International Criminal Law and the Slave Trade: the Past and the Present

There has been much interest in recent years in the work of the mixed commissions which were set up under bilateral treaties between Great Britain and a number of slave-trading countries in the early nineteenth century.[1] These treaties authorised the capture of ships and the liberation of the slaves held on board, after a determination by a mixed commission court that the ship had been carrying slaves in violation of the terms of the particular treaty. Some historians have taken an optimistic view of the role of these institutions. Jenny S Martinez, for instance, says that 'these slave trade courts were the first international human rights courts.' They 'applied international law' and 'explicitly aimed to promote humanitarian objectives.' For Martinez, the story of these courts is one that 'sheds important light on the origins of our contemporary system of international legal protection for human rights and also provides insight into issues faced by modern international tribunals like the International Criminal Court.'[2] In her new book, *The Slave Trade, Abolition and the Long History of International Criminal Law: the Recaptive and the Victim*, Emily Haslam takes a more sceptical view.[3] Rather than placing them at the start of a progressive narrative of the history of human rights and international law, she seeks to explore what a re-reading of the history of these courts can tell us about their shortcomings, and what we can learn about the nature of international criminal law in the process. The work is a fine archival study of the working of these courts, as well as a theoretical reflection on international criminal law and its history.

A number of key themes run through this book. The most important is the fact that the slave trade was not regarded as a crime in international law in this era. The 'international law' enforced in these courts was that made by treaties between European sovereigns, which

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[1] Leslie Bethell, 'The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century' 7 *Journal of African History* (1966) 79.

[2] Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press, 2012), 6.

[3] Emily Haslam, *The Slave Trade, Abolition and the Long History of International Criminal Law: the Recaptive and the Victim* (Routledge, 2020). See also Lauren Benton, 'Abolition and Imperial Law, 1780-1820' 39 *Journal of Commonwealth and Imperial History* (2011) 355-74 and Lauren Benton and Lisa Ford, *A Rage for Order: the British Empire and the Origins of International Law* (Harvard University Press, 2016), 122-131.

defined the rights of those engaged in the slave trade, and those engaged in suppressing it, but which did not focus on the rights of the slave. Before a ship could be condemned as a 'prize' and sold for the benefit of its captors, and before the slaves could be liberated with certificates of emancipation, the commissary judges and commissioners of arbitration appointed by both sides to the mixed commission had to determine whether the capture was lawful. There were multiple opportunities to find that it was not: for instance, Britain's treaty with the largest slave trading nation, signed at the end of the Napoleonic wars, permitted the Portuguese slave trade to continue south of the equator, and only allowed the seizure of vessels actually carrying slaves. Haslam's opening story illustrates the horrific outcomes this system might produce: the *Maria da Gloria*, captured with a cargo of slaves off the Brazilian coast by a British vessel in 1833, was first taken to the Anglo-Brazilian mixed commission court in Rio de Janeiro. After that tribunal declined jurisdiction in the grounds that the vessel was Portuguese, the captive slaves - who had not been disembarked - were taken back across the Atlantic to Sierra Leone. Those who survived the second voyage did not find freedom: for when the court in Freetown found that the ship had been intercepted south of the equator, it was restored to her owners with its cargo of humans, to be sent back to a life of slavery in Brazil. In this case, the norms of 'international law' did not protect these humans' rights, but confirmed their enslavement.

A second theme which runs through the book is the need to recover the voice of the 'recaptive'. As Haslam explains, slaves held on board 'recaptured' ships lived in a 'liminal legal state' until the commissions had made the adjudication which would decide whether they were to be free or slaves. In this state, they were not seen as 'humans' with innate rights nor even 'victims' who had been wronged, but as items of property, the right to which was the subject of adjudication as a matter of prize law. Under the British Slave Trade Act of 1824, all slaves seized as prize of war were to be regarded as 'forfeited to the sole use of His Majesty ... for the purpose only of divesting and barring all other property, right, title or interest' which might be claimed in the slave.[4] The slave's freedom was not intrinsic: it required some kind of royal manumission. Nor, as Haslam stresses, did 'recaptives' have a voice in the proceedings which might lead to their liberation: not being legal subjects, they

[4] 5 Geo IV c 113 s 22.

had no standing even to ask to be landed on shore, let alone be heard in litigation. She therefore seeks to 'read against the grain' in an attempt to recover the voice of the recaptive, whether in the limited testimony which can be recovered, or in the acts of recaptured slaves, when they rose in rebellion while still kept on board.

This is an important story, which contributes to a growing literature challenging the Whiggish view of slave emancipation, according to which voiceless slaves were given their freedom by saintly abolitionists. As numerous historians have recently shown, even in the process of emancipation, the proprietary rights of slave owners were recognised in the generous compensation paid by the Slave Compensation Commission: property was not to be sacrificed on the altar of freedom.[5] Nor did freedom come at once. Like the slaves freed in the British Empire in 1833, so the recaptives were not simply emancipated, for the crown had the power to bind to apprenticeships for up to seven years. Their legal status also remained 'liminal', for it was not until 1853 that parliament confirmed that liberated slaves in Sierra Leone were British subjects.[6] In this work, Haslam opens a path to find the voices of Africans, by focusing on that key moment when their fate was before these commissions, as objects of interest to these international tribunals. It stresses that the path to emancipation was not a straightforward one, and that it cannot fully be understood without listening to the voices of the Africans.[7]

Haslam's book is intended as a contribution not only to the historiography of the abolition of the slave trade, but also to debates about the nature of international criminal law. She argues

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[5] See Nicholas Draper, *The Price of Emancipation: Slave-Ownership, Compensation and British Society at the End of Slavery* (Cambridge University Press, 2010). See also the work of the Legacies of British Slave Ownership project at University College London: https://www.ucl.ac.uk/lbs/.

[6] An Act to remove doubts as to the rights of liberated Africans in Sierra Leone 16 & 17 Vic c 86

[7] For more work recovering these voices, see J Richards, 'Anti-slave-trade law, "liberated Africans" and the state in the South Atlantic world, c.1839–1852' 241 *Past and Present* (2018) 179-219; and J Richards, 'The Adjudication of Slave Ship Captures, Coercive Intervention, and Value Exchange in Comparative Atlantic Perspective, ca. 1839–1870' 62 *Comparative Studies in Society and History* (2020) 836.

that the story of the recaptives and their legal experience needs to be inscribed into international criminal legal histories. Her book is intended, first, to challenge the progressive narratives of the history of international criminal law, in which a new field is seen to have emerged out of the foundations laid by the Nuremberg and Tokyo tribunals. Such histories tend to give an optimistic view of the role of international criminal law in responding to atrocities and upholding human rights.[8] Haslam's longer history gives less room for professional self-satisfaction. As she explains, the 'failure to criminalise the transatlantic slave trade in international law and the reasons for that failure (and its ongoing effects) should take a place in international criminal law. Ultimately, international criminal law requires the righting of an injustice in the accounting of its history' (8-9). She points to the paradox that modern international lawyers, who seek to expand the reach of international law to criminalise a broader range of modern *hostes humani generis* by invoking the analogy of 'the pirate and the slave trader before him',[9] overlook the fact that international law did not in the past regard the slave trader as a pirate, nor his practice as a crime. For Haslam, a Whiggish view of history is no more appropriate for the history of international law than it is for the history of abolition.

Haslam's arguments raise fascinating questions about the relationship between the past and the present in international law. Early in the book, she refers to the Durban declaration that the slave trade is a crime against humanity 'and *should* always have been so' (2).[10] Later, she says that 'international law's support of the slave trade is a debt that can never be redeemed' (128). Such comments appear to treat international law almost as an agent in itself, which

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[8] See the discussions in Sarah M H Nouwen, 'Justifying Justice', in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge University Press, 2012) 327-351 and Christine E J Schwöbel, 'The Comfort of International Criminal Law' 24 *Law and Critique* (2013) 169.

[9] *Filártiga v. Peña-Irala* 630 F2d 876 (2nd Cir. 1980) at 890, quoted in Haslam, *The Slave Trade, Abolition and the Long History of International Law* at 58.

[10] Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, para 13: https://www.un.org/WCAR/durban.pdf (accessed 16 April 2021). She also refers to the French Loi Taubira, declaring the slave trade a crime against humanity (Loi n° 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité).

needs to right its wrongs by recognising its past errors, rather than as a set of norms which are debated, discussed and refined by particular communities - of statesmen and jurists - and which change over time. Haslam defends this approach by arguing that 'there are benefits to recognising the indebtedness of the law in the case of historic injustices', since the 'legacies of historic injustice can be difficult to deal with because of the difficulty of allocating particular responsibility' (128). Present day international lawyers, she suggests, may not bear any *personal* guilt for past injustices, but as 'beneficiaries of past injustice', they can be seen as 'constructive trustees', with an obligation to right those past wrongs.[11]

There are two aspects to this argument. The first is that we should hold past practitioners morally to account for their failures: in particular, the failure of nineteenth century practitioners to conceive of the slave trade as a crime against humanity, and to act on that conception. This argument may be open to the criticism of contextual historians who might argue that the very idea of a crime against humanity is not a timeless concept, but came into being at a particular moment in time.[12] Rather than seeing concepts as timeless, such historians prefer to examine them as the product of human choices over time, which are contestable and open to revision. In fact, as Haslam's own work shows, the very status of the slave trade was contested in the era discussed in her book. The history of British policing of the trade shows that there were many who recognised the rights of the enslaved, and wanted the trade to be regarded as a violation of the law of nations. Robert Thorpe, Chief Judge of the Vice Admiralty Court of Sierra Leone in the Napoleonic wars, clearly regarded trading in slaves as a violation of 'the laws of nature and nations' and was prepared to condemn ships on that ground.[13] The Admiralty judge Sir William Scott (later Lord Stowell) also pointed out in 1811 that Britain regarded the slave trade as 'repugnant to the law of nations, to justice and

[11] She follows here the argument of Robert Meister, *After Evil: a Politics of Human Rights* (Columbia University Press, 2011). Meister argues that 'historical injustice should be viewed, primarily, as a form of property - the creation of an asset - rather than as personal liability for a harm' (237).

[12] Compare Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).

[13] See Tara Helfman, 'The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade' 115 *Yale Law Journal* (2006) 1122.

humanity'.[14] But what was the law of nations? Was is a binding variant of natural law, a moral system taught by reason? Was it a consensus born of customary practice or the *communis opinio* of learned jurists? Or was it those particular conventions agreed to by the ruling heads of polities among themselves? The very entity of the law of nations was not a timeless concept, but a matter of negotiation and debate.

As is well known, it was Scott himself who would set limits to how far British could police the slave trade by his decision in *Le Louis* that there was no right to search the ships of a foreign power with whom no state of war (or treaty) existed. In a judgment whose significance is stressed in this book, he held that slave traders could not be compared with pirates.[15] The view of the law of nations which Scott took - and the constraints of the treaty system which took on the task of outlawing slave trading - made it more difficult for the Royal Navy to police the slave trade than many politicians would have liked. Their desire to go further than treaties allowed led to the passing of the acts piloted by Palmerston in 1839 and Aberdeen in 1845 which authorised action to be taken against Portuguese and Brazilian ships, treaty or not. Furthermore, some nineteenth-century English jurists took the view that the slave trade was a violation of the law of nations. Robert Phillimore, for instance, wrote in his *Commentaries on International Law* that, while the slave trade was not technically piracy, it was 'by general practice, by treaties, by the laws and ordinances of civilized States, as well as by the immutable laws of eternal justice ... indelibly branded as a legal as well as a natural crime'.[16] Such evidence may be read to suggest that, in an era when international law rested to a large degree on the opinion of law officers, jurists and legislators, British policymakers - and indeed judges - might have gone further and simply acted on a view that the slave trade was a violation of the law of nations. However, to blame them for not doing so is to overlook

[14] This allowed her to police the slave trade at least against the subjects of any state which had not by its own positive law rendered such a trade lawful. *The Fortuna* (1811) 1 Dodson 81.

[15] 'It is not the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately, and thereby creating a universal terror and alarm; but of persons confining their transactions (reprehensible as they may be) to particular countries, without exciting the slightest apprehension in others': *Le Louis* (1817) 2 Dodson 210 at 247.

[16] R Phillimore, *Commentaries on International Law* vol. 1 (William Benning, 1854) 323.

the sheer practical difficulties of policing the slave trade: in the mid-nineteenth century, even the powerful Royal Navy had nothing like the manpower and resources required to police the slave trade on both sides of the Atlantic and the ocean in between. While influential and powerful voices might nudge the law in a certain direction, there were practical limits on what could be done.

Nor should it be forgotten that the recognition of slaves' rights was a slow one in municipal as well as international law. Six years before the abolition of slavery in the British empire in 1833, Stowell - who claimed to be a 'stern abolitionist'[17] - confirmed that the famous case of James Somerset[18] had no purchase in the wider British empire, in which (in contrast to the motherland) there were systems of positive law which permitted enslavement. Consequently, the servile status of a slave who returned from England to Antigua reattached in the colony.[19] Not long thereafter, as Haslam shows, the Law Officers took the view that recaptured slaves could not claim to be freed by being taken on board a British ship, or being landed in a British colony such as Sierra Leone. After 1833, English lawyers took a wider view of the reach of habeas corpus, even in the face of international protests. The American slaves who rebelled on board the *Creole* in 1841 and sailed it to Nassau were regarded as free once there, since there was no power to hold someone as a slave on free British soil.[20] But policy-makers remained attuned to the difficulties which they might encounter if they extended the rights of Magna Carta to Africans, and imperial expansion was often accompanied by the establishment of protectorates, rather than colonies, to avoid the establishment of outposts of 'free soil' in Africa in which all kinds of slavery would be outlawed. This suggests that there was no monolithic *law* which would either protect or oppress Africans in this era: rather, their legal treatment was a matter of contestation and negotiation, between those who recognised the rights of Africans and those who did not. If the law in question was a matter of

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[17] R A Melikan, 'Scott, William, Baron Stowell (1745-1836)', *Oxford Dictionary of National Biography*.

[18] *Somerset v Stewart* (1772) Lofft 1.

[19] *The Slave, Grace* (1827) 2 Haggard 94.

[20] See Edward D Jervey and C Harold Huber, 'The Creole Affair' 65 *Journal of Negro History* (1980) 196.

contestation, it seems hard to hold 'it' to account for its failures, though we might take a critical view of those actors who continued to argue against the recognition of the rights of Africans, and who profited from their oppression.

The second aspect of Haslam's argument concerns the obligations of present-day practitioners in light of this history. Her work joins that of a number of international law scholars who have argued that an exploration of history can help us rethink present understandings insofar as they rest on inherited assumptions which are open to question. In recent years, these scholars have turned to history to argue that some of the key conceptual building blocks of modern international law - such as 'sovereignty' - are the products of contestable theories inherited from the past, which legitimized European imperial expansion at the expense of what became known as the 'third world'.[21] Haslam tackles this problem from a different angle: rather than looking at those past voices who might be said to have shaped the present discipline, her work focuses on those whose voices were *not* allowed to shape it. She shows that an awareness that there were voices unheard in past debates may make us better attuned to the voices of those who are silenced today. This is, in effect, to suggest that international law is still a matter of contestation and that there is still work to be done.

Dealing with present concerns, Haslam goes further, in arguing that 'the fundamentally irredeemable nature of the debt owed to the recaptive lends urgency to critical thinking about the present, including by challenging us to ask what the recaptive might make of contemporary justice efforts' (129). In her view, a rethinking of the history of the slave trade and its place in international criminal legal history 'provokes us to centre questions about distribution', and about 'the material conditions that work to limit justice' (130). Does this mean that the international lawyer should be seen as kind of 'constructive trustee' holding the benefits of past injustices, who is under an obligation to reverse the historical 'unjust enrichment' brought about by the legacies of slavery and colonialism? There are hints of such an argument in this book, though Haslam herself notes that 'the full ramifications of this

[21] Eg, Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

approach stand to be developed further' (131). But if this argument is to be made, it is one which needs further fleshing out, to explain how international criminal law in particular should contribute to this task. For just as it may be said to be a little artificial to blame 'international law' for the state of the subject in the early nineteenth century, so it may be a little unrealistic to place on the shoulders of contemporary international lawyers the whole burden of righting the wrongs of slavery and colonialism. That, surely, is an obligation which must be shared very much more widely.

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