FYDOR MARTENS AND THE QUESTION OF SLAVERY AT THE BRUSSELS CONFERENCE

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1. Fydor Martens played a crucial role in the move to establish an international regime to suppress the slave trade. This may come as a surprise as there is nothing in Martens' past which would have pointed to his involvement in issues of slavery or the slave trade during the late nineteenth century, nor was Tsarist Russian implicated, in any serious manner, in the international slave trade. It was, instead, the perception of Russia as a disinterested party on the issue of the slave trade and Martens acknowledge status as a jurist which thrust him into the spotlight during the 1889-1890 Brussels Conference where he mediation the differing interests of France and Great Britain to draft – in effect – the 1890 General Act of the Brussels Conference.

2. Martens play a fundamental role in the issue of the suppression of the slave trade which, though it is seldom recognised today, was *the* issue which had global implications during most of the nineteenth century. The fact that very little else before required coordination of European States, newly independent American States, and emerging 'civilized nations', meant that the suppression of the slave trade was one of the few items that – as a result of the limited inter-State intercourse during the age of sail – demanded truly international attention. The limited contact between States meant that the establishment of law regarding slavery was a slow and clumsy process which, though agreed to in principle at the 1815 Congress of Vienna, would only manifest itself in a binding universal instrument in 1890 at the Brussels Conference; and ultimately by the suppression of both the slave trade and slavery with the coming in to force of the 1926

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Note that quotations from French sources are translated by the author.

League of Nations Convention to Suppress the Slave Trade and Slavery. It was these factors then – the interaction of European Powers with the New World, Africa and on the high seas of the Atlantic, Pacific and Indian oceans, coupled with its time span, which marked every decade of the nineteenth century; that made the suppression of the slave trade *the* international issue of resonance throughout the eighteen hundreds.

3. At the outset of this paper, it should be made plain that the lack of a developed multilateral international system during the eighteen hundreds was not decisive in explaining the slow pace by which the slave trade on the seas was outlawed. What was at the heart of the matter was the very essence of States' understanding of the nature of the seas. The challenge to the abolition of the slave trade on the high seas was not the slave trade *per se*; but, rather, the conflict between the Grotian notion of the freedom of the seas and attempts to establish a right to visit ships suspected of being involved in the slave trade. The introducing of a 'right to visit' into the corpus of international law is fundamental to understanding the move to suppress the slave trade during the nineteenth century. Over a period of eighty years, Great Britain – which was the primary actor in the suppression of the slave trade at sea – sought to advocate various understandings of the concept of a 'right to visit'; first seeking to assimilate it to piracy, then arguing that the term was in keeping with the French notion of '*droit de visite*': that is an indirect right to visit to ascertain the right to fly the flag hoisted but not to *search* a ship, as a way to suppress the slave trade. Ultimately, it was a diplomatic compromise marshalled by Martens in 1890 that allowed for the acceptance of the concept of a 'right to visit' – while limiting its application to a specific maritime zone and to the type of ship used in the late nineteenth century slave trade.

4. This Paper is part of a larger study, which will appear in the 2006 edition of the *British Yearbook of International* Law and focuses on British attempts, during the nineteenth century, to end the Atlantic Slave Trade and outlaw the slave trade internationally by way of a universal instrument; which it only succeeded in achieving after seventy-five years of effort. For most of the nineteenth century though, the battle lines were drawn between Great Britain on the one hand, which put forward an

abolitionist agenda primed on the use of its superior naval forces; and on the other hand, lesser maritime Powers that sought to maintain freedom of commerce for their merchant fleet. The larger study brings into focus the manner in which a dominant Power, limited by normative constrains in the guise of established international law regarding the freedom of the seas, was able, over a long period of time, to reach a *modus vivendi* with those States that, by an large, were in opposition to a right to visit. Consideration is given in that study to the failed attempts, in the early eighteen hundreds, by Great Britain to establish a universal treaty outlawing the slave trade, and the change of tactics that would ultimately prove more successful – the establishment of a web of bilateral agreements that would come to include all maritime powers. The larger study also highlights the relationship between Great Britain and Brazil, France, Portugal along with the United States of America, to demonstrate the various dynamics that were at play in getting these recalcitrant States to join the bilateral regime. It concludes with an examination of the 1890 General Act of Brussels, which achieved the decades-long British foreign policy objective of a universal instrument meant to suppress the slave trade at sea. As for this Paper, in considers Russia's role during the nineteenth century as a bit player with regard to the slave trade and then focus on Marten fundamental role played at Brussels in 1889-1890.

British Attempts to Gain a Right to Visit to Suppress the Slave Trade

5. The slave trade was at its peak during the nineteenth century, as the Barbary States (Algiers, Tunis and Tripoli) were involved in the of so-called 'white slave trade' in the Mediterranean; the Atlantic Slave Trade (1519-1867) having emerged in the late fifteenth century as a new "species of slavery"[1] which ultimately include the known transport of more than eleven million Africans[2]; and the Oriental Slave Trade, an older, more ingrained, slave trade which had existed for more than a millennia and only was suppressed in the early twentieth century. It was during the eighteen hundreds that Great

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1 Robin Blackburn, *The Overthrow of Colonial Slavery (1776-1848)*, 1988, p 7.

2 See David Eltis, "The Volume and Structures of the Transatlantic Slave Trade: A Reassessment", *William and Mary Quarterly*, Vol. 58, 2001, n. 21. The dataset is found in David Eltis *et als.* (eds.) *The Trans-Atlantic Slave Trade: A Database on CD-ROM*, 1999.

Britain emerged as an unrivalled maritime power. As a result of that privileged position, Great Britain sought to translate a belligerent right to visit ships into a peacetime right so as to suppress the slave trade. During the early nineteenth century a number of court cases both in Great Britain and the United States of America considered whether there existed a right to visit foreign ships on the high seas in time of peace so as to suppress the slave trade. While late-Napoleonic municipal judgments on both sides of the Atlantic were willing to admit a right to visit based, to a large extent, on domestic law lifted to the international level by way of natural law[3]; by 1825, such pronouncements had been reversed in favour of high court decisions which conformed to a growing thread of positivism as a means of interpreting of international law[4]. For instance, in the 1925 *Antelope* case, United States Chief Justice of the Supreme Court, John Marshall, took a decidedly positivist approach to interpreting the law regarding both the slave trade and the notion of visitation:

> Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say, that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property.
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> In this commerce, thus sanctioned by universal assent, every nation has an equal right to engage. How is this right to be lost? Each may renounce it for its own people; but can this renunciation affect others?
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> No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a

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[3] For discussion of *jus gentium* as general principles of municipal law applicable internationally and *jus inter gentes* as the law of nations, see Alfred Rubin, *Ethics and Authority in International Law*, 1997.

[4] This should come as little surprise as the trend in international relations during this era was to leave behind the notion of natural law justified by reference to domestic law in favour of positive international law. See Arthur Nussbaum, *A Concise History of the Law of Nations*, 1961, pp. 232-234, where he considers this shift:

> In the science of international law, the nineteenth century was the great era of positivism. […] broad movements of legal and political thought were influential in the advance of positivism. The battle pro and contra the law of nature was fought along all fronts of legal and political science. On the European Continent, where the doctrine of the law of nature had won such notable triumphs, it not only was defeated but fell into utter disrepute. Political bias was a factor in this phenomenon: the law of nature, having furnished the conceptual weapons of the French Revolution, became an easy target for the theorist of the counterrevolution. Moreover, the speculative methods of the natural law school harmonized but little with the intellectual atmosphere of a century in which physical science had so conspicuously demonstrated the value of observation and painstaking research. In international law, too, theories had to be based upon the solid foundation of fact.

> rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested only be consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it.

[…]

> If it be […] repugnant to the law of nations […] it is almost superfluous to say in this Court, that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The Courts of no country execute the penal laws of another; and the course of the American government on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors.
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> It follows, that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored[5].

6. As there was an acknowledgement that domestic law did not allow for a right to visit, Great Britain sought to establish such a right by way of an international instrument. While early attempts failed, Great Britain maintain this strategic foreign policy objective for seventy-five years and, for tactical reasons, spent most of the intervening period establishing a web of bilateral arrangements which would then, ultimately converge and be subsumed into the General Act of the 1890 Brussels Conference. With regard to these early universal attempts, they transpired during the Concert of Europe[6] wherein Russia had a seat at the table. While the British Foreign Minister, Lord Castlereagh, proposed at the Congress of Vienna in 1814-15 that the slave trade be outlawed within a three-year period; that a permanent institution be established to supervise the adherence to the treaty obligations; and that a reciprocal right of visit be established[7]; this was not to be, as he was unable to gain a binding commitment regarding the abolition of the slave trade beyond a Declaration by the Powers which expressed the wish to "bring to an end a scourge which has for a long time desolated Africa, degraded Europe, and afflicted humanity". The Powers declared that they:

> consider the universal abolition of the trade in Negroes to be particularly worthy of their attention, being in conformity with the spirit of the times, and the general principles of our august Sovereigns, who our animated in their sincere desire to work towards the quickest and most effective of measures,

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5 The *Antelope* [1825], 23 *United States Supreme Court Reports* 66, pp. 121-123.

6 The Concert system was meant to allow European Powers to consider international issues, at intervals, during peacetime, as opposed to their former practice of solely meeting to settle the peace after war (ex: Congress of Vienna). Four meeting took place in this manner: Aix-la-Chapelle (1818), Troppau (1820), Laibach (1821), and Verona (1822).

7 See Suzanne Miers, *Britain and the Ending of the Slave Trade*, 1975, pp. 10-11.

> by all means at their disposal, and to act, in the use of those means with all zealousness and perseverance which is required of such a grand and beautiful cause[8].

While Castlereagh failed to get any cooperation to suppress the slave trade at Aix-la-Chapelle in 1818, his successor the Duke of Wellington, did somewhat better at the 1822 Congress of Verona, though once again, this was in the guise of a the following declaration with no binding commitments from the participants:

> That they invariably persisted in their principles and sentiments which these Sovereigns manifested in their Declaration of 8 February 1815 – That they have never ceased, and will never cease to consider the commerce in Negroes – "a scourge which has for a long time desolated Africa, degraded Europe, and afflicted humanity", and that they are ready to contribute to everything which could assure and accelerate the complete and definite abolition of this commerce.[9]

7. This Resolution was the end product of earlier, unsuccessful attempts, by Great Britain to establish a universal instrument prohibiting the slave trade. Yet, the failure at Vienna in 1815 more than any other, determined a change in the tactics of Great Britain in pursuing its ultimate foreign policy objective of a universal instrument allowing for a right to visit on the high seas in pursuit of an end to the slave trade. That is, Great Britain turned to building a bilateral system and through it, was able to isolated the few States outside the system and increased the momentum towards a universally accepted *right* to visit. That it took until 1890 for a universal treaty to be adopted speaks to the willingness of a number of States to demonstrate their opposition to, not the slave trade *per se*, but to the granting to Great Britain the right to visit their merchant ships.

8. It fell to France and the United States of America to be most obstinate in their call to respect the absolute right (in peacetime) to free commerce upon the high seas as against British attempts to limit that right with an aim of suppressing the slave trade. While Brazil, France, Portugal, and the United States of America had individual and distinct reasons for not wanting to participate in this British initiative, they all saw in the British wish to suppress the slave trade an attempt to appropriate for itself the policing of the

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8 *Declaration des 8 Cours, relative à l'Abolition Universelle de lat Traite des Nègres*, 8 February 1815, *British and Foreign State Papers*, Vol. 3 (1815-1816), 1838, p. 972. The eight Powers at Vienna were: Austria, Britain, France, Prussia, Russia, Portugal, Spain, and Sweden.

9 *Résolution relatives à l'Abolition de la Traite des Nègres*, 28 November 1822, *British and Foreign State Papers*, Vol. 10 (1822-1823), 1828, pp. 109-110.

seas and control over maritime commerce. While Brazil and Portugal were persuaded by coercive means to join the system, France and the United States remained adamant in their belief regarding the freedom of the seas. In the end, France and the United States would accommodate themselves to the British wish to suppress the slave trade much as Great Britain would come to terms with an agreed to *limited* right to visit merchant ships of these two States.

9. Having been unable to forge a consensus to establish a universal treaty outlawing the slave trade during the Concert of Europe era, Great Britain would ultimately enter into treaties with thirty-one nineteenth century States so as to suppress the slave trade at sea[10]. One such treaty, to which Russia was party, was the 1841 Quintuple Treaty which "stirred up a veritable hornets' nest in France"[11], in part, because Austria, Prussia, and Russia being land Powers were not truly effected by its provisions for the suppression of slavery at sea. The end result was that the 1841 Treaty was not ratified by France, though it did came into force for the other four parties, and was later acceded to by Belgium (1848) and Germany (1879)[12].

10. While the United States of America would accommodate itself to the British right to visit by sending out its own squadrons to sail the seas in tandem with the British Royal Navy, France sough further restriction on any British pretension to a right to visit. When a ten year treaty lapsed in 1845, the French and British came to a *modus vivendi* on a provisional basis, but which would, in fact, last until the end of the First World War. The 1859 Instructions, of which the French and British versions mirrored each other (like all such Instruction), were very elaborate and included a conceptual understanding of a right to visit. The Instructions first set down the principle that by "virtue of the immunity of

[10] These thirty-one States included, by chronological order of the signing of the first agreement with Great Britain: Portugal, Denmark, France, Spain, Netherlands, Sweden, Buenos Aires, Colombia, Brazil, Mexico, Confederation of Peru, Bolivia, Hanseatic Cities, Tuscany, the two Sicilies, Chili, Venezuela, Uruguay, Haiti, Texas, Austria, Prussia, Russia, The United States of America, The Kings and Chiefs of Cape Mount (Africa), Equator, Muscat, Arabs of the Gulf, New Granada, Zanzibar, Egypt. See Phillimore, *op. cit.*, n. 2, pp. 420-421.

[11] Miers, *op. cit.,* n. 7, p. 17. See also Henry de Montardy, *La Traite et le Droit International*, 1899, pp. 87-88.

[12] *Id*.

national flags, no merchant-vessel navigating the high seas is subject to any foreign jurisdiction. A vessel of war cannot therefore visit, detain, arrest, or seize (expect under Treaty) any merchant-vessel not recognized as belonging to her own nation". The Instructions went on to state that if a ship failed to hoist its flag, that a "first warning may be given her by firing a blank gun, and should this have no result, a second gun warning may be given her by means of a shotted gun, to be levelled in such a manner as not to [strike] her"[13]. If a ship did hoist its flag, it was to be understood that the "man-of-war has no right to exercise the least control over her", unless the nationality could be "seriously called into question". On this basis, after having hailed and informed the ship of its intensions, a cruiser could send an officer aboard with the understanding that only an examination of papers was to transpire: "All inquiry into the nature of the cargo; or the commercial operations of the said ships; in a word, on any other subject save that of their nationality; all search, all visit, are absolutely forbidden"[14]. In other words, the right to visit had been narrowed *stricto senso*, having been decoupled from the right to *search*. The final set of Instructions of note, those issued in 1867, mirrored the above provisions of the 1859 Instructions, but were more focused, allowing an officer to request only specified papers on board a ship suspected of flying a fraudulent flag. If a ship was deemed to have been flying such a flag, the warship was to escort its capture to the nearest port where a representative of the flag State could determine whether it had a right to fly the flag in question[15].

11. The 1859 Instructions would become crucial to the relationship between France and Great Britain where the suppression of slave trade at sea was concerned, as these Instructions would persist in their application beyond the nineteenth century. This understanding between France and Great Britain would remain the last word as between the two Powers, despite attempts to gain universal agreement on the modalities by which

[13] Instructions issued to Commanders of French Ships of War, as found in the "Correspondence respecting the Visit of American Vessels by British Cruisers", *British Sessional Papers*, Vol. 34, 1857-1858, p. 427.

[14] *Id.*, p. 428.

[15] See "Instructions as to Vessels under the French Flag", *Documents relatives à la Répression de la Traite des Esclaves publiés en execution des Articles LXXXI et suivants de l'Act Général de Bruxelles*, 1892, pp. 272-274.

the suppression of the slave trade should transpire and despite Martens having hammered out an agreement amongst the parties' diplomats in Brussels in 1890.

The Brussels Conference

12. In their quest for what historians termed the 'Second European Empires' the ideology which justify usurpation of land shifted beyond the New World[16]. Having colonised the Western Hemisphere, European Powers embarked on a civilizing mission. That mission would descend into an all out 'scramble for Africa' by the 1880s. While much of the colonization of the New World had taken place under the banner of "Gold, Glory and God"; the British missionary, David Livingstone, made it known throughout Europe that in Africa "slave raiding and trading were devastating large areas, and his appeal to bring 'Christianity, commerce, and civilization' to the heart of the continent" did not fall on deaf ears[17]. A recurring theme throughout much of this period was a demand by Europeans to end the slave trade, not only at sea, but on land: on the African Continent. Thus, in the latter part of the nineteenth century, as Africa was opened to the pursuit of Empire, European States concluded treaties with local African elite mandating the suppression of the slave trade. For its part Great Britain became party to more than a hundred such agreements "which eventually covered the whole coast from which slaves were exported"[18]. During this period, it was clear that the suppression of slavery and the slave trade had become very much part of the discourse of international relations and, though it had been championed by Great Britain, other States with holdings in Africa – France, Germany, Italy, and Portugal (and the private Congolese State which was to be awarded to King Leopold of Belgium in 1885) – were willing to see its inclusion on the agenda of international conferences and for it to find voice in international instruments.

13. Thus when a dispute arose over an Anglo-Portuguese treaty regarding control of the mouth of the Congo River in 1884, the German Chancellor, Otto von Bismarck, proposed

[16] For 'Second European Empires' see Antony Pagden, *Lords of all the World; Ideologies of Empire in Spain, Britain and France c.1500-c.1800*, 1995, p. 2.
[17] Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem*, 2003, p. 20.
[18] Miers, *Britain and the Ending of the Slave Trade*, *op. cit.,* n. 7, p. 46.

an international conference to settle the question. The Berlin Conference, which ultimately provided for the free navigation of the Congo and, more generally, a framework for the effective occupation of the African coast, also found on its agenda a British proposal which called for – in the language of the twenty-first century – universal jurisdiction to be established over the slave trade[19]. The proposal put forward was in the form of a declaration making the slave trade "a crime against the Law of Nations". The draft Declaration read in part that: "The Slave Trade is henceforth a crime prohibited by the Law of Nations, and cognizable by the tribunals of all civilized nations whatever the nationality of the accused"[20]. This proposal, however, did not find favour with the fifteen States gathering in Berlin as they were unwilling to commit to such a far-reaching pronouncement, instead they accepted a general declaration that the slave trade was indeed prohibited by international law. The Declaration Relative to the Slave Trade, which emerged from the 1885 General Act of the Conference of Berlin, reads:

> Seeing the trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations, which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo declare that these territories may not serve as a market or means of transit for the trade in slaves, or whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it.[21]

14. Shortly after the end of Berlin Conference, an ally to the anti-slavery cause emerged from the most unlikely of sources, in the person of the Roman Catholic Archbishop of Algiers, Cardinal Lavigerie. In what can only be called a 'one-man' crusade, Cardinal Lavigerie gained the support of the Pope, and moved to establish a number of anti-slavery societies throughout Europe and aroused public sentiment through the detailing of the horrors of the slave trade on the Africa continent. During his visit to London, Cardinal Lavigerie it was suggested that a "Conference of the Powers might be

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[19] See H. L. Wesseling, *Divide and Rule: The Partition of Africa 1880-1914*, 1996, pp. 113-119.

[20] Miers, *op. cit.,* n. 7, pp. 171-172.

[21] Article 9, *General Act of the Conference of Berlin, relative to the Development of Trade and Civilization in Africa; the free navigation of the River Congo, Niger, etc.; the Suppression of the Slave Trade by Sea and Land; the occupation of Territory on the African Coast, etc.* 26 February 1885. Sir E Hertslet, *The Map of Africa by Treaty*, Vol. 2, 1967, p. 474. The following are the States which participated in the 1884-1885 Berlin Conference: Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, The Netherlands, Norway, Portugal, Russia, Spain, Sweden, Turkey, and the United States of America.

convened" to deal with the issue of slavery and the slave trade in Africa[22]. Such a conference, Professor Susan Miers notes, was "infinitely more practical and less hazardous" than Cardinal Lavigerie's other proposal which was to establish a religio-military order modelled on the Templers or the Knights of Malta to take the battle to Africa in a crusade to suppress the trade[23]. This suggestion was taken up by the British Foreign Ministry and on 18 November 1889, the seventeen States invited met in Belgium to inaugurate the Brussels Conference meant to discuss the end of the slave trade by land and sea[24].

15. While the General Act of the Brussels Conference dealt with issues of the suppression of the African slave trade on land, in countries of destination, it also established an arms agreement and restricted the traffic in spirits. However, the suppression of the slave trade at sea, it was said, was the "most awaited and most delicate point"[25] to be considered; it was, in fact, the point upon which the Conference hinged[26]. The delegated British plenipotentiary, Lord Vivian, spelled out his State's position on the second day of the Conference in the following terms:

> The Congresses of Vienna and Verona had established the general principles; the Berlin Conference recognized and applied these principles to the territory forming the conventional basin of the Congo. The Powers, therefore, had formally accepted these principles, and the object of this Conference, such as Her Majesty's Governments understands it, is to establish efficient measures to put into practice these principles and to substitute individual action for collective action.

Lord Vivian then turned to the suppression of the slave trade at sea, calling for a folding of the established bilateral regime for the suppression of the slave trade into a universal instrument:

> It is the opinion of Her Majesty's Government that the suppression of the maritime trade is the object upon which the efforts of this Conference should be primarily focused [...]. It may be possible,

[22] British and Foreign Anti-Slavery Society, *The Slave-Trade Conference at Brussels and the British and Foreign Anti-Slavery Society*, 1890, p. 6.

[23] See "Sur les anciens orders religieux-militaires et la possibilité d'une association du même gendre pour l'abolition de l'esclavage, dans les contrées Barbares de l'Afrique" in Cardinal Lavigerie, *Documents sur la Foundation de l'oeuvre Antiescalvagiste*, 1889, p. 712-715.

[24] The following are the States which attended the 1889-1890 Brussels Conference: Austria, Belgium, Congo Free State, Denmark, France, Germany, Great Britain, Italy, The Netherlands, Persia, Portugal, Russia, Spain, Sweden and Norway, Turkey, the United States of America, and Zanzibar.

[25] Henry de Montardy, *La Traite et le Droit International*, 1899, p. 141.

[26] Henry Queneuil, *La Conférence de Bruxelles et ses Résultats*, 1907, p. 132.

> perhaps, to come to a unanimous international understanding, which, while respecting the right and interests of the Powers not yet linked by the Treaties, to incorporate and even amplify the provisions of the existing Treaties, which it might well be substituted for[27].

16. Following on the heels of this statement, the British delegation took the initiative and presented a proposal which called for the creation of a *cordon sanitaire* around "the most dreadful pest which has ever gnawed on humanity"[28]. Within this zone – which would extend from Port Suez south on both coasts of the Red Sea and into the Persian Gulf before following the African coast southwards, extending to the far extremities of Mozambique – the British proposal called for the right to detain "vessels directly or indirectly suspected of trafficking in Slaves" both in internal and international waters with a look toward bringing them to be adjudged before mixed tribunals[29]. During the Conference the ago-old Anglo-French rivalry was once again rearing its head, this time directly linked to the African colonial ambitions of the Powers; anti-British sentiment in France would remained high – and *vice versa* – throughout this period (from 1881 and the 'Easter Question' to Fashoda in 1891[30]). The Anti-Slavery Society of France foreshadowed French resistance to the right to visit at Brussels, (and later in Paris) in 1888, when it stated that "we believe it is utterly impossible to obtain the consent of Parliamentary and public opinion in France, to the right for English cruisers to search French boats sailing under the national flag"[31]. In a Declaration made on 20 December 1889, the French representatives in Brussels stated categorically that if the right to visit was placed on the agenda, that they were not authorized to participate in such discussions. Having acknowledged that the British proposal had not mentioned a right to visit *per se*, the French plenipotentiaries indicated that they were willing to discuss the issue of the suppression of the slave trade at sea, and thus put forward a general sketch of a forthcoming proposal, with the understanding that they would produce a more substantial version in the new year. This French diplomatic declaration pointed to the 1867 Anglo-French Instructions and noted that it would submit a proposal which would

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27 Protocol 2, Protocoles de Séances Plénieres de la Conférence de Bruxelles, 19 November 1889, *Actes de la Conférence de Bruxelles (1889-1890)*, pp. 21 and 22.

28 Annex 2, Protocol 10, "Project présenté par les Plénipotentiaries de la Grande-Bretagne", 28 November 1889, *Actes de la Conférence de Bruxelles (1889-1890)*, p. 149.

29 *Id.*, p. 150.

30 See, generally, Wesseling, *op. cit*. n. 19.

31 British and Foreign Anti-Slavery Society, *op. cit.*, n. 22, p. 20.

include, *inter alia*, for the verification of the nationality of a boat sailing in the zone "contaminated by the exercising of the trade"[32].

17. The French Counter-proposal was made on 20 January 1890; it provided for a zone which was enlarged to include the west coast of Africa, it laid down the principle that ships in the zone could only be searched by their own navies, but that there could be an exception existed where the right to fly a flag was in question. The Counter-proposal, having laid down the manner in which a ship could be visited, then explained that fraudulent ships would be brought to a port where an international tribunal would be located. The supposed flag-State's Consul would then undertake an investigation. If there was a difference of opinion between the Captain of the cruiser and the Consul, then the international tribunal would consider the case. While the status of the seized ship would be considered by this mixed tribunal, its captain and crew were to be tried by their respective municipal systems. Finally, the French Counter-proposal called for the creation of an international bureaux which would act as a registry for ships in the zone[33]. On 6 February 1890, the British Delegation responded to the French Counter-proposal in a positive manner, saying that it "merited serious attention" and that it "could probably serve as the basis for effective preventative measures which would receive general applicability in the zone where the trade is taking place"[34]. However, it noted with regret that the French Government could not accept "under any circumstances, the reciprocal right to monitor sailing ships in the trade zone"; for its part the British Delegation noted that it could not discuss "proposals which derogated, in any way, from the treaties to which the Queen is party, or the rights which flow from them". Having made the point, the Declaration said that Her Majesty's Government wanted to go as far as possible to reach an understanding with all Powers, and thus was willing to concede that the "right to visit established in the existing treaties be limited to the zone determined [during the Conference], and to limit the exercise of this right to ships of less than 500 tons [i.e.:

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[32] Annex 3, Protocol 10, "Déclaration des Plénipotentiaires de France", 20 December 1889, *Actes de la Conférence de Bruxelles (1889-1890)*, p. 153.

[33] Annex 4, Protocol 10, "Project de Traité et projet de Règlement présentés par les Pléinpotentiaires de France" *Actes de la Conférence de Bruxelles (1889-1890)*, p. 154.

[34] Annex 5, Protocol 10, "Déclaration des Plénipotentiaires de la Grande-Bretagne", 6 February 1890, *Actes de la Conférence de Bruxelles (1889-1890)*, p. 159.

tantamount to 'native', African, vessels], as long as this final condition, related to the dimensions of vessels, be submitted to revision if experience shows that a change was necessary". The Declaration went on to say that Great Britain "could not make these great concessions if the Conference, for its part, did not consent to adopt the strict regulations suggested in the French Counter-proposal, with an look to preventing, within the limits of the zone, the usurpation or abuse of flags of all the signatory States"[35]. In light of these proposals, the British Declaration stated that it probably made sense to drop the ideal of an international tribunal as its bilateral network had attached to it an already established network of mixed commissions. Finally, the Declaration expressed itself in favour of an international bureau as proposed by France.

18. The Parties having made plain their positions, it was left to the only international jurists attending the Brussels Conference to step into the breach, though hesitantly, to mediate a solution. The eminent international lawyer, Fyodor Martens benefited from the fact that, as a Russian plenipotentiaries, he was seen as a disinterested party where issues of slavery in Africa and the slave trade at sea were concerned. Martens prepared a report and draft articles which later were "entered into the General Act without major modification"[36]. In his Report, Martens stated that the more he studied the British and French proposals, the "more I became convinced that there did not exist between them any fundamental contradictions"[37]. At the same time he acknowledged Great Britain's century worth of experience in suppressing the slave trade at sea; but noted his belief that the conditions in which the trade persisted had changed. The trade was now exclusively taking place in East Africa, by means of indigenous boats, in a region where the near entirety of the coast was either under the sovereignty or the protection of European Powers. As such, there was a real possibility for the Powers to work collectively on land and at sea to end the slave trade. With this in mind, Martens laid out draft articles that would become part of the General Act; that took into consideration the various components of the British and French proposals, and expressed them both as over-

[35] *Id.*, p. 60.
[36] Queneuil, *op. cit.,* n. 26, p. 136.
[37] Annex 7, Protocol 10, "Rapport de M. de Martens, second Plénipotentiaire de Russie, sur les projets précédents", 17 February 1890, *Actes de la Conférence de Bruxelles (1889-1890)*, p. 169.

arching principles and practical rules[38]. A contemporary French jurist, Henry Queneuil, wrote of Martens' mediation work, in glowing terms: "thus the different principles found themselves reconciled without having compromised the efficacy of the repression of the slave trade by sea. At the same time, a latent and disquieting conflict between France and Great Britain which had existed for fifty years was put to rest[39].

19. The provisions regarding the Repression of the Slave Trade at Sea make up Chapter III of the General Act of the Brussels Conference relative to the African Slave Trade, which was signed on 2 July 1890. The General Act defines a maritime zone which centred on the high seas contiguous to the East Coast of Africa and included both the Red Sea and the Persian Gulf. It acknowledge a right to visit, search, and detain, in established treaties and that these treaties remained in force "in so far as they are not modified by the present General Act"[40]. The two major British concessions were also included, namely that the States agreed that all such rights to visit could only transpire in the newly established maritime zone, and this only with respect to "vessels of less than 500 tons burthen"[41]. Article 42 introduced the modified regime for visits under the General Act, allowing for such visit to suppress the slave trade and to verify the propriety of the use of the flag:

> When an officers in command of a vessels of war of any of the Signatory Powers have reason to believe that a vessel of less than 500 tons burthen, found in the above-mentioned zone, is engaged in the Slave Trade, or is guilty of the fraudulent use of a flag, they may proceed to the verification of the ship's papers.

Having done so, Article 46 notes:

> If, in carrying out the supervision provided for in the preceding Articles, the officer in command of the cruiser is convinced that an Act of Slave Trade has been committed on board during the passage, or that irrefutable proofs exist against the captain, or fitter-out, to justify a charge of fraudulent use of the flag, or fraud, or the participation in the Slave Trade, he shall take the detained vessel to the nearest port of the zone where there is a competent authority to the Power whose flag has been used.

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[38] See Annex 6, Protocol 10, "Projet de Traité et project de Règlement codifiant les projets précédents et préséntés par les Plénipotentiaires de Russie", 17 February 1890, *Actes de la Conférence de Bruxelles (1889-1890)*, p. 169.

[39] Queneuil, *op. cit.,* n. 26, p. 148.

[40] Article 24, General Act of the Brussels Conference relative to the African Slave Trade, 2 July 1890, Sir E. Hertslet, *The Map of Africa by Treaty*, Vol. 2, 1967, p. 499.

[41] 'Burthen' refers to the carrying capacity or load of a ship.

In such circumstances, a Consul or the commander of a man-of-war of the same nationality as the suspected ship could be considered the competent authority to examine and determine the status of the seized vessel. In Martens' Report, he highlighted the fact that having dropped the proposal for an international tribunal, it was essential to have a means to settling disputes which might arise as between the flag State and these involved in the capture, and thus inserted a compromissory clause which envisioned the possible appointment of an arbitration panel[42].

20. Beyond the provisions regarding right to visit, the 1890 General Act provides, at Article 27, a provision which remains, *mutatis mutandis*, operative under the 1982 Law of the Sea Convention: "Any slave who may have taken refugee on board a ship of war flying the flag of one of the Signatory Powers, shall be immediately and definitively freed". Finally, an International Bureau was to be established in Zanzibar – the first inter-governmental entity to be situated on the African continent – to gather information, including the registering of vessels, but more generally, to "centralize all documents and information of a nature to facilitate the repression of the Slave Trade in the maritime zone"[43].

21. On the basis of the 1890 General Act, as Queneuil noted, it looked like the 'latent and disquieting conflict' had been put to rest. But had it? Professor Miers writes that an "unforeseen and serious difficulty"[44] arose as the French ambassador in Brussels wrote to the Belgian Foreign Minister, stating:

> I have the honour to confirm to your Excellency the information which I gave *viva voce* yesterday to Baron Lambermont [the President of the Conference]; after a prolonged discussion occupying the sitting of the 24th and 25th of last month, the French Chamber of Deputies decided to suspend the authorization to ratify the General Act […]. His Majesty's Government must be aware of the part which the Cabinet had taken in this grave debate, and it was certainly been from no want of effort on

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[42] See Article 54, *op. cit* n. 40. Note that the mixed commission which had, by the 1870s, become a solely British affairs were subsumed into the domestic jurisdiction. For Great Britain this meant either the relevant Supreme Court of the Colony or an Admiralty Court. See *Documents relatives à la Répression de la Traite des Esclaves publiés en execution des Articles LXXXI et suivants de l'Act Général de Bruxelles*; 1892, p. 260.

[43] See Article 77, *id*. For the work of the International Bureau in Zanzibar see: *Documents relatives à la Répression de la Traite des Esclaves publiés en execution des Articles LXXXI et suivants de l'Act Général de Bruxelles*; from 1892 to 1913 under the heading "*Bureau international maritime de Zanzibar*".

[44] Miers, *op. cit.,* n. 7, p. 293.

> their part that the conclusion was not entirely different. Your Excellency is further aware that the consideration which weighed with the Chamber were derived from the nature of the measures to be taken for the repression of the traffic at sea[45].

Despite the fact that the prestigious Institute of International Law came on side in 1891, and said that the General Act did not reinstitute an expansive right to visit and that the Act addressed the concerns of France, it thus expressed its hope that all States which had been present in Brussels would come to ratify the Act[46]; the issue of French ratification remained a question mark. That question mark was lifted on 2 January 1892 – at least partially – when France deposited its instrument of ratification, with the following proviso:

> His Excellency [the French ambassador to Belgian] declared that the President of the Republic, in his ratification of the General Act of Brussels, has provisionally reserved, for an ulterior understanding, Articles XXI, XXII, and XXIII, and Articles XLII to LXI[47].

22. In essence, France agreed to the General Act but modified its undertaking by excluding itself from the provisions related to visitation. Articles 21, 22, and 23, as noted earlier, related to the *ratione loci* of the treaty; to the rights established in previous treaties now to be applicable solely in the conventional zone; and to the limitation, *ratione personae*, of the treaty to ships of less than 500 tons. Articles 42 to 61 set out the modalities of the regime of visitation within the General Act. The clause "provisionally reserved, for an ulterior understanding" was interesting, as the French legislature had determined that France would be "governed by the stipulations and arrangements now in force", that is to say, the 1867 Naval Instructions.[48]. The French reservation having been accepted by the other Parties; the General Act came into force on 2 April 1892.

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45 See "France", Protocol of a Meeting held at the Foreign Office at Brussels, respecting the Ratification of the General Act of the Brussels Conference, 2 July 1891, Hertslet, *op. cit.*, n. 40, pp. 521-522.

46 Institut de Droit International, "Voeu motive de l'Institut tendant à la ratification intégrale de l'Act general de Bruxelles", *Annuaire de l'Institut de Droit International*, Vol. 11, 1889-1892, p. 269.

47 See "France", Protocol of a Meeting held at Brussels, in the Foreign Office, respecting the Exchange of Ratification of the General Act of the Brussels Conference, 2 July 1892, Hertslet, *op. cit.*, n. 40, pp. 521-522. France further modified its reservation in light of the fact that Belgian – as depositor of the General Act – point out that obligations stemming from Articles 30 to 41, regarding the authorisation of native vessels to fly a State's flag where only applicable in the zone established by Articles 21 to which it had reserved. France responded by declaring that its east coast possessions would indeed be part of that regime, noting that it "will be spontaneously applied by the Government of the Republic in the territory of Obock [Djibouti], and, according to necessity in the Island of Madagascar and the Comoros". *Id*.

48 *Id*.

Despite Professor Miers concluding that little had been lost because the French "government agreed to abide by the regulations of 1867 and to put into operation the new rules for the issue of French colours"[49]; and despite the French jurist Henry Queneuil echoed these sentiments in saying that the differences between the General Act and the 1867 Instructions were not great[50], the French limited acceptance of the 1890 General Act did provide at least one means by which slave traders could avoid visits by hosting the French flag; though this would ultimately be put to a stop by the Permanent Court of Arbitration in its 1905 *Muscat Dhows* case.

23. In that case, the Panel considered whether the status of subjects of the Sultan of Muscat who had been granted the status of *protégé* by France in 1844 (that status having been modified in 1863) – and thus benefited from the protection of France and, on the seas, by the French flag – was limited by the obligations undertaken by France as a result of the 1890 Brussels Act. The issuance of papers authorising dhows to fly French flags had been, it had been noted, had meant that those 'native vessels' had been "commonly employed in the slave trade"[51]. It is Award, the arbitrators pointed to Article 32 of the 1890 General Act which set out the conditions under which native vessels was to be granted authority to fly a flag. This included owners or outfitters "furnishing proof that they enjoy a good reputation, and especially that they have never been condemned for acts of slave trade"[52]. The Court determined that after France had ratified the Brussels Act (1892), it was not allowed to "authorize vessels belonging to subjects of His Highness the Sultan of Muscat to fly the French flag, except on conditions that their owners or fitters-out had established that they had been considered and treated by France as her *protégés* before the year 1863. It further determined, with regard to another question, that the "authorization to fly the French flag can not be transmitted or transferred to any other person or than other dhow, even if belonging to the same

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[49] Miers, *op. cit.,* n. 7, p. 293. For the 1867 Instructions see *Documents relatives à la Répression de la Traite des Esclaves publiés en execution des Articles LXXXI et suivants de l'Act Général de Bruxelles*, 1892, pp. 272-274.

[50] Queneuil, *op. cit.,* n. 26, p. 189.

[51] See Syllabus, "The Muscat Dhows Case between France and Great Britain", James Brown Scott (ed.), *The Hague Court Reports*, 1916, p. 93.

[52] See Article 32, General Act of the Brussels Conference relative to the African Slave Trade, 2 July 1890, Hertslet, *op. cit.*, n. 40, p. 500.

owner"[53]. In essence, the Permanent Court of Arbitration determined that in this case the slave trade would die a natural death. That subjects of Muscat might well be able to benefit from the protection of the French flag, but only in their lifetime (or that of their precious dhow) had they received such protection some forty years previous. Taking into consideration the life expectance in early twentieth century Muscat and that of 'native vessels', the Permanent Court of Justice had, at the behest of Great Britain, sounded the death-knell of the slave trade a sea.

Conclusion

24. While the debate about the motives of Great Britain, regarding its attempts to suppress the slave trade remain lively today; what can not be disputed is that Great Britain did, in fact, lead and shoulder most of the responsibility in ending the slave trade and slavery itself. For Great Britain, the main stumbling block was not the abolition of slavery *per se*, as there persisted throughout the known world a growing ideological aversion to both slavery and the slave trade. Instead, the Grotian notion of the freedom of the seas ran counter to the main means by which Great Britain sough to suppress the slave trade: the wish to create a mutual right to visit ships on the high seas suspected of being involved in the slave trade.

25. Today, we know that while the freedom of the high seas remains as a guiding principle of the 1982 United Nations Convention on the Law of the Sea, that freedom in not absolute and does, in fact, allow for a right to visit ships suspected of being engaged in the slave trade[54]. The provisions of the Law of the Sea dealing with slavery are very much a reflection of the solution mediated by Fyodor de Martens in Brussels in 1890.

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[53] Award of the arbitration tribunal appointed to decide on the question of the grant of the French flag to Muscat dhows, 8 August 1905, James Brown Scott (ed.), *The Hague Court Reports*, 1916, pp. 99 and 100.

[54] See Part VII (High Seas) of the 1982 United Nations Convention on the Law of the Sea. That the freedom of the seas has always been qualified, see Hugo Grotius, *De Jure Belli ac Pacis* Libri Tres, (Carnegie' Classics of International Law series, Vol. 2), 1925, pp. 190-191; Hugo Grotius, *De Jur Praedae Commentarius,* (Carnegie' Classics of International Law series, Vol 22), 1950, pp.226-255; and W E Bulter, "Grotius and the Law of the Sea" in Hedley Bull (*et als*, eds) *Hugo Grotius and International Relations*, 1995; pp. 209-220.

Despite France failing to join the regime regarding visitation as envisioned by the 1890, Martens had ushered in the framework for the international suppression of the slave trade which would then find voice through the 1926 League of Nations convention and the 1956 United Nations conventions suppressing slavery and the slave trade. As a jurist from a disinterested party, Martens was requested to undertake the specific task of mediated a dispute which had been in existence for more than fifty years. It is to his credit that he was able to convince the diplomats in Brussels to agree to the Final Act. Thought France's *Assemblé Nationale* would opt-out of the system devised by Martens, the provisions of the 1982 Law of the Sea Convention are testimony that Martens solution is the one that survives and is thus one more tenant of the legacy of one of the greatest international jurist of all time.