] His inconsistent views on this subject served to prolong slavery in the British colonies and preserve commercial interests.[86] Indeed, Mansfield before he was appointed to the bench believed that the English common law superseded any contrary colonial law. Most notably, when Mansfield held the position of Solicitor General, in *The Kenneback Land Patent Case*, Sep. 5, 1755, in an opinion to the Privy Council advised them that English law trumped the laws of the colonies.[87] However, he seemed to abandon this view when faced with the issue of slavery, even suggesting that merchants should lobby Parliament to

82. *See id.* at 295 (Mansfield framed the question as whether colonial slavery laws could be enforced in England in the same way . . . a marriage contracted in a foreign country would be recognized in England. To legalize slavery . . . would have many consequences "absolutely contrary to the municipal laws of England.").

83. *See id.* (Long after the Somerset case, Mansfield continued to regard black slaves not as human beings having inalienable rights but as chattels-personal property that their owners could dispose of as they wished.).

84. *See* POSER, *supra* note 11.

85. *See id. See also* Derek A. Webb, *The Somerset Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America*, 32 LAW & HIST. REV. 455, 456 (2014) (The case presented to Mansfield and the King's Bench a classic conflict of laws question, in which the court had to resolve whether to apply English law, which was the law of the forum of the King's Bench, and which forbade forceful removal of a slave out of the country, or Virginia law, which was the law under which Stewart held Somerset, and which permitted such forceful removal. On June 22, 1772, the court ruled unanimously that they would apply English law, and, therefore, found the attempt to return Somerset to Jamaica illegal, and further ordered that Somerset be discharged.).

86. *See* POSER, *supra* note 11, at 297. (He exhibited this view in the infamous Zong case eleven years after his Somerset ruling.).

87. *See id.* at 295 (In the Kenneback Land Patent Case, Mansfield held that the king in council had authority to hear an appeal from the decision of a Massachusetts court over a dispute over title to a large tract of land.).

legalize slavery in England.[88] Suggesting that Mansfield believed positive law would trump the English common law, natural law and morality on the legality of slavery.[89] Thus without a clear statement of positive law, slavery was illegal. But Mansfield's advice to Parliament coupled with his attempt to appease slaveholders in the Colonies begs the question of whether Mansfield supported the institution of slavery. Moreover, in his Somerset decision, Mansfield made clear that the pivotal issue in the case was not about slavery in the colonies.[90] If Mansfield was not so duplicitous in his interpretation of the law in the slavery cases, he may well have been remembered as a champion of the abolition movement.[91] Indeed after the Somerset decision, the highest court of Scotland granted freedom to an African slave in Scotland on the premise that slavery was not recognized in Scotland.[92] But Mansfield was a champion for commercial interests

88. Somerset v. Stewart, (1772) 98 Eng. Rep. 499, 510 ("So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced in any reasons, moral or political; but only on positive law. . . .[It is] so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore, the black must be discharged.").

89. *See e.g.*, Webb, *supra* note 85, at 459 (explaining the effect of the Somerset decision on the Abolitionist Movement in America) ("For them, even though they acknowledged that Mansfield had said that slavery could be legal if, and only if, it enjoyed an infrastructure of positive law protection, *Somerset* stood in a general way for the pre-eminence of natural justice over positive law. And as a consequence, they drew two conclusions regarding the implications of the decision for slavery: first, that *Somerset* abolished slavery outright throughout England, and second, that it similarly abolished slavery in the colonies prior to the Revolution.").

90. *See, e.g.*, POSER, *supra* note 11, at 298, (citing JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE NINETEENTH CENTURY Vol. II, 1222 (North Carolina Press, 2012)) ("Light was also shed on Mansfield's views after the Somerset case . . . In 1790 the Earl of Sheffield . . . wrote to Mansfield's nephew, Lord Stormont, that Mansfield had told him . . . that abolishing the slave trade would not help the slaves, who would be transported across the Atlantic on less well-regulated foreign ships; not to mention the fact that merchants in Bristol and Liverpool would lose revenues."); *see alos id.* at 300 ("[In] deciding the Somerset case, Mansfield went out of his way to reassure the West Indian planters that the legality of the slave trade or of colonial slavery was not an issue before the court.").

91. *See* POSER, *supra* note 11, at 298 ("Although the Somerset decision did not end slavery or the slave trade, it was far from meaningless . . . it provided support for the growing abolitionist sentiment. In Scotland . . . it had immediate effect.").

92. *See* Knight v. Wedderburn (1778); *see also Slavery, Freedom or Perpetual Servitude?—The Joseph Knight Case*, NAT'L REC. OF SCOT.,

and not for humanitarian concerns. After his decision in Somerset was heralded as a victory by Abolitionists and some American courts, Mansfield clarified that the Somerset decision was not a declaration on the illegality of the slave trade.[93] His opinion in the Zong decided eleven years after Somerset and comments in social circles demonstrate Mansfield's preference for British commercial interests.[94]

B. The Zong Case

The 1783 case of *Gregson v. Gilbert* was instructive as to Mansfield's regard for slavery.[95] In this case, his views testified to his belief that Africans were not human beings, but chattel.[96] The decision was heralded a sword for the abolitionist cause. But for

---

https://www.nrscotland.gov.uk/research/learning/slavery/slavery-freedom-or-perpetual-servitude-the-joseph-knight-case [https://perma.cc/H5AR-38VK] (last visitied Mar. 26, 2023); POSER, *supra* note 11, at 298 ("Less than two weeks after the [Somerset] decision, an African slave in Scotland named Joseph Knight . . . brought suit in the magistrate's court in Perthshire in November 1773 . . . the highest court of Scotland took the decisive step that Mansfield had been unwilling to take. The court freed Knight, declaring that the state of slavery is not recognized by the laws of this kingdom and is inconsistent with the principles thereof."); Webb, *supra* note 85, at 461 ("Similarly in Scotland, the Court of Sessions held in 1778 that, as a consequence of *Somerset,* a master of a slave could not exercise any form of dominion over a slave in Scotland, even though the slave had been purchased in Jamaica where slavery was legal, because such laws were unjust.").

93. *See* Webb, *supra* note 85, at 468. Mansfield was apparently vexed by this trend and attempted to narrow the meaning of his decision. In *Rex v. Inhabitants of Thomas Ditton,* he pointed out that "the determination got no further than that the master cannot by force compel him to go out of the kingdom" and later observed that "The case of Somerset is the only one on this subject. Where slaves have been brought here, and have commenced actions for their wages, I have always non-suited the plaintiff."[29] Although some of the sweeping and forceful language with which he expressed himself in the *Somerset* decision may have led to the sorts of interpretations made by the various judges in England and Scotland and the radical abolitionists in America, in Mansfield's mind, as in Phillips', the *Somerset* decision did not abolish slavery in England.

94. *See* POSER, *supra* note 11, at 290 (The existence of slavery in England and British participation in the African slave trade created a dilemma for Mansfield. There was a tension between his rational and humane beliefs and his unwavering support of British commerce and the sanctity of property.).

95. *See* Gregson v. Gilbert (1783) 99 Eng. Rep. 629 at 630.

96. *See* POSER, *supra* note 11, at 297 (quoting F.O. SHYLLON, BLACK SLAVES IN BRITAIN (Institute of Race Relations by Oxford University Press 1974) ("Long after deciding the *Somerset* case, Mansfield continued to regard black slaves not as human beings having inalienable rights but as chattels – personal property that their owners could dispose of as they wished. He exhibited this view most chillingly in the infamous case of the slave ship, *Zong*, decided in May 1783, eleven years after his *Somerset* ruling.").

Mansfield, his *Zong* opinion was designed to prevent the undermining of the British slave trade.[97] Though he ruled that there was no peril to justify throwing the slaves overboard, in private circles, he opined that abolishing the slave trade would not help the slaves, he also expressed concern over the loss of revenue to merchants in Bristol and Liverpool if the trade was abolished.[98]

The transatlantic slave trade may have been one of the world's most costly insurance disasters of all times.[99] The most significant factor was the inability of the seller and the buyer of enslaved persons to perform their contractual obligations due to the decision of a third party, most notably, the ship's captain, to decide under what circumstances and who among the enslaved were disposable. [100] Insurance companies were instrumental in the commercialization of black bodies,[101] while the law of maritime insurance regarded slaves as cargo.[102] The principles of maritime

97. *See id.* at 298.

98. *See id.* at 629.

99. *See* FRANK L. MARAIST ET. AL., CASES AND MATERIALS ON MARITIME LAW 843 (3rd ed. 2016) ("Insurance has its origin in wagering and perhaps in maritime law. In the 17th Century some British shipowners, while gathered at Lloyd's Coffeehouse in London, began to wager as to whether their ships would return safely from overseas voyages. A shipowner whose vessel was at sea would leave a document describing the vessel, the voyage, and the value of the venture. Another shipowner who was willing to gamble that the voyage would be successfully completed would sign below (hence the term, underwriter) thus guaranteeing the safe completion of the voyage in exchange for a fee. From this developed Lloyds of London, where underwriters, representing persons who are willing to wager, guarantee a percentage of a feared loss.").

100. *See generally* Gregson v. Gilbert (1783) 99 Eng. Rep. 629.

101. *See* Rice, *supra* note 60, at 51–52 ("For example, in England, Lloyd's of London the well-known financial institution opened its doors in 1688, at the peak of the African slave trade. "Lloyd's of London . . . is still . . . the largest meeting place for underwriters and shippers to transact marine insurance business. In 1906, the British Parliament enacted the Marine Insurance Act [which] continues to influence marine insurance policy wordings and conditions." In America, the "slave trade also built entire industries, from rum distilleries to insurance companies" in the Northeast. In Connecticut, for example, the "now-defunct Hartford Life Insurance Company . . . sold slave policies. And [among American insurers,] Boston insurance companies . . . made up the majority of the underwriters for Rhode Island slave voyages").

102. *See id.* at 50–51 ("The for-profit marine insurance contract had been in use for at least two centuries when John Hawkins commenced his first slave voyage in the mid-sixteenth century with the support and blessing of Queen Elizabeth I. In addition, at the very height of the transatlantic slave trade, marine insurance played an indispensable role in maritime commerce. In fact, the massive and prolonged slave trade as well as the terrorism that it produced would not have occurred but for ship owners' and slavers' ability to purchase marine insurance. The financial risks and potential losses associated

law as it related to the African slave trade contributed to the status of human beings as property.[103] The law of general average, for example allowed shipowners to recover the loss of their cargo caused by a peril of the sea. Given these rules, it is easy to imagine the decision to throw slaves overboard was made in contemplation of obtaining a recovery for the loss.[104]

In the 1781 *Gregson v. Gilbert* ("the *Zong* case") case, about one hundred Africans died from thirst and hunger on board.[105] In addition, the remaining 150 slaves were thrown overboard. Here, the ship claimed that a navigational error caused supplies to dwindle, which in turn led to either the demise of slaves or resulted in poor physical condition.[106] These effects lowered the value of the slaves as any other perishable cargo. Under the general maritime law, the insurance company is liable for any loss of cargo perish due to "perils of the sea."[107]

The insurer refused to pay the "cargo" claim on the lost Africans and the shipowner sued.[108] The insurer claimed that the slaves' demise was not caused by a peril of the sea, but by the

---

with voyages from England to Africa and then to the Americas were just too great.Without a doubt, slavers needed insurance.")

103. *See id*. at 48 ("Insuring one's property or enterprise against natural and man-made perils is a very ancient practice. Marine insurance is the oldest type of insurance, and one of the earliest forms of property and indemnity insurance. It began around 3,000 BC when Chinese merchants insured themselves "against trade losses by distributing the cargo of one merchant over many boats." This involved the well-known and current-day practices of risk transference and risk distribution. To be sure, insurance was a significant development in maritime commerce; it allowed and encouraged merchants to invest money and assume risky enterprises with some assurances that others would help in the event of serious losses.").

104. *See generally* Shaver Transp. Co. v. Travelers Indem. Co., 481 F. Supp. 892, 897 (D. Or. 1979) ("General average is a venerable doctrine of maritime law that dates back 2,800 years. The doctrine provides that when a portion of ship or cargo is sacrificed to save the rest from a real and substantial peril, each owner of property saved contributes ratably to make up the loss of those whose property has been sacrificed. General average contribution exists independently of marine insurance and is owed even in the absence of cargo insurance. However, cargo owners typically insure themselves against possible obligation arising from a general average situation.").

105. *See id.*

106. *See* Catherine Baksi, *The Story of the Zong Slave Ship: A Mass Murder Masquerading as an Insurance*, THE GUARDIAN, LANDMARKS IN THE LAW, (Jan. 19, 2021) https://www.theguardian.com/law/2021/jan/19/the-story-of-the-zong-slave-ship-a-mass-masquerading-as-an-insurance-claim [https://perma.cc/63JU-S5T7].

107. MARAIST ET AL., *supra* note 99, at 848.

108. *See* Baksi, *supra* note 106.

captain's negligent navigational deviation.[109] Under the general maritime law, the loss of cargo fell upon the insurer of the cargo only in cases of peril of the sea or acts of war by enemy nations.[110] The court found that the Africans were thrown overboard only because the captain knew that the slaves had declined in value due to their poor physical condition as a direct result of the lack of water and food during the voyage from Africa to Jamaica.[111] Interestingly and relevant to the thesis of this Article, Justices Lee and Chambre raised the issue of whether the slaves should be treated as property or "fellow-creatures."[112] Notwithstanding, these justices ignored the moral issue and proceeded to characterize the Africans as goods and concluded that the loss ensued because of perils of the seas.

The case was then remanded for reconsideration on the payment of costs.[113] This case, then, does not embody the hue and cry of the immorality of the slave trade because the murder of these human beings was never pivotal in the case.[114] Rather, the case veered on the side of the insurers who were not liable under the policy.[115] For abolitionists, the larger question in the *Zong* case

109. *See* Gregson v. Gilbert [1783], 99 Eng. Rep. 629.

110. *See* Shaver Transp. Co. v. Travelers Indem. Co., 481 F. Supp. 892, 894 (D. Or. 1979) (noting that the Perils clause is an ancient maritime rule which defines the risks protected by the policy. "In addition to a long list of 'perils of the sea,' the clause includes a catchall phrase, 'and all other perils, losses, and misfortunes, that have or shall, come to the hurt, detriment or damage to the said goods and merchandise.'" The doctrine of jettison is usually included in this phrase.).

111. *See id.*

112. *See* Gregson v. Gilbert (1783) 99 Eng. Rep. 629 at 629–30 ("It has been decided, whether wisely or unwisely is not now the question, that a portion of our fellow creatures may become the subject of property.").

113. *See id.* ("This is a very uncommon case and deserves a reconsideration. There is great weight in the objection, that the evidence does not support the statement of the loss made in the declaration. There is no evidence of the ship being foul and leaky, and that certainly was not the cause of the delay. There is weight, also, in the circumstance of the throwing overboard of the negroes after the rain (if the fact be so), for which, upon the evidence, there appears to have been no necessity. There should, on the ground of reconsideration only, be a new trial, on the payment of costs.").

114. *See id.*; *see also* Archie Zariski, *Mansfield, Atkin, Weinstein: Three Responsive Judges at the Nexus of Law, Politics, and Economy*, 67 IUS GENTIUM 311, 326 (2018) (explaining that in the course of those proceedings the Lord Chief Justice is reported to have declared that although it was "shocking" to say, in the case of marine insurance slaves as cargo were to be treated no differently than "horses" being transported).

115. *See* Gregson v. Gilbert (1783) 99 Eng. Rep. 629, 630 (Buller, J., concurring) ("The argument drawn from the law respecting indictments for murder does not apply. There the substance of the indictment is proved though the instruments with which the crime

was whether the slaves that were thrown overboard constituted goods that were damaged as a result of the perils of the sea or whether they were human beings and thus were required to be transported in a seaworthy vessel under maritime law.[116]

The murders were totally ignored whereas the interpretation of the maritime law was clarified.[117] In the case's aftermath, the British Parliament's negative reaction and the United States' enactment of the Alien Tort Statute in 1789 lent credence to the proposition that the practice of slavery was repugnant internationally. After the *Zong* decision, the British Parliament responded with two statutes, which were then applied to subsequent cases involving the insurance of slaves.[118] This clarification of positive law allowed a glimmer that human beings were not expendable and are not the subjects of cargo. The exceptions provided by these two statutes still apply to maritime contracts today.[119]

The Zong was a slave ship traveling from West Africa to Jamaica with a cargo of several hundred slaves.[120] Navigational

---

was affected be different from that laid. It would be dangerous to suffer the plaintiff to recover on a peril not stated in the declaration.").

116. *See* C A P. XXXIII. An ACT to amend and continue, for a limited Tirne, feveral Acts of Parliament for regulating the shipping and carrying Slaves in British Vessels from the Coast of Africa. *See* Ian Birrell, *Massacre of the Slaves who did not Die in Vain*, DAILY MAIL (Sept. 15, 2011, 9:46 AM), https://www.dailymail.co.uk/home/books/article-2030135/Massacre-slaves-did-die-vain-THE-ZONG-BY-JAMES-WALVIN.html [https://perma.cc/2SKT-Z3NZ].

117. Gregson v. Gilbert (1783) 99 Eng. Rep. 629, n. 119; *see e.g.*, Ian Birrell, *Massacre of the Slaves Who Did Not Die in Vain*, DAILY MAIL (Sept. 15, 2011), https://www.dailymail.co.uk/home/books/article-2030135/Massacre-slaves-did-die-vain-THE-ZONG-BY-JAMES-WALVIN.html [https://perma.cc/2SKT-Z3NZ] (discussing the story of the Zong in a well-told, brief, and engaging book by James Walvin) ("Such killings were not uncommon amid the violence of the slave trade. What made this incident so shocking to the pair was that the owners of the ship, a group of prosperous Liverpool merchants, were taking their insurers to court over the loss of their cargo. They were demanding money for mass murder.").

118. *Id.* n. (b) (Justice Buller arguing, "It was probably this case which led to the passing of the statutes 30 G. 3, c. 33, s. 8 and 34 G. 3, c. 80 s. 10, prohibiting the insurance of slaves against any loss or damage except the perils of the seas, piracy, insurrection, capture, barratry, and destruction by fire.; and providing that no loss or damage shall be recoverable on account of the mortality of slaves by natural death or ill-treatment, or against loss by throwing overboard on any account whatsoever." *Id*. at 630, n. (b) (citations omitted).

119. *See* Shaver Transp. Co. v. Travelers Indem. Co., 481 F. Supp. 892, 897 (D. Or. 1979).

120. *See* Gregson v. Gilbert (1783) 99 Eng. 629.

errors caused the voyage to be delayed for several days. As the supply of food and water dwindled, about sixty slaves died of thirst, another forty threw themselves overboard and another 150 were thrown overboard.[121] The shipowner sued its insurer who refused to pay for the loss of the slaves, arguing that the death of the slaves was a result of navigational mismanagement and not a "peril of the sea" as covered by the cargo policy.[122]

At trial, the jury ruled against the insurer on the premise that the loss of the slaves was a result of the normal perils of the sea.[123] The insurer appealed this decision and Mansfield ordered a new trial to determine whether the lack of water was cognizable under the policy as a normal peril of the sea.[124] By framing the question in this way, Mansfield effectively stated that throwing slaves overboard was legal if the lack of water constituted a peril of the sea. Importantly, his decision in this case never addressed the culpability of throwing the slaves overboard.[125]

But Mansfield's decisions did not enjoy the warm welcome in the early days of the United States as it does today. Interestingly, Thomas Jefferson opined that Mansfield's judgments were "a threat to liberty."[126] Although other founding fathers and many American jurists past and present applaud Mansfield's work, Jefferson was troubled by Mansfield's assimilation of mercantile customs and the civil law of continental Europe into the common

121. *See id.*

122. *See* Brenna Bhandar, *Property, Law, and Race: Modes of Abstraction*, 4 .C. IRVINE L. REV. 203, 214 (2014) ("The case resulted in a dispute over the insurance contract, and centered on whether the actions of the Captain were necessary or not. Despite evidence at the trial that there was in fact no water shortage, the court found for the slave owners. On appeal, Lord Mansfield ordered a new trial on the question of whether the fact of necessity had been established.").

123. *See* POSER, *supra* note 11, at 298 ("A jury gave a verdict against the insurer on the ground that the loss of the slaves was a result of the normal perials of the sea. On appeal Mansfield ruled that if the shipowner could proved that it was necessary to throw the slaves overboard, then the act was legal.").

124. *See* Gregson v. Gilbert (1783) 99 Eng. 629.

125. *See id.* at 298 (Nowhere in his short opinion was there any suggestion that the captain and crew of the Zong were murderers).

126. *Id.* at 396 (citing Letter from Thomas Jefferson to Mr. Cutting (Oct. 2 ,1788), *in* 7 WRITINGS OF THOMAS JEFFERSON 155 (Andrew A. Lipscomb & Albert E. Berg eds., mem'l ed. 1904)) ("I hold it essential, in America, to forbid that any English decision which has happened since the accession of Lord Mansfield to the bench [in 1756],, should ever be cited in a court; though there have come many good ones from him, yet there is so much sly poison instilled into a great part of them, that it is better to proscribe the whole.").

law, and regarded calling Mansfield "the evil genius of English law."[127] Notwithstanding, Mansfield's legacy still lives on and is often cited by our modern Supreme Court in various areas of law.[128]

Years after the *Zong* case, *United States v. Amistad* worked its way through the US court system based on the same legal question: *were slaves persons or property*?[129] (Emphasis added). The *Amistad* case took place over the span of the years 1839-1840.[130] The case concerned a Cuban slave ship, *La Amistad* which was captured near Long Island, New York, in 1841 and taken into custody. On board were forty-five Africans who were captured as slaves. The slaves murdered the captain, and killed or captured some of the crew, and took command of the ship. When the ship was found by the American authorities, two of the Cuban crewmembers claimed to own the ship and the Africans. The American officers claimed the ship and its cargo as salvage. Other parties claimed various property interests in the ship or its cargo.

At that time Cuba was a colony of Spain. Although Spain had entered into a treaty with Great Britain to refrain from engaging in the African Slave Trade, the illegal trade was still practiced in Cuba where Africans were still being kidnapped and taken to Cuba. The case began in the district court of Connecticut where the U.S. government intervened on behalf of the Queen of Spain on the basis of treaty rights relating to lost property of Spanish subjects. Thus, the U.S. government argued that the slave owners had a right to the ship and the Africans on board. The Africans led by one of the Africans, Cinque, argued that they were illegally kidnapped, and the case eventually reached the United States Supreme Court to determine whether the Africans should be deemed as property of Spain and be forced to Cuba as slaves. Former President and

127. *Id*. at 397 ("Several years later, Jefferson repeated this advice, although he revised it slightly by saying that American law should exclude English cases from the beginning of George III's reign in 1760.").

128. *Id*. at 398 ("The Supreme Court has cited Mansfield's decisions over three hundred and thirty times, in cases that bear on almost every area of the law.").

129. United States v. The Amistad, 40 U.S. 518 (1841).

130. Brant T. Lee, *Teaching the Amistad*, 46 ST. LOUIS U. L. J. 775 (2002); *see also* Roger S. Clark, *Steven Spielberg's Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery an Inaugural Lecture as Board of Governors Professor, Rutgers*, 30 RUTGERS L. J. 371, 383–86 (1999).

Secretary of State, John Quincy Adams argued on behalf of the Africans, and they finally were set free and returned to Sierra Leone in Africa.

A study of the *Amistad* case also reveals the legal struggle between commercial interests of the great maritime nations and the immorality of the slave trade. The case demonstrated the negotiability of black bodies for political and commercial expediency.[131] The *Amistad* dispute arose after the practice of slavery was abolished in Britain who then had dominion over the high seas and asserted jurisdiction over the captured Spanish vessel. However, the United States at that time still struggled with the slavery question that threatened to sever the nation. After a long and arduous legal process, the Africans were set free and returned to Africa.[132]

During this case John Quincy Adams argued that natural law principles can and should prevail where positive law is either absent or will produce an absurd result. Justice Story, an eminent commercial and admiralty jurist, held that the Africans were illegally enslaved because neither Spanish law nor the treaty between America and Spain authorized slavery.[133] Here, the laws

131. *Id.* at 520 ("To bring the case of the Amistad within this article, it is essential to establish: 1st. That the negroes, under all the circumstances, fall within the description of merchandise, in the sense of the treaty. 2d. That there has been a rescue of them on the high seas, out of the hands of pirates and robbers. 3d. That Ruiz and Montez are the true proprietors of the negroes, and have established their title by competent proofs. If those negroes were, at the time, lawfully held as slaves, under the laws of Spain, and recognized by those laws as property, capable of being bought and sold, no reason is seen, why this may not be deemed within the intent of the treaty, to be included under the denomination of merchandise, and ought, as such, to be restored to the claimants; for upon that point, the laws of Spain would seem to furnish the proper rule of interpretation.").

132. *Id.* at 595-96 ("It is also a most important consideration in the present case, which ought not to be lost sight of, that, supposing these African negroes not to be slaves, but kidnapped, and free negroes, the treaty with Spain cannot be obligatory upon them; and the United States are bound to respect their rights as much as those of Spanish subjects. The conflict of rights between the parties under such circumstances, becomes positive and inevitable, and must be decided upon the eternal principles of justice and international law . . . *A fortiori*, the doctrine must apply where human life and human liberty are in issue; and constitute the very essence of the controversy. The treaty with Spain never could have intended to take away the equal rights of all foreigners, who should contest their claims before any of our Courts, to equal justice; or to deprive such foreigners of the protection given them by other treaties, or by the general law of nations. Upon the merits of the case, then, there does not seem to us to be any ground for doubt, that these negroes ought to be deemed free; and that the Spanish treaty interposes no obstacle to the just assertion of their rights.").

133. The Amistad, 40 U.S. 518.

of an imperial power were transported extraterritorially to hold slavery illegal.[134] The final outcome in the *Amistad* case, then, stands in stark contrast to Mansfield's judgments in the British slave cases where British law was not applied extraterritorially to its colonies.[135] The case stands for the proposition that under the law of nations, the law of nature governs.[136]

V. THE ALIEN TORT STATUTE AND MODERN-DAY HUMAN TRAFFICKING

The vestiges of duplicity in American courts as displayed in the *Amistad* case are seen in the claims of human trafficking against American and multinational corporations today. The Supreme Court's reluctance to hold corporations liable for forced labor in the global supply chain is reminiscent of Lord Mansfield's duplicity in the British slave cases. In a line of cases beginning with *Kiobel v. Royal Dutch Petroleum*, the Court has consistently held that the ATS did not create a new cause of action for corporate liability for human trafficking and other violations of human rights because in 1789, when the statute was enacted, such causes of action did not exist and were not cognizable under the law of nations as crimes.[137]

The ATS was passed as part of the Judiciary Act of 1789, which included labeling the practice of slavery as a crime against the law of nations.[138] The Act provides jurisdiction over claims brought by

134. *id.*

135. *See id.* at 597; *see also*, Hon. Frank J. Williams, *Natural Law Vanquishes Oppression In Amistad Case,* 46 R.I. BAR J. (1998) ("The shape of the argument is one that finds the absence of positive law controlling. It is because there is no law Spanish or American, that authorizes slavery. The Africans were entitled to use natural law even to the extent of revolution.").

136. *The Amistad*, 40 U.S. at 595 ("The conflict of rights between parties under such circumstances, becomes positive and inevitable and must be decided upon the eternal principles of justice and international law.").

137. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

138. 28 U.S.C. § 1350; *see* M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT'L L. 316, n.4 (2009) ("The text of the ATS as it appeared in the Judiciary Act of 1789, Ch. 20, § 9(b), 1 Stat. at 76-77, reads: '[The District Courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States' (emphasis added); the ATS as it is currently codified in 28 U.S.C. § 1350 provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

"an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[139] The Court's efforts to erase the practice of slavery from the 1789 legislature's cognition are not convincing given the historical record of the influence of early antislavery thinkers on American and European laws.[140] Slavery has always been viewed as immoral and repugnant to the law of nature.[141] As early as the third century AD, scholars have asserted the immorality of slavery and its repugnance to the law of nature.[142] In fact, in the Declaration of Independence, Thomas Jefferson alluded to the equality of all men. The Declaration of Independence, while not focused on the abolition of slavery, contemplated that a state of bondage of any kind was repugnant to nature when alluding to British led acts of piracy. Thus, the idea that slavery was wrong existed even before the creation of the ATS.

In the 1796 English case *Tatham v. Hodgson*, several slaves died from starvation during a voyage from Cameroon to the island of Grenada. The voyage, which was scheduled to last six to nine weeks, became six months, causing the vessel to run out of food. The only source of food available was Indian corn, which caused the slaves to fall sick and die.[143] A claim was brought under the perils clause of the insurance policy claiming coverage for the loss of the slaves.[144]

the British Parliament enacted insurance statutes, which outlawed the practice of insuring slaves as cargo.[145] The statute was designed to prevent negligent shipowners from mistreating slaves by throwing them overboard when slaves' conditions

139. 28 U.S.C. § 1350.

140. Antony Honoré, *The Nature of Slavery*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 9 (Jean Allain, ed., Oxford University Press 2012) ("According to Ulpian writing in the early years of the third century AD, though in civil law slaves are treated as nullities, by natural law this is not the case, because by natural law all people are equal . . . [A]ll natural people are born free.").

141. *See id.* at 10.

142. *See id.* at 11, ("[The] Stoics think it important to understand that nature creates in parents love for their children; and from this source we derive the general sociability of the human race . . . Even among animals' nature's power can be observed.") (quoting Cicero).

143. *See id.*

144. *See id.*

145. Tatham v. Hodgson, (1796) 101 Eng. Rep. 756, 757; 6 T.R. 656, 657 ("that no loss or damage shall be recoverable on account of the mortality of slaves by natural death or ill treatment, or against loss by throwing overboard of slaves on any account whatsoever.").

deteriorated onboard. However, the court in *Tatham v. Hodgson* used the newly created statute to invalidate the shipowner's insurance, effectively making it unlawful to purchase any "cargo" insurance for any slave death, natural or otherwise. Thus, as early as the 1700s, British law did not view slaves as mere property but as human beings with natural rights.[146]

Through the long reach of our laws, the United States can combat the scourge of chattel slavery in the modern age. For example, the Maritime Drug Law Enforcement Act ("MDLEA") is a statute that extraterritorially. So, human trafficking that is facilitated by transporting victims in ships or other ocean going vessels falls under US jurisdiction.[147] However, US Courts are reluctant to apply constitutional law and federal statutes to extraterritorial conduct.[148] The current US Supreme Court has either declined to hear claims of human trafficking and modern-day slavery brought under ATS, the Trafficking Victims Protection Reauthorization Act ("TVPRA"), or the 13th Amendment. When the

146. *See id.* (Chief Justice Lord Kenyon argued in the *Tatham* case as follows: "This Act of Parliament being founded in humanity, we ought not on any account to put such a construction on it as to render it useless even if its expressions were doubtful: but I think that no fair doubt can be raised on the words of it. The Act prohibits the owners recovering on account of the mortality of slaves by natural death ; but it is argued that if a captain will take a number of slaves disproportioned to the quantity of provisions on board, in consequence of which they die, the owners shall notwithstanding recover ; that would repeal the Act of Parliament, which meant that every person going on this voyage should find his interest combined with his duty, and that he should take all possible care that the slaves should be well fed. A captain, who knows the possible length of the voyage does not discharge his duty, if he takes an insufficient quantity of provisions.").

147. The Maritime Drug Law Enforcement Act, 6 U.S.C. § 70501 (stating that Congress finds and declares that (1) trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States and (2) operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States); *see also*, United States v. Hernandez, 864 F.3d 1292 (11th Cir. 2017) (explaining that the Maritime Drug Law Enforcement Act ("MDLEA") is a valid exercise of congressional authority under the Felonies Clause, even though the MDLEA reaches stateless vessels on the high seas without a proven nexus to the United States).

148. *See, e.g.*, Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 887–88 (1999) ("Only one ATCA suit against a private corporate defendant, however, has survived even a motion for summary judgment. This dearth of sustainable cases against private defendants flows from a combination of vague statutory language and judicial interpretations imposing a state action requirement for most claims.").

Court hears such cases, the presumption against extra-territoriality has disposed of these cases.[149] The Court's reluctance to entertain these claims is based on the doctrine of presumption against extraterritoriality.[150] But, this presumption can be overcome where the challenged conduct "touches and concerns" the United States.[151]

Recently, the United States' Fourth Circuit Court of Appeals gave some "teeth" to TVPRA by holding that the US anti-trafficking laws applied extraterritorially and retroactively to human trafficking in the maritime space and in US territories around the world.[152] This ruling signals some hope for trafficking victims who are vulnerable to the unsavory forced labor practices and the associated crimes committed against domestic and live-in workers on US bases around the world, including those who are forcibly transported for purposes of sex.

The TVPRA's extraterritorial interpretation continues to evolve and its application to foreign actors can also be viewed under 13th Amendment principles. Under the 13th Amendment, forced labor is prohibited because it represents the "badges and incidence" of slavery.[153] While courts cannot apply the 13th

149. *See generally* Jesner v. Arab Bank, PLC, 2018 WL 1914663 (U.S. 2018), Doe v. Nestle, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010), 61 A.L.R. Fed. 2d 171 (Collecting Cases); *see also* Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring the TVPA As A Promising Tool for Corporate Accountability*, 6 COLUM. HUM. RTS. L. REV. 1, 5–6 (2021) ("Over the years, a series of other Supreme Court cases—Sosa v. Alvarez-Machain, Kiobel v. Royal Dutch Petrol Co. (Kiobel II), and Jesner v. Arab Bank, PLC—has significantly limited the categories of cases that plaintiffs may bring under the ATS. Consequently, it has become increasingly challenging for foreign victims of forced labor seeking recovery from MNCs to bring successful ATS suits. The Court in *Nestlé* only added further restrictions to the kinds of suits that may be brought against corporations under the ATS, making it harder for most victims to prevail.")

150. Roe v. Howard, 917 F.3d 229, 240 (4th Cir. 2019) ("The canon of statutory interpretation known as the 'presumption against extraterritoriality' instructs that '[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.'").

151. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124-25 (2013). ("[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.").

152. *See Howard*, 917 F.3d at 233 (holding that 18 U.S.C. §§ 1589, 1590, and 1591 apply extraterritorially and retroactively); *see generally* Trafficking Victims Protection Reauthorization Act, H.R. 3244, 106th Cong. (2000); *see also* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (the "2008 TVPRA").

153. U.S. CONST. amend. XIII.

Amendment against a foreign actor who commits a violation on foreign soil, the prohibition against slavery and involuntary servitude enshrined in 13th Amendment jurisprudence the bedrock of the TVPRA. This long-arm reach into the maritime spaces include the high seas where the US has the power of universal jurisdiction over foreign actors engaged in human trafficking. The U.S. has jurisdiction over acts, including piracy, committed on the high seas, including the US maritime spaces.[154]

In Roe v. Howard, plaintiff, Sarah Roe was an Ethiopian woman that worked as a housekeeper for the Howards, who worked at the U.S. Embassy in Yemen, and lived in Embassy housing. Mr. Howard was deceased at the time the lawsuit was filed. Roe sued the wife, Linda Howard for her role in sexual abuse that Roe suffered from Russell Howard, Linda's husband in 2007.[155] Ms. Howard sought dismissal of the case on the grounds that the TVPA did not apply extraterritorially. The *Howard* Court recognized that Congress intended to authorize enterprise liability for human trafficking and to open US courts to individuals who were victimized outside the United States.[156]

However, the ruling raises the question of whether the TVPRA can also operate as a *jus cogens* sword to punish traffickers who transport their victims in the maritime space. In other words, how far does the TVPRA reach to offer redress and reparations for those who were or are in slavery and for modern victims of human trafficking. Another question the *Howard* decision left unanswered is whether the TVPRA can be applied retroactively. Understandably, this is a "loaded" question that may pave the way to argue that the TVPRA can be a door to reparations for the transatlantic slave trade.

---

154. *See* Roe v. Howard, 917 F.3d 229, 240 (4th Cir. 2019); s*ee* 18 U.S.C.A. § 7-18 (1) (West).

155. *See id.* at 233, 234.

156. *See id.* (holding that actions of former employer, a State Department employee stationed at the United States Embassy in Yemen, were within the extraterritorial scope of Trafficking Victims Protection Act ("TVPA") provisions prohibiting forced labor and forced labor trafficking, and thus employer was liable on housekeeper's claims under civil enforcement provision of TVPA, where Trafficking Victims Protection Reauthorization Act ("TVPRA") amended the TVPA to apply to conduct of federal government employees that would have constituted offense outside the United States if conduct had been engaged in within the United States or special maritime and territorial jurisdiction.).

VI. THE MODERN SUPREME COURT AND ATS JURISPRUDENCE

The US courts have been slow to attach liability to vessel owners for crimes of human trafficking. Although the United States has laws through domestic legislation and international treaties ratified by Congress to protect trafficking victims, vessel owners and other corporate entities are not held liable for their victims' plight. In one sex-trafficking case brought against a contractor, the court held that the TVPA did not extend jurisdiction extra-territorially.[157] The court agreed with the defendants that the TVPA did not authorize enterprise liability. However, the court's reasoning was unsound in its cursory explanation that the TVPA did not apply to the issue, as Congress did not intend for the Act to apply extraterritorially.

However, the TVPA was designed to protect victims who are coerced into leaving their countries with the promise of work in another country. If the United States is that other country, then Congress can regulate in this area under its foreign commerce powers. In addition, human trafficking falls under the rubric of *jus cogens* norms, which confers universal jurisdiction on any nation to prosecute crimes of this nature.[158] The violation of these norms is cognizant under customary international law, which is embedded into the law of nations and by implication under US law.[159] Under customary international law, human trafficking in all its forms violates *jus cogens* norms. Since the early nineteenth century, the practice of slavery has been recognized as illegal in both British and American courts under a line of cases. The British began a campaign against slavery in the early 1800s despite the

157. Plaintiff A v. Schair, 744 F.3d 1247, 1250-51 (11th Cir. 2014); s*ee* Adhikari v. Daoud & Partners, 95 F. Supp. 3d 1013 (S.D. Tex. 2015), aff'd sub nom. Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184 (5th Cir. 2017) (Held that neither the ATS nor the TVPRA provided for extraterritorial jurisdiction for human trafficking or slavery).

158. Nicolaos Strapatsas, *Universal Jurisdiction and the International Criminal Court* 29 Manitoba L.J. 1, 11 (2002) (defining universal jurisdiction, all states can exercise "even against the wishes of the State having territorial or any other form of jurisdiction"); *see also* Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 371 (E.D. La. 1997) ("Where a state has universal jurisdiction, it may punish conduct although the state has no links of territoriality or nationality with the offender or victim."); Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, at 150 ("With growing frequency, national courts operating under the doctrine of universal jurisdiction are prosecuting despots in their custody for atrocities committed abroad.").

159. The Paquete Habana, 175 U.S. 677 (1900).

trade not being outlawed under the positive law.[160] Importantly, in *Le Jeune Eugenie*, Justice Story concluded that the slave trade violated international law.[161]

Although federal law is hesitant to regulate extraterritorial activity, early Supreme Court international law jurisprudence signaled that customary international law (or *Jus cogens* norms) regarding human rights violations allows the enforcement of US laws where the issue "touches and concerns" the United States.[162] The United States is touched by concerns on the high seas relating to international trade and fishing. Therefore, issues that involve the high seas in particular, Congress's powers to regulate through its commerce power is far-reaching.[163] The Supreme Court treats the ATS as a relic of the past. They appear hesitant to resolve issues that involve claims against corporate interests. Historically, US jurisdiction for foreign claims was founded on ATS, the Alien Tort Claims Act ("ATCA") and customary international law.[164] In several high-profile cases brought under the ATS, the Court has consistently ruled that ATS is a jurisdictional statute that does not create new causes of action such as claims for corporate liability for allegations of human rights violations and most recently, for crimes of human trafficking and forced labor. The Court explained that these crimes were not cognizable as crimes "against the law of nations" under the ATS in 1789 when the statute was enacted.[165]

However, a review of the debate on the morality of slavery in Britain and France points to a contrary interpretation of what crimes were encompassed within the law of nations. Even in the

160. Le Louis, 165 Eng. Rep. (1817), 1464 (holding that the British ship was not justified in seizing the French ship under international law at that time); *accord* The Antelope, 23 U.S. 66, 116–25 (1825).

161. United States v. The Schooner La Jeune Eugenie, 26 F. Case No. 15,551 (Cir. Ct. Mass. 1822).

162. *See The Paquete Habana,* 175 U.S. at 700 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

163. Jeffrey E. Zinsmeister, *In Rem Actions Under U.S. Admiralty Jurisdiction as an Effective Means of Obtaining Thirteenth Amendment Relief to Combat Modern Slavery*, 93 CALIF. L. REV. 1251 (2005).

164. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

165. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); RJR Nabisco, Inc. v. European Community, 579 U.S. 325, 337 (2016); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

United States, strong arguments can be made that when the Declaration of Independence was created, the framers contemplated slavery as one of those crimes. The political climate at the time did not allow the framers to vociferously frame the argument to declare slavery illegal. However, this political expediency does not translate into a dismissal of slavery as immoral and against natural law in 1789.[166] Benjamin Franklin, a former slave owner, spent the latter days of his life arguing before Congress for the abolition of the slave trade.[167] In 1772, Franklin's treatise argued that the practice of holding men in bondage was unnatural.[168] In fact, the influential American Quaker Movement revealed that the Pennsylvanian legislature spoke out on the evils of slavery in the 1600s. Additionally, Pennsylvania passed the Abolition Act in 1780.[169] By 1776, the Second Continental Congress passed a resolution "that no slaves be imported into any of the Thirteen United Colonies." That same year, the importation of slaves was prohibited in the Delaware Constitution.[170] Thus, it can be inferred that when ATS was created in 1789, swaths of the United States legislators thought of slavery as a crime against humanity.[171] Moreover, Franklin's commitment to the Quaker Movement and its campaign to abolish the slave trade coupled with his numerous exhortations before Congress may have directly influenced the drafting of the ATS and its promulgation.

In *Doe v. Nestle*, the concurring and dissenting opinions signal that the Court is not unanimous in its broad exclusion of corporate liability from the ATS.[172] The *Nestle* case involved a claim brought by six individuals from Mali against Nestle USA, Inc. and Cargill,

166. *See generally* DAVIS, *supra* note 9, 9–10 (citing THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd, ed., 1950) (explaining that the original draft of the declaration of independence appeared to condemn slavery and the slave trade, but was deleted by the First Continental Congress.").

167. *See* Arthur Stuart Pitt, *Franklin and The Quaker Movement Against Slavery,* 32 BULLETIN OF FRIENDS HIST. ASSOC. 13, 13–31 (1943).

168. *See id.* at 27-30.

169. DAVIS, *supra* note 9, at 25 (In 1780, Pennsylvania asopted a gradual emancipation law.) *see also The Somerset Case and the Slave Trade*, FOUNDERS ONLINE, NATIONAL ARCHIVE, https://founders.archives.gov/documents/Franklin/01-19-02-0128 [https://perma.cc/Y9GY-HSVM] (originally printed in THE LONDON CHRONICLE, June 18–20, 1772).

170. *See id*. at 24.

171. *See generally* DAVIS, *supra* note 9, at 23.

172. *See* Nestle v. Doe, 141 S.Ct. 1931 at 1941, 1944, 1951 (Sotomayor, J. concurring and Alito, J. dissenting).

Inc., two corporations that provided technical and financial resources to farms in the Ivory Coast.[173] The plaintiffs claimed that they were trafficked as child slaves to the Ivory Coast to produce cocoa. The Ninth Circuit held that the plaintiffs had plead a cause of action under ATS and that the complaint survived dismissal under the extraterritorial standard in *Kiobel v. Royal Dutch Petroleum Co*.[174] Under the Ninth Circuit's view, the corporations' major operational decisions originated in the United States. The Supreme Court reversed this holding on June 17, 2021.[175]

Within the Court's two-step analytical framework announced in *RJR Nabisco v. European Community*, under step one, the ATS is presumed to only apply domestically unless the statute gives a clear, affirmative indication that rebuts this presumption.[176] Step two asks whether the relevant conduct occurred in the United States. And if so, the ATS applies even if other conduct occurred abroad.

In deciding *Nestle*, the Ninth Circuit held that there was relevant conduct within the United States when the two corporations made technical and financial contributions to procure an exclusive deal for the production of cocoa at Ivory Coast farms where the children were trafficked.[177] The defendant's argued that the ATS's focus is on the conduct that directly caused the harm, not on the indirect actions. So the aiding and abetting actions, which the complaint is based on, constitutes merely secondary liability and is not a tort itself.[178] It is important to note that the corporations went beyond financial support to these farms. The complaint stated that the corporations provided training, fertilizer, tools, and cash to the overseas farms.

---

173. *Id.*

174. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (holding that the presumption against extraterritoriality applies to claims under the ATS and finding that nothing in the statute rebuts this presumption).

175. Nestle v. Doe, 141 S.Ct. 1931 at 1941, 1944, 1951.

176. *Id.* at 1936 (citations and quotations omitted) ("Our precedents reflect a two-step framework for analyzing extraterritoriality issues. First, we presume that a statute applies only domestically, and we ask whether the statute gives a clear, affirmative indication that rebuts this presumption . . . Second, where the statute, as here, does not apply extraterritorially, plaintiffs must establish that "the conduct relevant to the statute's focus occurred in the United States. Then the case involves a permissible domestic application even if other conduct occurred abroad.").

177. *Id.*

178. *Id.*

Notwithstanding, the Supreme Court held that the lower Court application of the ATS to this case was an impermissible extraterritorial application. The court rationalized that for the ATS to apply, there must be a US adopted treaty which creates a tort-related duty; thereby, the federal district courts will have jurisdiction to hear claims by aliens for breach of that duty. Barring such a treaty, the ATS does not empower aliens to sue because the ATS is only a jurisdictional statute.[179] This reasoning does not pass muster because even if the United States has not adopted a human rights treaty that prohibits forced labor, international law is a part of US law through the application of customary international law, which includes the law of nations.[180]

The ATS was created to assist aliens who have been injured by a tort in violation of the law of nations.[181] Moreover, corporations are legally defined as persons and the ATS is directed against torts committed by such persons. When Congress enacted the TVPRA, it was not clear whether Congress intended the TVPRA to apply retroactively.[182] Viewed in this light, the Court missed an opportunity to interpret an ambiguous statute to apply enforcements against slavery in accordance with international legal norms.

VII. CONCLUSION

The concept of human rights resonates throughout modern international law.[183] Actors in the international legal system have agreed through treaties and customs that certain rights are inalienable and, as such, constitute peremptory norms. Nevertheless, these truisms are frequently degraded under

179. *Id.*

180. The Paquete Habana, 175 U.S. 677 (1900).

181. Nestle v. Doe, 141 S.Ct. 1931, 1944, (Gorsuch, J., concurring) (citations omitted) ("Nothing in ATS supplies corporations with special protections against suit. The statute specifies which plaintiffs may sue (aliens) . . . Case after case makes plain that, at a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts . . . of nearly every variety.").

182. *See, e.g.*, Roe v. Howard, 917 F.3d 229, 240 (4th Cir. 2019).

183. A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach,* 23 PENN. STATE. INT'L. L. REV. 809, 810 (2005) (quotations omitted) ("Notwithstanding the proliferation of international treaties prohibiting slavery and the slave trade, the United Nations has recently declared that slaves and slavery like practices continue to be among the greatest human rights challenges facing the international community.").

concepts of jurisdictional presumptions against extraterritoriality or state sovereignty. The abolition of slavery is among the list of these agreements.[184]

In admiralty law, slavery ranks high on those crimes that are considered *hostis humanis generis*. The abolition of Western slavery bolstered the concept that the practice is so evil that any nation should have the legal right to prosecute this crime. In modern times, however, the resurgence of slavery is often dismissed on jurisdictional grounds and claims of territorial sovereignty.[185] This results in victims being left without redress and their perpetrators are able to go unpunished and free to continue the trade. If slavery, like piracy, is considered as *hostis humanis generis*, then any nation would have the right to prosecute perpetrators and obtain redress for human trafficking victims.

The states' hesitation to prosecute human traffickers rests on the flawed premise first proposed by late 18th and 19th century thinkers like David Hume, John Stuart Mill, Von Savigny, Jeremy Bentham and Edmund Burke, that natural rights do not emanate from "real law" but from some "unreal metaphysical phenomenon."[186] Even today, international law is viewed by many as a phantom law. From John Austin with his Hobbesian pronouncement that the only law is that of the sovereign to the rise of Marxism. This appropriation of human rights by the law of sovereignty has served to degrade the concept of human rights as natural rights.[187]

---

184. *Id.*

185. *Id.*

186. Burns H. Weston, *Natural Law Transformed Into Natural Rights*, ENCYC. BRITANNICA, https://www.britannica.com/topic/human-rights/Natural-law-transformed-into-natural-rights [https://perma.cc/B8GR-98TC] (last visited on December 18, 2022) ("In England, for example, conservative political thinkers such as Edmund Burke and David Hume united with liberals such as Jeremy Bentham to condemn the doctrine, the former out of fear that public affirmation of natural rights would lead to social upheaval, the latter out of concern lest declarations and proclamations of natural rights substitute for effective legislation. In his *Reflections on the Revolution in France* (1790), Burke—a believer in natural law who nonetheless denied that the "rights of Man" could be derived from it—criticized the drafters of the Declaration of the Rights of Man and of the Citizen for proclaiming the "monstrous fiction" of human equality, which, he argued, serves but to inspire "false ideas and vain expectations into men destined to travel in the obscure walk of laborious life.").

187. *See generally* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv. Int'l L. J. 1, 2 (1999) ("The late nineteenth century was also the period in which positivism decisively replaced

The specter of human rights in the 1945 Charter of the United Nations and the 1948 Universal Declaration of Human rights has its genesis in this philosophical hijacking of human rights.[188] These treaties do not offer any concrete solutions to the problem of slavery in the 21st century. Unless human rights violations like human trafficking and modern-day slavery are grounded in the principle of natural rights, which constitutes these crimes as *hostis humanis generis*, then these crimes will continue and the argument for redress or reparations will fail under the dual weights of territorial sovereignty and commercial rationalizations.

Like the global supply chain today, various European nations have seized upon Africans as the cheapest and most expedient labor supply to meet the demands of mining and tropical agriculture.[189] In modern times, however, this resurgence of slavery or forced labor in the global supply chain is dismissed on jurisdictional grounds just like the 18th and 19th century slave cases. Victims are left without redress, while the perpetrators go unpunished free to continue the practice. If slavery, like piracy is considered among the crimes against the law of nations in the international legal system, then under the principle of universal jurisdiction which was pivotal in the Amistad case, any nation should have jurisdiction over the perpetrators of human trafficking.

The Supreme Court's position that corporations cannot be sued under the ATS is as absurd today as Mansfield's position in the 1700s that an African who is free on British soil can be forced onto a ship sitting in a British port and sold as a slave bound for a British plantation in Jamaica because the law of England did not

---

naturalism as the principal jurisprudential technique of the discipline of international law…. Positivism and nineteenth century international law crippled the non-European world . . . because of the selective and discriminatory application of the neutral concept of sovereignty.") *See e.g.* I.A. Shearer, STARKE'S INTERNATIONAL LAW, 7-12, (11th. Ed. Oxford Univ. Press 1994), ("International law remains tinged with concepts such as national and territorial sovereignty.").

188. *See* Tai-Heng Cheng, The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?, 41 Cornell Int'l L. J. 251, 253 (2008).

189. Rassam, *supra* note 183, at 810-11 ("Contemporary forms of slavery flourish in most states as monetary gain and expendable labor bring profit both to slaveholders and corrupt government official . . . The U.S. Department of State estimates that approximately 800,000-900,000 people are trafficked annually . . . Scant attention paid to those enslaved within the confines of their home countries.").

apply to her colonies.[190] The distinctions based on extraterritoriality are as illogical today as they were back then. An American corporation should not be able to violate American human rights laws in another country when the action is illegal in the United States or within its maritime jurisdiction.

The Supreme Court's interpretation of the ATS defies logic.[191] Slavery and other forms of indentured servitude are a violation of the Thirteenth Amendment; these practices violate customary international law and a host of international treaties such as the Convention to Suppress the Slave Trade and the Abolition of Slavery.[192] In the maritime commons, the Law of the Sea Convention and the 1958 High Seas Convention recognize the right of the flag state to prevent and punish those who transport victims of slavery.[193] A warship on the high seas may board any foreign nongovernmental vessel if there are reasonable grounds to believe such vessel is engaged in the slave trade.[194] Finally, Congress revised TVPA to extend its jurisdiction to US Maritime Jurisdictions and territories, including US foreign embassies to provide redress to foreign victims of human trafficking at these locations.[195]

---

190. *See* Somerset v. Stewart (1772) 98 Eng. Rep. 499.

191. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) ("[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.").

192. Article 7 of the Slave Convention defines the slave trade to include "all acts involved in the capture, acquisition or disposal of a person with the intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance." Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 4, *adopted* Sept. 7, 1957, 266 U.N.T.S. 3 (entered into force April 30, 1957). Article 4 of the Universal Declaration of Human Rights declares that slavery and the slave trade shall be prohibited in all their forms. See Universal Declaration of Human Rights art. 4 (Dec. 10, 1948); G.A. Res. 217A (III), UNGAOR, 3rd Sess., Supp. No. 13, UN Doc A/810 (1948) 71;*see also* Renee Colette Redman, *The League of Nations and the Right to be Free from Enslavement: The First Human Right to be Recognized as Customary International Law*, 70 CHI-KENT L. REV. 759 (1994); Louis B. Sohn, *Peacetime Use of Force on the High Seas, in the Law of Naval Operations*, 64 INT'L L. STUD. 38, 39-59 (1991).

193. *See* U.N. Convention on the Law of the Sea, art. 99, Dec. 10, 1982, 1833 U.N.T.S. 397 (Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.).

194. *See id.*; 1958 High Seas Convention art. 22(1)(b), Apr. 29, 1958, 13 U.S.T 2312.

195. Roe v. Howard, 917 F.3d 229, 240 (4th Cir. 2019).

Even if the ATS did not specify slavery as a crime against the law of nations in 1789, the law is not static. To confine the ATS only to piracy and acts against ambassadors is to mummify the statute. The statute should not be interpreted to punish only crimes against the sovereign but to tort violations of the law of nations–crimes against individuals by other individuals like corporations.[196] Today, the enumerated crimes of piracy and wrongs against ambassadors are hardly litigated by private persons.[197] When piracy is litigated, the courts decide these cases largely under the US piracy statute.[198] But for human trafficking, the only positive law available is the ATS.[199] The ATS is *sui generis* in that the crimes contemplated either arose outside the United States or had effects in the United States.[200] In this vein, inquiries into whether the ATS requires an extraterritorial nexus are unwarranted and the extraterritorial reach of the ATS is axiomatic.[201]

Today, the trafficking of humans today for sexual exploitation, forced labor or services, removal of organs are all crimes against the law of nations.[202] Thus, various US laws and international

196. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 41 (2021) at 1941 (Gorsuch, J., concurring).

197. *Id.* at 1944 (Sotomayor J., concurring) (citations omitted) ("[T]he domestic and international legal landscape has changed in the two centuries since Congress enacted the ATS . . . [T]he class of law of nations torts has grown 'with the evolving recognition that certain acts constituting crimes against humanity are in violation of basic principles of international law.' Like the pirates of the 18th century, today's torturers, slave traders and perpetrators of genocide are '*hostis humani generis*, an enemy of all mankind.'").

198. 18 U.S.C. §1651. Piracy under law of nations ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.") (June 25, 1948, ch. 645, 62 Stat. 774.).

199. *Id.* at 1948 ("Justice Thomas would instead bar any ATS suit that seeks to hold a defendant liable for violating any international norm that developed after the 18th century. That is a gross overreaction to a manageable (and largely hypothetical) problem.").

200. *See Id.*

201. *Id.* (citation omitted) ("Moreover, in arguing that ATS litigation inherently raises foreign policy concerns, Justice Thomas ignores the other side of the equation: that foreign nations may take (and indeed, historically have taken) umbrage at the United States' refusal to provide redress to their citizens for international law torts committed by U.S. nationals within the United States.").

202. Rassam, *supra*, note 183, at 810 ("The prohibition of slavery is non-derogable under comprehensive international and regional human rights treaties, including the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the American Convention on Human Rights. It is also a preemptory norm of customary international law and jus cogens as well as a crime against humanity.").

treaties, such as the Anti-Trafficking treaty, all require states in the international system to take national and international measures to prevent these crimes.[203] The EU as well as Britain created laws to protect these victims and to hold corporations and other individuals liable for such practices.[204]

Some of our founding fathers knew that slavery was repugnant to natural law and were guided by enlightenment thinkers like Montesquieu. These Founders contemplated slavery as a crime against the law of nations in 1789 and so should the courts today. By the 1760s, Montesquieu had placed African slavery into the Enlightenment agenda. Adam Smith's two books, the Wealth of Nations and the Theory of Moral Sentiments, condemned African slavery.[205] So did John Wesley, who by 1774, condemned every slave holder and slave merchant to eternal damnation.[206]

The crime of human trafficking within the current US legal framework reveals how the current patchwork of laws mirror the dualities at work in chattel slavery jurisprudence.[207] A challenge for the rule of laws is how to reconcile the vagaries of US law and

---

203. The 2000 Trafficking in Persons Protocol to the United Nations Convention Against Transnational Organized Crime notes that parties are required to criminalize such acts, to take national and international cooperative measures to prevent trafficking in persons, and, when appropriate to assist and protect victims. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 3, G.A. Res. 55/25, U.N. Doc. (2000).

204. *See* Council of Europe Convention on Action against Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197; *see also* Modern Slavery Act 2015, c. 30 (Eng.), https://www.gov.uk/government/collections/modern-slavery-bill [https://perma.cc/VZJ8-FYHN] ("The Modern Slavery Act will give law enforcement the tools to fight modern slavery, ensure perpetrators can receive suitably severe punishments for these appalling crimes and enhance support and protection for victims. The Act received Royal Assent on Thursday, 26 March 2015[.]"); Suzanne Miers, SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM (AltaMira Press 2003); *See* Rassam, *supra* note 183.

205. *See* generally DAVID BRION DAVIS, What the Abolitionists Were Up Against, in THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823, 45 (Oxford. Univ. Press 1999); *see also* Id. at 165, 272.

206. David Brion Davis, *Sterling Professor of History Emeritus at Yale University, Re-Examining the Problem of Slavery in* Western Culture, *Robert C. Baron Lecture*, *in Proceedings of the American Antiquarian Society,* at 261 (Oct. 23, 2008) ("In 1774 John Wesley, the founder of the Methodist Church, made clear that the sins of the world would soon be judged and that every slaveholder or investor in slave property was deeply stained with blood and guilt.").

207. Rassam, *supra* note 183.

international human rights law to bring redress to victims. The presumption against extraterritoriality should not be read into Congress' intent under the ATS or TVPRA.[208]

Justice Alito's interpretation of the ATS is correct and should be countenanced by courts going forward. Under Justice Alito's view, the application of the ATS does not turn on the question of extraterritoriality, but on whether the aiding and abetting conduct that form the basis of the petitioner's complaint is a "specific, universal, and obligatory" international law norm.[209] Justice Alito's position is that the case should be remanded to avoid a holding that translates into general corporate immunity.[210] General, corporate liability that is premised on aiding and abetting actions are analyzed either under a "purposeful" or "knowingly" standard.[211] But a reckless disregard standard should be applied as well. Corporations should not close their eyes to these human rights violations. As Justice Alito opined, the question is whether domestic corporations are immune from liability under the ATS.[212] If a particular claim may be brought under the ATS against a

208. Nestle v. Doe, 141 S.Ct. 1931 at 1950 (stating that Justice Thomas' majority opinion does not explain "why an ATS suit for the tort of piracy, for example, would categorically present fewer foreign policy concerns than a suit for aiding and abetting child slavery.").

209. *Id.* (Alito, J., dissenting) (citations omitted) ("[T]he Court must assume[:]. . . . (1) that . . . it is proper for us to recognize new claims that may be asserted under the ATS; (2) that the conduct petitioners are alleged to have aided and abetted provides the basis for such a claim; (3) that there is a specific, universal, and obligatory international law norm that imposes liability for what our legal system terms aiding and abetting; (4) that if there is such a norm, we should choose to recognize an ATS aiding-and-abetting claim; and (5) that respondents' complaint adequately alleges all the elements of such a claim, including the requisite *mens rea*.").

210. *Id.*

211. *Id*.

212. Nestle v. Doe, 141 S.Ct. 1931 at 1950 (Alito J, dissenting) ("The primary question presented in the two certiorari petitions filed in these cases is whether domestic corporations are immune from liability under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. I would decide that question, and for the reasons explained in Part I of Justice GORSUCH's opinion, which I join, I would hold that if a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation."); *see also id.* at 1945–46, n. 4 (Sotomayor J., concurring) ("Corporate status does not justify special immunity."); *See generally* Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L.J. 443, 475 (2001) (Discussing the theory that international human rights law recognizes that corporations have a duty to abide by international human rights law.).

natural person who is a US citizen, a similar claim may be brought against a domestic corporation.[213]

The interpretation should extend Congress' reach to cases involving foreign actors under the rubric of international law and *jus cogens* jurisprudence.[214] It is only through the United States' long reach can victims gain access to U.S. courts and only then can we begin to combat the resurgence of this evil in the modern age.[215]

213. *Id.* (Alito, J. dissenting); *see also id.* (Sotomayor, J., concurring in part).

214. *Id.* at 1946 (Sotomayor J., concurring) (quotations and citations omitted) ("[T]he anxieties of the pre-constitutional period cannot be ignored easily enough to think that the ATS was not meant to have a practical effect . . . Because the First Congress did not pass the ATS only to leave it lying fallow indefinitely, the statute is best read as having been enacted on the understanding that the common law would provide a cause of action for widely recognized torts in violation of the law of nations. (The ATS was not enacted to sit on a shelf waiting further legislation.). In other words, from the moment the ATS became law, Congress expected federal courts to identify actionable torts under international law and to provide injured plaintiffs with a forum to seek redress.").

215. *See generally id.* (quotations and citations omitted) ("The First congress made the legislative determination that a remedy should be available under the ATS to foreign citizens who suffer torts in violation of the law of nations. Barring some extraordinary collateral consequence that could not have been foreseen by Congress, federal courts should not, under the guise of judicial discretion, second-guess that legislative decision.").