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Universal Jurisdiction over slave trafficking under the Law of Nations as compared to the Law of the Sea Convention

The rights and obligations of the states, with regard to one another, are implicated by international law, sometimes referred to as the law of nations. Such law is comprised of international custom and accord.[1] Such custom and accord has roots in both the common law of nations and various treaties between nations.[2] However, neither the singular decisions of the common law of nations nor singular treaties themselves supplant the principles of the well established law of nations.[3] Therefore, the custom and accord which becomes part of the conventional law of nations are those laws which are so commonly practiced or agreed to that they become inseparable from the rights and duties concerning the mutual interaction between nations as the law followed by all nations.[4] In explaining the law of nations, Hugo Grotius differentiated it from the law of nature, as formulated by Roman law.[5] The Roman term of "law of nations" can mean either principle derived from nature or our definition of international law.[6]

Under the law of nature, all people are born into freedom, and become slaves only through the laws and events created by man.[7] Therefore, slavery is contrary to the law of nature, but if condoned by the nations collectively, slavery is not in violation of the law

[1] 1 Richard Wildman, Esq., Institutes of International Law, International Rights in Time of Peace 1 (1850).
[2] Id. at 2.
[3] Id.
[4] Id. at 5-6.
[5] Id. at 5.
[6] Id.
[7] Renee Collette 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, 766 (1994) (discussing, Hugo Grotius, De Jure Belli ac Pacis Libri Tres (On The Law of War and Peace) 690 (Francis W. Kelsey trans., 1925) (1646)).

of nations.[8] Before the nineteenth century, slave trafficking was considered customary as it was widely practiced and condoned by the collective nations. Therefore, the act of slave trafficking was considered to be allowable under the law of nations. It was not until the abolitionist movements of the nineteenth century that slave trafficking began losing this characteristic of being conventional. As Western states began to outlaw slave trafficking, the practice could no longer be authorized under the law of nations. Slave trafficking was slowly becoming uncustomary.

The United Nations Convention on the Law of the Sea (Law of the Sea) is an attempt to codify the law of nations as it pertains to the oceans. The Law of the Sea has been ratified by a majority of states. Like the law of nations, the Law of the Sea considers slave trafficking to be an exception to its rules, which establish the right to freedom from the interference of navigation on the high seas in peace time.[9]

While the law of nations and the Law of the Sea are in accord regarding the unacceptability of allowing slave trafficking on the high seas, the questions remain: who is capable of enforcing the law of nations and the Law of the Sea against foreign ships? Under what jurisdiction are states or international courts able to enforce the international law of nations and/or the Law of the Sea against foreign ships? The short answer to these questions is that all nations are vested with enforcement authority under universal jurisdiction of the law of nations to sanction ships engaged in slave trafficking. However, if a slave trafficker is sanctioned under the Law of the Sea, the enforcing state and the flag state of the criminal ship may both have to be subscribing members of the Law of the Sea convention.

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[8] Id. at 766.
[9] United Nations Convention on the Law of the Sea art. 90, Dec. 10, 1982, 1833 U.N.T.S. 3 (hereinafter Law of the Sea).

A. Freedom of Navigation

Under the Law of the Sea, in times of peace, ships carrying a national flag are generally allowed the right to sail the high seas without interference from other vessels. [10] However, a military vessel is granted the authority by which its officers may demand to know the identity and the nationality of a passing ship.[11] This military act of investigation is also legal under the law of nations.[12] Another exception to the above rules is that, under the Law of the Sea, the right of unimpeded navigation does not vest in the case of ships engaged in slave trafficking.[13] It is well established that the Law of the Sea favors freedom of navigation and reconciles the need to impede certain oceanic crimes such as slave trafficking. According the Article 90 of the Law of the Sea, the freedom of navigation is not extended to ships engaged in activities prohibited by the Law of the Seas. Furthermore, under Article 110 of the Law of the Sea, a vessel may interfere with the activities of a foreign slave trafficking ship.[14]

The Law of the Sea contains these rules and their exceptions, which encompass the conventional law of nations concerning the same. However, under the law of nations, any state may exercise enforcement authority over slave trafficking on the high seas. Under the law of nations, the basis for jurisdiction lies in the customary nature of the repugnance of the crime and the necessity for enforcement against it. Under the Law of the Sea, Article 99 seems to imply that states should enact laws mandating the illegality of slave trafficking under the flag of that state; and that the right of enforcement of such

[10] Robert C.F. Rueland, Interference with Non-national ships on the high seas: peace time exceptions to the Exclusivity Rule of Flag-State Jurisidiction, 22 Vand. J. of Transnt'l L. 1161, 1167 (1989).
[11] Id. at 1169.
[12] Id.
[13] Law of the Sea, supra note 9, art. 110(1)(b).
[14] Michael A. Becker, The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea, 46 Harv. Int'l L. J. 131, 210 (2005).

laws does not vest in foreign states.[15] However, the reasonable suspicion of slave trafficking is considered justification for interference with a foreign vessel, regardless of whether the involved vessels are flagged by states which are parties to the Law of the Sea.[16] Additionally, as with the exception to any rule; the burden rests with the accusing party to prove that the exception exists based on reasonable suspicion of slave trafficking.[17]

Therefore, under both the law of nations and the Law of the Sea, vessels have a right to navigate the high seas, during peace time, without interference. Moreover, under both sets of international law, the navigation of a vessel, reasonably suspected of slave trafficking, may be impeded by a foreign vessel. These laws highlight the importance of flag state sovereignty and autonomy on the high seas. However, as the above discussion indicates, the right of the flag state is relinquished when it does not maintain its obligation to police vessels which fly its flag. In the circumstance of a flag state failing to police ships flying its flag, both the law of nations and the Law of the Sea allow the vessels of another state to interfere with the navigation of a criminal ship. Once a criminal ship is intercepted and captured, it may be dealt with by a number of courts, none of which may be a court of the criminal ship's flag state.

B. Jurisdiction of the Flag State

Jurisdiction of the flag state generally reaches to the vessels flying its flag and only to vessels flying foreign flags in exceptional circumstances. This creates an international regime in which states are reasonably certain as to their responsibilities and obligations to the international public and separates the duties of one state from the duties

[15] Id. at 210.
[16] Id.
[17] Rueland, supra note 10, at 1167.

owed by another. Through its jurisdictional reach, the flag state regulates vessels according to the interests of the state and with regard to the interests of the international community.

Under the law of nations, the rights and obligations of the flag state are derived from admiralty law of the time.[18] The flag state and nationality of a vessel are determined under the law of nations according to registration of the vessel with a flag state. However, in the event that a ship presents papers of questionable legitimacy to requesting authorities, a court may decide the ship's nationality based on factors other than the flag and papers.[19] Accordingly, in such a situation where a ship's papers are unconvincing, a ship is entitled to the nationality of its ownership and course of trade.[20]

Determination of the flag state helps ascertain the proper laws that should be applied in the case of possible illegal conduct on the part of a vessel.[21] This determination is more difficult when a ship flies the flags and maintains the papers of more than one state to avoid interference or prosecution for engaging in illegal activity. Carrying these flags and papers of convenience is still illegal under the law of nations.[22] Under the law of nations, when a vessel was found to be engaging in illegal activities, the crew of the condemned vessel was sent to their nations of citizenship for prosecution, released, or occasionally, stranded.[23] This is because vice-admiralty courts held no jurisdiction over criminal matters.[24] In order to recuperate court costs for the prosecution of the illegal activity, and to reimburse the members of the vessel that interfered in the

[18] Jenny S. Martinez, Antislavery Courts and the Dawn of International Human Rights, 117 Yale L. J. 550, 587 (2008).
[19] Id.
[20] Id.
[21] Id. at 586.
[22] Id.
[23] Id. at 591-92.
[24] Id.

illegal activity, the captured ship was often resold and its proceeds were paid out appropriately.[25] In the event that the captured ship was engaging in slave trafficking, the slaves were often allowed to regain their freedom, with recorded certificates thereof.[26]

An exception to this flag state jurisdiction can be found in the Law of the Sea Article 110. This was discussed above as the right of a state-owned ship to request the identification of a passing vessel. This Article establishes a specific right of a warship to board a foreign vessel, if the foreign vessel is reasonably suspected of engaging in the slave trade.[27] This exception does not apply if a ship is entitled to complete immunity under articles 95 and 96.[28] Therefore, under article 110, a ship, upon being reasonably suspected by a foreign warship of being engaged in slave trafficking, loses the protection of the exclusive jurisdiction of its flag state.

In the event that the suspicions are unfounded, the ship boarded will be compensated for any losses or damages that it sustains as a result of the interference.[29] However, if suspicions are founded, few if any express rights of enforcement against foreign slave trafficking ships can be found in international conventions.[30] However, this does not restrict states involved from extending jurisdiction over the criminal ship and acts based on treaties and/or various laws including applicable choice of law provisions. Essentially, article 110 can be seen as a "gateway provision" which allows the initial step in the road to the prosecution of slave trafficking ships. This article provides the necessary exception to the exclusive jurisdiction of the flag state, which allows foreign

[25] Id.
[26] Id.
[27] Law of the Sea, supra note 9, art. 110(1)(b).
[28] Id. at art. 110(1).
[29] Id. at art. 110(3).
[30] UN Secretariat, The Relation Between the Articles Concerning the Law of the Sea Adopted b the International Law Commission and International Agreements Dealing with the Suppression of the Slave Trade, UN Doc. A/CONF/.13/7 (1957), 1UNCOS I OR 165. Para 3, 4, 22-24.

ships a right to board a possible criminal vessel.

Without this provision, any prohibitions of maritime slave trafficking would be significantly less effective since there would be no right to interfere with the navigation of a ship reasonably suspected of trafficking under the Law of the Sea. However, under the law of nations, given the widespread belief that slavery is an egregious offense, it may be argued that an exception to flag state jurisdiction, similar to article 110, exists under the law of nations that would allow a vessel to board and search a vessel reasonably suspected of slave trafficking. A difficulty with the law of nations is that it changes as international custom changes. It is therefore more difficult to interpret and rely on than a written treaty such as the Law of the Sea.

1. Slave Trafficking under Law of Nations

By the middle of the nineteenth century, many western states had outlawed the slave trade. Consequently, slave trafficking had become controversial under the law of nations. However, the international case law was sparse concerning how specifically to resolve the legal issues of slave trafficking. Eventually, issues of slave trafficking were settled on the now common principles of human rights.[31]

In 1807, the British ratified the Slave Trade Act[32] which greatly effected over-sea slave trafficking. This Abolition Act claimed that under the law of nation, British vessels had the right to search foreign ships in order to determine whether they were ships of a British enemy or an enemy sympathizer. British vessels then used this international right to inspect ships suspected of trafficking slaves. If a ship was caught transporting slaves, the British vessel would capture the ship and haul those responsible for slave trafficking

[31] 4 James Kent, Commentaries on American Law, Doc. 26 (1826-30) (available at http://press-pubs.uchicago.edu/founders/documents/a1_9_1s26.html).
[32] Slave Trade Act, 1807, 47 Geo III Sess. 1 c. 36 (Eng.).

into one of the many British vice-admiralty courts along the various international Atlantic coasts. If the court found that the ship was illegally engaged in slave trafficking, the ship would be held as a prize of the captor under the law of nations.[33] This mode of operation was called into question by the holding in Le Louis and La Amistad.

a. Slave Trade was not Prohibited by the Law of Nations

In Le Louis[34], a French vessel was captured by a British military vessel off the coast of Africa after the French vessel denied a request by the British to board and search the French vessel.[35] A court of vice-admiralty in Sierra Leone found the vessel to be trafficking slaves, which was legal under French law. The owner of the French vessel appealed to the British High Court of Admiralty claiming that the British vessel had no right to demand to board and search the French vessel in a time of peace. The High Court agreed holding that because trafficking slaves was not considered a crime under the law of nations, nor a matter of piracy, it should not be treated as such, otherwise the result would be an international conflict.[36]

Therefore the only way in which the slave trade would be condemnable by the common law of nations was for convention to name it as such a crime; for nations to enter into a treaty naming it a crime; or all civilized states must consider slave trade a crime and refuse to tolerate the practice. Apart from these reasons to condemn slave trade internationally, every nation had the right to engage in the act. In issuing the decision, J. William Scott made clear the principle that one in pursuit of justice is not at

[33] Martinez, supra note 18, at 565.
[34] Le Louis, 165 Eng. Rep. 1464 (High Ct. Adm., 1817).
[35] Louis B. Sohn & John E. Noyes, Cases and Materials on the Law of the Sea, 181 (2004).
[36] Id.

liberty to create an injustice.[37] Therefore, one ship seeking to inhibit slave trafficking as a crime could not legally demand to interfere with a foreign ship in times of peace.

Additionally, in La Amistad, slave trafficking was held not to be universally illegal, and therefore not illegal under the law of nations.[38] In this case, La Amistad, a Spanish ship, was engaged in carrying slaves in the waters surrounding Cuba, a Spanish colony.[39] At the time, the Spanish had prohibited African slave trading.[40] Subsequently, the slaves on ship mutinied, killing all the Spanish on board with the exception of two members of the crew.[41] The two crewmembers kept the ship in water near the United States.[42] Eventually, the federal authorities took notice and brought the ship and the slaves into an American port.[43]

A suit was brought against the two crewmembers for illegally engaging in the African slave trade contrary to Spanish law. As their defense, the crewmembers produced documents claimed to be a production of the Cuban government which showed that the slaves were not African, but were Cuban.[44] This defense was based on the fact that Spanish law only illegitimated the African slave trade, not the Cuban slave trade. Therefore, trafficking Cuban slaves was permitted as long as they were not part of the African slave trade.[45] None of three U.S. courts presiding over this case believed that the slaves were from Cuba. Rather the courts believed that the slaves were African and had

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[37] Tara Helfman, The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade, 115 Yale L. J. 1122, 1151 (2006).
[38] The Amistad, 40 U.S. 518, 587 (1841).
[39] Id. at 521-22.
[40] 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, 30 Rutgers L. J. 371, 383 (1999).
[41] Amistad, 40 U.S. at 522.
[42] Id. at 524.
[43] Clark, supra note 39, at 384.
[44] Amistad, 40 U.S. at 587.
[45] Clark, supra note 39, at 385.

been illegally trafficked to Cuba on board a Portuguese ship.[46]

The Court ultimately held that the slaves, having come from Africa against their will and against the laws of Spain, they were entitled to their freedom.[47] Furthermore, this case emphasizes the point that slave trafficking was not universally condemned, and therefore not illegal under the law of nations. The illegality resulted from the nation's own laws, and the rights and obligations imposed by treaty.

These cases in sequence show that the right of visit under the law of nations has evolved to include the right to visit when a ship has been suspected of slave trade. The right to visit in this circumstance is considered a conventional rather than a customary law.[48] The law is conventional because nations entered into treaties which granted parties to the treaty, the right to intercept and capture slave trafficking ships. The law was not considered customary because the illegality of slave trafficking was not until relatively recently a custom.[49]

b. Choice of Law used to Circumvent the Lack of Prohibition of Slavery in the Law of Nations.

By 1821, all European states and the United States had enacted legislation which made it illegal for their respective citizens to engage in trafficking slaves north of the equator.[50] This legislation, while creating the right to visit and capture slave trading ships on the high seas, also created a black market for slave trading.[51] In response to the still thriving slave market, the United States had enacted legislation which equated slave

[46] Id. at 386.
[47] Amistad, 40 U.S. at 593 & 596.
[48] Rueland, supra note 10, at 1190.
[49] Id. at 1191.
[50] Kent, supra note 31.
[51] Id.

trafficking to piracy.[52] Because the law of nations provided that any vessel suspected of piracy could be searched and seized, regardless of its flag; this legal analogy, equating slave trading with piracy, extended the enforcement jurisdiction over American vessels suspected of slave trafficking to foreign vessels.[53]

A case which addresses this legal analogy between slave trafficking and piracy is The Antelope.[54] This case resulted when the *Antelope*, a Spanish ship, and its slaves, were captured by the *Arraganta*,[55] a Venezualan ship, flying the Venezuelan flag, but manned primarily by Americans.[56] As the *Antelope* was loading slaves into its hold on the coast of Portuguese-controlled Africa, the *Arraganta* captured the *Antelope*, taking control of the vessel and its cargo of slaves.[57] The *Arraganta* also captured other vessels trafficking slaves and took on those slaves as well.[58]

After capturing the several slave trafficking ships and claiming each seized ship's cargo of slaves, the *Antelope* was escorted back to Brazil by the *Arraganta*.[59] In the vicinity of Brazil, the *Arraganta* sank and its captain assumed control of the *Antelope* as it set sail for North America with the cargo of slaves from each ship that the *Arraganta* had captured.[60] Upon setting sail for North America, and still trafficking the slaves, the *Antelope*, was again captured by an American vessel and taken into port in Savannah, Georgia where the crew was prosecuted for slave trafficking and the slaves dealt with

[52] Slave Trade Prohibition Act of May 15, 1820, 16 Cong. Ch. 113, May 15, 1820, 3 Stat. 600.
[53] Martinez, supra note 18, 604.
[54] The Antelope, 23 U.S. (10 Wheat) 66 (1825).
[55] Id. at 68.
[56] Id. at 67-68.
[57] Id. at 68.
[58] Id. at 67-68.
[59] Id. at 68.
[60] Id.

according to law.[61]

Many parties claimed title to the slaves and restitution as to their capture. The Spanish and Portuguese claimed that they were entitled to recover the slaves as property of their citizens. The captain of the *Antelope* claimed the slaves as his personal captured property. The United States claimed that the slaves had been illegally trafficked by American citizens and because their transport was illegal under U.S. law, the slaves - under U.S. law and the law of nations, were to be considered free citizens.[62]

In deciding the case, the circuit court held that the captain had no right to claim the slaves and that the U.S. had only the right to claim the slaves that had been captured from the ship of its own citizens. Subsequently, sixteen of the approximate 280 slaves were allowed to be freed under U.S. law which made it illegal for those slaves to be traded.[63] The Spanish and Portuguese claims were subsequently heard by the Supreme Court and the Spanish claim was upheld. However, the evidence that there were actually Portuguese owners was too sparse for the Court to uphold the Portuguese claim. Subsequently, the slaves not claimed by the Spanish were to be set free under U.S. law, and the law of nations.[64]

When the case was heard by the U.S. Supreme Court, the Court held that because many states having colonies sanctioned slave trade, slave trade could not be considered contrary to the law of nations. However, slave trade did violate the law of nature.[65] Furthermore, the U.S. could consider slavery to be "piracy" under U.S. law, but the U.S. courts could not extend that definition of slavery as piracy to cases to be decided upon

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[61] Id.
[62] Id. at 72-73.
[63] Id. at 68.
[64] Clark, supra note 40, at 403 (discussing, Antelope, 23 U.S. at 284).
[65] Antelope, 23 U.S. at 120.

international admiralty law.[66]

The Court reasoned that the right to search and seize pirate vessels and their cargo derived from the law of nations regardless of peace time because all nations were perpetually at war with pirates and because pirates technically belonged to no nation. Therefore, all nations had a right to visitation and search of pirate ships.[67] In contrast, not all nations had denounced slave trade as illegal.[68] Therefore not all nations were at war with slave ships.[69] Furthermore, the Court held that until all nations consented to prohibit slavery, slavery would be permissible under the law of nations.[70]

The Antelope is a case which overturned United States v. La Jeune Eugenia,[71] which held that the slave trade was illegal under the law of nations. In La Jeune Eugenia an American ship, flying the French flag, was captured off the coast of Africa.[72] The ship was found empty of slaves, but nonetheless, equipped for slave trafficking.[73] The ship was thus condemned.[74] Furthermore, the ship was determined to be an American vessel despite flying the flag of France and carrying French papers. The court believed that the French nationality of the ship was merely a mechanism by which Americans engaged in trafficking slaves sought avoidance of confrontation on the high seas.[75]

Regardless of the finding that the ship was American, the French asserted ownership and demanded the release of the ship. The circuit court held that regardless of

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[66] Jeffrey E. Zinsmeister, In rem Actions Under Admiralty Jurisdiction as an Effective Means of Obtaining Thirteenth Amendment Relief to Combat Modern Slavery, 93 Cal. L. Rev. 1249, 1275 (2005).
[67] Antelope, 23 U.S. at 118.
[68] Id.
[69] Zinsmeister, supra note 66, at 1276.
[70] Antelope, 23 U.S. at 122.
[71] United States v. La Jeune Eugenia, 26 Fed. Cas. 832. No. 1551 (C.C.D. Mass. 1822).
[72] Id. at 842.
[73] Id. at 832.
[74] Id. at 833.
[75] Id. at 840-841.

the ship's nationality, slave trade is contrary to the law of nations.[76] Therefore, the ship would not be returned to France and was to be condemned under customary international law of nations. J. Story also noted that slave trade was condemnable under French law in addition to the law of nations.[77] Supporting the holding on the basis that both nations having claim to the captured ship and its cargo had made slave trafficking illegal; the illegal act was punishable in either state and consequently, both, states.

The holding in La Jeune Eugenia was overturned because its parameters were too broad in that this case allowed the condemnation of all slave trafficking ships under the law of nations. Conversely, the holding in The Antelope narrowed the holding in La Jeune Eugenie by reversing the conclusion that slave trafficking was universally illegal under the law of nations; but maintaining that where the nations claiming an interest in the outcome of a slave trafficking case each hold that the act is illegal, under a choice of law analysis, the illegal act is punishable in the state hosting the action.

In British courts the same arguments were taking place. Most notably, one of the earliest English cases discerning whether slave trade is illegal under international law is the case of The Amedie.[78] The case involved an American ship, carrying slaves from Africa to a Spanish colony in 1808.[79] The ship was intercepted by a British cruiser which then captured the American ship and its cargo. The case was tried in a vice-admiralty court in the West Indies. The case was then appealed to the Court of Appeals in England where the judgment was affirmed.[80] The Court indicated that, because trading of slaves had been previously declared illegal in both England and the U.S., the trade was *prima*

[76] Id. at 851.
[77] Id. at 849.
[78] The Amedie, (1810) 12 Eng. Rep. 92 (P.C.).
[79] Martinez, supra note 18, at 565.
[80] Amedie, supra note 78.

facie illegal. The court reasoned that in order for the ship and its slave cargo to be restored to the owner, the owner would have to prove that his state of citizenship recognizes the practice of slave trade as lawful.[81] The owner of The Amedie could not prevail.

Subsequently, in Madrazo v. Willis the presiding court held that only British vessels could be held accountable under British law regarding slave trade.[82] Because slavery had until recently not been illegal in much of Europe, it could hardly be considered offensive by the law of nations. However, ships belonging to nations which held slave trade to be illegal could be captured if the ship was engaging in the slave trade.[83]

Therefore, as held in The Antelope, the British courts also recognized that foreign vessels could be held accountable for acts on the high seas when both the state hosting the action and the state of the accused have both mandated the act illegal. These cases show that slavery was not, at that time, considered to be illegal under the law of nations. However, English courts would hold merchants accountable for illegal trafficking of slaves, if such was a crime in the merchant's nation.[84] Moreover, if slavery was illegal by the common law of nations, every captured vessel carrying slaves would be held accountable.[85]

Therefore, under these cases, the law of nations was transformed as it perpetually developed. Initially, the right to engage in slave trade was recognized under the law of nations simply because of the absence of international recognition that it was illegal.

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[81] Id. at 96.
[82] Madrazo v. Willis, 5 Eng. Corn. Law Rep. 313 (1829).
[83] Kent, supra note 31.
[84] Id.
[85] Id.

While a state may, by its own laws consider the act to be illegal; those laws under Le Louis could not be extended internationally. Furthermore, under Le Louis (1817), the right of visit does not extend to the vessels of other nations in times of peace. However, in La Amistad (1841), this trend changes. In La Amistad, the court recognized the right to visit and impose sanctions on international parties where the law of the state imposing sanctions and the law of the offending party's flag state agree as to the illegality of the offense. This holding was built on the holding in The Amedie, that where one was found guilty in a foreign court, of slave trafficking on the high seas, that party could not recover his ship and cargo of slaves unless a party could show that the laws of his flag state affirmatively allowed slave trafficking. Despite these holdings, the court recognized in Le Louis that until the nations by convention, treaty, or widespread legal revolution, deemed slave trafficking to be universally illegal, slave trafficking would not be illegal under the law of nations. In the middle of the nineteenth century, the Western world became unified in its condemnation of slave trafficking north of the equator; this marked the beginning of the illegality of slave trafficking under the law of nations.

2. Slave Trafficking under Law of the Sea as compared to under the law of nations.

While slave trafficking of the past may be more publicized than slave trafficking in modern times, slave trafficking across ocean routes is still occurring.[86] In the twentieth century, slave trade increased between Africa and the Middle East during the WWII, when the Western powers concerned with preventing slave trade were preoccupied with their own war.[87] Consequently, the Red Sea and Persian Gulf remain areas of prime trade

[86] Samuel Pyeatt Menefee, The Maritime Slave Trade: A 21st Century Problem?, 7 ILSA J. Int'l & Comp. L. 495, 497 (2001).
[87] Samuel Pyeatt Menefee, The Smuggling of Refugees by Sea: A Modern Day Maritime Slave Trade, 2

routes of slave traffic from Africa and India to the Middle East. In addition, the Pacific Ocean is a route by which crime organizations bring Chinese immigrants illegally into the U.S. for forced labor.[88] The conditions in which these "virtual slaves" travel are much like those endured by African slaves of centuries past.[89] Once in the U.S., the illegal immigrants are housed by the crime organizations and forced to work to pay off their debt for getting smuggled into the country.[90] The forced labor includes work for clothing and restraint industries, prostitution, and crime.[91] If the immigrants do not pay their fees they, and/or their families are faced with torture and even death. Additionally, sex slavery remains alive and well in many developed and less developed states. Various organizations and governments have attempted to halt these modern forms of slavery and the Law of the Sea reflects some of those efforts.

The UN found in 1998, that many states were unable to properly deal with crimes at sea due to their "weak maritime law enforcement capability."[92] The UN further indicated that to eradicate the problem of crime on the high seas, flag states should exercise their jurisdiction over vessels that fly their flag.[93] However, under the Law of the Sea, a state not party to the treaty need not heed any such direction prescribed in the treaty. Therefore, unless the law of nations applies in a circumstance allowing a non-party state's ship to be intercepted and searched, the non-party state retains the right to be free of the exceptions proposed in the Law of the Sea to the rights of a flag state's

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Regent J. Int'l L. 1, 8 (2003).
[88] Menefee, supra note 86, at 500.
[89] Id. at 501.
[90] Id. at 502.
[91] Id. at 501.
[92] Oceans and the Law of the Sea: Report of the Secretary-General, U.N. GAOR, 53rd Sess., Agenda Item 38(a), at para. 120, U.N. Doc. A/53/456 (Oct. 5, 1998).
[93] Elissa Steglich, Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways through Expanded Criminal Jurisdiction, 78 Tex. L. Rev. 1323, 1335 (2000).

jurisdiction.

By allowing a ship to fly the state's flag as one of convenience, a state gains revenues by "selling" the right to fly their flag without investing money into regulating the actions of the vessel. In regulating the activities of vessels flying flags of convenience, the flag state would encourage ship owners to obtain their flag of convenience elsewhere.[94] However, a ship flying more than one flag may be likened to a stateless vessel under article 92[95], which under article 110(1)(d) of the Law of the Sea may be boarded by a ship of any state.[96] Therefore, under the Law of the Sea, a vessel flying flags of convenience is likened to a stateless vessel and may be visited by the ship of any state.

In addition to the right to visit based on statelessness under the Law of the Sea, the right of visitation and search of foreign vessels extends to ships suspected of slave trafficking. Most states recognized this right of visitation and search of foreign vessels suspected of slave trafficking in the middle of the 20th century, under the Law of the Sea.[97] In 1958, the Convention on the High Seas, determined that states must police ships flying that state's flag in order to eliminate slave trafficking. Additionally, under this convention, all slaves are considered free.[98] The Convention went on to state that warships may stop and board a foreign vessel at sea, only when there is suspicion that the vessel is trafficking slaves.[99] The 1982 Law of the Sea Convention holds these same

[94] Id. at 1336.
[95] Law of the Sea, supra note 9, at art. 92(2).
[96] Id. at art. 110(1)(d).
[97] Zinsmeister, supra note 66, at 1278.
[98] Geneva Convention on the High Seas, opened for signature Apr. 29, 1958, art. 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962).
[99] Id. at art. 22(1)(b).

rights and obligations.[100] It is still considered illegal under the law of nations to visit and search a foreign vessel suspected of slavery because the condemnation of slavery, though widespread is not considered universal.[101] However, some disagree that this right has not become customary.[102] The customary nature of slavery however is alive and well in some parts of the developing world, therefore, unless the majority of nations are prepared to claim that the customs of the developing world make no difference in determining the law of nations, these customary practices of continuing slavery and the trafficking of slaves means that the illegality of slavery has not obtained universality.

That most states recognize the right of visitation of foreign vessels suspected of slavery in the 20th century, presents a change from the reasoning in Le Louis and The Antelope in which the English Court and the Supreme Court, respectively, concluded that slavery was not condemnable under the law of nations.[103]

Aside from the right to visitation and search of a foreign vessel reasonably suspected of slave trade, the Law of the Sea does not incorporate any means of enforcing its ban on slavery.[104] Under the Law of the Sea, only if the slave trafficking ship is the same nationality as the investigating warship, and assuming the law of that state prohibits slave trade, is the investigating ship allowed to seize the other and its cargo.[105] If the ships are not of the same nationality and a warship finds a vessel on the high seas to be engaging in slave trafficking, the investigating ship may only report its findings to the

[100] Law of the Sea, supra note 9, arts. 99, 110(1)(b), (2).
[101] Zinsmeister, supra note 66, at 1278.
[102] Rueland, supra note 10, at 1196.
[103] Le Louis, 165 Eng. Rep. at 1476; Antelope, 23 U.S. at 118.
[104] Ian Patrick Barry, The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative, 33 Hofstra L. Rev. 299, 313 (2004).
[105] Id.

slave traffickers flag state.[106] On the other hand, customary international law may permit seizure of the ship and its cargo once slave trafficking is found, regardless of the flag the slave ship flies.[107] This may be an application of the law of nations rather than the Law of the Sea, even if the articles of the Law of the Sea are applied to give the court jurisdiction over the parties and subject matter involved. In this instance, one would have to argue that the modern law of nations provides that slave trafficking is conventionally considered a universal crime and as such, should be universally prosecuted and punished.

C. Universal Jurisdiction

Universal jurisdiction is derived from the nature of the crime rather than from treaty or nationality of a vessel at sea.[108] However, such jurisdiction can be established by treaty or custom.[109] Furthermore, such jurisdiction presumes that, based on the heinousness of the crime, all the states should pursue its oppression for the good of everyone.[110] Therefore, universal jurisdiction does not require a strong relationship between the exercising authority and the accused.[111] In matters of slave trafficking, the international community has an interest in exercising jurisdiction in order to minimize such atrocious human rights violations world wide. Crimes against humanity are thereby likened to piracy.[112] Piracy was the first crime over which universal jurisdiction was widely permitted.[113]

Moreover, the "Lotus rule" is an example of universal jurisdiction applied through

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[106] Id.
[107] Id.
[108] Gabriel Bottini, Universal Jurisdiction After the Creation of the International Criminal Court, 36 N.Y.U.J. Int'l L. & Pol. 503, 511 (2004).
[109] Id. at 520-21.
[110] Id. at 511.
[111] Id. at 512.
[112] Michael P. Scharf, Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States, 35 New Eng. L. Rev. 363, 371 (2001).
[113] Id. at 369.

custom. This rule came about in France v. Turkey[114], when the SS Lotus, a French vessel, collided with a Turkish vessel. The Turkish authorities tried and convicted the French watchman of the SS Lotus of manslaughter based on the fact that the watchman was negligent in his duties and the negligence caused the wreck and the wreck caused the death of Turkish citizens.[115] The French contended that they alone had jurisdiction over their citizens and that Turkish authorities had no basis in international law for exercising jurisdiction over a non-citizen.[116] The court held that Turkish authorities had the jurisdiction to exercise authority over the French watchman in this case. Furthermore, the burden was on France to establish that the Turkish exercise of jurisdiction was in violation of international law.[117] Therefore, unless the application of jurisdiction violates international law, a state is free to exercise jurisdiction assuming the state has a direct interest in the resolution of the matter.[118]

The "Lotus rule" seems inconsistent with the Vienna Convention's Law of Treaties (Law of Treaties) which states that a treaty cannot impose obligations on or give rights to a third-party state without its consent,[119] and that the third-party state will only be obliged to the treaty if it expresses so in writing.[120] Under the Law of Treaties article 34, treaties like the Law of the Sea can and do create universal jurisdiction; however, they do not obligate third party states to comply with the terms of the treaty.[121]

However, based on the difference between sovereign and individual responsibility: the rights of states and the rights of individuals are different. While under

[114] France v. Turkey, 1927 P.C.I.J. (ser. A) No. 9. Sohn, supra note 35, at 160.
[115] Scharf, supra note 112, at 367.
[116] Id.
[117] Id.
[118] Id.
[119] Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 8 I.L.M. 1969.
[120] Id. at art. 35.
[121] Bottini, supra note 108, at 521.

the Law of Treaties, a non-party state must not be obligated or gain rights without its consent, the same does not follow with regard to the citizens of a non-party state.[122] Therefore, the rights of states are not restricted when universal jurisdiction based on treaties is enforced over a non-party state's citizens. Furthermore, the Law of Treaties is not violated when treaty-based universal jurisdiction is enforced over non-party state citizens.[123] If this were untrue, the citizens of non-party states could interfere with the rights of party-states and not be held accountable.[124] It would perhaps be more accurate to conclude that the Law of Treaties prohibits the rights of states from being limited by the treaty unless the state chooses be party to the treaty.[125] Therefore, while the third-party state is not obligated to comply with the terms of the treaty, the nationals of the third-party state may still be subject to the universal jurisdiction prescribed therein.[126]

In applying the Lotus rule, universal jurisdiction reaches those involved in such crimes as slave trafficking. The basis of this jurisdiction is presumed over the crime of slave trafficking because of the widespread believe that slavery is wrong. Therefore, as long as the prosecuting state has a direct interest in the resolution of a case of slave trafficking on the high seas, that state is free to exercise jurisdiction over the subject matter and parties involved. Furthermore, this exercise of jurisdiction would not be opposed to the Law of Treaties. The Lotus rule extends subject matter jurisdiction and personal jurisdiction allowed by the law of nations.

D. Conclusion

Under the Lotus rule, all states are awarded enforcement authority over the crime

[122] Scharf, supra note 112, at 378.
[123] Id. at 379.
[124] Id. at 382.
[125] Id. at 376.
[126] Bottini, supra note 108, at 521.

of slave trafficking, by way of universal jurisdiction, assuming the crime is illegal under the laws of the enforcing state. The Lotus rule, and therefore universal jurisdiction is limited where jurisdiction over a slave trafficking vessel is obtained under the Law of the Sea. However, the Law of the Sea may be invoked to provide jurisdiction for boarding a ship when both the boarding vessel and the boarded vessel fly flags of states which are parties to the Law of the Sea. However, there is no jurisdiction extended under the Law of the Sea to do anything about slave trafficking on the high seas once a boarded vessel is found to be trafficking. Therefore, the law of nations, in conjunction with the Lotus rule may be instrumental in finding and prosecuting ships involved in slave trafficking. Under this possibility, the law of nations would provide jurisdiction to board a vessel reasonably suspected of slave trafficking, and the universal jurisdiction provided by the Lotus rule would provide the jurisdiction necessary to prosecute those found on the high seas to be involved in slave trafficking.

Whether the law of nations or the Law of the Sea is used to find and/or prosecute those involved in slave trafficking on the high seas, the degree of heinousness is still a determining factor in the willingness of the presiding court to exercise jurisdiction in international disputes. Furthermore, in an age when many international cases are referred from state courts to international courts and international arbitration, the international laws provided by the law of nations and treaties may be of more assistance than the laws of states when determining whether slave trafficking is a crime; whether the crime can be prosecuted in a specific jurisdiction; and what remedies are available to those aggrieved.